No. 21-

IN THE

Supreme Court of the United States

DEBORAH BOWERS AND STEVE JABAR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. May a court of appeals reinstate a verdict on a theory of fraud that was not pled in the indictment, not sought to be proven or argued at the trial, not advanced by the government on its appeal, and which had been disavowed by the government?

2. Where the investigation was concluded at the time of the questioning, and the only evidence on materiality is the agent's testimony that the false answers to his questions would have no effect on the investigation, were the answers material under 18 U.S.C. §1001?

List of Parties and Related Cases

The caption of the case in this Court contains the names of all parties (petitioners Bowers and Jabar and respondent United States). There were no other co-defendants at trial.

Related cases:

United States v. Steve S. Jabar and Deborah Bowers, 09-CR-170, U. S. District Court for the Western District of New York. Judgments entered:

> September 29, 2017 (Acquittal of Steve S. Jabar and Deborah Bowers on Counts 1 and 4 pursuant to Rule 29 FRCrP;
>
> April 25, 2018 (Conviction of Steven S. Jabar on Count 14);
>
> June 20, 2018 (Conviction of Deborah Bowers on Counts 11, 12, 13);
>
> December 16, 2021 - On Remand for consideration of the defendants' motion for a new trial on the wire fraud and wire fraud conspiracy counts;

United States v. Steve S. Jabar and Deborah Bowers, U.S. Court of Appeals for the Second Circuit, Docket Nos. 17-3514(L), 18-1233(XAP), 18-1857(XAP)

> November 19, 2021, Opinion
>
> December 16, 2021, Mandate, district court's judgment of acquittal on the wire fraud and wire fraud conspiracy counts is REVERSED; the district court's denial of a judgment of acquittal and a new trial on the false statement counts is AFFIRMED; and the case is REMANDED with directions for the entry of judgment consistent with this Court's opinion and for consideration of the defendants' motion for a new trial on the wire fraud and wire fraud conspiracy counts.

Table of Contents

Index To Appendices

Table of Authorities

Page(s)

Cases:

Statutes & Other Authorities:

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

Deborah Bowers and Steve S. Jabar petition this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit reinstating verdicts for fraud and affirming their convictions for making false statements to federal agent.

Opinions Below

The Second Circuit's precedential opinion (per Walker, J., with Sack[1] and Menashi, JJ.), filed November 19, 2021, is Appendix A. It is published at 2021 U.S. App. LEXIS 34380. The Decision and Order of the United States District Court for the Western District of New York (Vilardo, J.) is Appendix B. It is published at 2017 U.S. Dist. LEXIS 159559; 2017 WL 4276652. Decisions not directly pertinent to this petition are reported at 2011 U.S. Dist. LEXIS 167285 and 2011 WL 13364609, July 11, 2011 (Magistrate Judge McCarthy); 2016 U.S. Dist. LEXIS 96369, July 22, 2016 (Vilardo, J.);

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[1] Circuit Judge Ralph K. Winter, originally a member of this panel, died on December 8, 2020. Circuit Judge Robert D. Sack replaced Judge Winter on the panel for this appeal.

2011 U.S. Dist. LEXIS 167286 and 2011 WL 13364608, July 11, 2011(Magistrate Jude McCarthy) adopted by district court 2012 U.S. Dist. LEXIS 201620, Jan. 10, 2012 (Arcara, J.).

Jurisdiction

On November 19, 2021, the United States Court of Appeals for the Second Circuit filed its opinion and judgment reinstating petitioners' fraud convictions and affirming their false statements convictions, remanding the case to the district court to consider the motions for a new trial on the fraud counts that had previously been considered moot. App. A. As a result, pursuant to Rules 13.1 this petition for certiorari is due not later than 90 days thereafter, that is, on or before February 17, 2022. This petition is timely filed on or before that date. Rules 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Text of Federal Constitutional Provision and Statutes

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . . .

Title 18, United States Code, provides, in pertinent part:

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S. Code § 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 . . . communication in interstate or foreign commerce, any writings . . . . for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

18 U.S. Code § 1001 - Statements or entries generally

(a) . . . whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully— . . . (2) makes any materially false, fictitious, or fraudulent statement or representation; . . . . shall be fined under this title, imprisoned not more than 5 years.

Statement of the Case

Deborah Bowers and her husband Michael, pastor of the Clarence Church of Christ near Buffalo, New York, befriended a local Kurdish refugee family being harassed in the community by persons ignorantly associating Kurds with Saddam Hussein. They became good friends with this family, being Steve Jabar, his wife and children. Their church began helping the Kurdish community.

By 1999 Mrs. Bowers, as a result of this experience, was working for Journey's End, a refugee settlement organization. She, Steve Jabar and others formed Opportunities for Kids International ("OKI"), a not-for-profit corporation. OKI was a small, informal operation, which became a vehicle for efforts to help children in the Middle East. Friends and church members were enlisted to serve on the board of directors and as officers; Deborah Bowers was named as Executive Director and Steve Jabar as Treasurer.

OKI collected and then distributed in Iraq shoes, over-the-counter medicine, kerosene heaters, and blankets in Iraq. They raised money to purchase large tanks to be used to store drinking water for war-torn areas of Iraq. Mrs. Bowers traveled to Iraq for some of these endeavors. She worked to help a Kurdish Iraqi woman who had been wounded in a 1988 chemical attack on the city of Halabja get to United States for surgery.

By the mid 2000's, Steve Jabar had not only been naturalized as a US citizen, he had come to work for DHS as an asylum officer. Owing not only to his command of the English language, but also of the extraordinary fact that Mr. Jabar was an Iraqi-born U.S. citizen who had fought against Saddam Hussein's regime in his youth, and eventually as a Peshmerga commander, he was "loaned" from DHS to the Coalition Provisional Authority ("CPA") in Baghdad and the Department of Defense (DoD). There he served as a bilingual cultural advisor and liaison with Iraqi government officials in high-level, in highly sensitive positions and tasks, including response to a scandal at Abu Ghraib.

While working for the CPA, Jabar met women's rights activists with a dream of building a TV or radio station in Baghdad to promote women's rights. One of the activists, Bushra Jamil, left the CPA to take a job as an independent contractor at the United Nations with the United Nations Development Fund for Women ("UNIFEM"). From her, Steve Jabar learned that the UN had grants available for projects that would revitalize the infrastructure of Iraq and that OKI could submit a proposal for building the radio station they had talked about previously. In the Spring of 2004, Deborah Bowers set about the task at her kitchen table of writing a proposal for OKI to establish the "Voice of Women" radio station in the heart of Iraq. She had no prior experience with requesting grants, accounting, handling large sums of money, or building a radio station. The proposal was submitted in June of 2004.

Bushra Jamil, now as a Project Coordinator for UNIFEM, with UNIFEM's community based review group called Cluster 9, worked with OKI to develop the proposal, adding components and increasing the proposed budget from $423,000 to approximately $500,000. There was great concern with the need for the project to move forward in time for upcoming elections in 2005, so it was considered a positive thing that OKI felt that they could get a head start expending funds on the project even before grant money could be received in Baghdad to begin the project. Indeed, when the Program Appraisal Committee (PAC) at UNIFEM headquarters in New York requested more information, among other things, it was advised that OKI had already raised and spent over $84,000 to get the project going. CA2 JA 2077.[2]

The "Standard Projection Cooperation Agreement" went into effect on December 12, 2004. [CA2 JA 2056]. This agreement provided for an initial distribution to OKI of $350,000, with the balance of $150,000 to be delivered after the first quarterly report showing what had been expended on the project. [CA2 JA 338–339]. Beyond the general

[2] References to CA2# ___ are references to filings in the circuit court. References to "CA2 JA ___" are references pages in the 9 volumes of the "Joint Appendix" appearing in the circuit docket as, CA2# 97–105. References to "CA2 SA___" are references pages in the 10 volumes of the "Joint Appendix" appearing in the circuit docket as CA2# 166 - 175. References to "Govt SA __" are references to the Special Appendix to the government brief on appeal, CA2# 96-2. References to "WDNY# ____ are references to filings in the District Court.

idea that UN funds should be "utilized" to build the station, there were no restrictions on how the money would be treated in the OKI account as the government admitted in the trial court and the court below. The initial installment of $350,000 was disbursed on December 13, 2004 by wire transfer to OKI's bank account in Buffalo. It was only just before this that OKI learned that the funds would come to the US rather than go directly to Baghdad, when OKI's US banking information was sought by the UN at the end of October 2004. [See, Indictment Count 2, CA2 JA 72–73].

Utilizing the grant money

Before this, with the news of the impending approval of the UN grant, Mr. Jabar, who was working in Iraq, had been talking to many people about the VOW project and securing loans from individuals to get the project going. [CA2 SA 1732-33]. Noted above, $84,000 was spent prior to the grant funds being dispersed. In addition to the money Jabar spent himself from his pay[CA2 JA 1008; CA2 SA 1732-33], an array of people were involved in lending and some testified at the trial: Abbas Mohammed Qati loaned $18,000 [CA2 JA 2209], Nesrin Dickow loaned $40,000 [CA2 JA 980], Hana Dawood Korkis loaned $30,000 [CA2 JA 1020], Saad Almizoori loaned at least $6,100 [CA2 JA 456], Hassam Dawood Salman al Samarai loaned $50,000 [CA2 JA 1359], and Bushra Jamil loaned $260,000. [CA2 JA 1364].

With this in mind, when the grant funds got into the account, Mrs. Bowers used some of the funds to reimburse individuals who had lent Mr. Jabar money and to pay some of his debts here – mortgage and taxes – while he was spending his money and incurring debts on behalf of OKI in Iraq. She also paid down credit card debts she incurred on behalf of the VOW project also. The total of these and later advances was about $65,000. She later explained this in the questioning that led to the §1001 charges.

With no banking system in Iraq, Mrs. Bowers tried to wire $300,000 to a bank account in Amman Jordan that belonged to the brother of Bushra Jamil. She sought no special assistance with wiring such a large amount of money to the Mideast, naive to the suspicion that her efforts to send large amounts to the Mideast might arouse. The wire was canceled with no explanation to her. So, she went about opening other accounts to transfer money to try to get the money to the Mideast in different ways and in different amounts, oblivious still to all the inevitable "suspicious transaction" reports being generated in the process. She got most of the money to Iraq in addition to the significant funds that Mr. Jabar had contributed and raised by borrowings like described above. By April 1, 2005, the radio station was up and running.

The quarterly report, the purpose of which is to show what was spent on the radio project, showed that the expenditures by the end of the first three months actually exceeded what the UN gave to OKI, $362,918 [CA2 JA 2099-2102; CA2 SA 2605-22].

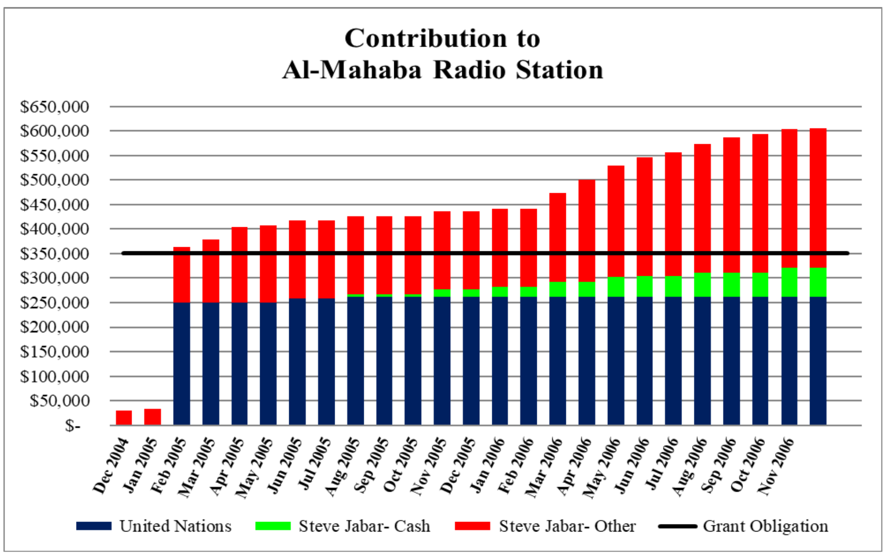
There were no business records for OKI in the US. There was no checkbook or check register in evidence. There was no ledger or bookkeeping program. OKI was so informal that the only records were the OKI bank statements. CPA Eric Colca reconstructed a general ledger from available records and other information. [CA2 JA 1537].

Colca's analysis showed expenditures on the project of $357,361.49 by the end of March, 2005 and then, conservatively, a total of $625,203.12 through the end of 2006. That analysis, in turn, was corroborated by the certified annual financial report for the VOW Radio [Def. Ex. 46A at CA2 SA 2623-49] and a collection of certified receipts from the first quarter, which showed total expenditures, in excess of what Mr. Colca deduced, of over $700,000[3] [CA2 SA 2527-60, 2650-52; CA2 JA 1660-63]. All this was also corroborated by the obvious fact, ignored by the government and the court of appeals, that the radio station was built and operational, even up to the time of the trial.

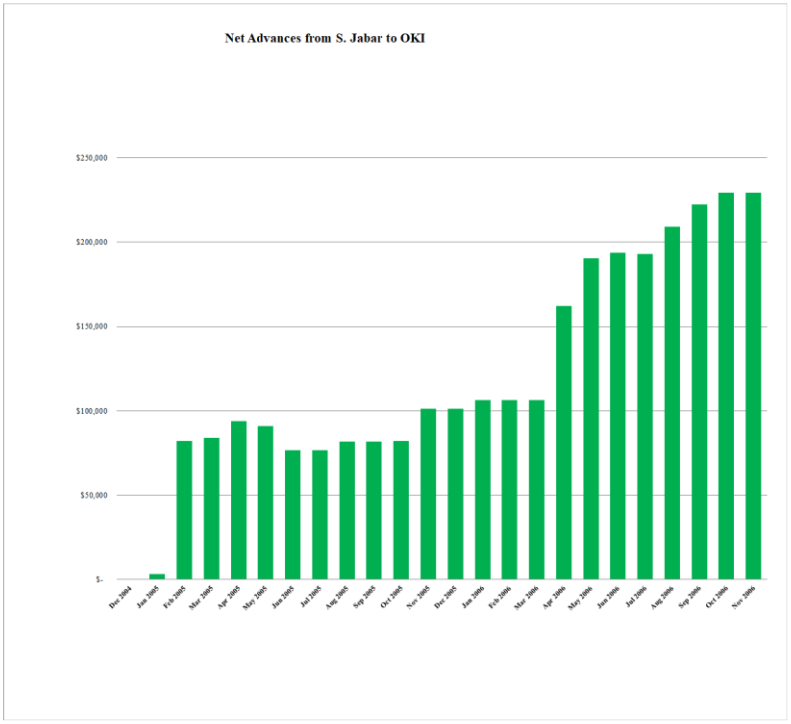
Mr. Colca created graphs demonstrating his findings which are set forth below.

[3] It was the testimony of Colca that the certified financial statement for 2005, when dinars were converted to dollars, was over $700,000. CA2 JA 1661.

The first graph reflects the contributions he was able to account for to the radio station, from the UN (blue), cash received from Steve Jabar (green), and contributions attributed to Steve Jabar (red) on account of loans people made to the project which Mr. Jabar obligated himself to repay, as well as expenditures of the radio station that Jabar paid on its behalf. [CA2 JA 1572-1574].



The differential between the $261,500 credited to funds derived from the UN (blue) and the $350,000 threshold is accounted for by the advances to Jabar, reimbursements to Jabar and Bowers, and cash that Jabar received for direct transport to Iraq which are included in the "Steve Jabar - cash" (green) bars.. Another chart showed the contributions attributed to Mr. Jabar through the end of 2006. [CA2 JA 1574].



On cross-examination, Mr. Colca's attention was brought to errors in his calculations amounting only to $2500. [CA2 JA 1655]. The government did nothing to challenge the total expenditures reflected in the collection of original certified receipts or the certified financial statement for 2005. There was no rebuttal attempted. The accounting evidence demonstrated that the advances to Jabar and the reimbursements to Jabar and Bowers never exceeded the actual contributions attributable to Jabar toward the radio station. Thus, Colca testified that Jabar was always in a position where "he had a net loan to OKI. So, OKI was always owing him money." [CA2 JA 1554].

