APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4019

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEE ELBAZ, a/k/a Lena Green,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:18-cr-00157-TDC-1)

Argued: December 9, 2021 Decided: November 3, 2022

Before RICHARDSON, RUSHING, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Richardson wrote the opinion, in which Judge Rushing and Senior Judge Traxler joined.

ARGUED: Eric Joseph Brignac, **OFFICE OF THE FEDERAL PUBLIC DEFENDER**, Raleigh, North Carolina, for Appellant. James I. Pearce, **UNITED STATES DEPARTMENT OF JUSTICE**, Washington, D.C., for Appellee. **ON BRIEF**: G. Alan DuBois, Federal Public Defender, Jennifer C. Leisten, Assistant Federal Public Defender, **OFFICE OF THE FEDERAL PUBLIC DEFENDER**, Raleigh, North Carolina, for Appellant. Nicholas A. McQuaid, Acting Assistant Attorney General, Robert A. Zink, Acting Deputy Assistant Attorney General, Caitlin R. Cottingham, Assistant Chief, Fraud Section, Criminal Division, **UNITED STATES DEPARTMENT OF JUSTICE**, Washington, D.C., for Appellee.

RICHARDSON, Circuit Judge:

Based on the Defendant's petition for panel rehearing, the panel grants panel rehearing, vacates the prior panel opinion, and issues a new panel opinion below. While the result does not change, we appreciate Defendant's thoughtful petition.[1]

* * *

Lee Elbaz and her confederates orchestrated a multimillion-dollar fraud scheme, operating from Israel and targeting unsophisticated victims worldwide. Posing as an investment firm, Elbaz and her partners solicited "investments" that cost fraud victims over $100 million, including millions from victims in the United States. While vacationing in New York, Elbaz was arrested and later convicted for conspiring to commit wire fraud and for substantive wire fraud itself. She was sentenced to 22 years in prison and required to pay $28 million in restitution.

Elbaz argues that the wire-fraud statute does not apply to her extraterritorial conduct, so she did not commit a crime under United States law. She also argues that the district court committed two procedural errors warranting a new trial: refusing to compel immunity for witnesses she planned to call and refusing to grant a mistrial after a juror overheard a disparaging remark about Elbaz. And, finally, she raises several challenges to her sentence.

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[1] Granting panel rehearing and issuing this revised opinion renders the petition for rehearing en banc moot.

We reject most of these challenges. While the wire-fraud statute does not apply extraterritorially, the focus of the statute is on misuse of American wires. As her conduct misused American wires, she was properly prosecuted for a domestic offense. And the district judge properly refused to compel immunity to witnesses and denied a mistrial. But while we reject most of Elbaz's alleged sentencing errors, we agree the district court erred in imposing broad restitution that went beyond victims of domestic wire fraud.

I. Factual Background and Procedural Posture

A. The Fraud

Elbaz and her partners' fraud scheme involved so-called "binary options." These all-or-nothing options place a bet on the price of an asset at a certain time. And typically, that time is shortly after the binary option is purchased, sometimes only minutes or hours.[2] The option buyer does not hold the asset, and unlike other options, the option does not confer the right to purchase or sell that asset. Instead, the owner profits by a fixed amount if he correctly bets that the asset's price will be above a target (or below it or within a range, depending on how the option is structured). If the owner bets wrong, he loses his investment. The all-or-nothing aspect of binary options, combined with the short time frame, looks an

[2] For example, a binary option might expire in five hours with a "strike price" of $70 for a certain stock. In other words, it's a bet that the price of a certain stock will be above $70. And the option will have a payout if you win—let's say $100—and a cost to buy, let's say $40. If the stock price is above $70 at expiration, you get $100, and so you profit $60. If the stock price is $70 or lower, you get nothing, and lose your $40.

awful lot like gambling and seems to lead to many fraud schemes with binary options at the center. *See* SEC Off. of Inv. Educ. & Advoc., *Investor Alert: Binary Options and Fraud*, Investor.gov (June 6, 2013) (ECF attachment).

The scheme here operated in three layers. First, binary-option investments were marketed by two foreign companies, BinaryBook and BigOption. Second, when a customer responded to an advertisement, they would be contacted by a "conversion" agent from a company called Linktopia, who would persuade the customer to become a client by depositing at least $250. Third, once the customer was on the hook, responsibility for "retention" would transfer to Yukom Communications, based in Israel.

Elbaz worked for Yukom in Israel in various capacities, including as its Chief Executive Officer. Elbaz and others at Yukom made fraudulent representations to retain investors by convincing them to deposit more money, then stopping them from withdrawing their funds. Yukom's retention agents used fake names and told investors significant lies about their education, work experience, compensation incentives, location, and investment performance. And these lies supported their various techniques to "lock the client in," J.A. 1692, obtaining more deposits and refusing to permit withdrawals. In total, the scheme netted more than $100 million in deposits, including millions from American victims. As part of the scheme, Elbaz caused at least three domestic wire transmissions to occur in Maryland: (1) an email from a retention agent to a Maryland victim that included wire-transfer instructions, (2) a telephone call from a

retention agent to a second Maryland victim, and (3) an email requesting a third Maryland victim complete a deposit confirmation form.

B. Legal Proceedings

A grand jury indicted Elbaz for conspiracy to commit wire fraud and for three substantive wire-fraud counts, based on the three wire transmissions sent to victims in Maryland. And when Elbaz traveled to New York on vacation, she was arrested.

Before trial, Elbaz sought to dismiss the indictment, asserting that the wire-fraud statute did not apply because her conduct was extraterritorial. The district court acknowledged that the wire-fraud statute does not apply extraterritorially but rejected Elbaz's argument because it found that the charged wire frauds were domestic offenses based on the use of American wires to target American victims.

At trial, Elbaz planned to call four Israeli witnesses to testify. But before trial the United States informed the witnesses that three of them were under indictment and warned them about testifying. All four witnesses then declined to testify. Elbaz then sought to compel the government to grant immunity to these witnesses. The district court denied this extraordinary request.

During jury deliberations, one juror—Juror 9—overheard a negative conversation in Hebrew about Elbaz while standing in line at a drugstore. Juror 9 spoke enough Hebrew to generally understand but did not know the people speaking in this coincidental encounter. Juror 9 did not immediately disclose his

encounter to the court. Instead, he continued deliberations for a day before informing the court, though without telling any other jurors about the incident. Juror 9 said that what he had heard made him change his opinion, from leaning toward acquitting to leaning toward convicting. He was excused, but Elbaz sought a complete mistrial. Elbaz argued that Juror 9 tainted the jury and its deliberations by continuing to sit on the jury for a day after being influenced by the drugstore conversation. The court responded by conducting hearings to confirm none of the remaining jurors had heard any outside information. Satisfied that none had, the court sat an alternate juror, ordered the jury to start deliberations from scratch, and allowed the reconstituted jury to begin deliberating.

The jury convicted Elbaz on all counts. The court then sentenced Elbaz to 264 months in prison, followed by three years of supervised release. The court also ordered Elbaz to pay $28 million in restitution. Elbaz timely appealed.

II. Discussion

Elbaz challenges her conviction on three grounds. She first asserts that the wire-fraud statute was impermissibly applied to convict her for extraterritorial conduct. She alternatively claims that she must be granted a new trial because her proposed witnesses were not granted use immunity and because the juror's exposure to improper contact caused irreparable prejudice. Elbaz also challenges her sentence—including restitution—on various grounds. Except for the restitution award, we reject each challenge.

A. Extraterritoriality

Elbaz contends that the federal wire-fraud statute criminalizes only domestic, not extraterritorial, conduct. And this, she argues, requires vacating her conviction because the wire-fraud scheme was devised and carried out in Israel.

Courts have long presumed "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Austrl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248 (1991)). This presumption against extraterritoriality "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters." *Id.*

This presumption, however, can be rebutted. To determine whether it has been overcome, we conduct a two-step inquiry. At step one, if a statute lacks a clear indication of an extraterritorial application, it has none. *See id.* at 265. When a statute applies extraterritorially, we apply it extraterritorially as far as the statutory indication directs.

At step two, if the statute does not apply extraterritorially, we then ask whether the case before us "involves a domestic application of the statute." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337 (2016). And to identify a permissible domestic application, we must determine the statute's "focus" and whether the conduct relevant to the statute's focus occurred inside the United States. *Id.* It is not enough for conduct to merely "touch and concern the territory of the United States," *Kiobel v.*

Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013); the conduct must be domestic.

At the first step, we agree that the wire-fraud statute lacks any affirmative statutory instruction that it criminalizes purely extraterritorial conduct. But, at the second step, we find the statute's focus to be on the use of the wire—not the underlying fraudulent scheme. So Elbaz's conviction based on misuse of wires within the United States stands as a permissible domestic prosecution.

1. Wire Fraud Does Not Apply Extraterritorially

We agree with Elbaz at the first step of our inquiry that the wire-fraud statute provides no affirmative directive that overcomes the presumption against extraterritoriality. Nowhere within the wire-fraud statute did Congress clearly indicate that it applied to foreign conduct.[3]

There is one reference to "foreign commerce," but it is not enough to rebut the presumption. Section 1343 includes a jurisdictional hook, limiting its application

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[3] See 18 U.S.C. § 1343 ("Whoever, having devised or intending to devise any scheme or artifice to defraud … transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined … or imprisoned …."); § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

to wires made "in interstate or foreign commerce." 18 U.S.C. § 1343. Yet a "general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality." *Morrison*, 561 U.S. at 263. Rather, such language generally is intended to bring commerce "between [a] foreign country and [a] State" within the statute's reach. *See id.* at 263 n.7 (alteration in original); *see also United States v. Kim*, 246 F.3d 186, 189 (2d Cir. 2001). Because this jurisdictional language fails to rebut the presumption against extraterritorial application, and there are no other indications of extraterritorial application, the statute does not apply to extraterritorial conduct.

2. Elbaz's Offenses Were Domestic

Having found that wire fraud is limited to domestic conduct, we turn to step two of our inquiry. There, we must identify the wire-fraud statute's "focus." *RJR Nabisco*, 579 U.S. at 337. The statutory focus is "the object of the statute's solicitude—which can turn on the conduct, parties, or interests that it regulates or protects." *WesternGeco LLC v. IONGeophysical Corp.*, 138 S. Ct. 2129, 2138 (2018) (cleaned up). And to determine the focus, we turn to the text and structure of the act, without regard for any secret concern of members of Congress. *Id.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad …." *RJR Nabisco*, 579 U.S. at 337.