As Mr. Colca demonstrated, a reconstruction of the activities with the intent behind them showed that Mrs. Bowers's instincts about the payments at issue in the indictment were offset by funds already expended on behalf of OKI, by or on behalf of Mr. Jabar, which she explained when questioned about it, were correct.

Investigation of OKI

Eventually, suspicious transaction reports filed by banks made their way into the hands of an IRS agent named Michael Klimczak. Agent Klimczak had only been with the IRS for four years, however, about five months earlier, he was also assigned to Buffalo-area Joint Terrorism Task Force (JTTF).

Klimczak quickly realized that the funds were from the UN, and also that the radio station was operational, so there was little reason to suspect the funds had been used for illicit purposes. However, Klimczak discovered references to Mr. Jabar in FBI reports before 2005 when Jabar had been active in opposing a US invasion of Iraq. [CA2 SA 1176-77].[4] Also, presumably for this reason, Mr. Jabar was the victim of concerted efforts of some officials here and in Iraq to dislodge him from government service there and at CIS by accusing him of being a "terrorist" and a "spy" or a "Saddamist."

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[4] Much of the information which follows comes from the Defense Motion for Supplemental Discovery, WDNY# 268. Because of the exclusion of evidence and circumscription of what the defense

[WDNY#268, ¶¶ 35-44, 55-60, 63-65; CA2 SA 2329]. This was preposterous. Jabar had not just been a Peshmerga commander, [WDNY#268 at ¶¶ 4-13]. His father had been executed at the personal command of Saddam Hussein. [Id. at ¶¶ 6-9]; see also CA2 JA 111; CA2 SA 2329]. A retired captain, major general, lieutenant general, and a colonel with the U.S. army all testified as to his character [*see, generally,* CA2 SA 1555-1643, 1721-1788, 1808-1821, 1913-1934] and would have testified to much more if that had been permitted, as indicated by their statements submitted in connection with sentencing. They were aghast that Mr. Jabar's security clearance was revoked several times, undercutting the US mission in Iraq. [WDNY#268 ¶63]. A heavily redacted document from Klimczak to unspecified other federal officers, before the arrest on the instant indictment stated: "This indictment will allow Buffalo to neutralize Jabar and possibly assist in getting his cooperation." [GX3500BY, attached to WDNY# 367, p. 39; CA2 SA 1245].

Agent Klimczak did not see criminal activity related to terrorism, or even Internal Revenue. [CA2 SA 1254-56] All he saw as a crime was the "diversion" of OKI funds by Bowers and Jabar for "personal" benefit. This concept, that the "diversion" of the funds was the crime, pervaded the case throughout the trial, and was the prime argument by the

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could do exploring these questions, there was no trial testimony about this.

government to the jury.

Without prior arrangement, in July, 2006, agent Klimczak showed up at her house in the morning as Mrs. Bowers was heading to work. He proceeded with asking her questions about all the transactions, wire transfers, and checks which his investigation showed had gone immediately to the benefit of herself or Mr. Jabar. He took the approach of pointing to a bank record of a particular transaction, or an individual check, asking her what it was for. Bowers gave mostly correct answers, but a few wrong answers. In each instance, with some additional information being provided to her by Agent Klimczak, she corrected herself. Of the 14 transactions he asked about, 5 yielded initially inaccurate answers, which were then corrected. But of these five mistaken answers, three would later be charged as giving false statements under §1001. (Counts 11, 12 and 13). Count 10 alleged that she falsely stated "that the entire $350,000 grant from UNIFEM was sent to Iraq for the radio station." She was acquitted of this count, though it is nearly identical to the statement for which Mr. Jabar was convicted.

Klimczak acknowledged that Deborah Bowers, during this interview, explained that these payments he was concerned about were offset by expenditures by herself and Mr. Jabar in relation to the VOW project.

> Q. Okay. She was communicating -- she was telling you, wasn't she, that although you don't see all the $350,000 going there, in effect the money got there because the radio station spent more than $350,000?
>
> A. That's what she told me, yes.
>
> * * *
>
> Q. But she had -- she had made this additional statement trying, as another way to explain to you, by what she meant by all the money being sent to Baghdad?
>
> A. I don't know if that was an explanation, but that is what she said to me, yes.
>
> * * *
>
> Q. She told you that money to keep the radio station going was coming out of Jabar's pockets, Jabar pockets and Jamil's pocket?
>
> A. That's correct.
>
> Q. Jamil was Bushra Jamil?
>
> A. Yes.

[CA2 SA 1273-74].

Klimczak acknowledged that in a "net worth" tax investigation the IRS is obligated to follow "leads" provided by a taxpayer. [CA2 SA 1305]. Cf. Holland v. United States, 348 U.S. 121 (1954). But here he did not follow the leads she gave him because he was focused on the "diversion" of funds as a crime in itself and not on the net effect of all transactions:

> Q. Were you asking yourself if only 260,000 of 350,000 had gone to the radio station, how are they making a radio station?
>
> A. I wasn't thinking that at all.
>
> * * *
>
> Q. So, Debbie Bowers is giving you leads as to how, even though money from the U.N. may have gone into one pocket, out of the other pocket the radio station was getting built and put together in Iraq, right?
>
> A. Right.
>
> Q. All right. Did you follow those leads?
>
> A. No.
>
> Q. All right. And that's because for you, the problem here was that the U.N. money wasn't going to where the – just where the U.N. money – where the U.N. intended it, correct?
>
> A. Correct.

[CA2 SA 1304, 1305]. His explanation encapsulates the focus of government at trial in this case on the concept of "diversion of funds" from OKI, not any fraudulent misrepresentation to the UN as alluded to in the indictment.

It was after this interview that Agent Klimczak interviewed Mr. Jabar remotely from Iraq. [CA2 JA 941-45]. Jabar made a general statement that all of the grant funds made it to the radio station except about $10,000 before his memory was refreshed by Klimczak, and he stood corrected. He was convicted of making a single false statement.

Here again, Klimczak was well aware of the facts and there was no evidence offered as to how the initially false statement might have possibly affected the investigation.

Indictment

The indictment, [CA2 JA 62 at ¶9], charging wire fraud, posited that the "diversion" of funds in OKI"s account must have been inconsistent with promises by OKI in the UNIFEM agreement. Only one representation in the "Standard Project Cooperation Agreement" [CA2 JA 2087] addressed the utilization of the grant money, in Art. VIII, ¶2; where it promised

> to utilize the funds and any supplies and equipment provided by UNIFEM *in strict accordance with the Project Document*.

Neither the "Project Document" nor any testimony about its terms of the pertinent terms in it was ever produced at trial. This allowed the indictment to *characterize* the meaning of this provision in a way that seemed to comport with the "diversion" theory of fraud. The indictment does this by saying that

> the defendants, having obtained grant money from UNIFEM by: (a) representing that all money would be . . .used by . . OKI for the purpose of establishing and running a radio station in the country of Iraq . . . . diverted . . . certain of the UNIFEM grant funds to benefit defendants JABAR and BOWERS, to pay the personal debts, expenses, credit card bills and property taxes of defendants JABAR and BOWERS, and to otherwise profit and enrich themselves.

[CA2 JA 62 at ¶14]. However, there was no representation that the funds would be segregated in the OKI accounts for a dedicated use. The requirement in the agreement to "utilize," the money for the VOW project hardly precludes "utilizing" it as a compensating balance in the general ledger for expenditures on the overall project.

Deborah Bowers was charged with four counts of making a false statement under§ 1001, while Mr. Jabar was charged in a single §1001 count.

The trial

After several years of pretrial litigation, securing records from Iraq and enabling witnesses to come from Iraq, a trial was held in 2016.

In April, 2016, the defense moved for supplemental discovery [Dkt. 268], seeking records from DHS, the DoD, FBI (specifically the JTTF), and the Terrorism Screening Center relating to Jabar, suspicions about him, and the apparently concerted actions by certain official here and in Iraq to subvert Jabar. This was not simply because it was important to show the ulterior motivation of the government to bring some charge against Jabar to "neutralize" him and challenge the credibility of government witnesses. This was also important because of how preposterous these suspicions of Jabar were in light of his history.

Ultimately the defense was denied the documents sought or the ability to explore this issue at trial, except to the extent to simply elicit from Agent Klimczak his message about how the indictment would "allow Buffalo to neutralize Jabar," but without being allowed to explore to whom this message was sent or the full context of it.

Variant theories of criminality sought to be proven

The government made no effort to prove that the agreement required the U.N. grant funds to be dedicated for use only on the VOW radio project. Eric Colca explained that in accounting terms, grants, even for special purposes, unless otherwise specified, are simply additions to an organization's general ledger, netted against the other obligations to, and receivables from, other sources. [CA2 JA 1537-1561].

Rather than showing any "representation" in the UNIFEM agreement that OKI would restrict the use of the funds, the government quickly sought every opportunity at trial to suggest that other "representations," such as various statements in the grant application, could be substituted for what was alleged in the indictment. The defense unsuccessfully moved to preclude this effort to constructively amend the indictment. [WDNY#381]. The government's response, highly pertinent here, was "we're not limited by the indictment." [CA2 SA 85,89-90].

Throughout the trial, the government elicited from witnesses, and then incessantly argued to the jury, and to the court, that the quarterly report to the UN months after the funds were received was fraudulent because it did not recite the "diversion" of the grant funds. However, none of the government witnesses testified that this information was *supposed to be* in the quarterly report, and they all agreed that the purpose of the report was only to record *expenditures on the radio station*, not audit the trail of funds. The report explicitly nets the amount of the UN dollars against the expenditures. Still, the government argued that this was fraudulent, though not something alleged in the indictment.

Rather than prove what the agreement meant, the government insisted that it was simply "common sense,"[5] or else contrary to the intentions of the U.N.,[6] not to apply the dollars from UNIFEM directly to the VOW project. When the defense argued to the jury

[5] "But either way, whatever agreement is in place, common sense says you can't take the money and use it for whatever you want when you get a grant. Common sense tells you that. You can't pay your own loans and say it's okay." [CA2 JA 1691]. "Even Mike Bowers said that, Deborah Bowers' husband. A minister that came in here. He said you can't take money from the collection plate even if you intend to pay it back later. It's common sense" [Id. CA2 JA 1700]; "Just because Mr. Mahoney and Mr. Brown tell you it's okay doesn't make it so. The defense argument defies logic." [CA2 JA 1806].

[6] See Govt. Closing,"intended use" [CA2 JA 1679]; "UNIFEM didn't give Steve Jabar and Deborah Bowers grant money to use any way they wanted. UNIFEM did not give Steve Jabar and Deborah Bowers money to use to repay loans" [CA2 JA 1688]; "you have to use the money for its intended use"[CA2 JA 1700]; "would the U.N. have awarded this grant . . . if they knew their funds were going to be used for personal use." [CA2 JA 1804].

that the defendants violated no promise in the agreement, government counsel disavowed reliance on the UNIFEM agreement, saying, “That's not what the government is saying. . . . What the government is arguing is that you can't take UNIFEM money and spend it any way you want.”[CA2 JA 1804]. The government repeatedly characterized the “diversion” of the funds as “stealing,”[7] not from whom, or how this was the federal crime alleged in the indictment.

Verdict

Bowers and Jabar were acquitted by the jury of two substantive fraud allegations tied to emails before the UNIFEM disbursement (Counts 2 and 3). They were convicted of wire fraud conspiracy and a substantive count tied to emailing of the quarterly report. (Counts 1 and 4). They were acquitted of all money laundering charges (Counts 5-9). Jabar was convicted on the single §1001 charge against him. Deborah Bowers was acquitted of a §1001 charge alleging that she lied when she stated that all the UNIFEM money went to establishing the VOW Radio station. However, she was convicted of the

[7] “But no matter what good deeds he does, that's not a license to steal money.” [CA2 JA 1688]; “you still can't steal money,” [Id. CA2 JA 1690]; “this is an ongoing time frame that they're stealing money,” [Id. CA2 JA 1698]; “the government is not saying that they intended to steal the 350,000. Absolutely not. It's like saying that a bank teller is going to steal the entire drawer that they're working on at the bank that day. That's ridiculous. They're going to get caught. That would be stupid. You take a little

three other §1001 charges, Counts 11, 12, and 13.

Rule 29 dismissal of fraud charges

The defendants jointly moved [WDNY #433] under Rules 29 and 33 to set aside the convictions, or alternatively for a new trial on each count of conviction.

The district court first addressed the failure to prove the misrepresentation alleged in the indictment:

> [T]he government never even proved that the defendants agreed to spend the grant money—dollar-for-dollar—on the radio station and not to commingle the UN dollars with other money. . . . But the government told the Court that there was no such requirement. Docket Item 470 at 104 ("THE COURT: . . . You don't have any document that says the money can't be commingled, that it's got to be spent dollar for dollar? MS. GRISANTI: Correct."). And because there was no requirement to spend the allocated funds—dollar-for-dollar—on the radio station, the fungibility of money exposes the flaw in the government's argument that "you can't take UNIFEM money and spend it any way you want." Docket Item 415 at 50.

[App. B, p. 13]. Judge Vilardo went on to observe that the defendants' "utilization" of "the UN money and the other dollars—like the payment of debt and expenditures for the radio station—as part of a single pot" was not in violation of he UNIFEM agreement. [App. B, p. 14]. He also found no evidence to support the element of intent to harm the

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at a time and maybe nobody will notice. Maybe UNIFEM won't look closely enough." [CA2 JA 1796].

UN, something the government also did not attempt to prove, and which the government protested was not even an element of the crime. Therefore the district court granted dismissal of the remaining fraud counts on the first two of the grounds raised by the defense. The district court did not set aside the verdict or grant a new trial on the remaining §1001 counts. The government appealed that decision, insofar as it granted relief, and the defendant appealed the resulting judgment on the §1001 counts.

The government's appeal of the Rule 29 dismissal – a new theory: "right to control"

In its appeal of the dismissal order the government did not argue that it had proven any representation by the defendants that OKI would segregate the grant funds. Nor did the government advance any of the variant theories of "fraud" which, though unproven as well, were advanced to the jury as if they constituted the fraud alleged in the indictment. See above, p.13.

Rather the government argued for reinstating the fraud convictions on a completely new theory that was not even hinted at in the indictment nor sought to be proven or argued to the jury. It argued that "even if there was no such express term in the grant agreement" and that the UN "*expected* every dollar it paid to go to" the radio station and that Bowers and Jabar had withheld information about how they would use the funds, depriving the UN of its "right to control" its spending.

The government's idea for this argument came from the Rule 29 decision. The district court had addressed it only because it mistakenly thought the government had hinted at such an argument it by arguing that "regardless of what agreement it was" the "diversion" of the funds was enough to establish fraud because "the UN would not have given the grant money to OKI had it known that the defendants intended to use any part of those funds for their own personal use." [WDNY#442, p.14]. Primarily because this theory had not been pled, proven, or argued, the district court rejected it. [App. B, p. 20]. This theory was also untenable in this case because the "misrepresentation" posited as the basis for this "right to control" argument only involves the *failure to disclose* information to the UN.[8] A failure to disclose can constitute a "misrepresentation" only if there is a *duty to disclose*. See. *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176, 136 S. Ct. 1989, 1999-2000 (2016); *Chiarella v. United States*, 445 U.S. 222, 228 (1980). Neither Deborah Bowers or Steve Jabar had any duty to disclose anything to the UN.

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[8] The government elects only to say that Jabar and Bowers "withheld" information that, at some point presumably before their agreement with UN, they planned "to spend the grant money on repaying

Undaunted by the district court's rejection of a theory it never actually advanced, the government pressed the "right to control" theory on the Second Circuit, abandoning every argument made previously. For the first time also it strove to argue that Jabar and Bowers intended to economically harm the UN. The court of appeals did not adopt this new "right to control" theory, and mentioned it only in a footnote. The court of appeals instead advanced its own, also uncharged, theory of why the defendants should have been found guilty.

The court of appeals new theory: deprived of the "benefit of the bargain"

The decision below is loaded with factual errors and omissions. Chiefly, it completely ignored the unrefuted "good faith" evidence by the defense that OKI spent over $700,000 on the radio station, and the simple fact that the radio station was actually built, which would clearly take far more than the $362,918 first quarter expenditures, which was all the decision below acknowledged. Even within that amount, Colca's evidence demonstrated that the $65,000 spent by Bowers was offset by her and Jabar's prior expenditures on the project.

However, the issue of concern is how the court of appeals managed to reverse the

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personal debts." [Govt. Brief. p. 19, 26, 29, 30].

district court where the government had conceded below that it had not proven the misrepresentation alleged in the indictment, had urged a new and untenable theory on appeal. Simply, the decision ignores the government's arguments, and all the theories that the government had advanced in the indictment and at trial and on appeal. It presented a *new* theory, which it describes as "related to" the government's theory in a footnote which is the only place it mentions the "right to control" argument.

The decision preceded its analysis by comparing the false representations in two different cases.

> The scheme in *Starr*[9] "only defeated [defendants'] customers' expectation that the money they paid to the defendants would be fully used to pay for postage, an expectation that was not the basis of the bargain. To the contrary, the defendants' misrepresentations in *Schwartz*[10] were not "simply fraudulent inducements," but went to an essential element of the bargain: the lawful export of military equipment. The defendants made "explicit promises . . . in response to Litton's demands" and evidence showed that the deceived party "would not have sold its product" to defendants if they "had not been able to guarantee these conditions."[original footnotes omitted]

Despite this lead-in, the decision never identifies *any representation* by the defendants or explains why it is not exactly like the representation in *Starr*: here the

[9] United States v. Schwartz, 924 F.2d 410, 414 (2d Cir. 1991)United States v. Schwartz, 924 F.2d 410, 414 (2d Cir. 1991).

government had constantly relied on the “intent”[11] or “expectation” – never proven – of the UN that OKI would segregate the grant under in its accounts. The only difference was that in *Starr* there was actual *evidence* of the expectation that all the money would be used for postage. Here the government never sought to adduce any such intent or “expectation” evidence on the part of the UN.

The court of appeals acknowledges that the Project Document was not in evidence, and like the government, does not suggest that the charged misrepresentation could be found in the contract itself. Instead the court of appeals states:

> Although the government failed to offer the Project Document and Project Budget into evidence, a reasonable jury could rely on other evidence that was offered to infer that a restriction on the use of grant funds was part of the basis of the bargain.”[12]

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[10] United States v. Schwartz, 924 F.2d 410, 414 (2d Cir. 1991).

[11] “Instead, a reasonable jury could infer that the UN did not get what it intended in awarding the grant . . .A reasonable jury could have concluded based on the evidence adduced at trial that the UN indeed expected every dollar it paid to go to a particular purpose, even if there was no such express term in the grant agreement.” Gov’t Brief p.29

[12] Appendix A p. 19. This “other evidence” cited in the decision did not actually exist. The decisions states, “The defendants’ own budget proposal, received in evidence, unsurprisingly stated that every dollar of the grant proceeds would be allocated to a VOW-related expense. And a UNIFEM official testified that the agency as a matter of course demands assurances from grant recipients that they will devote the awarded money exclusively towards the project.” That was not in the original budget proposal

In other words, the court of appeals could find no *express representation* that OKI would segregate the funds. Thus its effort to liken this case to *Schwartz* is unsustainable.[13] However, the court of appeals instead chose to view the question as being whether the UN got the "benefit of the bargain" it expected, even if not promised. The decision repeatedly referred to this "benefit of the bargain" theory, always based on inferences, or "the possibility that restrictions on the use of funds" was part of the Cooperation Agreement.[14] In a footnote, the court of appeals, without reference to the record, states that, in contrast to the government's "right to control" theory argued for the first time on appeal, "[t]he theory that the UN was deprived of the benefit of the bargain was charged in the indictment, presented to the jury, and responded to by the defense." App. A., p. 28, n. 60. It was not. Neither the jury instructions nor the government's argument made any reference to this theory or even used the words "bargain." The government never argued at trial that there was any intent to harm the UN or to give it less than what had been bargained for.

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proposal or anywhere in the OKI proposal. CA2 JA 2072. This was not the testimony of any UNIFEM official.

[13] The decision says, at p. 20, "As in Schwartz, UNIFEM 'made explicit' these requirements by 'expressly demand[ing] assurances from' the defendants in the terms of the Cooperation Agreement." However, no promise to segregate the funds is contained in the Cooperation Agreement or shown to have been made in the Project Document.

But the issue here is not simply that the court of appeals again materially changed the theory of the offense to one that the defense had never been confronted with. The additional fact is that at trial and on the appeal the government *disavowed the idea* that the question was whether the UN got the "benefit of its bargain." The government insisted that what the U.N. wanted, the VOW Radio, which it and the people of Iraq got, was a "non-issue" and "this is not a breach of contract case where the benefit of the bargain is a relevant consideration." [WDNY#442, Response to Rule 29 motion, p. 13-14] In closing to the jury, despite an argument by the defense that the UN had gotten much more than it bargained for [CA2 JA 1748], the government brushed aside the agreement. The only reference to the UNIFEM agreement in the government's closing was this: "But either way, *whatever agreement is in place*, common sense says you can't take the money and use it for whatever you want when you get a grant." [CA2 JA 1691].

On oral argument of the Rule 29 motion the government insisted that the "benefit of the bargain" argument was a "red herring":

> THE COURT: But the radio station was built, right?

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[14] App. A p. 18-21, 28.

> MS. KRESSE: The radio station was built, but that, in a sense, Judge, is a red herring.
>
> THE COURT: Why? The UN, and the government proved the intent to defraud the UN
>
> MS. KRESSE: It's a red herring because the government never said that -- the government had to prove that there was an intent to defraud because at the very beginning, the very -- conversations with the UN, the attempts to get the money, the defendants intended from that very time to take some of that money and use it for things that had nothing to do with the UN.
>
> THE COURT: And that's your case, right?
>
> MS. KRESSE: That's the case.
>
> * * *
>
> MS. KRESSE: *Right. And it's not a breach of contract case. It's not a benefit of the bargain. Did the UN get what it bargained for? That's not the point*. CA2 JA 1980-81.

So here, a dozen years after being assured in an indictment that their criminality had to do with misrepresenting that they would segregate the grant funds for exclusive use on the radio station, after being tried on different unsupported variant theories, and having the dismissal challenged on appeal on a completely different, also untenable theory, Mr. Jabar and Mrs. Bowers learn from this decision that their real crime had nothing to do with any misrepresentations, but an implied breach of contract in not giving the UN an ineffable "benefit of the bargain" which the government has repudiated as its claim.

District Court Jurisdiction

The district court had jurisdiction because both petitioners were charged with violating federal criminal laws. 18 U.S.C. § 3231. The district court entered a judgment of conviction against both petitioners. [Govt SA 33].

Reasons for Granting the Petition

1. The reinstatement of the fraud verdicts disregards decisions of this Court enforcing "the most basic notions of due process" and conflicts with decisions of other circuits endorsing these same "basic notions"

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. . . . and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in *Cole v. Arkansas*, *supra*, at 201, "[it] is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Dunn v. United States, 442 U.S. 100, 106-07 (1979). *Accord, McCormick v. United States*, 500 U.S. 257, 269–70 & n.8 (1991); *Chiarella v. United States*, 445 U.S. 222, 226–27 & n.21 (1980)(court would not affirm a conviction based on a theory not presented to the jury).

Here the government conceded that the misrepresentation alleged in the indictment – the core of a fraud offense – was not proven. Instead it sought a trial conviction on other "representations," other crimes ("stealing") and no crime ("common sense"). On its appeal it advanced a completely new and unavailing theory that petitioners *withheld information,* depriving the UN of its "right to control" its spending. The court of appeals, not finding this theory useful, shifted to an entirely new theory, that petitioners deprived the UN of the "benefit of the bargain" in not segregating the grant funds in its accounts.

In its footnote seeking to justify using yet another theory of liability, the decision first claims that "[t]he theory that the UN was deprived of the benefit of the bargain was charged in the indictment, presented to the jury, and responded to by the defense." App. A p.28 n. 60. As stated above, p. 21, this is not factually accurate, and is disproven by the government's repeated and aggressive disavowal of such a theory at trial. Perhaps appreciating this, footnote continues to claim that the "benefit of the bargain" theory was "closely related" to the "right to control" theory which government did raise, if only on the appeal. As to that theory, the decision declares that it did not matter that this theory also "was not explicitly articulated at trial," citing, without discussion, the decision in *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019). *Lebedev* is representative of a longstanding chain of Second Circuit cases which, in disregard of *Dunn, McCormick and Chiarella*, have affirmed convictions, mostly in cases alleging fraud, on theories and facts not articulated in the indictment or not otherwise prsented to the jury.

The Second Circuit does not even appear to ever have endorsed this

Dunn/Chiarella/McCormick expression of 5th Amendment doctrine, which requires that a defendant may not be convicted on different facts, or theories of criminal liability, than those considered by the grand jury that indicted him. *Stirone v. United States*, 361 U.S. 212, 216 (1960)*; Russell v. United States*, 369 U.S. 749, 770 (1962). Instead, the Second Circuit has taken what it describes as a "flexibility in proof" approach, by allowing convictions on different facts and different theories of liability than stated in the indictment or actually tried, "with divergent results":

> Our constructive amendment jurisprudence has resulted in what we recently characterized as apparently "divergent results." Milstein, 401 F.3d 65 (collecting cases). One constant, however, is that we have "consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality (footnote omitted) to be proven at trial." United States v. Patino, 962 F.2d 263, 266 (2d Cir. 1992)

United States v. Rigas, 490 F.3d 208, 228 (2nd Cir. 2007)(omitted footnote listing other cases). *United States v. Lebedev* was only the most recent in the line of cases in this line.

This "flexibility in proof" allowed by in the Second Circuit in the instant case lies in ignoring the unrefuted evidence of good faith, the government's repeated admission that it failed to prove the misrepresentation alleged in the indictment, substituting the expectations of a party to a contract – reasonable or not – for actual representations, and reinstating a verdict on a theory expressly disavowed by the government and never argued or charged to the jury. This simply disregards the right to an indictment, and the

"the most basic notions of due process."

Surprisingly, only five circuits appear to have expressly endorsed the *Dunn/Chiarella/McCormick* doctrine limiting the bases on which convictions can be affirmed or reinstated.[15] Of these, the Fifth Circuit, in *United States v. Chambers*, 408 F.3d 237, 246-47 (5th Cir. 2005) has criticized this Second Circuit's "flexibility in proof" doctrine as expressed in *United States v. Danielson*, 199 F.3d 666, 669 (2nd Cir. 1999), one of the cases recited in *United States v. Rigas*.

On the other hand, only the Ninth Circuit appears to have endorsed the Second Circuit's doctrine.[16]

The looseness of the Second Circuit doctrine is epitomized in the present case. The decision below claims essentially that the government can shift its theory of how the

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[15] United States v. DiDonna, 866 F.3d 40, 50 (1st Cir. 2017)United States v. DiDonna, 866 F.3d 40, 50 (1st Cir. 2017); United States v. Jabateh, 974 F.3d 281, 297 (3d Cir. 2020)United States v. Jabateh, 974 F.3d 281, 297 (3d Cir. 2020); United States v. Haga, 821 F.2d 1036, 1046 (5rd Cir. 1987)United States v. Haga, 821 F.2d 1036, 1046 (5rd Cir. 1987); Sanders v. Freeman, 221 F.3d 846, 855 (6th Cir. 2000)Sanders v. Freeman, 221 F.3d 846, 855 (6th Cir. 2000), see also see also United States v. Minarik, 875 F.2d 1186, 1196 (6th Cir. 1989)United States v. Minarik, 875 F.2d 1186, 1196 (6th Cir. 1989) ("Prosecutors and courts . . . may not allow the facts to define the crime through hindsight after the case is over");United States v. Bliss, 642 F.2d 390 (10th Cir. 1981) United States v. Bliss, 642 F.2d 390 (10th Cir. 1981)

[16] United States v. Johnson, 804 F.2d 1078 (9th Cir. 1986); United States v. Alvarez-Ulloa, 784 F. 3d 558 (9th Cir. 2015) (citing Patino); United States v. Johnson, 804 F.2d 1078 (9th Cir. 1986).

offense was committed so long as there has been “notice of the core of criminality,” with no reference to the actual elements of the crime or the indictment. Here, we submit that the existence of a misrepresentation, and the obtaining of property by means of the misrepresentation are the “core of criminality.” But the court of appeals cannot identify any actual misrepresentation here, and the government disavowed any claim that the UN had not gotten much more than it bargained for. For the Second Circuit Court of Appeals, as in so many of these “flexibility in proof” cases, it is enough if government still seeks a conviction under the same statute as the indictment, and no more. It is no surprise, then, that a prosecutor in the Second Circuit would say, as the prosecutor in this trial did, "we're not limited by the indictment."

It is no excuse that the fundamental holdings by this Court in *Dunn*, *Chiarella,* and *McCormick* were expressed thirty years ago. However, it is equally evident from this persistent contrary history in the Second Circuit, and criticism of it, that intercession by this Court is needed to ensure that these “most basic notions of due process” apply to all citizens. This is especially true when there are no real guidelines to circumscribe this “flexible approach,” which Second Circuit itself admits has led to “divergent results.”

There can be no “flexible approach” to ensuring that the accused has notice and the opportunity to be heard on the exact accusation on which a criminal conviction is predicated, as represented in the indictment.

2. Satisfaction of the "materiality" element in 18 U.S.C. §1001 must be based on more than pure hypothesis divorced from actual evidence, but the circuits differ on this

The §1001 convictions against Mr. Jabar and Mrs. Bowers must be set aside. The affirmance of these convictions is in accord with a wide practice in the Second Circuit, not consistent with *United States v. Gaudin*, 512 U.S. 506 (1995), of sustaining §1001 convictions on purely hypothetical grounds, notwithstanding the evidence. Here there was no evidence of materiality offered and in fact it was admitted by the IRS Agent, and not disproven, that the statements of Deborah Bowers and Steven Jabar had no capacity to influence the investigation.

When the Supreme Court unanimously decided *United States v. Gaudin*, (1995) it was careful to make clear that, as with any element of a crime, proof of "materiality" required actual evidence.

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts.

515 U.S. at 512. *Gaudin* also recited the definition of "materiality," that the statement

"must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed.'" *Id. at 509.* Here there was no evidence offered by the government as to (b) or (c), and the agent admitted that the investigation could not be impacted.

Therefore, when court of appeals stated that, "[t]he jury could reasonably conclude that Jabar's and Bowers's explanation for whether they properly used the grant was 'capable of influencing' the investigation," App. A p.32, there was no reference to evidence about the decision to be made or who was to make it, or why, under "these historical facts" the defendants' mistaken – but immediately corrected – statements may have been so "capable." This is typical of cases in the Second Circuit where the government foregoes any effort to actually prove the elements, as they may have done prior to *Gaudin*. Just as in the case cited in the decision below, *United States v. Adekanbi*, 675 F.3d 178, 182 (2d Cir. 2012), it is typically the appeals court judges' *post hoc* reasoning, not the logical inferences to be drawn from actual evidence by the jury, that sustained he verdict. Here the court of appeals does not even offer its own logic as to how any evidence overcomes Klimczak's testimony "that their responses would not have changed his investigation." See also, *United States v. Khalil*, 692 Fed.Appx. 14, 16 (2nd Cir. 2017); *United States v. Jackson*, 792 Fed.Appx. 849, 854 (2nd Cir. 2019), which demonstrate similar reasoning.

Here, Agent Klimczak definitively answered the critical question of materiality. There is no need for speculation. But still the court of appeals substituted its own intuitive conclusion for a careful sufficiency of the evidence analysis, and this unrefuted evidence simply did not matter. This, in cases in the Second Circuit where the government does not venture to prove the element of materiality, the government can still succeed by letting judges decide, as they did prior to *Gaudin*.

For other circuits, this is not the case and evidence is required to prove the element of materiality, like any other element, *e.g. United States v. Johnson*, 2021 U.S. App. LEXIS 34920 (3rd Cir. 2021); *United States v. Ismail*, 97 F.3d 50 (4th Cir. 1996); *United States v. Beuttenmuller*, 29 F.3d 973 (5th Cir. 1994); *United States v. Clark*, 787 F.3d 451 (7th Cir. 2015); *United States v. Beltran*, 136 Fed.Appx. 59 (9th Cir. 2005); *United States v. Williams*, 934 F.3d 1122 (10th Cir. 2019).