The wire-fraud statute has three elements. Two are substantive: (1) the defendant devised, or intended to devise, a scheme or artifice to defraud; and (2) the

defendant used a wire to transmit any signal to execute the scheme or artifice. *United States v. Taylor*, 942 F.3d 205, 213-14 (4th Cir. 2019).[4] The third element is jurisdictional: The wire must be "in interstate or foreign commerce." *Id.* at 214 (noting that the interstate-or-foreign- commerce element "is a jurisdictional element").[5]

We can easily reject this third, jurisdictional element as the statutory focus. The "substantive elements primarily define the behavior that the statute calls a violation of federal law." *Torres v. Lynch,* 578 U.S. 452, 457 (2016) (cleaned up). The substantive elements describe "'the harm or evil' the law seeks to prevent." *Id.* (quoting Model Penal Code § 1.13(10)). The jurisdictional element, by contrast, merely "ties the substantive offense … to one of

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[4] The substantive elements can be met by several alternative means. For example, the scheme or artifice "to defraud" may alternatively be a scheme or artifice "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." § 1343. And the transmission by "wire" may alternatively be a transmission by "radio or television communication." § 1343. So too the wire transmission of "signals" may also be satisfied by the wire transmission of "writings, signs, … pictures, or sounds." But the alternative means available to accomplish the substantive elements does not affect our analysis that there are two substantive elements here.

[5] Some cases omit the jurisdictional element where unimportant to the issue presented. *See, e.g.*, *United States v. Curry*, 461 F.3d 452, 457 (4th Cir. 2006). And others collapse the use of a wire for executing the scheme and the jurisdictional requirement that the wire be in interstate and foreign commerce into a single element. *See, e.g.*, *United States v. Doty*, 832 F. App'x 174, 177-78 (4th Cir. 2020) (unpublished). But as we made plain in *Taylor*, these are technically separate statutory requirements.

Congress's constitutional powers." *Id.* So jurisdictional elements are never the statute's "focus"—the conduct, parties, or interest that the statute seeks to regulate. *See WesternGeco*, 138 S. Ct. at 2138.

The focus must thus be either the scheme to defraud or the use of wire communication for executing the scheme. The statute's text and our precedent reveal that the focus of the wire-fraud statute is the use of a wire, not the scheme to defraud. The wire transmission itself is "the actus reus that is punishable by federal law." *United States v. Jefferson*, 674 F.3d 332, 367 (4th Cir. 2012); *see also United States v. Ramirez*, 420 F.3d 134, 144-145 (2d Cir. 2005). Thus, the use of a wire is the "essential conduct prohibited by § 1343." *Jefferson*, 674 F.3d at 366 (quoting *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002)); *accord Pasquantino v. United States*, 544 U.S. 349, 358, 370 (2005) ("[T]he wire fraud statute punishes fraudulent use of domestic wires" and reflects the choice to "free the interstate wires from fraudulent use, irrespective of the object of the fraud."). The wire-fraud statute also criminalizes each wire transmission as a separate offense that may be separately punished rather than punishing each scheme as a separate offense. *Jefferson*, 674 F.3d at 367. And the method of determining venue for a wire-fraud prosecution supports this conclusion. Venue is based on the location of the wire transmissions. *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005). So venue is proper where wire fraud "occurred," including where each wire transmission was sent and where it was ultimately received. *Id.* at 527. Where the scheme was devised is irrelevant to venue.

Unlike the wire-transmission element, a scheme to defraud is not an essential conduct element of wire fraud. *See Jefferson*, 674 F.3d at 366. "[T]he devisal of a scheme relates only to establishing the *mens rea* element of the wire fraud offense." *Id.* at 368; *see Ramirez*, 420 F.3d at 144. Indeed, no scheme need be devised at all. It suffices for the defendant to "intend" to devise a scheme. § 1343. So while a scheme to defraud (or at least the intention to devise a scheme) remains a necessary element, it is not the essential conduct being criminalized and thus not the focus of § 1343.

Our sister circuits that have addressed this issue agree that the focus of the wire-fraud statute is the use of a wire to execute a scheme. *See, e.g.*, *United States v. Hussain*, 972 F.3d 1138, 1143-45 (9th Cir. 2020); *United States v. McLellan*, 959 F.3d 442, 469 (1st Cir. 2020). Joining them, we agree Elbaz's conviction must stand as a "permissible domestic application" so long as the charged wire transmissions were domestic. *See RJR Nabisco*, 579 U.S. at 337. They were.

Transmission of a message in furtherance of the scheme occurs in at least two locations: "where the wire transmission at issue originated" and where it "was received." *Jefferson*, 674 F.3d at 369. Here, the transmissions were received by victims in Maryland using wires in Maryland. So Elbaz's convictions are all permissible domestic applications of the wire-fraud statute.

Elbaz's conspiracy conviction under § 1349 was also a domestic application. *Cf. United States v. Ojedokun*, 16 F.4th 1091, 1107 (4th Cir. 2021) ("[C]onspiracies

operate 'wherever the agreement was made or wherever any overt act in furtherance of the conspiracy transpires,' which may include a place where 'the defendant has never set foot.'"). The focus of § 1349 is the "object of the attempt or conspiracy." § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). And that object is the *offense* that the conspirators conspire to commit. § 1349; *see Black's Law Dictionary* (8th ed. 2004) ("object" is the thing "to which thought, feeling, or action is directed" or the thing "sought to be attained or accomplished; an end, goal, or purpose"); *see also* Wayne R. LaFave, Criminal Law 833-34 (6th ed. 2017). Here, the substantive wire-fraud counts, which were domestic, were the objects of the conspiracy. And Elbaz concedes that the extraterritoriality analysis of her conspiracy conviction mirrors the substantive-wire-fraud counts. *See RJR Nabisco*, 579 U.S. at 341 (assuming that a conspiracy offense's "extraterritoriality tracks that of the provision underlying the alleged conspiracy"); *WesternGeco*, 136 S. Ct. at 2137 ("If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions."). So the conspiracy conviction was a domestic application of the statute in so far as the object of the conspiracy was domestic wire fraud.[6]

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[6] To be sure, Elbaz had an agreement to defraud people around the world using wires. In some abstract sense, that is a "conspiracy" to commit "wire fraud." But this extraterritorial "wire fraud" is not the crime of wire fraud under the United States Code. And since it is not a crime, it cannot be the object of

B. Trial Issues

Elbaz also argues she deserves a new trial for two reasons: The district court should have required the government to grant immunity to witnesses she planned to call, and the district court should have ordered a mistrial after a juror overheard prejudicial remarks about her. We reject both arguments.

1. Denial of Use Immunity to Witnesses Was Not an Abuse of Discretion

Elbaz argues that the district court should have compelled the government to grant immunity to potential defense witnesses. District courts lack the inherent power to grant immunity. *United States v. Klauber*, 611 F.2d 512, 517 (4th Cir. 1979). The power to seek witness immunity is conferred by Congress exclusively on the Executive for its discretionary use. 18 U.S.C. § 6003(b) (providing that a United States Attorney may seek an immunity order "when in his judgment" that testimony is "necessary to the public interest"); *see United States v. Karas*, 624 F.2d 500, 505 (4th Cir. 1980); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966) (Burger, J.). Even so, we have suggested that in some extreme circumstances a district court may be able to order the prosecution to seek immunity. *See United States v. Tindle*, 808 F.2d 319, 326 (4th Cir. 1986). But if such an extreme case exists, it is only when the defendant "makes a decisive

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a conspiracy under the United States Code. So the actual criminal conspiracy here is just the agreement to commit domestic wire fraud—a subpart of the broader agreement. And as you will see, this will be important to our restitution analysis.

showing of prosecutorial misconduct or overreaching." *United States v. Abbas*, 74 F.3d 506, 512 (4th Cir. 1996).[7]

And here, there is not a decisive showing of such extraordinary misconduct. In fact, there is *no showing* of prosecutorial misconduct. By the time Elbaz sought the testimony in April 2019, a federal grand jury had returned a sealed indictment charging three of the potential witnesses for their involvement in the fraud scheme. After consulting the district court on how to provide self-incrimination warnings, the government partially unsealed the indictment to inform the witnesses' counsel and to advise that people in their position generally choose not to testify. *See* J.A. 895 (finding that providing these witnesses with essentially truthful information after consulting the court was appropriate and prudent). In doing so, the government provided a reasonable warning to the newly indicted coconspirators. *Cf. United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012). After receiving this information, the potential witnesses refused to

[7] We have stated that "the district court can compel the prosecution to grant immunity when (1) the defendant makes a decisive showing of prosecutorial misconduct (Continued) or overreaching *and* (2) the proffered evidence would be material, exculpatory and unavailable from all other sources." *Abbas*, 74 F.3d at 512. But we did not find immunity was warranted in *Abbas*. Indeed, we are unaware of any case—and Elbaz has not proffered any—where we ordered a district court to grant use immunity. Our recitation of this alleged "power" originates in our *Tindle* decision, which rejected the defendant's claim that immunity should have been granted by the court. 808 F.2d at 326-27. As we again face a circumstance where no prosecutorial overreach or misconduct exists, we need not decide here whether a narrow power does exist for the judiciary to force a grant of immunity.

voluntarily testify. Nothing here even suggests prosecutorial misconduct or overreach. So the district court did not err by declining to compel the prosecutor to grant immunity.

2. Any Presumption of Prejudice From Improper Jury Contact Was Successfully Rebutted

Elbaz next argues that the district court erred in failing to declare a mistrial instead of merely dismissing Juror 9, who coincidentally overheard an unflattering conversation about the defendant while in line at a drugstore. We disagree. The district court acted well within its discretion to address this issue by removing the juror, ensuring no outside information was conveyed to other jurors, and restarting deliberations with an alternate juror and orders to proceed from scratch.[8]

The Sixth Amendment guarantees that a criminal defendant receives a speedy, public trial before an impartial jury. U.S. Const. amend. VI. Guarding that constitutional guarantee of impartiality has long required ensuring that external influences do not affect a jury's deliberation. *Mattox v. United States*, 146 U.S. 140, 149-150 (1892); *United States v. Reid*,

[8] "[I]n cases involving possible improper communication with jurors, 'because the ultimate factual determination regarding the impartiality of the jury necessarily depends on legal conclusions, it is reviewed in light of all the evidence,' and therefore we apply a 'somewhat narrowed' modified abuse of discretion standard that grants us 'more latitude to review the trial court's conclusion in this context than in other situations.'" *United States v. Basham*, 561 F.3d 302, 319 (4th Cir. 2009) (quoting *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996)).

53 U.S. 361, 366 (1851), *overruled on other grounds by Rosen v. United States*, 245 U.S. 467, 469-70 (1918); *Barnes v. Joyner*, 751 F.3d 229, 240 (4th Cir. 2014). Given the nature of this right, "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954).[9] To trigger this presumption, a defendant must introduce "competent evidence of extrajudicial juror contacts" that are "more than innocuous interventions." *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996) (quoting *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986)). But the presumption is rebuttable. The Government defeats the presumption by establishing that "there exists no 'reasonable possibility that the jury's verdict was influenced by an improper communication.'" *United States v. Basham*, 561 F.3d 302, 320 (4th Cir. 2009) (quoting *Cheek*, 94 F.3d at 141).