The petition ought to be granted to ensure that, where contested especially, the government remains obligated to actually prove, with evidence, that false statements are "material," as required by *Gaudin*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

February 17, 2022 Respectfully submitted,

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APPENDIX

APPENDIX A

17-3514 (L)
United States v. Jabar

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM 2020

ARGUED: OCTOBER 14, 2020
DECIDED: NOVEMBER 19, 2021

Nos. 17-3514-cr (Lead), 18-1233-cr (XAP), 18-1857-cr (XAP)

UNITED STATES OF AMERICA,
Appellant-Cross-Appellee,

v.

STEVE S. JABAR, aka Steve Shariff, aka Satar Jabar, aka Kamal Jabar, aka Kamal Jamel, DEBORAH BOWERS,
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the Western District of New York.

Before: WALKER, SACK,[*] and MENASHI, *Circuit Judges*.

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[*] Circuit Judge Ralph K. Winter, originally a member of this panel, died on December 8, 2020. Circuit Judge Robert D. Sack replaced Judge Winter on the panel for this appeal. *See* 2d Cir. IOP E(b).

The United States appeals from a post-verdict judgment of acquittal entered by the District Court for the Western District of New York (Lawrence J. Vilardo, *J.*) with respect to the convictions of defendants Steve S. Jabar and Deborah Bowers for wire fraud, in violation of 18 U.S.C. § 1343, and conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371. The government argues that a reasonable jury could infer that the defendants had an intent to defraud the United Nations when they diverted for personal use more than $65,000 of grant money awarded to their non-profit organization. Viewing the evidence in the light most favorable to the government, we conclude that there was sufficient evidence for the jury to convict on the wire fraud and related counts. Because the district court did not reach defendants' motion for a new trial on these counts, we remand for it to consider the motion in the first instance.

Jabar and Bowers also cross-appeal the district court's order denying their motions for a judgment of acquittal or a new trial on their convictions for making false statements, in violation of 18 U.S.C. § 1001. Viewing the evidence in the light most favorable to the government, we conclude that there was sufficient evidence for the jury to convict defendants for their false statements. We discern no errors with respect to the false statement convictions that would require a new trial.

Accordingly, we **REVERSE** the district court's judgment of acquittal on the wire fraud and wire fraud conspiracy counts; **AFFIRM** the district court's denial of a judgment of acquittal and a new trial on the false statement counts; and **REMAND** with directions for the entry of judgment consistent with the foregoing and for consideration of the motion for a new trial on the wire fraud and wire fraud conspiracy counts.

Tiffany H. Lee, Assistant United States Attorney, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, *for Appellant-Cross-Appellee*.

Jamesa J. Drake, Drake Law, LLC, *for Defendant-Appellee-Cross-Appellant Steve S. Jabar*.

Mark J. Mahoney (Jesse C. Pyle, *on the brief*), Harrington & Mahoney, *for Defendant-Appellee-Cross-Appellant Deborah Bowers*.

JOHN M. WALKER, JR., *Circuit Judge*:

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BACKGROUND

This case arises from defendants' personal use of grant money that the UN awarded to their non-profit organization, Opportunities for Kids International, Inc. (OKI). Jabar and Bowers applied for and obtained a grant in the amount of $500,000 ($150,000 of which was later withheld) for the sole purpose of establishing a radio station in Iraq dedicated to women's programming. Instead, the defendants siphoned off more than $65,000 of the grant to pay personal debts, bills, and taxes.

The following background draws the facts from the trial evidence and describes them in the light most favorable to the government, as we must in reviewing a post-verdict motion for a judgment of acquittal.[1] Unless otherwise noted, the parties do not dispute the relevant facts.

<u>The UN's Grant Application Process</u>

The UN is a well-known international organization of 193 member states based in New York City that engages in diplomatic and donor-state-driven endeavors. The efficacy of the UN generally, ever the subject of debate, has no bearing on this case. The United Nations Development Fund for Women (UNIFEM) is a UN agency that fosters gender equality, including by providing grants to non-governmental organizations (NGOs). UNIFEM requires an NGO that is interested in a grant to submit a proposal describing the project, the

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[1] *United States v. Litwok*, 678 F.3d 208, 210-11 (2d Cir. 2012).

organization receiving the grant, and the projected budget. If the project is approved, the NGO and UNIFEM enter into a standard cooperation agreement that sets forth conditions governing the use and management of the grant money.

UNIFEM grants are funded entirely through voluntary donations by UN member states. As a condition for obtaining the grant, UNIFEM requires grant recipients to maintain and submit detailed records of their expenditures to show that the grant is being spent in furtherance of UNIFEM's mandate.

The Charged Fraudulent Scheme

In 1995, Jabar and Bowers originally founded OKI as a not-for-profit organization to provide monetary, immigration, and educational assistance to Kurdish refugees in upstate New York. Bowers served as OKI's Executive Director and Jabar served as its Treasurer.

By 2003, Jabar had amassed hundreds of thousands of dollars of personal debt. To ease his financial difficulties, in November 2003, Jabar, with Bowers's assistance, applied for a loan that would consolidate $350,000 worth of mortgage payments, back taxes, consumer debts, bank loans, and other debts. The loan was refused. Thereafter, Jabar borrowed money from friends, including approximately $45,000 from Bassam Bitar and $23,000 from Saad Almizoori.

In June 2004, Jabar and Bowers applied on behalf of OKI for a UNIFEM grant to establish a radio station in Iraq named Voice of Women (VOW), which would broadcast programming to educate Iraqi women on democratic processes and increase civic engagement. Jabar and Bowers initially requested $423,000 in seed money, before increasing their request to $500,474. To substantiate the budget request, they submitted a line-item budget that explained how each dollar would be allocated towards the radio station.

On December 12 and 13, 2004, OKI and UNIFEM, respectively, formalized the terms of the grant in a Project Cooperation Agreement (Cooperation Agreement). The Cooperation Agreement's preamble pronounced, "UNIFEM has been entrusted by its donors with certain resources that can be allocated for programmes and projects, and is accountable to its donors and to its Executive Board for the proper management of these funds."[2] The Cooperation Agreement then set forth detailed terms regulating the spending, recordkeeping, and reporting of the grant funds.

UNIFEM would disburse the grant in multiple installments: an initial disbursement of $350,000 and subsequent installments on a quarterly basis. OKI was to use the funds "in strict accordance" with a so-called Project Document, which purported to list the objectives of the endeavor.[3] Expenditures were not to exceed a 20 percent variation from any line item of the Project Budget unless OKI

[2] Joint App'x 2087.

[3] Joint App'x 2092, art. VIII, ¶ 2.

obtained UNIFEM's advance approval. OKI was required to return to UNIFEM any funds not spent on the project within two months of the termination of the agreement or completion of the project. The government did not introduce either the Project Document or the Project Budget into evidence at trial.

The Cooperation Agreement additionally imposed detailed recordkeeping and reporting requirements. OKI agreed to maintain accurate and updated records of all expenditures "to ensure that all expenditures are in conformity with the provisions of the Project Work Plan and Project Budgets."[4] Such records were to include original invoices, bills, and receipts. Every quarter, OKI was to transmit to UNIFEM a financial report listing the disbursements incurred on the project. Only if the financial report showed the "satisfactory management and use of UNIFEM resources" would UNIFEM release the remainder of the grant.[5] OKI also agreed to at least one audit "on the status of funds advanced by UNIFEM" during the project.[6]

When Jabar signed the Cooperation Agreement on behalf of OKI, OKI's bank balance was $1,630.96. On December 15, OKI received the initial $350,000 disbursement. The next day, Bowers wrote a check for $20,000 to Bitar, one of Jabar's friends who had loaned him money for his personal expenses. One week later, on

[4] Joint App'x 2092, art. IX, ¶ 1.
[5] Joint App'x 2092, art. VIII, ¶ 1.
[6] Joint App'x 2093, art. XI, ¶ 1.

December 23, Bowers wired $10,000 to Almizoori, another friend of Jabar's who had loaned him money.

Over the next six months, Jabar and Bowers continued to withdraw money from OKI's grant-infused bank account for personal use. On February 17, 2005, Bowers wired $1,500 to pay for a family friend's medication. On March 3, Bowers wrote herself $7,362.54 check to repay $8,000 that she had loaned Jabar. On April 14, Bowers wrote Jabar a check for $7,219 bearing the memo "VOW Radio." That same day, she wrote a check from Jabar's account for an identical sum to pay his property taxes. On May 1, Bowers wrote a $5,600 check to Jabar with the memo "general manager" and deposited it in his personal account. She then used that money to pay his mortgage, premiums, credit cards, utility bills, medical bills, and insurance. On June 3, Bowers wired $10,000 from OKI's account to Jabar's personal account to cover a prior $10,000 check Jabar had written to Bitar for "payment/loan." On June 8, Bowers transferred $15,000 from OKI's account to her personal account. On June 20, Bowers transferred $4,200 from OKI's account to Jabar's personal account to pay loans, credit cards, and utility bills. In total, the government asserted that defendants withdrew more than $65,000 from the OKI account to pay personal expenses.

On May 9, 2005, more than one month beyond the quarterly report deadline, the defendants submitted a financial report showing $357,259 in expenditures and receipts showing $362,918 in VOW-related expenses. The report failed to account for numerous expenditures made using the grant. It claimed that OKI made its first expenditure on January 1, 2005, even though Bowers had transferred $20,000 to Bitar and $10,000 to Almizoori on December 15 and December 23, 2004, respectively. The report did not disclose any of the personal expenditure payments Jabar or Bowers made.

UNIFEM opened an investigation and audit over concerns that OKI's report showed unauthorized expenditures and inadequate receipts. Based on the audit's results, UNIFEM did not release the remaining $150,000 of the grant. OKI ultimately built a radio station, but the parties dispute whether it met the project specifications.

In June 2005, the Internal Revenue Service (IRS) received multiple suspicious activity reports that flagged attempted transfers from OKI's bank account to bank accounts in the Middle East. The IRS began an investigation led by Special Agent Michael Klimczak. In July 2006, Agent Klimczak interviewed Bowers in her home regarding the UN grant. Bowers initially told the agent that all $350,000 went towards VOW. When Agent Klimczak showed her copies of checks and wire transfers, however, she admitted the personal use payments. As an example, she initially claimed that the March 3, 2005 check for $7,219 went towards VOW but, upon being confronted with certain records, she admitted that she withdrew that grant money to pay Jabar's property taxes.

In September 2006, Agent Klimczak interviewed Jabar. Jabar initially told the agent that he had transferred all $350,000 to Iraq to spend on VOW, save $10,000 set aside for legal and other expenses. Upon being shown records of certain transactions, however, he admitted to repaying his personal debts with grant money. For example, he admitted to transferring money to Bitar and Almizoori to repay loans to renovate his properties, to pay property taxes, and to make credit card payments. He conceded that "he knew that wasn't the way to operate" but he did not want to "embarrass himself" before his friends.[7] He also admitted to using grant money "to keep the IRS people off his back."[8]

As Agent Klimczak continued showing records of personal expenditures from the OKI account, Jabar became upset. He stated, "[S]orry, big mistake, I'm going to get crucified for that," when shown the $7,219 check bearing the false memo, "VOW Radio."[9] He also exclaimed, "[T]his is life, you borrow money, and you pay it back. I needed the money. I didn't care where it came from. I needed to pay Bitar, bills, loans. I wasn't making millions out of [the Department of Homeland Security]."[10]

Procedural History

On May 21, 2009, the grand jury returned a fourteen-count indictment charging Jabar and Bowers with conspiracy to commit wire fraud (Count 1), wire fraud (Counts 2-4), money laundering (Counts 5-9), and false statements (Counts 10-14). At trial, the government's evidence included the Cooperation Agreement,

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[7] Joint App'x 2186.
[8] Joint App'x 2176.
[9] Joint App'x 2175-76.
[10] Joint App'x 2191.

records showing in excess of $65,000 in personal expenditures, testimony by friends of Jabar concerning his debts, and testimony by Agent Klimczak.

The defense produced accountant and expert witness Eric Colca, who testified that OKI had spent $357,361 on the VOW project by March 2005 and thus satisfied its obligation to spend $350,000 on the radio station. Colca calculated OKI's expenditures by totaling four categories of transactions that he assumed, based on Jabar's representations, were related to VOW: (1) transfers from the OKI account to a Jordanian bank account; (2) transfers from Jabar's personal account to the Jordanian account; (3) third-party loans for which Jabar purportedly assumed responsibility; and (4) invoices and receipts showing construction and operation expenses. From that total, Colca subtracted withdrawals from OKI's account that were unrelated to the radio station to arrive at total VOW expenditures. On cross-examination, Colca acknowledged that he did not conduct an audit and thus assumed without confirming, for example, that all $250,000 transferred from OKI's account to the Jordanian account was spent on the radio station. Colca also admitted to possibly double counting certain expenditures.

Following the five-week trial, the jury returned guilty verdicts against the defendants on wire fraud (Count 4), conspiracy to commit wire fraud (Count 1), and making false statements (Count 14 for Jabar; Counts 11-13 for Bowers). As to these counts, Jabar and Bowers jointly moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 and for a new trial pursuant to Federal Rule of

Criminal Procedure 33. The district court granted a judgment of acquittal on the wire fraud and conspiracy to commit wire fraud counts, dismissed the new trial motion on the wire fraud and conspiracy counts as moot, and upheld the false statement convictions.[11] The district court imposed sentences of one day of time served and fines of $500 as to both defendants. This appeal followed.

DISCUSSION

The government appeals from the judgment of acquittal on the wire fraud and related counts. The government argues that the district court erred by concluding that there was insufficient evidence of fraudulent intent. As to those counts, Jabar and Bowers argue that the district court correctly entered the judgment of acquittal and, in the alternative, that a new trial is warranted based on various evidentiary rulings and the jury instructions. On cross-appeal, Jabar and Bowers challenge the district court's denial of their motions for a judgment of acquittal or a new trial on the false statement counts.

[11] *United States v. Jabar*, No. 09-CR-170, 2017 WL 4276652, at *1 (W.D.N.Y. Sept. 27, 2017).

I. Wire Fraud and Conspiracy to Commit Wire Fraud

A. Sufficiency of the Evidence

We review *de novo* the district court's grant of a motion for a judgment of acquittal under Rule 29.[12] Only if "the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt" may the court enter a judgment of acquittal.[13] "[W]e must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence."[14] Here, the defendant "faces a heavy burden."[15] As long as the evidence "[would] suffice to convince any rational trier of fact that the crime charged has been proven beyond a reasonable doubt, then the conviction must stand."[16]

In reviewing the evidence on a motion for a judgment of acquittal, the court must be careful not to usurp the role of the jury. "Rule 29[] does not provide the trial court with an opportunity to substitute its own determination of . . . the weight of the evidence and

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[12] *United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012).

[13] *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999).

[14] *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017) (quotation marks omitted).

[15] *United States v. Novak*, 443 F.3d 150, 157 (2d Cir. 2006) (quotation marks omitted).

[16] *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994).

the reasonable inferences to be drawn for that of the jury."[17] Thus, where "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the court] must let the jury decide the matter."[18]

The elements of wire fraud are: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the wires to further the scheme."[19] Conspiracy to commit wire fraud requires merely the agreement between defendants to engage in the foregoing and an overt act by one of the conspirators in furtherance of the conspiracy.[20]

"Essential to a scheme to defraud is fraudulent intent."[21] Fraudulent intent may be inferred "[w]hen the 'necessary result' of the actor's scheme is to injure others."[22] Intent may also be proven "through circumstantial evidence, including by showing that defendant made misrepresentations to the victim(s) with knowledge that the statements were false."[23] Because an intent to deceive alone is insufficient to sustain a wire fraud conviction, "[m]isrepresentations amounting only to a deceit . . . must be coupled

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[17] *Guadagna*, 183 F.3d at 129 (quotation marks omitted).

[18] *Id.*

[19] *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015); *see* 18 U.S.C. § 1343.

[20] 18 U.S.C. § 371.

[21] *D'Amato*, 39 F.3d at 1257.

[22] *Id.* (quoting *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970)).