Juror 9, over a weekend, overheard a comment while waiting in a drugstore checkout line. The comment—made in Hebrew, a language which Juror 9 somewhat understood—suggested that Elbaz had poor character and that important information was

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[9] Some courts have suggested that post-*Remmer* developments—*Smith v. Phillips*, 455 U.S. 209, 215 (1982), *United States v. Olano*, 507 U.S. 725, 738-39 (1993), and Federal Rule of Evidence 606(b)—narrowed or overturned *Remmer*'s presumption of prejudice. *See, e.g.*, *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) ("[T]he *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*."). But the Fourth Circuit continues to adhere to a *Remmer* presumption when the contact goes beyond the innocuous. *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996).

withheld at trial. Juror 9 then returned to deliberations for a full day without informing the court about the comments he overheard. But the next day Juror 9 notified the court and testified that he did not share the comment with other jurors. He also testified that the remarks affected his feelings of the case, pushing him toward finding Elbaz guilty.[10] The judge then removed that juror, replaced him with an alternate, and ordered the jury to completely restart deliberations.

So we must decide whether this is a "more than innocuous intervention" sufficient to trigger a rebuttable presumption of a mistrial, and if so, whether the Government has rebutted that presumption. *Cheek*, 94 F.3d at 141. "Whether or not remarks overheard by the jury are sufficiently prejudicial to warrant overturning a conviction depends on the facts of each case." *Housden v. United States*, 517 F.2d 69, 70 (4th Cir. 1975). To determine whether a contact with a juror is innocuous or triggers the *Remmer* presumption we look to whether there was "(1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before

[10] The Government argues that this testimony by the juror is prohibited by Federal Rule of Evidence 606(b), which limits testimony from a juror about "the effect of anything on that juror's … vote" during "an inquiry into the validity of a verdict." As it does not change our analysis, we need not decide whether Rule 606(b) precludes testimony given before any verdict or whether Rule 606(b)'s exceptions apply. *See* Rule 606(b)(2) (permitting testimony about whether "an outside influence was improperly brought to bear on any juror" and "extraneous prejudicial information was improperly brought to the jury's attention").

the jury." *Cheek*, 94 F.3d at 141. And the Supreme Court has held that improper contact that was neither sought out by nor directed at the juror can still sometimes be prejudicial. *See, e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551-54 (1976) (collecting cases). For our purposes, we can assume, without deciding, the contact was prejudicial because the Government rebutted the presumption by establishing that there is no reasonable possibility that the verdict was improperly influenced by the communication.

Juror 9 was replaced. And judicial questioning ensured no other jurors had heard outside information.[11] The juror who overheard the information testified that he did not mention it, so the other jurors were unaware of the remark. As a result, we are assured that no juror on the reconstituted jury was tainted by the overheard conversation. *See United States v. Forrest*, 649 F.2d 355, 357 (5th Cir. 1981) (affirming convictions based on the trial judge's determination that the tampering of a juror was not known to the jurors who deliberated after the tainted juror was removed). The judge then instructed the jury to restart deliberations anew. Fed. R. Crim. P. 24(c)(3). And so we are not dealing with the same set of deliberations, but with a new set of deliberations, with jurors who had not heard the outside remark.[12]

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[11] Elbaz also suggests that the judge's questioning itself prejudiced her. We disagree and find that the "trial judge made reasoned judgments in walking the line between detecting bias and creating bias." *United States v. Smith*, 919 F.3d 825, 834 (4th Cir. 2019).

[12] This is not a case in which the verdict has been returned and the jury dismissed. In those circumstances, the government faces more difficulty in establishing that the information was neither

Elbaz asks that we speculate that the jurors were contaminated by Juror 9 before he was excused. But the record shows that none of those jurors knew of the drugstore conversation. Even so, Elbaz argues that the jurors might have been contaminated by the change in countenance by Juror 9 after he overheard the conversation but before he was removed. But the judge ordered the new jury to disregard previous deliberations, and we presume juries follow instructions. *See United States v. Benson*, 957 F.3d 218, 230 (4th Cir. 2020).

By pointing to new deliberations with untainted jurors, the Government has rebutted the *Remmer* presumption. So we hold that the district court did not abuse its discretion in finding no reasonable possibility that the reconstituted jury was influenced by the drugstore conversation and refusing to grant a mistrial. *See Smith*, 919 F.3d at 835 (noting the broad discretion afforded district courts in evaluating juror bias).

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known nor considered by the jurors that rendered the verdict. In contrast, when the court learns of an impropriety affecting only one juror during trial—as happened here—the usual response is to take steps to prevent prejudice to the remaining jurors, not to order a new trial. *See* 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 24.9(f) & n.135-36 (4th ed. 2021) (collecting cases). Because the court learned of the overheard drugstore conversation during the trial, it could ensure that no prejudice resulted—something that cannot so easily be done after the jury has rendered a verdict and been discharged.

C. Sentencing

Elbaz raises several sentencing challenges. She objects to considering foreign victims' losses in determining her term of imprisonment and her required restitution. And she also brings various challenges against the conditions of supervised release imposed by the district judge. Given our standard of review, we reject most of these challenges but agree the restitution order was improper.

1. Any Error in Considering Losses From Purely Foreign Conduct at Sentencing was Harmless

Separate from her claim that her conviction involved an improper extraterritorial application of the wire-fraud statute, Elbaz argues that the district court erred in considering her foreign conduct in sentencing. Elbaz's fraud scheme targeted victims both in the United States and abroad, and the district court considered losses to foreign victims when calculating her baseline sentencing level and restitution owed.[13]

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[13] At sentencing, the district court included foreign losses though noted that the "circuits are split on the issue," and estimated the amount of loss as about $28 million, resulting in a 22-level enhancement. J.A. 6671. The court determined that the total offense level was 41, for a guideline imprisonment range of 324 to 405 months. The court then varied down to a total sentence of 264 months (or 22 years). Elbaz objected to this calculation, arguing that the district court should only include losses incurred by victims inside the United States, caused by persons inside the conspiracy, and during the timeframe of the conspiracy when calculating the amount of loss. This results in a

We begin with the statutory directive that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. This "codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information." *United States v. Watts*, 519 U.S. 148, 151 (1997); *see Pepper v. United States*, 562 U.S. 476, 489 (2011) ("Both Congress and the Sentencing Commission thus expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)). So this Court lacks any basis to "invent a blanket prohibition against considering certain types of evidence at sentencing." *Watts*, 519 U.S. at 152.

And the Guidelines themselves confirm this understanding. In broadly defining the relevant conduct to be considered in determining the offense level, the Guidelines direct that the court consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and those acts and omissions undertaken by coconspirators that are "within the scope of the jointly undertaken activity," "in furtherance of that criminal activity," and "reasonably foreseeable." U.S.S.G. § 1B1.3(a)(1); *see*

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loss amount of about $5 million. Accepting Elbaz's argument yields an 18-level enhancement under U.S.S.G. § 2B1.1(b)(1)(J).

also § 1B1.4 ("In determining the sentence to impose … the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." (emphasis added)).

Despite § 1B1.3's broad language, we have generally said in the Fourth Circuit that "relevant conduct under the Guidelines must be criminal conduct." *United States v. Dove*, 247 F.3d 152, 155 (4th Cir. 2001). As we have already noted, Elbaz's purely foreign conduct was not a violation of U.S. criminal law. It is also unclear on the record before us whether Elbaz's foreign conduct was "criminal conduct" in a foreign jurisdiction.[14] So if § 1B1.3's broad language has an implicit limitation, as we have sometimes stated, the district court might have erred when it considered losses from purely foreign conduct when setting its initial sentencing range.

But if the district court erred, that error would be harmless. A Guidelines error is harmless if "(1) the district court would have reached the same result even if it had decided the Guidelines issue the other way and (2) the sentence would be reasonable even if the Guidelines issue had been decided in the defendant's favor." *United States v. Mills*, 917 F.3d 324, 330 (2019) (cleaned up). The first prong is met when a district court "expressly state[s]" that it would have imposed the same sentence even if it had found

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[14] The district court referenced the possibility that Elbaz's conduct was legal under Israeli law but never decided whether it was. J.A. 6732 ("[A]t least there was an argument that the conduct was not legal—was legal under Israeli law at least at one point in time … I just don't know enough.").

another Guideline range to be applicable. *Id.* at 331. The second prong is the "substantive reasonableness" prong. *Id.* "When reviewing the substantive reasonableness of a sentence, we 'examine[ ] the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).'" *United States v. Gomez-Jimenez*, 750 F.3d 370, 383 (4th Cir. 2014) (quoting *United States v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010)) (alteration in original).

Both prongs of that harmless-error analysis are satisfied. For the first prong, the district court expressly stated that "it would have imposed the same sentence based on its analysis" of the § 3553(a) factors "even if it had reached different conclusions on any or all of the contested Guidelines enhancements." J.A. 6768. The second prong is also satisfied. Here, "[t]he record reflects that … the district court provided a thorough and persuasive § 3553(a) analysis." *Gomez-Jimenez*, 750 F.3d at 383.[15] And even if the district court may have been barred from considering purely foreign conduct in calculating the Guideline range, the court was certainly free to consider it when setting its final sentence. As such, Elbaz's sentence was

[15] The district court carefully considered not only the losses caused by Elbaz's actions, but also, inter alia, the "nature and circumstances of the offense," the victims and impact to society, the significance of the crime, Elbaz's role in the offense as well as her "history and characteristics," what "sentence would be warranted to reflect the seriousness of the offense, promote respect for the law, provide just punishment, provide deterrence … and protect the public from further crimes," and several factors that mitigated the sentence. J.A. 6717-26.

substantively reasonable and, if the district court erred, that error was harmless.

2. Restitution to Foreign Victims Was Improper

Elbaz must also pay restitution under the Mandatory Victims Restitution Act of 1996. 18 U.S.C. § 3663A. The Act applies only to "the victim of the offense." *Id.* So unlike sentencing, the broader concept of "relevant conduct" does not expand "the offense of conviction." *United States v. Llamas,* 599 F.3d 381, 390-91 (4th Cir. 2010); *see also United States v. Dridi*, 952 F.3d 893, 901 (7th Cir. 2020). Thus, the district court's restitution order under the Act must be limited to "the losses to the victim *caused by the offense*." *Llamas*, 599 F.3d at 391 (quoting *United States v. Newsome*, 322 F.3d 328, 341 (4th Cir. 2003)).

The substantive wire-fraud counts cannot support restitution for foreign losses. Those counts involved individual U.S. victims. So only those domestic victims can receive restitution under the Act for the substantive counts.

Nor can the conspiracy count justify restitution under the Act for losses stemming from a purely extraterritorial conspiracy. The court can impose restitution under the Act for the separate conspiracy offense. *Llamas*, 599 F.3d at 390-91; *see also Newsome*, 322 F.3d at 341; *United States v. Seignious*, 757 F.3d 155, 161 (4th Cir. 2014). But the presumption against extraterritorial application applies to provisions, like the Act, that provide remedies just as it does to substantive prohibitions. *See WesternGeco*, 138 S. Ct. at 2137-39. This Act does

not explicitly rebut the presumption, so we must identify the Act's focus to ensure we apply it only domestically.

When determining the Act's focus, we consider how it "works in tandem with other provisions," *id.* at 2137, namely the offenses included by the Act. For these offenses, the Act provides more punishment and reimburses victims of those offenses. *See Pasquantino* 544 U.S. at 365 (noting restitution has both compensatory and punitive purposes). So we conclude that the Act's "focus" is that of the underlying offense—the wire-fraud conspiracy.