[23] *Guadagna*, 183 F.3d at 129.

with a contemplated harm to the victim."[24] "Such harm is apparent where there exists a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver."[25] Proof of actual injury to the victim is not required because the scheme need not have been successful or completed.[26]

Comparing two of our previous decisions clarifies that the misrepresentations must be central, not just collateral, to the bargain between the defendant and the victim. In *United States v. Starr*, owners of a bulk mailing company schemed to conceal higher rate mailings from customers in lower rate bulk mailings without paying the additional postage to the postal service or refunding their customers' excess postage payments.[27] Defendants "represented that funds deposited with them would be used only to pay for their customers' postage fees," but upon defrauding the postal service, defendants sent fraudulent receipts to their customers and appropriated the remainder of the funds for their own use.[28] We concluded that because the customers' mail was delivered on time to the correct location, whatever harm there was did not "affect the very nature of the bargain itself."[29] At most, the government's evidence

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[24] *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987).
[25] *Id.* (quotation marks omitted).
[26] *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996).
[27] 816 F.2d at 95.
[28] *Id.* at 99.
[29] *Id.* at 98.

showed defendants' intent to deceive or induce customers into the transaction but not a fraudulent intent.[30]

In *United States v. Schwartz* the defendants schemed to purchase U.S.-manufactured military equipment for their international clients.[31] One producer, Litton Industries, "expressly demanded assurances" that its devices would not be exported unlawfully, including that: the condition be incorporated into the sales agreement, the defendants disclose the customer's identity, and the customer obtain the requisite export certificates.[32] Rather than comply, the defendants fed Litton false information and fabricated documents to secure the purchase.[33] On appeal, we concluded that evidence of the defendants' deceitful acts supported a finding of fraudulent intent and thus upheld the wire fraud convictions. We distinguished these facts from the false representations in *Starr*, which "did not cause any discrepancy between benefits reasonably anticipated and actual benefits received" and, therefore, "did not go to an essential element of the bargain."[34] The scheme in *Starr* "only defeated [defendants'] customers' expectation that the money they paid to the defendants would be fully used to pay for postage, an expectation *that was not the basis of the bargain*."[35] To the contrary, the defendants' misrepresentations in *Schwartz* were not "simply

[30] *Id.* at 100.
[31] 924 F.2d 410, 414 (2d Cir. 1991).
[32] *Id.* at 421.
[33] *Id.*
[34] *Id.* at 420.
[35] *Id.* (emphasis added).

fraudulent inducements," but went to an essential element of the bargain: the *lawful* export of military equipment.[36] The defendants made "*explicit* promises . . . in response to Litton's demands" and evidence showed that the deceived party "would not have sold its product" to defendants if they "had not been able to guarantee these conditions."[37] Therefore, even though it received payment, Litton was deprived of "the right to define the terms for the sale of its property" and "good will because equipment [that] Litton, a government contractor, sold was exported illegally."[38] The wire fraud statute captured these non-pecuniary harms.[39]

Bearing these principles in mind, we consider the nature of the instant transaction between the parties and the government's evidence of fraudulent intent.

i. Nature of the Transaction Between the Parties

The district court ultimately concluded that the evidence was insufficient to prove that the defendants had the intent to defraud the UN because ultimately, they built "$350,000 worth of a radio station."[40] In reaching this decision, the district court rejected the notion that a reasonable jury could find Jabar and Bowers's use of

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[36] *Id.* at 421.

[37] *Id.* at 420-21.

[38] *Id.* at 421.

[39] *Id.*; *see also United States v. Peroco*, 13 F.4th 158, 172 (2d Cir. 2021) (depriving a party of an "essential element of the bargain . . . is plainly sufficient for a wire fraud conviction under our caselaw").

[40] *Jabar*, 2017 WL 4276652, at *5.

grant funds for personal expenses was itself a harm to the UN.[41] We do not agree that the evidence compels a finding that the benefit of the bargain to UNIFEM was confined to a brick-and-mortar radio station. The evidence was sufficient for the jury to determine reasonably that OKI's representation in the Cooperation Agreement that it would spend the grant funds pursuant to UNIFEM's specifications was equally essential to the issuance of the grant.

The Cooperation Agreement required compliance with numerous spending provisions that controlled OKI's use of the $500,000. OKI agreed to "utilize the funds . . . provided by UNIFEM in strict accordance with the Project Document."[42] Although the government failed to offer the Project Document and Project Budget into evidence, a reasonable jury could rely on other evidence that *was* offered to infer that a restriction on the use of grant funds was part of the basis of the bargain. The defendants' own budget proposal, received in evidence, unsurprisingly stated that every dollar of the grant proceeds would be allocated to a VOW-related expense. And a UNIFEM official testified that the agency as a matter of course demands assurances from grant recipients that they will devote the awarded money exclusively towards the project. The Cooperation Agreement also required that Jabar and Bowers return to UNIFEM

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[41] *Id.* at *6 (recognizing that evidence "may have been sufficient to show that the defendants intended to use UN money dollar-for-dollar not on the radio station but on personal expenses," but determining this was distinct from "intending to harm the UN by not giving the UN the benefit of its bargain").

[42] Joint App'x 2092, art. VIII, ¶ 2.

any funds not spent on the project. UNIFEM mandated the return of all unused funds precisely because the proper use and management of funds was central to the bargain.

The Cooperation Agreement contained exhaustive accounting requirements that also demonstrate that OKI's proper spending of the grant was essential to the bargain. The agreement required OKI to "keep accurate and up-to-date records and documents in respect of all expenditures"[43] and maintain "original invoices, bills, and receipts."[44] UNIFEM explained the purpose of the records clearly: so that UNIFEM could "ensure that all expenditures are in conformity with the provisions of the Project Work Plan and Project Budgets."[45] Moreover, OKI was required to disclose all income and expenditures in financial reports, "[t]he purpose of [which was] to request a quarterly advance of funds."[46] UNIFEM would disburse each subsequent grant installment only upon determining that the report "show[ed] satisfactory management and proper use of UNIFEM resources."[47] As in *Schwartz*, UNIFEM "made explicit" these requirements by "expressly demand[ing] assurances from" the defendants in the terms of the Cooperation Agreement.[48]

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[43] Joint App'x 2092, art. IX, ¶ 1; *see also* Joint App'x 2091, art. VII, ¶ 7 ("[OKI] shall maintain complete and accurate records of equipment, supplies and other property purchased with UNIFEM funds.").

[44] Joint App'x 2092, art. IX, ¶ 1

[45] *Id.*

[46] Joint App'x 2093, art. X, ¶ 2(b).

[47] Joint App'x 2092, art. VIII, ¶ 1.

[48] *Schwartz*, 924 F.2d at 420-21.

The spending and accounting conditions are reinforced by the Cooperation Agreement's precatory language describing UNIFEM'S duty and accountability to its donors and testimony from a UNIFEM official. Because grants are funded exclusively by donor countries, a UNIFEM official made clear that "there has to be assurance, continuous assurance available with the [UN] that the money is being spent for the purpose for which it has been given . . . ."[49]

In sum, the government's theory at trial was that the construction of the radio station was only part of the bargain and that it served to conceal defendants' fraudulent acts with respect to the rest of the bargain[50]—OKI's agreement to spend the entirety of the grant exclusively pursuant to the terms of the Cooperation Agreement. To the extent defendants insisted that the contractual bargain was confined to building the radio station, the jury was free to reject that claim based on its assessment of the weight of the evidence and reasonable inferences it could draw from that evidence.

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[49] Joint App'x 176-77.

[50] The indictment charged: "in order to conceal and promote their criminal conspiracy and wire fraud scheme, the defendants undertook *certain measures designed to demonstrate apparent compliance with the UNIFEM Agreement, including . . . establishing 'Voice of Women Radio.'*" Joint App'x 65 (emphasis added). The bargain, as set forth in the indictment, was "that all [grant] money would be acquired and used by . . . OKI for the purpose of establishing and running a radio station," pursuant "to the terms and conditions set forth in the UNIFEM Agreement." Joint App'x 64-65.

ii. Evidence of Jabar and Bowers's Fraudulent Intent

The district court concluded that the government's proof at most showed that Jabar and Bowers comingled the UN grant with their personal funds because they used "other fungible dollars to build the radio station for which the UN money was given."[51] We disagree. Based on the record, we conclude that there was sufficient evidence to support the government's theory of fraudulent intent: that from the outset the defendants never intended to use the entirety of the $500,000 grant or the $350,000 that they actually received on VOW, but rather they intended to divert a portion for their personal use, either as "free money" or as a loan.

Viewing the evidence in the light most favorable to the government, we conclude a reasonable jury could find that the necessary result of a scheme to take the grant money for personal use would harm the UN. By diverting a portion of the grant for purposes not authorized under the Cooperation Agreement and unrelated to VOW, the scheme would necessarily deprive UNIFEM of money or property while also depriving it of the proper management and documentation of contributions entrusted by donor countries to UNIFEM's care.

The evidence from which the jury could infer a fraudulent intent included: (1) bank records showing that Jabar and Bowers withdrew and transferred more than $65,000 from the OKI bank account for personal use; (2) Jabar's financial motive to defraud the

[51] *Jabar*, 2017 WL 4276652, at *6.

UN; (3) the defendants' immediate use of the grant money to repay Jabar's debts; (4) Jabar's statement to Agent Klimczak that he needed money; and (5) the defendants' initial false statements to Agent Klimczak that they spent the grant only on the project.

First, the government introduced bank records showing that Jabar and Bowers diverted more than $65,000 from the OKI bank account for their personal use. The evidence that the defendants made these unauthorized expenditures from the grant supports a strong inference that they intended to harm the UN by depriving it of the right to define the terms for use of grant funds. None of these funds independently came from OKI because OKI started with a negligible bank balance of only $1,630.96 prior to receiving the grant funds.

Second, the evidence demonstrated Jabar's motive to get easy cash, and quickly. His friends testified that he owed them tens of thousands of dollars. Bitar confirmed that, when Jabar and Bowers applied for the grant, Jabar "was in a bad financial situation"[52] and had asked to borrow money with such frequency—"two, three times a month"—that Bitar began recording the loans.[53] The jury could also consider Jabar's unsuccessful personal loan application, which the mortgage broker declined to even submit to potential lenders. The timing of the application process–shortly before the defendants

[52] Joint App'x 369.
[53] Joint App'x 370.

sought the UN grant–further supports Jabar's urgency for financial relief.

Third, Jabar, with Bowers's assistance, used the grant money to pay back his creditor friends immediately in December 2004, a fact that they concealed from UNIFEM. One day after the initial installment was credited to OKI's bank account, Bowers withdrew $20,000 to repay Bitar. One week later, she transferred $10,000 to repay Almizoori. A reasonable jury could view the timing and the nature of these transactions, when considered alongside the motive evidence, as revealing the defendants' true aim in obtaining the grant, as the government contended.

Fourth, Jabar admitted that his financial difficulties drove him to use the UN-issued funds for personal purposes. In explaining those personal expenditures to Agent Klimczak, he stated, "[T]his is life, you borrow money, and you pay it back. I needed the money. I didn't care where it came from. I needed to pay Bitar, bills, loans. I wasn't making millions out of DHS."[54] That statement could reasonably be understood by the jury to reveal Jabar's intentions when he applied for and received the grant: the grant was a solution to his mounting indebtedness.[55]

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[54] Joint App'x 2191.

[55] The district court reached the same conclusion regarding this statement. *See Jabar*, 2017 WL 4276652, at *7 (describing statement as evidence that defendants "intended to use UN grant money and other

Fifth, the defendants' false statements support the inference that they understood their conduct to deprive the UN of benefits that it anticipated. Bowers wrote "VOW Radio" in the memo line of a check, even though she used the money to pay Jabar's property taxes; and Bowers and Jabar lied to Agent Klimczak that the entire grant was spent on OKI only to admit to the contrary after being confronted with the records. These misrepresentations when coupled with intended harm to UNIFEM were sufficient to allow the jury to find fraudulent intent.

Jabar and Bowers do not dispute that they took UN dollars in the OKI account to fund personal expenditures. Rather, they argue that the government failed to carry its burden to disprove that they may have made VOW-related transactions using other banks accounts. This reasoning suffers from three flaws: it elides the distinction between an intent to harm and actual harm; it asks the court to review the evidence in the light most favorable to the defense—the inverse of the standard of review on a Rule 29 motion; and—once "harm" is properly understood—the concession that they personally used funds in the OKI account is itself an admission of harm.

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dollars to pay back Jabar's personal debts"). However, the district court wrongly determined that no reasonable jury could find that evidence of Jabar and Bowers's intent to violate the agreement in this manner supported a finding of fraudulent intent.

First, we emphasize that intent to defraud, an essential element of wire fraud, includes *contemplated* harm.[56] The government was not required to prove that Jabar and Bowers actually harmed the UN by failing to replace money that they diverted from the grant or by failing to build a radio station.

Second, "it is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence" and to assess the weight of the evidence.[57] On a motion for a judgment of acquittal pursuant to Rule 29, the court must view the case in the light most favorable to the government and defer to the jury's assessment of the evidence and its reasonable inferences drawn from that evidence.

Applying that deferential standard, we emphasize that the jury was not required to accept either the defendants' expert testimony that defendants spent more than $350,000 on the project by the end of March 2005 or the veracity of OKI's quarterly financial report. And there were many reasons why a jury might discount or reject that evidence. The government on cross-examination elicited several flaws in the methodology that defendants' expert witness Colca used. Colca did not conduct an audit. Instead, he "accepted the representations of Mr. Jabar regarding monies that he spent on the

[56] *See Peroco*, 13 F.4th at 176 (collecting cases).

[57] *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (quoting *Jackson*, 335 F.3d at 180).

radio station."[58] Similarly, Colca assumed, without confirming, that $250,000 transferred from OKI's bank account to the Jordanian bank account was for VOW-related expenditures.[59] He also acknowledged that his methodology, which separately tallied transfers to the Jordanian account, third-party loans, and invoices and receipts, could result in double counting radio-associated expenditures. Finally, Colca did not confirm that the invoices and receipts were paid. Presented with the above evidence, it was not unreasonable for the jury to discount Colca's testimony or reject it altogether.

The jury also was entitled to discount OKI's quarterly financial report, which showed $357,259 in expenditures, and receipts totaling $362,918. The jury heard testimony that the report appeared to reflect unauthorized expenditures and lack adequate receipts. Moreover, after an investigation and audit following the report, UNIFEM refused to disburse the rest of the grant. A reasonable jury could certainly infer that OKI's report and receipts were fatally defective and that the misrepresentations the report contained, together with evidence of contemplated harm to the UN, could support a finding of fraudulent intent.

Third, in making their counterarguments, Jabar and Bowers do not dispute that they took UN dollars in the OKI account to fund personal expenditures. In doing so, they seem wrongly to presume that those actions themselves did not cause harm to the UN. Jabar

[58] Joint App'x 1605.

[59] Joint App'x 1595 ("[W]e assumed that once it got to that account, that it was going to the radio station. That's as far as we could trace it.").

and Bowers ignore the possibility that restrictions on the use of funds were an essential element of their bargain with the UN, such that their intentional use of UN dollars on personal expenditure would harm the UN even if they paid back every penny and followed through on other aspects of the agreements.

For the above reasons, we conclude that the evidence was sufficient for a jury to find guilt beyond a reasonable doubt on the wire fraud and related conspiracy counts.[60]

B. Motion for a New Trial

Federal Rule of Criminal Procedure 29(d) directs the district court, upon entering a judgment of acquittal after a guilty verdict, to "conditionally determine whether any motion for a new trial should also be granted if the judgment of acquittal is vacated or reversed," and to "specify the reasons for that determination."[61] A conditional ruling on a motion for a new trial enables the appeals court to review

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[60] The theory that the UN was deprived of the benefit of the bargain was charged in the indictment, presented to the jury, and responded to by the defense. The closely related theory that the UN was denied the "right to control" its assets because defendants misrepresented "potentially valuable economic information" was not explicitly articulated at trial. *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019). That the jury was not charged on a right to control theory does not alter our conclusions. That is because liability under either theory turns on the materiality of the misrepresentations and requires us to consider whether the alleged deception "affect[ed] the very nature of the bargain." *United States v. Johnson*, 945 F.3d 606, 612 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 687 (2020).

[61] Fed. R. Crim. P. 29(d)(1).

efficiently the judgment of acquittal and the decision on a new trial "in a single, consolidated appeal."[62]

After the jury verdict, Jabar and Bowers timely moved for both a judgment of acquittal and a new trial. Upon granting judgment of acquittal on the fraud and conspiracy convictions, however, the district court did not issue a conditional ruling on the defendants' motion for a new trial in accordance with Rule 29(d).[63] Neither party on appeal challenges the district court's failure to enter the conditional ruling under Rule 29(d), but the motion for a new trial was made below, and given our disposition, is no longer moot. Consideration of a motion for a new trial is a matter best reserved to the district court's informed discretion.[64] Accordingly, we remand to the district court for its determination of defendants' motion for a new trial. We express no opinion on whether the motion should be granted or denied.

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[62] Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 *Am. U. L. Rev.* 433, 438 (1994).

[63] The district court mistakenly concluded that, "[b]ecause the fraud and conspiracy counts have been dismissed, the defendants' motion for a new trial on those counts is moot." *Jabar*, 2017 WL 4276652, at *13 n.13.

[64] *See United States v. Archer*, 977 F.3d 181, 187 (2d Cir. 2020); *United States v. Millender*, 970 F.3d 523, 531-32 (4th Cir. 2020) (remanding for district court to consider whether to grant a new trial and to "specifically explain the rationale for the decision").

II. False Statements

A. Motion to Suppress Jabar's Statements to the IRS

Jabar challenges the district court's failure to suppress statements that he made during his interview with Agent Klimczak on the basis that it was a custodial interrogation that trigged safeguards under *Miranda v. Arizona*, which were not provided.[65] The district court determined to the contrary that Jabar was not in custody. "We review the district court's factual findings on the existence of a custodial interrogation for clear error, and its legal conclusions *de novo*."[66] To determine if a person was in custody, we first focus on whether the person was "free to leave."[67] We next consider whether "a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest."[68] "Relevant considerations include: (1) the interrogation's duration; (2) its location (*e.g.*, at the suspect's home, in public, in a police station, or at the border); (3) whether the suspect volunteered for the interview; (4) whether the officers used restraints; (5) whether weapons were present and especially whether they were drawn; and (6) whether officers told the suspect he was free to leave or under suspicion."[69]

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[65] 384 U.S. 436 (1966).

[66] *United States v. Familetti*, 878 F.3d 53, 57 (2d Cir. 2017).

[67] *United States v. Newton*, 369 F.3d 659, 672 (2d Cir. 2004).

[68] *Id.*

[69] *United States v. Faux*, 828 F.3d 130, 135 (2d Cir. 2016) (quotation marks omitted).

We are satisfied that Jabar was not in custody. At the time of the interview, Jabar worked at DHS in Baghdad, and Agent Klimczak coordinated his videoconference interview through a Baghdad-based Federal Bureau of Investigations (FBI) officer. The FBI agent requested, but did not require, Jabar to attend, and he escorted Jabar to the interview without the use of any restraints, weapons, or force. Because the interview took place in the Baghdad Operations Center (BOC), a secure FBI facility, Jabar's movement within the BOC premises was necessarily restricted due to general security needs. Jabar does not contend, however, that he was prevented from leaving the interview. There is no suggestion that, at any point, Jabar attempted to terminate the interview or was prevented from doing so. Also, he was informed that he could take a break at any time and was offered refreshments. We believe these facts would not lead a reasonable person in Jabar's position to conclude that he was in custody. We thus affirm the district court's order denying the motion to suppress.

B. Sufficiency of the Evidence

Bowers appeals her convictions for falsely stating to Agent Klimczak that she made three transactions to further the radio station project: (1) the April 14, 2005 check to Jabar for $7,219 bearing the memo, "VOW Radio"; (2) a $10,000 wire transfer to Jabar's personal account; and (3) the $4,200 wire transfer on June 20, 2005 to Jabar's personal account. She contends that the statements were not material and that the government failed to establish that she intended to deceive Agent Klimczak. Jabar challenges his conviction for falsely stating to Agent Klimczak that the entire grant was transferred to Iraq for the purpose of the radio station on the grounds that his statement was not material.

To prove a false statement under 18 U.S.C. § 1001, the government must show that the defendant: "(i) knowingly and willfully, (ii) made a statement, (iii) in relation to a matter within the jurisdiction of a department or agency of the United States, (iv) with knowledge that it was false or fictitious and fraudulent."[70] A statement is material under § 1001 "if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed, or if it is capable of distracting government investigators' attention away from a critical matter."[71]

We find no merit to the defendants' claim that their statements were not material because Agent Klimczak already knew the answers to his questions, and he testified that their responses would not have changed his investigation. The jury could reasonably conclude that Jabar's and Bowers's explanation for whether they properly used the grant was "capable of influencing" the investigation, which is all that was required.[72]

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[70] *United States v. Banki*, 685 F.3d 99, 117 (2d Cir. 2012), *as amended* (Feb. 22, 2012) (quoting *United States v. Wiener*, 96 F.3d 35, 37 (2d Cir. 1996)).

[71] *United States v. Adekanbi*, 675 F.3d 178, 182 (2d Cir. 2012) (quotation marks omitted).

[72] *Id.*

Bowers also argues that she did not have an intent to deceive because she was cooperative, misremembered the transactions, and corrected herself when informed of inaccuracies in her responses to Agent Klimczak. We easily conclude that these fact issues fall within the purview of the jury,[73] which was free to reject or discount her argument at trial. Finally, that Bowers subsequently admitted to each false statement is not a basis for setting aside the jury's verdict, because "there is no safe harbor for recantation or correction of a prior false statement that violates section 1001."[74] For the above reasons, we conclude that there was sufficient evidence for the jury to convict defendants for their false statements.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's judgment of acquittal on the wire fraud and wire fraud conspiracy counts, AFFIRM the district court's denial of a judgment of acquittal and a new trial on the false statement counts, and REMAND with directions for the entry of judgment consistent with the foregoing and for consideration of defendants' motion for a new trial on the wire fraud and wire fraud conspiracy counts.

[73] *United States v. Coppola*, 671 F.3d 220, 239 (2d Cir. 2012) ("[T]he task of choosing among permissible competing inferences is for the jury, not a reviewing court.").

[74] *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006).

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United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

STEVE S. JABAR and DEBORAH BOWERS,

Defendants.

09-CR-170
DECISION AND ORDER

On September 2, 2016, after a five-week jury trial, defendants Steve S. Jabar and Deborah Bowers were convicted of conspiring to commit wire fraud, engaging in wire fraud, and making several materially false statements.

The defendants now (1) renew their motion pursuant to Federal Rule of Criminal Procedure 29 for a judgment of acquittal, on which this Court previously reserved decision; and (2) move for a new trial pursuant to Rule 33. Docket Items 398, 399, 433. For the following reasons, the defendants' Rule 29 motions are granted with respect to Counts 1 and 4 (wire fraud conspiracy and wire fraud) but are denied with respect to all other counts, and their Rule 33 motions are denied.

FACTUAL AND PROCEDURAL BACKGROUND

The defendants were convicted of crimes related to their involvement in a not-for-profit corporation known as Opportunities for Kids International ("OKI"). Jabar served as a member of OKI's Board of Trustees and was in charge of OKI in Baghdad, Iraq. Bowers served as OKI's Executive Director, and she maintained signatory authority over OKI bank accounts and conducted the corporation's day-to-day financial affairs.

In 2004, the defendants, on behalf of OKI, applied for a grant from the United Nations Development Fund for Women ("UNIFEM"), an entity of the United Nations ("UN"), to establish a radio station in Iraq. Known as Radio Almahaba or Voice of Women Radio, the radio station had the mission of empowering Iraqi women as part of the effort to make Iraq stable and democratic. The application was approved, and in December 2004, UNIFEM and OKI signed an institutional contract providing a grant in the amount of $500,000 and a standard cooperation agreement. Jabar signed on OKI's behalf, and upon his signature OKI received the first installment of the grant in the amount of $350,000. Because the required quarterly financial report was submitted late with inadequate tracking and proof of expenditures, however, OKI never received the $150,000 balance.

In June 2005, three financial institutions advised the Internal Revenue Service ("IRS") that OKI had attempted to wire several hundred thousand dollars to the Middle East. During the course of the investigation that followed, and because of wire transfers related to the UNIFEM grant, IRS Special Agent Michael Klimczak interviewed Bowers and Jabar in July and September 2006, respectively, about OKI's financial records and expenditures.

In May 2009, the defendants were indicted on various counts of conspiring to commit wire fraud, engaging in wire fraud, laundering money, and making materially false statements. Docket Item 1. The indictment alleges that the defendants engaged in a scheme to divert to themselves some of the grant money OKI received from UNIFEM and to use that money to pay personal debts and expenses instead of to establish the radio station. *Id.*

For a number of reasons—especially the parties' affinity for motion practice—the case languished in pre-trial purgatory for years. The case was reassigned from the Honorable Richard J. Arcara to the undersigned on November 12, 2015, and the defendants' joint trial began on August 2, 2016. On August 19, 2016, at the close of the government's case, the defendants moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Docket Item 398. After hearing oral argument on the motion, this Court reserved decision. *Id.*

On September 2, 2016, the jury returned its verdict. Specifically, Jabar was convicted on Counts 1, 4, and 14: one count of wire fraud conspiracy, 18 U.S.C. Sections 371, 1343; one count of wire fraud, 18 U.S.C. Sections 2, 1343; and one count of making materially false statements, 18 U.S.C. Section 1001(a)(2). Docket Item 420. Bowers was convicted on Counts 1, 4, 11, 12, and 13: one count of wire fraud conspiracy, 18 U.S.C. Sections 371, 1343; one count of wire fraud, 18 U.S.C. Sections 2, 1343; and three counts of making materially false statements, 18 U.S.C. Section 1001(a)(2). *Id.* Both defendants were acquitted on Counts 2 and 3 (wire fraud), and on Counts 5, 6, 7, 8, and 9 (money laundering). *Id.* Bowers also was acquitted on Count 10 (materially false statements). *Id.*

The defendants moved for a judgment of acquittal or a new trial on October 29, 2016. Docket Items 433-34. The government responded on December 16, 2016, Docket Item 442, and the defendants replied on January 9, 2017, Docket Item 446. On February 9, 2017, this Court heard oral argument, reserved decision, and requested further briefing from both sides. Docket Item 458. The additional briefing and replies, which this Court has considered along with the initial briefing in rendering this decision, were submitted on February 24 and March 10, 2017. Docket Items 463-64, 466-67.

DISCUSSION

I. Legal Standards

A. Motion for a Judgment of Acquittal (Rule 29)

A district court shall enter a judgment of acquittal for "any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29. At the same time, the court must "avoid usurping the role of the jury." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). So "'[a] defendant challenging the sufficiency of the evidence that led to his conviction at trial bears a heavy burden' . . . [and courts] must uphold the judgment of conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Vilar*, 729 F.3d 62, 91 (2d Cir. 2013) (quoting *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) and *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (alteration omitted).

The Second Circuit has phrased it this way: "[A] court may enter a judgment of acquittal if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (quotations omitted). But in a close call, where "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *Id.* at 129.

In considering whether the evidence is sufficient to support a guilty verdict, "[a] court examines each piece of evidence and considers its probative value before determining whether it is unreasonable to find the evidence in its totality, not in isolation, sufficient to support guilt beyond a reasonable doubt." *United States v. Goffer*, 721 F.3d 113, 124 (2d Cir. 2013) (internal quotations omitted). Courts "resolve all inferences from the evidence and issues of credibility in favor of the verdict." *United States v. Howard*, 214 F.3d 361, 363 (2d Cir. 2000). When the evidence, viewed in favor of the prosecution, "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence[,]" however, "a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005) (quotation and citation omitted).

B. Motion for a New Trial (Rule 33)

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "A district court should grant a new trial motion if it is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *United States v. Landau*, 155 F.3d 93, 104 (2d Cir. 1998) (quotation omitted). When considering a motion for a new trial, a district judge "is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *Id.* (quotation omitted); *see also United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992) (stating that a court also may make determinations as to witness credibility). But while courts have greater deference under Rule 33 than Rule 29, they still must exercise their authority pursuant to Rule 33 "sparingly" and only in "the most extraordinary of circumstances[;]" in other words, there must be a real concern that an innocent person may have been convicted. *Sanchez*, 969 F.2d at 1414.

II. Count 4 (Wire Fraud)

Jabar and Bowers challenge their convictions for wire fraud under 18 U.S.C. Section 1343.[1] The foundation for the wire fraud charge was their receipt of the UNIFEM grant. Jabar and Bowers were charged with using wire communication in foreign or interstate commerce to fraudulently represent that the grant money would be acquired and used by OKI to establish and run a radio station. Docket Item 1 at 6. The statute prohibits using wire communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343.

To convict a defendant of wire fraud, the government must prove the following essential elements: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme." *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015) (internal quotations omitted).[2] To prove such a scheme, the government must produce "proof of a scheme or artifice to defraud, which itself demands a showing that the defendants possessed a fraudulent intent." *United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006) (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (internal quotation marks omitted). Fraudulent

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[1] The defendants challenge their convictions on both wire fraud conspiracy and wire fraud. Because the underlying elements of wire fraud are the same for both crimes, the Court addresses the defendants' substantive wire fraud convictions before turning to their respective wire fraud conspiracy convictions.

[2] Because the wire fraud and mail fraud statutes use the same relevant language, the case law involving either crime is informative on the other. *See Binday*, 804 F.3d at 569; *see also Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.").

intent necessarily includes an intent to cause some kind of actual harm. *Starr*, 816 F.2d at 98. The scheme need not have been successful—the victims of the fraud need not have been actually harmed—but the government still must show "that some actual harm or injury was *contemplated* by the schemer." *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (citation omitted).

Intent to deceive is not enough. As the Second Circuit has noted:

> Because the defendant must intend to harm the fraud's victims, "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution." *Starr,* 816 F.2d at 98. "Instead, the deceit must be coupled with a contemplated harm to the victim." *Id.* In many cases, this requirement poses no additional obstacle for the government. When the "necessary result" of the actor's scheme is to injure others, fraudulent intent may be inferred from the scheme itself. . . . Where the scheme does not cause injury to the alleged victim as its necessary result, the government must produce evidence independent of the alleged scheme to show the defendant's fraudulent intent.

Id. So when fraudulent intent cannot be inferred from the scheme itself, "[o]nly a showing of intended harm will satisfy the element of fraudulent intent." *Starr*, 816 F.2d at 98.

A. Intent to Defraud

In an effort to prove some contemplated harm or injury to the UN, the government points to the defendants' use of the UN grant funds for purely personal purposes soon after they were deposited into the OKI account. The government contends that the immediate use of the UN funds to repay personal loans that Jabar had received from Bassam Bitar and Saad Almizoori—totaling $30,000—together with the defendants' failure to disclose their connection with UN employee Bushra Jamil is sufficient to prove a scheme to defraud the UN. But while that evidence may well be sufficient to show intent to deceive, it does not evidence the required intent to harm. And for that reason, the defendants' convictions under Count 4 must be set aside.

The analysis begins with the Second Circuit's reversal of the mail and wire fraud convictions in *Starr*. In that case, the defendants were convicted of mail and wire fraud for engaging in a scheme to defraud their customers by burying higher rate mailings in lower rate bulk mailings without paying the additional postage or refunding their customers' excess postage payments. 816 F.2d at 95. On appeal, the defendants argued that the evidence was insufficient to show that they had the requisite intent to defraud their customers. *Id.* at 97. The Second Circuit agreed. It explained the relationship between and among misrepresentations, intent, and harm in the fraud context:

> 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. Moreover, the harm contemplated must affect the very nature of the bargain itself. Such harm is apparent where there exists a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver.

816 F.2d at 98 (quotation omitted).

The Second Circuit disagreed with the government's argument that the misappropriation of the funds itself demonstrated that the defendants had contemplated harm to their customers. *Starr*, 816 F.2d at 99. In the words of the court, "[a]lthough it may be assumed that the use to which the money would be put, and the concomitant expectation that it would be used for a specific purpose, implicitly constituted a part of the bargain between the parties, that defeated expectation alone would not affect the nature or quality of the services that was the basis of the customers' bargain." *Id.* at 99-

100. Because the misappropriation of funds was not central to the contract between the defendants and their customers, and because the government had not otherwise shown how the misappropriation demonstrated that the defendants intended to harm their customers, any alleged harm was at most "metaphysical" and not enough from which to infer fraudulent intent. *Id.* at 100. Stated another way, the customers got what they paid for, and the defendants' fraud in avoiding the required postage payments did not change that.