As we discussed earlier, the focus of the wire-fraud conspiracy tracks the focus of its own underlying offense. Recall that § 1349 applies to one who conspires only "to commit any offense" under the chapter of the U.S. Code containing wire fraud. And the U.S. Code only criminalizes *domestic* wire fraud. That means purely foreign conduct that would otherwise amount to "wire fraud" is not a crime under the U.S. Code. So any alleged "object" of the conspiracy that lacks a domestic nexus is not an "offense" under the U.S. Code, and an agreement to commit a non-criminal object is no conspiracy offense at all. *See supra* n.5. So a conspiracy with foreign "wire fraud" as its object cannot justify imposing restitution.[16]

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[16] The restitution is not limited to the victims of the three substantive wire-fraud offenses charged. It also extends to those victims who were "directly [or] proximately harmed" by a conspiracy to misuse domestic wires. § 3663A(a)(2).

We thus find the inclusion of those foreign victims with no nexus to criminal conduct in the United States in the restitution calculation was an error and remand for recalculation.

3. The Supervised Release Conditions Were Proper

Elbaz also challenges certain supervised release conditions imposed at sentencing. The district court imposed three years of supervised release, orally announcing that the terms were subject to "the standard and statutory conditions of supervised release" along with "additional conditions." J.A. 6727.[17] The additional conditions were read aloud. Those conditions were also in the probation officer's sentencing recommendation and detailed in the written judgment. Elbaz never objected to "the standard and statutory conditions of supervised release" or any of the additional conditions.

Elbaz first argues that the district court did not sufficiently specify "the standard and statutory conditions" of supervised release by merely orally incorporating them. But because Elbaz failed to raise this claim below, we review it only for plain error. *United States v. McMiller*, 954 F.3d 670, 675 (4th Cir.

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[17] The additional conditions include financial disclosures, a bar on incurring new credit charges or lines of credit without the approval of the probation officer, a bar on engaging in "an occupation, business, profession or volunteer activity that would require (Continued) or enable you to have access to financial information of others" without the probation officer's approval, a bar on violating immigration laws, and a bar on contacting victims of her crime without the probation officer's approval. J.A. 6728, 6773.

2020) ("Because McMiller did not object to these [supervised release] conditions at the time of his sentencing, we again apply plain error review."). Elbaz argues that her objection to the length of imprisonment preserves any challenge to the terms of supervised release, and so argues that we should review her claim for abuse of discretion. But objections must be made "with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." *United States v. Midgette*, 478 F.3d 616, 622 (4th Cir. 2007). Elbaz's objections to her term of imprisonment are not specific enough to preserve a challenge to the terms of supervised release.

Our precedent has sometimes applied abuse-of-discretion review when a defendant fails to expressly object to the sentencing issue raised on appeal. For example, in *United States v. Lynn*, 592 F.3d 572 (4th Cir. 2010), we held that arguing for a shorter sentence length preserves an objection to the adequacy of the district court's reasoning when it imposes a longer sentence. 592 F.3d at 578, 581. And in *United States v. Lewis,* 958 F.3d 240 (4th Cir. 2020), we seemingly extended *Lynn* in finding that a defendant who argued only for a shorter prison sentence had preserved their objection to the adequacy of explanation regarding addiction-treatment conditions imposed during that prison sentence. *Lewis*, 958 F.3d at 243 n.2. While unstated, we must have concluded that a defendant who argues for a shorter prison sentence sufficiently "inform[s] the court" that they "wish[ ] the court to take" a different path and so preserves objection both to the prison sentence's length and its conditions. *See Lynn*, 592 at 577

(quoting Fed. R. Crim. Pro. 51(b)) (emphasis removed).

But *Lynn* and *Lewis* are inapplicable here. *Lewis* did find a defendant's prior argument for a shorter prison sentence preserved their objection to the reasons given for imposing addiction-treatment conditions on their release. *Lewis*, 958 F.3d at 243 n.2. Yet, *Lewis* did not—and could not—displace the requirement that to preserve an objection a defendant must inform the court of the action he seeks or his specific objection. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 764 (2020); Fed. R. Crim. Pro. 51(b). Arguing for a different prison sentence does not inform a district court that the defendant seeks different supervised release conditions. Instead, *Lewis* is best read to say that where the sentence and the supervised release condition are problematic on the same basis—i.e., a failure to explain the need for addiction treatment during prison is the same failure to explain addiction treatment upon release—then asking for a lower sentence preserves the problematic basis and thus preserves all impacts of that error since the district court has been "reasonably … alert[ed]" to the error. *See Midgette*, 478 F.3d 616, 622 (4th Cir. 2007).[18] Here, that is not the case, and so we

[18] We have otherwise explained that a "general objection" suffices to preserve an argument when "the context makes the finer, more-specific bases obvious." *United States v. Boyd*, 5 F.4th 550, 556 (4th Cir. 2021). This seems to be the corollary to what we have termed the "sentence as a whole" doctrine. Applying the "sentence as a whole" doctrine, we stated in Boyd that "a court's overarching explanation of a sentence 'as a whole' may be procedurally sufficient in some cases," but that at the same time the explanation given by the district court for the sentence as a whole must also be sufficient to explain and contend with any

review Elbaz's argument using the plain error standard.

We find no plain error. A district court must orally pronounce discretionary conditions. *United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020). But the district court may satisfy this obligation "through incorporation—by incorporating, for instance, all Guidelines 'standard' conditions." *Id.* So the only question was whether this was a clear enough incorporation. While Elbaz raises a few possible alternative meanings of "standard and statutory conditions," the Guidelines conditions are the most obvious meaning in context. So even if it would not have been clear enough to survive de novo review, the district court's incorporation of the standard conditions here was not plainly erroneous.

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objection to the conditions imposed. See *Boyd*, 5 F.4th at 559 (quoting *United States v. Huntley*, 594 F. App'x 108, 111 (4th Cir. 2014)). As the statutory factors relevant to the sentence length inquiry are also relevant to the imposition of special conditions, district courts need not cover the same ground twice, but must still provide a reasoned basis to sustain both the sentence length and conditions imposed. *See id.*; *United States v. Williams*, 5 F.4th 500, 508-09 (4th Cir. 2021) (finding that the district court discharged its duty to explain the conditions it imposed by addressing "holistically" how the statutory factors applied to the case). This same logic seems to underpin *Lewis*. If the district court errs in failing to explain addiction treatment for the imprisonment sentence, then that same error applies to the addiction-treatment supervised release condition. But that requires that the imprisonment-sentence error be the same as the supervised-release- condition error. When the defendant raises no argument applicable to the supervised release condition, they are not saved just because they raised *some* type of argument against the sentence length. That is the situation in this case, and so Elbaz's argument is not preserved.

Elbaz also argues that the court erred in failing to provide an adequate explanation for the additional conditions imposed. As mentioned above, Elbaz failed to object to the supervised release conditions, much less object on this basis. Thus, we review only for plain error. *McMiller*, 954 F.3d at 675. And on appeal, Elbaz generally alleges that the explanation was insufficient, but presents arguments on only two financial conditions that require Elbaz to get the approval of her probation officer before (1) "incur[ring] any new credit charges or opening lines of credit" or (2) "engag[ing] in [work] or volunteer activity that would require [her] or enable [her] to have access to financial information of others." J.A. 6728. So we consider only those conditions. *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (holding that appellant must list both "contentions and the reasons for them" to avoid abandoning arguments).

Supervised release conditions only need to be "'reasonably related' to statutory factors referred to in § 3583(d)(1)." *United States v. Dotson*, 324 F.3d 256, 260 (4th Cir. 2003). And the court also has a duty to explain the conditions of release. *See United States v. Arbaugh*, 951 F.3d 167, 178 (4th Cir. 2020) ("Just as with other parts of a sentence, the district court must adequately explain any special conditions of supervised release."). But where "a special condition is so unobtrusive, or the reason for it so self-evident and unassailable," remand may be unnecessary under plain-error review. *McMiller*, 954 F.3d at 677.

Elbaz contends that the court failed to explain why the limits on credit or access to others' financial

information were appropriate in Elbaz's circumstances. But the court thoroughly discussed the financial nature of her crimes (along with adopting the detailed presentence report). And it is obvious from the face of the record that these restrictions were motivated by a desire to protect against Elbaz's future capacity to commit similar financial fraud. And that is enough to "permit meaningful appellate review of [her] supervised release conditions" given these circumstances. *Id.* Under these circumstances, the reason for imposing the conditions is so "self-evident and unassailable" that the district court's failure to expressly explain each of them did not "seriously affect[ ] the fairness, integrity, or public reputation" of the sentencing proceedings. *See id.* (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

Finally, Elbaz argues that the conditions impermissibly delegate authority to a probation officer, because she "must not incur new credit charges or open additional lines of credit without the approval of the probation officer" and "must not engage in an occupation, business, profession or volunteer activity that would require or enable [her] to have access to financial information of others without the prior approval of the probation officer." J.A. 6773. While probation officers cannot be given "completely unguided discretion," discretion tends to be more acceptable when it is cabined to narrow conditions, not plagued by "overbreadth and vagueness." *United States v. Hamilton*, 986 F.3d 413, 420 (4th Cir. 2021). It is permissible to give "probation officers a significant measure of discretion" which can "vest some interpretive role in the officer …. There simply need to be some general parameters set on that

discretion related to the record in this case." *Id.*; *see also United States v. Comer*, 5 F.4th 535, 547-48 (4th Cir. 2021) (rejecting a nondelegation challenge to a condition that the defendant not maintain a social media account without approval of a probation officer). Here, the sort of discretion given to the probation officer relates to the main harm of this case: Elbaz's abuse of financial trust. And the restrictions are narrow, involving the use of credit and being in a position to obtain others' financial information. So the district court did not plainly err in imposing these conditions.

* * *

Elbaz hatched a massive fraudulent scheme that targeted victims in the United States using wires in the United States. Even though we agree that the wire-fraud statute does not apply extraterritorially, its focus is the misuse of wires in the United States for fraudulent purposes, so Elbaz was convicted of the domestic act of using wires in the United States. The district court did not err in refusing to impose the extraordinary remedy of granting use immunity to witnesses, and the court sufficiently cleansed the proceeding of any prejudice caused by the juror who overheard outside discussion of the defendant. Any error based on the district court's consideration of Elbaz's extraterritorial conduct at sentencing was harmless. But the district court too broadly imposed restitution, so we must remand for a new restitution order. Finally, the court did not plainly err when imposing supervised release conditions, and the conditions were both reasonable and constitutional.

The conviction and sentence are therefore affirmed except for the restitution order.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

LEE ELBAZ, Defendant.

Criminal Action No. TDC-18-0157

MEMORANDUM OPINION

Defendant Lee Elbaz is charged with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and three counts of wire fraud, in violation of 18 U.S.C. § 1343 and 2. Presently pending before the Court are four Motions to Dismiss filed by Elbaz in which she argues that the Indictment fails to state an offense, the charged offenses are improperly based on extraterritorial conduct, the conspiracy charge exceeds Congress's power under the Commerce Clause to criminalize a foreign conspiracy, and the Indictment fails to allege proper venue in the District of Maryland. Elbaz has also filed a Motion to Strike Paragraph 10 of the Indictment and a Motion, in the Alternative, for a Bill of Particulars. After briefing, the Court held a hearing on all six Motions on July 30, 2018. For the reasons set forth below, the Motions to Dismiss are denied, the Motion to Strike is denied, and the Motion for a Bill of Particulars is granted in part and denied in part.

BACKGROUND

The Indictment alleges the following facts, which the Court accepts as true for purposes of the Motions.

Elbaz, a resident of Israel, was the Chief Executive Officer of Yukom Communications, an Israel-based business that provided sales and marketing services for two internet-based businesses with the brand names BinaryBook and BigOption ("the Companies"). BinaryBook and BigOption sell financial instruments known as "binary options," consisting of bets on the outcome of a particular event, that result in the payment of either a pre-determined amount of money or nothing. Indictment ¶ 9, ECF No. 37. Elbaz identified herself as the "Trading Floor Manager" for BinaryBook and BigOption. *Id.* ¶ 7.

Count One of the Indictment charges Elbaz with conspiracy to commit wire fraud. The fraud was allegedly perpetrated in several ways. Sales representatives of the Companies ("Representatives") would misrepresent their personal financial incentives to investors by stating that they were paid a commission based on investor profit, when in fact they were paid a commission based on investor deposits. The Indictment alleges that Elbaz trained and encouraged Representatives to make such claims.

Representatives also misrepresented the average investment return on binary options. Representatives were given a script that included false statements such as that investor returns averaged 15-25 percent per month and that there was an average success rate of 70 percent. Elbaz allegedly trained and encouraged

employees of the Companies to make such misrepresentations.

Furthermore, Representatives, following scripts provided by Elbaz, made false statements about their educational backgrounds, claiming to have a master's degree in economics; their location, stating that they were in London; and their names, using "stage names" or other aliases. Elbaz allegedly trained and encouraged Representatives to make such statements and personally approved the stage names.

The Indictment also alleges that Representatives misstated to investors how easy it was for investors to withdraw their funds. When an investor sought to withdraw funds, the Representatives instead offered the investor an "Academy" class that was purportedly designed to improve trading performance, but did not, in fact, do so. *Id.* ¶ 34. Elbaz allegedly trained and encouraged employees to make misrepresentations that funds could be withdrawn easily.

Finally, Representatives did not disclose material information about various proposed investment terms, including "bonuses," "risk free trades," and "insured trades." *Id.* ¶¶ 36-39. Although these terms implied that investors would receive additional money or decreased risk, these tools were actually mechanisms used to make it more difficult to withdraw deposits. Elbaz allegedly trained and encouraged employees to make misrepresentations about the ability to withdraw funds invested in these instruments.

Counts Two, Three, and Four charge Elbaz with three counts of wire fraud. In these counts, the

Indictment charges that on three separate occasions, Elbaz caused, or aided and abetted, the sending of wire transmissions from Representatives to victims in Maryland for the purpose of executing a scheme to defraud. The Indictment identifies three Maryland victims through pseudonyms as Victims A, B, and C, and it provides specific dates on which a Representative of BinaryBook or BigOption communicated with the victim through a wire transmission.

DISCUSSION

The Court will first address Elbaz's Motions to Dismiss, then consider the Motion to Strike, and finally examine the Motion for a Bill of Particulars.

I. Motions to Dismiss

A. Legal Standard

Elbaz has been charged in Counts Two, Three, and Four with substantive counts of wire fraud in violation of 18 U.S.C. § 1343, which states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under

> this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 (2012). Elbaz is also charged with aiding and abetting these offenses under 18 U.S.C. § 2, which provides that anyone who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2.

Elbaz is charged in Count One with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, which states: "Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 18 U.S.C. § 1349.

Elbaz has filed her Motions to Dismiss under Federal Rule of Criminal Procedure 12, which states that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits" and includes challenges of failure to state an offense and improper venue. Fed. R. Crim. P. 12(b)(1), (3)(A)(i), (3)(B)(v). Under *United States v. Engle,* 676 F.3d 405 (4th Cir. 2012), a court may dismiss an indictment "where there is an infirmity of law in the prosecution." *Id.* at 415. It may not do so based on a "determination of facts that should have been developed at trial." *Id.* Thus, when evaluating a challenge to an indictment under Rule 12, the Court must base its determination solely on the facts contained in the indictment and must accept all facts in the indictment as true. *Id.*

B. Failure to State an Offense

Elbaz seeks dismissal of the Indictment for failing to state an offense. According to Elbaz, the Indictment does not set forth the essential facts that would fairly inform her of the conduct forming the offense charged in Count One. In her view, the Indictment fails to allege any facts that link her to the perpetrators of the fraud, or that show that she was aware of the fraud at all. Elbaz further argues that Counts Two, Three, and Four are deficient because there is no factual allegation that she made or caused to be made a materially false statement, or that the individuals who communicated with the Maryland victims were connected to Elbaz. Finally, she argues that there are no facts that support the charge that she aided and abetted wire fraud.

When a defendant challenges the sufficiency of an indictment, courts apply a "heightened scrutiny to ensure that every essential element of an offense has been charged." *United States v. Perry,* 757 F.3d 166, 171 (4th Cir. 2014). "An indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future prosecution for the same offense." *Id.* (quoting *United States v. Kingrea,* 573 F.3d 186, 191 (4th Cir. 2009)). An indictment is allowed to set forth the offense in the words of the statute itself, so long as it includes all of the necessary elements of the offense, but the statutory language must also be accompanied by a "statement of the essential facts constituting the offense charged." *Perry,* 757 F.3d at 171 (quoting *United States v. Quinn,* 359 F.3d 666, 673 (4th Cir.

2004)). However, while an indictment is intended to be "concise," Fed. R. Crim. P. 7(c), there is no requirement that it "include every fact to be alleged by the government," *United States v. Moyer,* 674 F.3dl92, 203 (3d Cir. 2012).

When the charged crime is conspiracy, "all that is necessary in the indictment is that the object of the conspiracy be set forth sufficiently to identify the offense which the defendant is charged with conspiring to commit." *United States v. Matzkin,* 14 F.3d 1014, 1019 (4th Cir. 1994). The sufficiency of the indictment is determined by "practical, as opposed to purely technical considerations," with the key question being whether it tells the defendant all that is needed to show for his defense, and whether it provides enough information that the defendant will not be placed in double jeopardy. *Id.*

On Count One, the elements of conspiracy to commit wire fraud are "(1) two or more persons made an agreement to commit wire fraud; (2) the defendant knew the unlawful purpose of the agreement; and (3) the defendant joined in the agreement willfully." *United States v. Kuhrt,* 788 F.3d 403, 414 (5th Cir. 2015). The Indictment clearly states these elements. In paragraph 17, the Indictment alleges that Elbaz "and others known and unknown to the Grand Jury, did knowingly and willfully combine, conspire, confederate, and agree with each other and others ... to commit wire fraud." Indictment ¶ 17. The object of the conspiracy was explicitly identified as the commission of the federal crime of wire fraud, which was described as "knowingly and with the intent to defraud, having devised ... a scheme and artifice to

defraud binary options investors in BinaryBook and Big Option, … knowingly transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, pictures, and sounds for the purpose of executing the scheme and artifice in violation of Title 18, United States Code, Section 1343." *Id.*

Thus, each element of conspiracy, as well as the object of the conspiracy, is fairly stated. *See Perry,* 757 F.3d at 171; *Matzkin,* 14 F.3d at 1019. Although this description largely tracks the statute, the Indictment is not limited to the statutory language. It also includes the "essential facts constituting the offense charged," including the dates of the offense (from May 2014 to June 2017) and the location (the District of Maryland and elsewhere). Indictment ¶ 17. It describes the object of the conspiracy as wire fraud relating to a scheme to defraud "binary options investors in BinaryBook and Big Option." *Id.*

Beyond those basic facts, which are typically sufficient to state a conspiracy charge, the Indictment sets forth a detailed description of the manner and means of the conspiracy, including that Elbaz and her co-conspirators induced investors to deposit funds based on four different categories of misrepresentations made by BinaryBook and BigOption personnel, specifically misrepresentations that Representatives were paid based on total investor profits, when in fact they were paid based on total investor deposits, misrepresentations about the profitability of their accounts, misrepresentations about the location and education of particular Representatives, and misrepresentations about

investors' ability to withdraw their funds. These additional facts are more than enough to identify the offense Elbaz is charged with conspiring to commit and to allow Elbaz to understand whether she is being subjected to double jeopardy.

Elbaz claims that the Indictment does not provide sufficient facts to connect her to the perpetrators of the fraud or to show that she was aware of the actual acts of wire fraud. Elbaz further claims that the Indictment "must contain factual allegations from which a reasonabl[e] jury could conclude that the defendant made or caused to be made a materially false statement." Mot. Dismiss (Failure to State an Offense) at 9, ECF No. 58. First, these claims misunderstand the purpose of an indictment, which is to put the defendant on notice of the charge against her, not to demonstrate that the Government has sufficient facts to convict the defendants. Unlike for a civil complaint, there is no requirement that an indictment offer sufficient facts, which if true, would establish the offense. Rather, an indictment must merely identify those essential facts necessary to inform her of the charge, prepare a defense, and avoid double jeopardy, not lay out the whole of the Government's case. *See, e.g., Moyer,* 674 F.3d at 203.

Second, as Elbaz has argued, the essential element of the offense is the agreement to commit a crime, which the Indictment has alleged. There is no requirement that a defendant know the identity of all other co-conspirators in order to sustain a conviction. Indeed, an indictment charging conspiracy does not need to name co-conspirators because it is "the existence of the conspiracy, rather than the particular

identity of the conspirators" that is the essential element of the crime. *United States v. Am. Waste Fibers Co., Inc.,* 809 F.2d 1044, 1046 (4th Cir. 1987). It is also not required, to establish a conviction for conspiracy, to show that the defendant was aware of any particular criminal act. Even if a member of a conspiracy did not know of certain criminal acts by co-conspirators, that member "is responsible for the acts of the others in furtherance of the conspiracy." *United States v. Snead,* 527 F.2d 590, 591 (4th Cir. 1975). Thus, facts showing the defendant's knowledge of particular criminal acts are not essential elements that must be stated in a conspiracy indictment.

Third, to the extent that Elbaz argues that certain facts about her involvement must be alleged in order to allow her to prepare her defense, the Indictment further describes her alleged role in the conspiracy by stating, among other things, that Elbaz supervised the representatives who made false statements in furtherance of the fraud, that she trained and encouraged the representatives to make misrepresentations, and that she used an alias in interacting with investors and approved stage names for representatives to use. The Indictment provides specific examples of such activities by alleging that she taught a "retention class" on February 24, 2016, received a "Course Manual" on August 24, 2016, received a communication from a manager stating that "there is a lot more money to take from" investors, and directed a representative to place a small bonus in an investor account on April 10, 2015. Indictment ¶¶ 22a, 22e, 24a. These facts are sufficient to provide notice to Elbaz of the conspiracy charge against her, to allow her to prepare her defense, and

to permit her to assess whether she is subject to double jeopardy. To the extent that any additional facts are needed, they will be discussed in relation to the Motion for a Bill of Particulars.

As for the substantive wire fraud charges in Counts Two, Three, and Four, the Indictment likewise states all of the elements of the offense and provides notice of the charges against Elbaz. To convict a person of the crime of wire fraud, the Government must show that the defendant "(1) devised or intended to devise a scheme to defraud and (2) used … wire communications in furtherance of the scheme." *United States v. Wynn,* 684 F.3d 473, 477 (4th Cir. 2012). As charged in the Indictment, a person who aids and abets the crime of wire fraud may also be found guilty of the substantive offense. 18 U.S.C. § 2. Paragraph 41 of the Indictment states that Elbaz:

> [K]nowingly and with the intent to defraud, having devised and intending to devise, and willfully participated in, a scheme and artifice to defraud binary options investors in BinaryBook and BigOption, and for obtaining money and property by means of materially false and fraudulent pretenses, representations and promises, transmitted and caused to be transmitted, and aided and abetted the transmission, by means of wire communication in interstate and foreign commerce, writings, signs, pictures, and, sounds for the purpose of executing the scheme and artifice.

Indictment ¶ 41. The Indictment therefore stated all of the elements of a wire fraud offense. Although this language largely tracked the statutory text, the

Indictment included "essential facts constituting the offense charged," *Perry,* 757 F.3d at 171, including (1) that the scheme was to defraud binary investors in BinaryBook and Big Option, and (2) the scheme occurred between May 2014 and June 2017. It included, in paragraph 42, the dates of each charged count, the type of wire transmission, the company for which the Representative worked when engaged in that communication, and the location of the receipt of the communication, the District of Maryland. Indictment ¶ 42.

These facts are more than sufficient to state the elements of the offense and to provide notice of the charge against the defendant in order to prepare a defense and to avoid double jeopardy. Again, there is no requirement that the Indictment provide more, or include sufficient facts to establish a violation of the statute. For example, in *United States v. Loayza,* 107 F.3d 257 (4th Cir. 1997), an indictment for mail fraud described the scheme to defraud and specified the date, amount, and originating bank of several allegedly fraudulent checks, but did not state the specific check number or the name of the victim. *Id.* at 261. The United States Court of Appeals for the Fourth Circuit found this information sufficient to "place [the defendant] on notice of the charges." *Id.* The court went on to state that, while the defendant "understandably wants the government to disclose its theory of the case and the supporting evidentiary facts … [t]hat is not and never has been required at the indictment stage." *Id.* (quoting *United States v. Arlen,* 947 F.2d 139, 145 n.7 (5th Cir. 1991)).

As discussed above, there is no requirement that the Indictment specifically provide details showing that Elbaz was connected to the Representatives identified in Counts Two, Three, and Four, or that she was aware of those wire transmissions. First, by alleging that she "caused" the wires to be transmitted, or "aided and abetted" the transmission, the Indictment adequately states the elements of the offense to provide notice of the charge. The Indictment need not offer up all of the evidence that will be used to prove guilt.

Second, the Court notes that facts showing that Elbaz was aware of these wire transmissions are not even necessary for a conviction. Under the *Pinkerton* theory of liability, if Elbaz is convicted of the conspiracy count, she would be liable for all reasonably foreseeable acts of co-conspirators in furtherance of the conspiracy, including the wire fraud charges in Counts Two, Three, and Four, even if she was not specifically aware of those transmissions. *See, e.g., Pinkerton* v. *United States,* 328 U.S. 640, 647 (1946); *United States v. Singh,* 518 F.3d 236, 253-54 (4th Cir. 2008). Thus, there was no requirement that the Indictment include specific facts connecting Elbaz to the wire transmissions or the representatives who made them

Elbaz's reliance on *United States v. Hooker,* 841 F.2d 1225 (4th Cir. 1988), as an example of a case in which an indictment was dismissed for a failure to allege essential facts, is misplaced. In *Hooker,* the court dismissed a RICO charge against a defendant because the Indictment failed to allege an essential *element* of the crime, specifically the interstate

commerce element, not an essential *fact* in addition to the necessary elements. *Id.* at 1227, 1232. That defect is not present here, where there is no significant dispute that the Indictment alleges all of the necessary elements for both the conspiracy charge and the substantive wire fraud counts. Accordingly, because the Court finds that the Indictment adequately states offenses for both wire fraud and conspiracy to commit wire fraud, the Motion to Dismiss the Indictment for Failure to State an Offense will be denied.

C. Extraterritoriality

Elbaz also moves to dismiss all counts of the Indictment on the assertion that the Indictment improperly seeks to prosecute extraterritorial conduct. Specifically, Elbaz argues that since a wire fraud conspiracy requires proof only of an agreement to commit wire fraud, and since that agreement occurred overseas, the agreement is not within the scope of 18 U.S.C. § 1349. On the substantive wire fraud counts, Elbaz argues that the allegations of three wire transmissions to victims in the United States do not establish the crime as domestic because the "focus" of the wire fraud statute is not the wire communications, but the broader scheme to defraud, which she claims was foreign in nature, and in any event the allegations do not tie Elbaz to the wires. Mot. Dismiss (Extraterritoriality) at 10-11, ECF No. 57. Elbaz further argues that even if the Court finds that the wire fraud and wire fraud conspiracy statutes apply to Elbaz's extraterritorial conduct, applying those provisions to her conduct would violate due process.

The United States Supreme Court has outlined a two-step framework for analyzing extraterritoriality issues. First, a court must consider whether a statute was intended to apply extraterritorially. *RJR Nabisco, Inc. v. European Cmty.,* 136 S. Ct. 2090, 2101 (2016). This determination requires a "clear, affirmative indication" in the statute itself and must be more than a mere reference to "foreign commerce." *Id*; *Morrison v. Nat'I Austl. Bank Ltd.,* 561 U.S. 247, 263 (2010). If the statute applies to extraterritorial conduct, the inquiry is over and the Court may apply the statute to any conduct regardless of geography, absent some other limitation. *RJR Nabisco,* 136 S. Ct. at 2101.

If the statute does not apply extraterritorially, then a court must determine whether the case involves a domestic application of the statute. *Id.* In so doing, a court must examine the "focus" of the statute and determine if any alleged conduct that is relevant to that focus occurred in the United States. *Id.* The focus of a statute is the conduct that it seeks to regulate, as well as the parties that the statute seeks to protect. *WesternGeco LLC v. ION Geophysical Corp.,* 138 S. Ct. 2129, 2137-38 (2018). "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco,* 136 S. Ct. at 2101. If "the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application" of the statute, "regardless of any other conduct that occurred in U.S. territory." *Id.*

There is no claim that the statutes at issue, 18 U.S.C. §§ 1343 and 1349, apply extraterritorially. Therefore, the question to consider is whether there was conduct occurring in the United States that was relevant to the "focus" of each statute. In *Morrison,* the Supreme Court assessed the "focus" of a statute for extraterritoriality purposes by considering what "transactions the statute seeks to regulate" and what "parties or prospective parties to those transactions that the statute seeks to protect." *Morrison,* 561 U.S. at 267. The Court also considered the text of other statutes that made up part of the same regulatory scheme and the policy justification for different possible statutory interpretations. *Id.* at 268-69.

Although the Fourth Circuit has not specifically addressed how to determine a statute's "focus" for purposes of this analysis, it has considered the wire fraud statute in detail. In *United States v. Jefferson,* 674 F.3d 332 (4th Cir. 2012), the court held that the "essential conduct element" prohibited by § 1343 is "the misuse of wires," such that each use of a wire in furtherance of a scheme to defraud is a separate offense. *Id.* at 366. Likewise, in *United States v. Condoion,* 600 F.2d 7 (4th Cir. 1979), the court stated that the "gravamen" of the offense of wire fraud is "the misuse of interstate communication facilities to execute any scheme or artifice to defraud." *Id.* at 8.

Based on this analysis, which reveals that the transaction sought to be regulated by the wire fraud statute is the wire transmission itself, the Court concludes that the "focus" of a wire fraud for purposes of assessing whether a domestic offense has occurred is the misuse of a wire communication. *See*

Pasquantino v. United States, 544 U.S. 349, 358 (2005) ("[T]he wire fraud statute punishes fraudulent use of domestic wires"). The wire fraud statute seeks to regulate the use of United States wires by preventing their use in furtherance of a fraud and seeks to protect individuals and parties in the United States from such fraudulent schemes. *Cf. WesternGeco,* 138 S. Ct. at 2137-38. Here, the Indictment has alleged in Counts Two, Three, and Four that Elbaz caused transmissions to be sent over wires to victims in the United States in order to further a scheme to defraud. A wire can form the basis of a wire fraud conviction even if it did not involve a fraudulent communication; it need only further the scheme to defraud. *See United States v. Jinian,* 725 F.3d 954, 960 (9th Cir. 2013); *cf. S. Atl. P'ship of Tenn., LP v. Riese,* 284 F.3d 518, 531-32 (4th Cir. 2002) (noting that mailings in a mail fraud prosecution merely have to further the scheme to defraud, and that they need not themselves contain fraudulent misrepresentations). Thus, the charged wires received in the United States are sufficient to establish conduct in the United States relevant to the focus of the statute.

This conclusion is supported by cases in which courts have upheld wire fraud convictions of individuals outside of the United States who were engaged in a fraud scheme that utilized wires to the United States in furtherance of the scheme. In *United States v. Kim,* 246 F.3d 186 (2d Cir. 2001), a United Nations official stationed in Croatia was convicted of wire fraud and conspiracy to commit wire fraud when he used his position to approve fraudulently inflated baggage invoices for United Nations flights. *Id.* at

187-88. Based on faxes from a United Nations official to New York that resulted in wire transfers from a New York bank to pay an invoice, the court found that the crime was domestic in nature even though the fraud scheme occurred overseas. *Id.* at 189. The court reasoned that the purpose of the wire fraud statute is to "prevent the use of our telecommunication systems in furtherance of fraudulent enterprises," and Congress intended to prohibit foreign schemes that involved the use of U.S. wires. *Id.* at 190. Likewise, in *United States v. Gilboe,* 684 F.2d 235 (2d Cir. 1982), the court upheld a wire fraud conviction where a Norwegian citizen living in Hong Kong defrauded a ship owner and the Chinese government by falsifying a grain shipment from Argentina to China. *Id.* at 237. The court found jurisdiction based on telephone conversations with a ship broker in the New York office of the ship owner and several wire transfers from China to the Bahamas routed through New York banks. *Id.* at 237-38. As these cases illustrate, it does not matter if the bulk of the scheme to defraud involves foreign activity. Because the focus of the wire fraud statute is misuse of U.S. wires to further a fraudulent scheme, the allegations that Elbaz caused such misuse are sufficient to support the conclusion that Counts Two, Three, and Four are permissible domestic applications of the wire fraud statute.