After *Starr*, the cases in the Second Circuit "have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not necessarily 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. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007). "An intent to harm a party to a transaction cannot be found where the evidence merely indicates that the services contracted for were dishonestly completed." *Novak*, 443 F.3d at 159. If a party receives what it bargains for and the defendant's conduct does not affect an essential element of that bargain, then "the evidence is insufficient to show the requisite intent to harm." *Id.*

Because the government offered no proof that the defendants did not intend to build the radio station the UN had bargained for—or even that the defendants did not intend to spend the equivalent of the UN grant in fungible dollars on the radio station—the government proved only intent to deceive, not intent to defraud. For example, the government maintains that it proved the defendants' fraudulent intent through evidence of: (1) Bowers's and Jabar's undisclosed relationship with the UN's Bushra Jamil; (2) the defendants' embellishing the qualifications of the OKI board members; (3) Jabar's mounting debts that the UN funds were used to pay; (4) the defendants' breach of contractual promises in the UNIFEM Agreement as to how the expenditures would be approved, spent, and recorded; (5) the inaccuracies in the quarterly report submitted by the defendants; (6) the mislabeling of checks that went to personal expenditures (including a $7,219 check that was used to pay for Jabar's property taxes); and (7) the increase in the proposed budget from $423,000 to $500,000. Docket Item 470 at 108-28. That evidence, when viewed in light of the purpose of the UNIFEM Agreement, indeed suggests deceit and shady bookkeeping. But it does not prove intent to harm the UN—especially when the defendants built, and the UN got, the radio station that the UN bargained for.

Because money is fungible, this is not a case where the necessary result of the defendants' alleged scheme was injury to others. *See D'Amato*, 39 F.3d at 1257. If the defendants used *some* money to build a radio station—as they in fact did here—their spending on themselves dollars from a UN grant earmarked for the radio station did not *necessarily* defraud the UN. As a result, the government was required to produce evidence independent of the alleged scheme to defraud to prove the defendants' fraudulent intent. *See D'Amato*, 39 F.3d at 1257 ("Where the scheme does not cause injury to the alleged victim as its necessary result, the government must produce evidence independent of the alleged scheme to show the defendant's fraudulent intent."). So to prove the fraudulent intent of Bowers and Jabar, the government was required to show that each of them made misrepresentations or omissions intended to harm the UN in a way that affected the nature of the bargain—i.e., the UNIFEM Agreement. *See Starr*, 816 F.2d at 98-99.

But the circumstantial evidence and omissions offered by the government fell short. The nature of the bargain at issue here was simple and straightforward: Under the UNIFEM Agreement, UNIFEM agreed to give the defendants a grant of $500,000—and actually gave them the first $350,000—toward building a radio station.[3] UNIFEM reasonably anticipated that $350,000 worth of a radio station would be built after the defendants spent the first installment of the grant money. If the government had shown that at the time they signed the UNIFEM Agreement, the defendants never intended to build $350,000 worth of a radio station, then it would have proven that the defendants possessed the requisite fraudulent intent. *See Starr*, 816 F.2d at 98 ("Such harm is apparent where there exists a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver.") (citation and internal quotation marks omitted). But the government did not even try to prove that.

As the testimony of the government's accountant revealed, the government did not even look into the expenditures by the defendants of money other than the UNIFEM

[3] The contract itself, signed by Jabar, provided for the "[e]stablishment of Voice of Women independent radio station as part of IRAQIA project . . ." and made "fees payable in installments upon certification of satisfactory performance at each phae [sic]"—$350,000 "[u]pon signing the contract" and $150,000 "[u]pon radio station equipment arrival to Baghdad." Gov't Exhibit 207C. Jabar also signed a page referencing the "duration and terms of payment" that stated: "For the radio station establishment, UNIFEM will pay OKI the amount of *Five Hundred Thousand US Dollars (US$500,000)* where *Three Hundred and Fifty Thousand US Dollars (US$350,000.-)* will be paid upon signing the contract and *One Hundreds [sic] and Fifty Thousand US Dollars (US$150,000.-)* will be paid on a quarterly, three-months, basis based on the Standard Project Cooperation Agreement." Gov't Exhibit 12N.

grant money. *See generally* Docket Item 418; Gov't Exhibits 40A-H, 40K, 40M-O. In fact, only the defense presented the jury with evidence showing the money spent on the radio station. More specifically, the defense offered evidence of receipts from radio station expenditures totaling $362,918 at the end of the first quarter. Def. Exhibits 11, 11A, 11E, 12A-B, 12D-F, 12I-J, 12M-N, 12S-Y, 13, 13A-I, 13K-P, 37A. And the defense also submitted an annual financial report showing that more than $350,000 went to the radio station by the end of 2005.[4] Def. Exhibit 46A at 5.

The government apparently believed that simply proving that the defendants received money from the UN and then immediately spent that money on personal expenses was enough to prove the requisite intent to defraud. That belief was misplaced. The government's proof may have been sufficient to show that the defendants intended to use UN money dollar-for-dollar not on the radio station but on personal expenses. But that is not the same as intending to harm the UN by not giving the UN the benefit of its bargain—and not intending to use, and actually using, other fungible dollars to build the radio station for which the UN money was given. *See Starr*, 816 F.2d at 98-99.

In fact, the government never even proved that the defendants agreed to spend the grant money—dollar-for-dollar—on the radio station and not to commingle the UN dollars with other money. Had the government proved that the defendants were

[4] The Court takes judicial notice under Federal Rule of Evidence 201(c)(1) that the U.S. Department of the Treasury reported the exchange rate at the end of each fiscal quarter of 2005 as about .00068 USD per 1 Dinar. *See* Treasury Reporting Rates of Exchange, https://www.fiscal.treasury.gov/fsreports/rpt/treasRptRateExch/historicalRates.htm. The Court used the 534,603,679 Dinar figure listed as "Transfers revenues (donation received)" in Exhibit 46A to make its calculation. *See* Def. Exhibit 46A at 5.

required, as part of the OKI–UNIFEM Agreement, to spend the grant money dollar-for-dollar on the radio station, then the jury might have had at least some basis to conclude that the UN did not get what it bargained for. But the government told the Court that there was no such requirement. Docket Item 470 at 104 ("THE COURT: . . . You don't have any document that says the money can't be commingled, that it's got to be spent dollar for dollar? MS. GRISANTI: Correct."). And because there was no requirement to spend the allocated funds—dollar-for-dollar—on the radio station, the fungibility of money exposes the flaw in the government's argument that "you can't take UNIFEM money and spend it any way you want." Docket Item 415 at 50.

Moreover, even if the defendants had promised, pursuant to Article VIII, Paragraph 2, and other provisions of the UNIFEM Agreement, not to spend the grant money dollar-for-dollar the way that they did, the simple fact of their breach alone—even if an intentional breach—does not prove fraud. *U.S. ex rel. O'Donnell v. Countrywide Homes Loans, Inc.*, 822 F.3d 650, 660 (2d Cir. 2016) ("[B]reach of a contract, without further evidence of fraudulent intent, does not establish a fraud claim.") (citation omitted). So while the government may have shown that the defendants intended to use dollars from the UN grant to pay personal expenses, that is insufficient to prove an intent to harm the UN. Nor did the government demonstrate that the defendants did not intend to (or even did not actually) purchase the components of the radio station from UN money and other money that totaled $350,000 or more.[5] And because the initial $350,000 installment was conditioned only upon the defendants'

[5] *See* Def. Exhibits 14-16, 19-20, 24, 27, 28, 31, 33-34 (photographs of the radio station, up and running).

signature—not upon an audit confirming that the quarterly financial report matched up with the finalized budget—any failure by the defendants to adhere to obligations under Article VIII, Paragraph 2, and accurately complete the quarterly report did not affect the nature of the UNIFEM Agreement. *See Starr*, 816 F.2d at 98-99; Gov't Exhibit 207C; Docket Item 427 at 96-97.

And all that is supported by the defendants' view of their use of the money, as evidenced by their admissions to Agent Klimczak, the IRS agent who interviewed both Jabar and Bowers in 2006 about their use of the UN grant money. According to Klimczak, when Jabar was confronted with paperwork showing that Bowers had wired $4,200 of UNIFEM grant money into his personal bank account, Jabar "basically said . . . that this is life, *you borrow money, and you pay it back*. I needed the money. I didn't care where it came from. I needed to pay Bitar, bills, loans." Docket Item 426 at 82 (emphasis added). As for Bowers, the testimony showed that she regarded the personal uses of the grant funds as loans. *See, e.g.*, *id.* at 160 ("[S]he did mention to me that yes, she should have listed the $30,000 as a loan for Steve Jabar."). And using loans to fund the radio station was nothing new and not limited to UN funds; on the contrary, it was the defendants' regular course of business. Bushra Jamil testified that she, her brother, her uncle, and others, including Nesrin Dickow and Hana Korkis, had loaned Jabar money for the radio station. Docket Item 429 at 5, 8, 12-13, 18, 26, 140, 172, 175-76.

In other words, the defendants intended to build—and indeed built—a radio station using UN money and other dollars. They also intended to use UN grant money and other dollars to pay back Jabar's personal debts. And they saw the UN money and the other dollars—like the payment of debt and expenditures for the radio station—as part of a single pot. That may have been a breach of contract. It appears to be evidence of an intent to deceive. It undoubtedly was not good accounting. But it is not proof of criminal intent to defraud.

B. Government's Intent to Harm Argument

Perhaps sensing that its proof at trial had failed to show that the defendants intended to harm the UN, the government argued that it did not need to do so. During oral argument of the Rule 29 motion, the Court asked the government what evidence it had presented of the defendants' intent to harm the UN:

> THE COURT: Okay. Let me ask the government: What do you have on intent other than financial difficulty and the fact that the money didn't go directly to the radio station?

Docket Item 441 at 45. The government's response tried to distinguish intent to defraud from intent to harm:

> MS. KRESSE: Well, Judge, the government does not have to prove intent to harm the U.N. The government has to prove intent to defraud the U.N. or to obtain money by materially false and fraudulent pretenses and representations.

Id. But the government's response seems to conflate intent to deceive and intent to defraud. Because there can be no intent to defraud without intent to harm, *see Starr*, 816 F.2d at 98, the government's bootstrapping provides no foothold for its fraud case.

The government doubled down on this precarious position to the very end. In its post-conviction briefing, the government actually admitted its failure to adduce evidence of the defendants' intent to harm the UN. In its own words, "the government cannot be faulted for failing to present evidence of the other 'types' of intent the defendants claim are legally required—intent to deceive, *intent to cause economic harm to the victim, and* *intent to unlawfully obtain property of another.*" Docket Item 442 at 18 (emphasis added) (internal quotation marks omitted). Faulted or not, the government was (and is) incorrect to argue that intent to defraud does not require an intent to harm the victim.

The government also argued that this Court refused to charge the jury on such a requirement. *Id.*[6] But this Court explicitly told the jury that the government was required to prove "that the defendants knowingly devised the scheme to defraud with the specific intent to defraud," and then explained that "'intent to defraud' means to act consciously and with the specific intent to deceive[,] *for the purpose of causing some financial or property loss to another person or entity*, as well as to realize some personal gain." Docket Item 437 at 43 (emphasis added). Although the Court's instructions did not use the words "intend to harm," the substance of this instruction is that a defendant must have engaged in a scheme "for the purpose of causing"—i.e., intended to cause—some sort of loss—i.e., harm—to a victim. It therefore is not surprising that at the post-conviction hearing, defense counsel acknowledged that the Court "absolutely" had instructed the jury on the requisite intent to harm. *See* Docket Item 470 at 43.

C. Right to Control

Having rejected the government's theory under *Starr*, this Court turns to the government's alternate theory—presented after trial—that "the UN would not have given the grant money to OKI had it known that the defendants intended to use any part of

[6] The government is correct when it says that this Court charged the jury that "the government need not prove that the defendants actually realized any gain from the scheme to defraud or that the intended victim actually suffered any loss." Docket Item 442 at 18-19. But the instruction that no actual loss was required for conviction is very different from the government's argument here—that it did not need to prove that the defendants intended to harm the UN.

those funds for their own personal use." Docket Item 442 at 14. Citing the Supreme Court's recent decision in *Shaw v. United States*, 137 S. Ct. 462 (2016), the government notes that a party can be harmed, even if it gets what it bargained for, if it parts with its money as a result of deceit. *Id.* at 19. Called the "right to control" theory in the Second Circuit, this concept has evolved ever since Judge Learned Hand observed that:

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost the chance to bargain with the facts before him. That is the evil against which the [mail fraud] statute is directed.

United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932).[7]

Today in the Second Circuit, when the government pursues the "right to control" theory by seeking to show that a person or entity lost its chance to bargain intelligently because of some deceit or non-disclosure, it must prove that the person or entity "has been deprived of potentially valuable economic information." *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996) (citation omitted). "[T]he information withheld either must be of some independent value or must bear on the ultimate value of the transaction." *Id.* (citation omitted). In other words, "misrepresentations or non-disclosure of information cannot support a conviction under the 'right to control' theory unless those misrepresentations or non-disclosures can or do result in tangible economic harm." *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017). For two reasons, the government's "right to control" argument is misplaced.

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[7] Since defining "fraudulent intent" as requiring a contemplated harm to the victim in *United States v. Regent Office Supply*, 421 F.2d 1174 (2d. Cir. 1970), the Second Circuit recognized "there can be no doubt that *Rowe* has been deprived of much of its vitality." *Starr*, 816 F.2d at 101.

First, the government did not pursue such a theory at trial, the government did not request a jury charge on this theory, and this Court therefore did not charge the jury on this theory. *Compare* Docket Item 437 (jury charge) *with Finazzo*, 850 F.3d at 111-12 (finding "[t]he district court informed the jury that the 'right to control' one's assets is injured 'when a victim is deprived of potentially valuable economic information it would consider valuable in deciding how to use its assets.'"). So the government has waived any argument that the UN was a victim of fraud because it was deceived into parting with its money through misrepresentations or non-disclosures.

Second, even if the government had proceeded under such a theory, and even if the jury had been so charged, the government—through its own admissions—would not have shown that the defendants' "misrepresentations or non-disclosures [could] or [did] result in tangible economic harm" to the UN. *See Finazzo*, 850 F.3d at 111.

In *Finazzo*, the Second Circuit upheld mail and wire fraud convictions for a defendant who used his position at the company that employed him to hire a vendor that he failed to tell the company he had an ownership interest in. *Id.* at 98-99, 102, 114-15. The vendor had charged higher prices for an inferior product, and the government proved that the company lost money because the defendant's inside dealing prevented the company from bargaining intelligently. *Id.* at 114. Further, the government established ways that the company was harmed, such as the defendant's refusal to shift 25% of the vendor business overseas, which would have saved the company millions of dollars. *Id.* at 114. Because the government proved that the defendant used his position to steer a significant amount of business to the vendor in a manner that inflicted tangible economic harm on the company, the defendant's deceit crossed the mail-and-wire-fraud line under the "right to control" theory. *Id.* at 113-14.

Here, the evidence that the government argues supports its "right to control" theory—e.g., the failure to tell the UN about Jabar's financial troubles, his friendship with Bushra Jamil, and the comingling of UN grant money with money used to pay personal expenditures—did not and could not result in tangible economic harm to the UN.[8] There was no evidence presented at trial that the defendants' non-disclosures prevented the UN from negotiating a better bargain on a radio station. *Cf. id.* at 113-14. Nor did the non-disclosures lead to tangible economic harm to the UN, as it ended up with what it bargained for—an Iraqi radio station. *Cf. id.* Indeed, the government has conceded that it did not believe it had to show that the defendants intended the UN to suffer *economic* harm. *See* Docket Item 442 at 18 ("[T]here was no requirement that the government prove that the defendants intended economic harm to the UN.").[9]

The government's reliance on *Shaw* does not save it, either. In *Shaw*, the defendant used the identifying numbers of a Bank of America customer's account to transfer funds from that account to accounts in other banks to which the defendant had

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[8] With regard to "right to control" cases, the Southern District of New York held recently that the Second Circuit upholds convictions "where the deceit had the potential to cause economic harm to the victim *or where it involved a violation of the law*." *United States v. Davis*, 2017 WL 3328240 (S.D.N.Y. Aug. 3, 2017) (emphasis added). The non-disclosures set forth by the government—Jabar's financial troubles, his friendship with Bushra Jamil, and the defendants' intent to comingle the UN grant money with money for personal expenditures—did not inherently involve a violation of the law and therefore such a theory here, even if it had been presented and charged, would fail.