In contrast, Elbaz relies on recent cases that have rejected the notion that a single wire to or from the United States is sufficient to establish a domestic offense. *See Petroleos Mexicanos v. SK Eng. & Constr. Co. Ltd,* 572 F. App'x 60, 61 (2d Cir. 2014) (holding that a wire fraud scheme was extraterritorial despite having three financial transactions involving the

United States); *United States v. Prevezon Holdings Ltd.,* 122 F. Supp. 3d 57, 72 (S.D.N.Y. 2015). In some of these cases, district courts have concluded that the "focus" of the wire fraud statute is the scheme to defraud, such that there needs to be "substantial" conduct in the United States that is "integral" to the scheme, not simply the use of a U.S. wire in furtherance of the scheme, to establish a domestic offense. *See United States v. Gasperini,* No. 16-CR-441(NGG), 2017 WL 2399693, at *8 (E.D.N.Y. June 1, 2017); *United States v. All Assets Held at Bank Julius,* 251 F. Supp. 3d 82, 102-03 (D.D.C. 2017). *Cf Elsevier, Inv. v. Grossman,* 199 F. Supp. 3d 768, 783-84 (S.D.N.Y. 2016) (holding that the "focus" of mail fraud is the scheme to defraud).

However, these cases address the scenario in which a fraud scheme perpetrated by foreigners against other foreigners, with no U.S. nexus other than the incidental use of U.S. wires, is nevertheless charged as a domestic offense. *See, e.g., Prevezon Holdings Ltd,* 122 F. Supp. 3d at 72 (noting that both *Prevezon* and *Petroleos Mexicanos* involved a "foreign conspiracy against a foreign victim conducted by foreign defendants participating in foreign enterprises"); *Bank Julius,* 251 F. Supp. 3d at 93, 102-09 (considering a scheme in which the only identified victim was the Ukrainian Government, and the defendant committed his fraud while serving as a government official of the Ukraine, through transactions that passed through U.S. financial institutions). None of these cases establish that a scheme that defrauds U.S. victims through the use of U.S. wires is not a domestic application of the wire fraud statute. Indeed, in *Gasperini* and *Elsevier,* the

court found that there was a domestic offense because there were either U.S. victims or foreign victims with U.S. offices. *See Gasperini,* 2017 WL 2399693, at *6-9; *Elsevier,* 199 F. Supp. 3d at 783-84. Here, where the Indictment alleges that the specific victims of the charged wire fraud counts resided in the United States and received wires relevant to the scheme while in the United States, the Court finds that even if the scheme to defraud were deemed the "focus" of the offense, conduct relating to the scheme to defraud also occurred in the United States.

For similar reasons, the Court concludes that the Indictment has also alleged a domestic application of the wire fraud conspiracy statute, 18 U.S.C. § 1349. Elbaz argues that the "focus" of § 1349 is the entering of the conspiratorial agreement. In particular, Elbaz argues, without legal authority, that because a wire fraud conspiracy does not require an overt act, only the location of the agreement itself, not the location of any acts taken in furtherance of the conspiracy, is relevant.

Although case law does not provide a definitive answer to this question, it generally runs contrary to Elbaz's overly narrow position. In *Kim,* the Second Circuit made no distinction between jurisdiction over the substantive wire fraud counts and the conspiracy to commit wire fraud charge and found that where there were wire transmissions to or from the United States establishing a domestic wire fraud offense, there was likewise jurisdiction over a wire fraud conspiracy charge. *See Kim,* 246 F.3d at 191 n.2.

In the analogous context of whether there is venue for a wire fraud conspiracy, the Fourth Circuit has

held that venue is proper in any district where an overt act in furtherance of the conspiracy was committed by any one of the conspirators, not merely where the conspiratorial agreement was made. *See United States v. Day,* 700 F.3d 713, 727 (4th Cir. 2012). *Day* belies the notion that the Fourth Circuit would view a wire fraud conspiracy, even without an overt act requirement, to have occurred only at the situs of the agreement. *See id.*

In another related context, the United States Court of Appeals for the District of Columbia Circuit considered and rejected a defendant's attempt to differentiate between the extraterritorial application of a substantive offense and a related conspiracy statute and held that where Congress has authorized extraterritorial application of the substantive offense, it followed that the conspiracy offense necessarily applies extraterritorially. *United States v. Ballestas,* 795 F.3d 138, 144-45 (D.C. Cir. 2015).

Elbaz's reliance on *United States v. Melgar-Hernandez,* 832 F.2d 261 (D.C. Cir. 2016), is misplaced. Although that case held that the "essential element" of a Maryland conspiracy statute without an overt act requirement was the unlawful agreement and thus was completed upon the entry of that agreement, it concluded only that Maryland had jurisdiction over a conspiracy to commit murder outside that state. *Id.* at 265. It did not decide that the "focus" of a conspiracy for purposes of domestic application—which is notably a term broader than the term "element" or "essential element"—was limited to the situs of the agreement. *Id.*

Significantly, Elbaz's overly narrow conception of the "focus" of a wire fraud conspiracy would lead to unreasonable results. Under her theory, drug dealers could avoid domestic liability for a drug conspiracy under 21 U.S.C. § 846, which also lacks an overt act requirement, simply by meeting in Canada or Mexico to reach an agreement, even if there were numerous drug deals and other acts in furtherance of the conspiracy that occurred in the United States. A drug kingpin overseeing drug activity in the United States, but who entered into the conspiratorial agreement in Mexico, would be untouchable for that crime. Such a result illustrates the absurdity of the Elbaz's position. Accordingly, the Court concludes, as in *Kim,* that if wire fraud counts charge a domestic violation based on wires were sent to or from victims in the United States, the wire fraud conspiracy count also charges a domestic application of § 1349. *Kim,* 246 F.3d at 191 n.2.

Finally, Elbaz argues, without persuasive authority, that the application of the wire fraud and conspiracy statutes to her conduct violates due process. To establish a due process violation, Elbaz must show that the domestic nexus is so insufficient that prosecuting her under an American criminal statute would be "arbitrary or fundamentally unfair." *United States v. Murillo,* 826 F.3d 152, 156 (4th Cir. 2016). Notably, this is not a case involving foreigners defrauding foreigners in which there was incidental use of U.S. wires. The Indictment alleges that there were victims in the United States, specifically in Maryland, and that Elbaz caused wires to be sent to them in furtherance of a scheme to defraud. Thus,

there is a significant U.S. interest in preventing the defrauding of U.S. persons.

Elbaz does not seriously dispute that point, but instead argues that she did not personally take actions that affected United States interests. However, the nature of a conspiracy is that co-conspirators are responsible for the reasonably foreseeable actions of each other. *See Snead,* 527 F.2d at 591. The Indictment alleges that Elbaz supervised and trained Representatives to make false statements to defraud investors, and some of those Representatives then directly engaged with Americans over U.S. wires. Under these circumstances, it is neither arbitrary nor unfair to prosecute Elbaz in a United States court. There is no due process violation.

Accordingly, the Court will deny the Motion to Dismiss on extraterritoriality grounds as to all counts.

D. Commerce Clause

In a related argument, Elbaz moves to dismiss the conspiracy charge in Count One of the Indictment based on the claim that Congress lacks the authority pursuant to the Commerce Clause to criminalize a wire fraud conspiracy that occurred outside of the United States among foreign nationals. Specifically, Elbaz argues that Congress's constitutional authority to regulate foreign commerce does not extend the application of 18 U.S.C. § 1349 to the conduct alleged in Count One.

Under the Constitution's Commerce Clause, Congress has the authority to regulate commerce

"with foreign Nations, among the several States, and with the Indian Tribes." U.S. Const. Art. I § 8, cl. 3. The Supreme Court has interpreted the Commerce Clause as granting substantial deference to Congress, but this power is not without limits. *See United States v. Lopez,* 514 U.S. 548, 559 (1995) (striking down a criminal statute as outside congressional authority under the Commerce Clause). Under *Lopez,* Congress may regulate three broad categories of interstate activity: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities that substantially affect interstate commerce. *Id.* Congress's power to regulate foreign commerce may be broader than the power to regulate interstate commerce. *Atl. Cleaners & Dyers v. United States,* 286 U.S. 427, 434 (1932); *see also Bd. Of Trustees of Univ, of III. v. United States,* 289 U.S. 48, 56-57 (1933) (noting that Congress's authority under the Foreign Commerce Clause is plenary); *United States v. Bollinger,* 798 F.3d 201, 212 (4th Cir. 2015) (stating that "[t]he regulation of commerce with foreign nations ... requires a unitary federal voice and expansive authority").

Here, Elbaz's claim that the conspiracy charge has no nexus to the United States or to foreign commerce misreads the Indictment. Paragraph 17 specifically alleges that over a three year period from May 2014 to June 2017, in the District of Maryland and elsewhere, Elbaz conspired to commit the federal crime of wire fraud, a crime which specifically involves the use of wire communications in interstate or foreign commerce. The fact that the conspiracy has, as its object, the transmittal of wire communications "in interstate or foreign commerce," for the purpose of

executing a scheme to defraud, 18 U.S.C. § 1343, on its face implicates foreign commerce because it is an agreement to, in part, to use wires between states or between the United States and a foreign country to engage in fraud. By criminalizing conspiratorial agreements to misuse such wires for fraudulent activity, Congress operates well within its authority to regulate instrumentalities of foreign commerce, since phones and internet connections are plainly used to engage in such commerce.

From the additional description of the conspiracy in the Indictment, there is no question that the allegations specifically involve wires directly related to commerce between the United States and foreign countries. The alleged scheme involved the marketing of financial instruments, through the use of false statements, by an Israel-based company, through internetbased businesses (BinaryBook and Big Option), to victims which specifically included the individuals in the United States referenced in the Indictment. The marketing included using emails and phone calls to individuals in the United States to discuss potential transactions and notably identifies at least three specific wires to victims in the United States. The Indictment thus squarely alleges a crime that directly implicates commerce between the United States and foreign countries, not only commerce between two or more foreign nations, and thus alleges conduct squarely within Congress's authority to regulate.

Elbaz argues that the application of the wire fraud conspiracy statute here violates the Commerce Clause because the conspiracy "did not target the United

States and is therefore, at best, only tangentially related to U.S. commerce." Mot. Dismiss (Commerce) at 6, ECF No. 59. Even if the conspiracy focused more on other countries, the Indictment clearly alleges a conspiracy directed in part at the United States by virtue of allegations that the marketing of the financial instruments was directed at U.S. customers and victims. The fact that the impact of a criminal scheme on the United States may have been less than on other countries does not provide a basis to conclude that Congress cannot regulate such schemes to protect American victims, however many there are as compared to foreign victims. The fact that Elbaz caused these transmissions from overseas, if anything, strengthens this argument by bringing the conduct within the scope of the more expansive foreign commerce power.

Elbaz's contention that the Indictment does not allege that she personally directed activity toward the United States, or was aware that it was being so directed, does not support her constitutional claim. In light of the seriousness of conspiratorial activity, Congress may deem a conspiratorial agreement to use wires between the United States and foreign countries to further a scheme to defraud as worthy of regulation by criminal statutes. *See United States v. Rabinowich,* 238 U.S. 78, 88 (1915) ("For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime."). As with other conspiracies, in order to combat the substantive criminal activity directed at the United States, it may

hold members of the conspiracy liable for reasonably foreseeable acts in furtherance of the conspiracy, such as fraudulent statements to U.S. customers, even if any particular co-conspirator does not have actual knowledge of those acts. *See Singh,* 518 F.3d at 253.

Here, the Indictment alleges that Elbaz supervised and trained representatives on using false statements to market financial instruments, and that the representatives' marketing activities included selling to customers in the United States, so it is entirely foreseeable that such contacts would occur. When knowledge of facts giving rise to federal jurisdiction—such as the use of a wire communication to the United States in furtherance of a fraud—is not an element of wire fraud, such knowledge is also not necessary to establish liability for conspiracy to commit wire fraud. *See United States v. Feola,* 420 U.S. 671, 696 (1975). Therefore, whether or not Elbaz had actual knowledge of a United States nexus, Congress could still fairly seek to hold Elbaz accountable because her actions within the conspiracy, in fact, contributed to the adverse impact on U.S. foreign commerce. Accordingly, the Court will deny the Motion to Dismiss based on the Commerce Clause challenge.

E. Venue

Elbaz's final argument for dismissal is the failure to allege proper venue. Elbaz asserts that the Indictment fails to allege that any specific conduct occurred in the District of Maryland and explicitly contends that the factual allegations of the conspiracy count, if true, would not establish that the criminal activity was continued or completed in the District of Maryland. Elbaz further argues that the

communications into the District of Maryland were not foreseeable to her. Finally, she asserts that Counts Two, Three, and Four should be dismissed because they fail to proffer facts relating to wires that came from or passed through the District of Maryland in furtherance of the alleged fraud.

Under the statute addressing venue in criminal cases, a federal criminal offense "begun in one district and completed in another, or committed in more than one district," may be "prosecuted in any district in which the offense was begun, continued, or completed." 18 U.S.C. § 3237(a). With regard to conspiracy to commit wire fraud, venue is proper in any district where an overt act in furtherance of the conspiracy was committed by any one of the conspirators. *See Day,* 700 F.3d at 727; *see also United States v. Al-Talib,* 55 F.3d 923, 928 (4th Cir. 1995). Because acts by one co-conspirator in furtherance of the conspiracy can be attributed to all members of the conspiracy, a single conspirator's actions in a district can be sufficient to establish venue for other members of the conspiracy. *See Snead, 5T1* F.2d at 591 (citing *Hyde v. United States,* 225 U.S. 347 (1912)).

Here, the Indictment specifically alleges, in paragraph 17, that Elbaz and others did, "in the District of Maryland and elsewhere," "knowingly transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, pictures, and sounds for the purpose of executing the scheme and artifice." Indictment ¶ 17. Any such transmittal would qualify as an overt act in the District. *See Engle,* 676 F.3d at 415 (holding that general language stating the location of the

offense provides a sufficient basis to deny a pretrial motion to dismiss).

Beyond that allegation, the Court also can and will consider the illustrative overt acts described in paragraph 42. Although Elbaz argues that paragraph 42 cannot be considered for purposes of the conspiracy count because it was not expressly incorporated as part of the discussion relating to Count One, such rigid adherence of form over substance is not necessary. In *United States v. Duncan,* 598 F.2d 839 (4th Cir. 1979), the Fourth Circuit, faced with a similar scenario, considered language in a conspiracy count in assessing whether the indictment sufficiently stated a cause of action in a separate substantive count. *Id.* at 849 & n.5. Such consideration is permissible so long as the issue at hand is not the absence of an essential element of the offense. *Id.* Where, as here, the language provides additional facts to illustrate the elements of conspiracy which have been explicitly stated in paragraph 17, the Court will consider it.

In paragraph 42, the Indictment alleges that Elbaz, "for the purpose of executing ... the scheme to defraud, knowingly caused to be transmitted by means of wire communications in interstate commerce" three specific communications to victims in Maryland. Indictment ¶ 42. It does not matter that these wires were not necessarily themselves fraudulent in nature. In *Day,* the defendant was convicted of wire fraud, conspiracy to commit wire fraud, and other offenses relating to a scheme to defraud the Department of Defense by supplying defective spare parts for military equipment. *Day,* 700 F.3d at 716. The Fourth

Circuit held that emails sent by the defendant's co-conspirators to government officials located in Virginia constituted overt acts sufficient to establish venue. *Id.* at 727. In so ruling, the court rejected the argument that the specific overt acts were *"de minimis* in context" and "completely legal," because the relevant question is whether an overt act furthers a conspiracy, not how much the overt act furthers the conspiracy. *Id.*

Here, as in *Day,* the Indictment does not allege that the identified communications with the victims in the District of Maryland included fraudulent statements, or that Elbaz was the sender or recipient of the wire communication. But where these wire communications were alleged to have been caused by Elbaz in order to further the conspiracy to defraud investors, *see* Indictment ¶ 42, they sufficiently allege an overt act that, under *Day,* establishes venue in Maryland. *Day,* 700 F.3d at 727. In light of such allegations, Elbaz's citation to unpublished district court cases in which the court assessed whether such an overt act was alleged in the indictment does not alter the Court's conclusion. *See United States v. Jones,* No. 7:16-cf-30026, 2017 WL 1169754, at *2-3 (W.D. Va. Mar. 27, 2017); *United States v. Shusterman,* No. WDQ- 13-0460, 2014 WL 6835161, at *3-5 (D. Md. Dec. 2, 2014).

To the extent that Elbaz argues that the Indictment must allege facts showing that such overt acts were caused by or reasonably foreseeable to Elbaz, the Indictment's allegations that Representatives of BinaryBook and BigOption worked under Elbaz's supervision, and that she trained and encouraged

them to use false claims in order to increase investor deposits, are sufficient to support such a conclusion. Where Elbaz is alleged to have been part of the conspiracy, and a member of a conspiracy is responsible for the acts of others in furtherance of the conspiracy, *see Singh,* 518 F.3d at 253, she would still be responsible for wires sent by others in furtherance of the conspiracy, even if she was not specifically aware of or directly involved in their transmission. Therefore, the Court finds that venue for Count One has been sufficiently pleaded.

As for the substantive counts, Counts Two, Three, and Four, wire fraud is a "continuing offense," such that venue on a substantive wire fraud count is established when the defendant causes a wire communication to be transmitted in furtherance of the fraud. *United States* v. *Ebersole,* 411 F.3d 517, 527 (4th Cir. 2005). A wire transmittal occurs both "where it was sent and where it was received." *Id.*

Here, paragraph 42 alleges that Elbaz caused wires to be sent to Maryland for the purpose of executing a scheme to defraud. It does not matter that Elbaz was not the sender or recipient. *Ebersole,* 411 F.3d at 527. As discussed above, the allegations that Elbaz supervised and trained representatives to make false statements in order to induce more investor deposits supports the allegation that she either caused or aided and abetted the sending of these wires for the stated purpose. The Court thus finds that venue for the substantive wire fraud counts has been sufficiently pleaded.

II. Motion to Strike

Elbaz has filed a Motion to Strike Paragraph 10 of the Indictment, which states:

> While some binary options were listed on registered exchanges or traded on a designated contract market that were subject to oversight by U.S. regulators such as the Securities and Exchange Commission and the Commodities Futures Trading Commission, neither BinaryBook nor BigOption sold binary options that were traded on a legal and regulated designated contract market in the United States.

Indictment ¶ 10. Elbaz argues that paragraph 10 has no probative value for Count One of the Indictment, is disconnected from Counts Two, Three, and Four, and risks prejudicing jurors against her. Elbaz argues that the allegation in paragraph 10 is unrelated to whether she entered into a conspiracy to commit wire fraud and does not help the Government prove that Elbaz committed wire fraud or aided and abetted the commission of wire fraud. Elbaz further argues that the Government only included paragraph 10 to trigger a negative reaction by the jury by implying that Elbaz's companies should have been registered with U.S. regulators.

Under Federal Rule of Criminal Procedure 7(d), courts "may strike surplusage from the indictment." Fed. R. Crim. P. 7(d). Courts should grant motions to strike surplusage "only if it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial." *United States v.*

Williams, 445 F.3d 724, 733 (4th Cir. 2006) (quoting *United States v. Rezaq,* 134 F.3d 1121, 1134 (D.C. Cir. 1998)). A court can avoid any potential prejudice by not giving the indictment to the jury and specifically instructing the jury that the indictment is not evidence. *Williams,* 445 F.3d at 734.

The Court finds that Elbaz has failed to establish that the allegations are irrelevant. The Government asserts that paragraph 10 was included because the fact that the binary options sold by BinaryBook and BigOption should have been, but were not, listed on registered exchanges or traded on a designated contract market regulated by the SEC arguably made it more likely that there was a scheme to defraud, because a decision not to meet such a requirement may tend to reveal an intent to evade detection of the fraudulent scheme by federal authorities, and may also tend to increase the likelihood of the success of the fraud based on a lack of regulatory oversight. Although there may be other potential inferences from these facts, there is nothing impermissible about these inferences.

The allegations in paragraph 10 are neither inflammatory nor unduly prejudicial, where the failure to meet a regulatory requirement is far less inflammatory than the primary allegation of defrauding investors. Notably, in *Williams,* the court refused to strike from an indictment for a felon-in-possession charge the significantly more inflammatory allegation that the defendant was responsible for an uncharged murder. *Williams,* 445 F.3d at 733-34. The Fourth Circuit found that evidence of the uncharged murder was not unfairly

prejudicial, was probative of the charged offense, and was mitigated by the fact that the jury was instructed to consider the evidence for the limited purpose of showing that the defendant possessed the firearm. *Id.*

As trial approaches, Elbaz is free to argue that the Indictment should not be shared with the jury, or to propose a limiting instruction to prevent the jury from drawing any inappropriate inferences from paragraph 10. As for the pending Motion, however, the Court will deny the Motion to Strike because paragraph 10 is relevant and not unduly prejudicial.

III. Bill of Particulars

Elbaz seeks a bill of particulars on the grounds that because of the alleged deficiencies in the Indictment, and the Government's production of 2.5 million pages of discovery, more information is needed to allow her to prepare her defense. She requests that the bill of particulars include four classes of information. First, Elbaz seeks the identities of the individuals referenced in the Indictment as having performed acts in furtherance of the conspiracy, such as the Representatives who engaged in the three charged wire transmissions. Second, Elbaz seeks the identities of the alleged victims of the offense. Third, Elbaz seeks identification of the allegedly fraudulent statements that Elbaz made or caused to be made in furtherance of the scheme. Fourth, Elbaz seeks the identification of the location where the conspiratorial agreement was entered and of any overt acts in furtherance of the conspiracy committed in Maryland, in order to assess whether venue is proper.

The Federal Rules of Criminal Procedure require that the "indictment ... be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). The defendant may "move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits." Fed. R. Crim. P. 7(f)-. "The purpose of a bill of particulars is to enable a defendant to obtain sufficient information on the nature of the charge against him so that he may prepare for trial, minimize the danger of surprise at trial, and enable him to plead his acquittal or conviction in bar of another prosecution for the same offense." *United States v. Schembari,* 484 F.2d 931, 935 (4th Cir. 1973). However, "[a] bill of particulars is not to be used to provide detailed disclosure of the government's evidence in advance