[9] The government is correct that intent to cause economic harm is not always required in a fraud case. *See, e.g.*, *Shaw*, 137 S. Ct. 462. But such intent is required when the government pursues a "right to control" theory. *See Finazzo*, 850 F.3d at 111.

access. *Id.* at 466. The defendant claimed that he did not intend to cheat the bank; rather, he intended only to defraud the customer. *Id.* The Supreme Court disagreed. *Id.* Both the bank and the customer had property rights in the customer's account. *Id.* The Court noted that the federal bank fraud statute, 18 U.S.C. Section 1344, "while insisting upon 'a scheme to defraud,' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Id.* at 467. Because the defendant intended to deprive the bank of the right to use the money entrusted to it by its customer, the fact that the defendant may not have intended the bank to suffer financial harm was irrelevant. *Id.*

Shaw is factually a very different situation and is distinguishable for that reason alone. Moreover, because *Finazzo* was decided after *Shaw*, the Second Circuit's "right to control" jurisprudence survives the Supreme Court's decision. Because the "misrepresentation or non-disclosure of information" here could not and did not "result in tangible economic harm," the "right to control" theory would not salvage the defendants' convictions even if the government had pursued it at trial.[10] *See Finazzo*, 850 F.3d at 111.

[10] The defendants have argued that their good faith also undermines their wire fraud convictions. *See* Docket Item 464 at 6-7. Having concluded that the defendants lacked the required intent to defraud, this Court need not and does not address "good faith" here. Suffice it to say that it would be logically inconsistent for the defendants to have had good faith and still be convicted for wire fraud. *See* Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. Rev. 611, 639, 639 n.105 (2011) (noting "federal courts have repeated innumerable times the black-letter principle that a defendant's good faith negates the specific intent to defraud" and citing cases as examples).

III. Count 1 (Wire Fraud Conspiracy)

Both defendants also were convicted on one count of conspiracy to commit wire fraud in violation of 18 U.S.C. Section 371. To be convicted under Section 371, two or more persons must have "conspire[d] either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose," and one or more of such persons must have taken an overt act to effect the object of the conspiracy.

The defendants' convictions for wire fraud conspiracy required proof that they conspired to commit the substantive offense. As addressed above, the government failed to prove that the defendants had the requisite intent for the substantive offense of wire fraud, and so no agreement between them could have established a conspiracy to commit wire fraud. *See United States v. Feola*, 420 U.S. 671, 686 (1975) ("[I]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself."); *see also United States v. Cangiano*, 491 F.2d 906, 909 (2d Cir. 1974) ("Where the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute."). Therefore, the defendants' convictions on Count 1 are set aside as well.

IV. Materially False Statements (Counts 11, 12, 13 for Bowers; Count 14 for Jabar)

Bowers was convicted on three counts, and Jabar on one count, of making materially false statements to federal agents. The defendants' convictions for false statements do not parallel their wire fraud and wire fraud conspiracy convictions because a defendant can be convicted for making materially false statements even without the specific intent to defraud. *See United States v. Yermian*, 468 U.S. 63, 73 n.12 (1984) ("Intent to deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or to mislead. Defraud is to deprive of some right, interest or property by deceit") (citation omitted). In fact, while the proof at trial was insufficient to sustain the defendants' fraud and conspiracy convictions, *see supra* Parts II and III, that proof nevertheless showed that the defendants knew they were doing something wrong by deceiving the UN and tried to hide it. And so even though the deceitful intent and conduct of the defendants were insufficient to establish fraud, the attempt to cover up that conduct might still be criminal.

"It is a federal crime under 18 U.S.C. § 1001 to make any false or fraudulent statement in any matter within the jurisdiction of a federal agency." *Yermian*, 468 U.S. at 64. "[I]n order to secure a conviction under § 1001(a)(2), the Government must prove that a defendant (1) knowingly and willfully, (2) made a materially false, fictitious, or fraudulent statement, (3) in relation to a matter within the jurisdiction of a department or agency of the United States, (4) with knowledge that it was false or fictitious or fraudulent." *United States v. Coplan*, 703 F.3d 46, 78 (2d Cir. 2012) (emphasis omitted).[11]

On Count 11, Bowers was convicted of falsely stating that a $7,219 check went to the radio station, when it really went into Jabar's personal bank account and then was

[11] For purposes of clarity and at the request of both parties, Docket Items 274 at 46; 353 at 110, this Court explained materiality as an element separate from the false statement itself and thus discussed the criminal offense under Section 1001 as requiring proof of five essential elements.

spent on property taxes. *See* Docket Item 420 at 12. Klimczak testified that when questioned about the check, Bowers said that she used the money for the radio station and that "she [knew] that because VOW Radio is listed in the memo section of the check." Docket Item 426 at 63; *see* Gov't Exhibits 15G, 21B. But when Klimczak confronted Bowers with a corresponding check in the identical amount that went to pay Jabar's taxes, she admitted that she actually had used that money to pay the taxes at Jabar's request. *Id.* at 230-31.

On Count 12, Bowers was convicted of telling Klimczak that a $10,000 wire transfer from OKI's Key Bank account to Jabar's M&T bank account eventually was wired to Amman, Jordan, when it actually was used to pay Jabar's personal loan. *See* Docket Item 420 at 13. According to Klimczak, when questioned about this transfer, Bowers stated that she had used the wire transfer as an efficient way to send the grant money overseas. Docket Item 426 at 232. But when shown evidence of the payment on Jabar's personal loan, Bowers admitted where the money actually went. *Id.* at 232-33.

On Count 13, Bowers was convicted of saying that a $4,200 wire transfer was made from her personal account into Jabar's personal account to facilitate transferring funds to Iraq, when the money actually went toward paying Jabar's personal expenses. *See* Docket Item 420 at 14. Klimczak testified that when he asked Bowers about this transfer, she said "that she was having trouble transferring the money over to the radio station, so she was using Steve Jabar's M&T Bank account to get the money overseas." Docket Item 426 at 78; *see* Gov't Exhibit 19E. But when Klimczak showed Bowers a copy of Jabar's bank account statement, she admitted that she had made the wire transfer at Jabar's request, acknowledged that the money was used for Jabar's mortgage payments, and stated that the source of those payments was the UN grant. Docket Item 426 at 79-80; *see* Gov't Exhibit 21B at 9.

On Count 14, Jabar was convicted of telling the IRS and the FBI that the entire $350,000 from the UN grant—except for a small amount—was sent to Iraq for the radio station. *See* Docket Item 420 at 15. Klimczak testified that Jabar was not forthcoming on the various deposits into, and expenditures from, his personal bank account until he was confronted with financial records that traced the UN funds. For example, when discussing the $7,219 check, Jabar first said "that any funds that were payable to him from the UNIFEM grant funds was money that was used for the radio station." Docket Item 426 at 65. Klimczak testified that when he then showed Jabar a check for the same amount payable to the Tonawanda Town Clerk, Jabar "raised his voice" and said "sorry, big mistake, I'm going to get crucified for that." *Id.* at 66-67. Klimczak's testimony suggested that Jabar similarly became upset when confronted with other expenditures. *Id.* at 82. And according to Klimczak, when Jabar was told that approximately $60,000 was used for Jabar's personal expenses and loans, Jabar responded, "Even if I did, I didn't care." *Id.* at 82.

The defendants make several arguments with respect to their Section 1001 convictions, all of which lack merit.

Bowers and Jabar first argue that "any apparently false statements were, given the context, not intentionally deceptive." Docket Items 446 at 44, 433 at 42-43. But that is a question for the jury, and the government need only prove that the statements were false "under any reasonable interpretation." *United States v. Adler*, 623 F.2d 1287, 1289 (8th Cir. 1980); *see United States v. Diogo*, 320 F.2d 898, 907 (2d Cir. 1963) (finding where no evidence is offered, "it is incumbent upon the [g]overnment to negative any reasonable interpretation that would make the defendant's statement factually correct"). Here, the jury could have reasonably interpreted the testimony and corresponding exhibits to conclude that the defendants made materially false statements to Agent Klimczak. With respect to each count, Bowers or Jabar told Klimczak that UN money was spent on the radio station when it was not. And when Klimczak confronted Bowers or Jabar with clear proof that the money was spent otherwise, they admitted that what they had said earlier was not true.

The fact that the defendants admitted their actual use of the funds when confronted with compelling proof of where the money went does not erase or absolve their prior false statements. "[T]here is no safe harbor for recantation or correction of a prior false statement that violates section 1001." *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006). A court need not accept a defendant's innocent explanation of her statements, and "absent fundamental ambiguity . . . the question of what a defendant meant when he made his representation will normally be for the jury." *Diogo*, 320 F.2d at 907. Here, the jury had plenty of evidence from which they reasonably could conclude that the defendants understood Agent Klimczak's questions but knowingly chose to respond falsely before they were forced to admit the truth.[12]

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[12] The defendants' use of $7,219 of the UN funds is perhaps the most salient evidence that the defendants knew they were doing something wrong and wanted to hide it. *See* Gov't Exhibits 15G, 21B at 5, 20; 40G; 109A at 64 (Mar. 19 – Apr. 19, 2005 Statement), 112EJ. Bowers wrote a check for $7,219, dated April 14, 2005, from the Key Bank OKI account covered by the UN funds to Jabar. The memo section of the check reads “VOW Radio.” On that date, the check was deposited into Steve Jabar's M&T bank account. Later that day, Bowers wrote a check from Jabar's personal

Next, the defendants argue that without evidence of actual fraud, the defendants' statements with respect to expenditures of the grant money was not within the jurisdiction of the United States. Docket Item 433 at 42-43; Docket Item 446 at 44. The "primary purpose" of the statute's jurisdictional requirement "is to identify the factor that makes the false statement an appropriate subject for federal concern." *Yermian*, 468 U.S. at 68. "A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation." *United States v. Rodgers*, 466 U.S. 475, 479 (1984). And "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001." *Id.* at 480. Here, the IRS had the authority to investigate OKI's use of funds, and the defendants were obligated to cooperate with that investigation. Docket Item 425 at 6, 27, 28, 38 ("[A]n IRS special agent . . . investigate[s] tax-related and other financial crimes in violation of federal law."). Agent Klimczak's investigation did not fall outside the IRS's jurisdiction simply because the evidence produced at trial was insufficient to sustain convictions for wire fraud or wire fraud conspiracy.

The defendants also argue that the allegedly false statements were not material because any such statements could not have influenced Klimczak, who already knew the truth. Docket Items 433 at 42-43, 446 at 44. Not so. "A false statement is material if it tends to or *is capable of influencing* the decision-making body to which it was addressed." *Stewart*, 433 F.3d at 318 (citation omitted) (emphasis added). Even

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account for $7,219 to the Tonawanda Town Clerk. Testimony revealed that the payment was for taxes on Jabar's properties. *See* Docket Item 418 at 116-17, 131. Writing "VOW Radio" on the check must have been intended to deceive—i.e., to make it look as though the check was used for something other than what it actually was used for.

though Agent Klimczak already knew where the grant money went—and therefore would not actually have relied on the defendants' false statements—such reliance is not required. *See United States v. Lichenstein*, 610 F.2d 1272, 1277-78 (5th Cir. 1980). The test, rather, is whether the false statement had the capacity to influence. *See Stewart*, 433 F.3d at 318.

Here, the false statements certainly had the capacity to influence. Because Section 1001 is designed to protect the government "from the perversion which might result from the deceptive practices described," it would be counterintuitive for a federal agent's prior knowledge or diligence during an investigation to circumscribe the criminality of a false statement. *See United States v. Rodgers*, 466 U.S. 475, 479-81 (1984). Under the circumstances here, it was reasonable for the jury to conclude that the defendants' statements had the potential to influence the federal investigation as to UN grant money.

Finally, the defendants argue that the government violated their constitutional rights by soliciting, or not correcting, false testimony from Agent Klimczak. Docket Item 434 at 7 (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). "[A] defendant's constitutional rights are violated when the government uses evidence that it 'knew, or should have known' was false." *United States v. Vozzella*, 124 F.3d 389, 393 (2d Cir. 1997) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). But Agent Klimczak did not falsely testify about the government's ability to conduct investigations abroad, and any equivocal testimony on that topic was clarified on re-cross and re-direct examinations. *See* Docket Item 426. Moreover, even if the government could have—or even should have—better clarified its ability to conduct investigations outside the United

States, that failure was not reasonably likely to have affected the verdict and therefore was harmless. *See Drake v. Portuondo*, 553 F.3d 230, 241 (2d Cir. 2009) ("[A] conviction must be set aside if (1) the prosecution actually knew of . . . false testimony, and (2) there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.").

V. Rule 33 Motion for a New Trial

Because this Court has found the evidence sufficient to sustain the defendants' convictions under Section 1001 (materially false statements), it turns to the defendants' Rule 33 motion for a new trial on those counts.[13]

As noted, this Court does not find persuasive arguments about the improper admission of evidence or the use of false testimony by the government. *See supra* Part IV. For that reason, the defendants are not entitled to a new trial on these grounds.

This Court finds equally unpersuasive the argument that there was prejudicial spillover from the fraud counts that warrants a new trial on the Section 1001 charges. The defendants argue that much of the evidence and testimony regarding misrepresentations relating to the dismissed wire fraud and wire fraud conspiracy charges did not apply to the specific false statement charges. Docket Item 433 at 64-65. According to the defendants, evidence of these misrepresentations constituted character assassination and general allegations of untruthfulness that would not have been admissible at a trial on the Section 1001 charges alone. *Id.* In particular, the

[13] Because the fraud and conspiracy counts have been dismissed, the defendants' motion for a new trial on those counts is moot.

defendants argue that Exhibit 30B—an email from Bowers listing the OKI board of directors—was a "tidal wave of prejudice, with no probative value." *Id.* at 65.

When a court dismisses some, but not all, counts on which a jury reached a guilty verdict, a new trial for the remaining counts is warranted if "it is impossible to separate the irrelevant from the relevant and the harmless from the prejudicial." *United States v. Lippi*, 190 F. Supp. 604, 607 (D. Del. 1961). In *Lippi*, the defendant was convicted of three counts under 29 U.S.C. Section 186, which makes it unlawful for any representative of any employee to receive or accept from the employer any money or thing of value. *Id.* at 605. The district court dismissed Count 2 because the indictment did not allege receipt of a "thing of value" and the government did not prove the defendant received money. *Id.* at 606. "Because the amount of evidence admitted to prove Count 2 was very substantial and [might] now be irrelevant and prejudicial[,]" the court granted a new trial for Counts 1 and 3. *Id.* at 607.

Unlike the counts in *Lippi*—which all were charges under the same statute—the counts of fraud (and fraud conspiracy) and the counts of false statements here do not share a close tie, let alone a statute. Although the government's unsuccessful effort to prove the fraud counts included evidence irrelevant to the false statements, that evidence is easily distinguished and not prejudicial. The Section 1001 counts on which the defendants were convicted were discrete and specific statements. Docket Item 1 at 17-21. Moreover, the jury acquitted Bowers on one count of making materially false statements, demonstrating that the jury considered each false statement charge individually, not holistically or in light of other misleading acts or statements. Docket Item 420 at 11.

For that reason, this Court disagrees that any evidence of uncharged but allegedly false statements, such as Exhibit 30B, caused the jury to convict the defendants on the false statement charges. And there is no real concern an innocent person was convicted here. *See Sanchez*, 969 F.2d at 1414. As discussed above in Part IV, there was clear evidence of each false statement—Klimczak's testimony of defendants' own statements—as well as compelling evidence that contradicted each statement that the defendants made.

For all those reasons, and because the convictions under Section 1001 do not otherwise constitute a "manifest injustice" warranting a new trial, the defendants' Rule 33 motions are denied.

CONCLUSION

As is so often the case, the cover up here was worse than the acts that were covered up. The defendants knew they were doing something wrong by using the UN funds in the way that they did. Their use of the funds was not a crime—at least as charged here in light of the proof at trial. But in their efforts to deflect the federal investigation, they made materially false, and therefore criminal, statements.

For the reasons above, the defendants' Rule 29 motions are GRANTED with respect to Counts 1 and 4 (wire fraud conspiracy and wire fraud) but are DENIED with respect to Counts 11, 12, 13, and 14 (materially false statements). Docket Items 399, 433. The defendants' Rule 33 motions are DENIED. Docket Item 433. The Clerk of

Court is directed to enter a judgment of acquittal under Federal Rule of Criminal Procedure 29 for Counts 1 and 4.

SO ORDERED.

Dated: September 27, 2017
Buffalo, New York

s/Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE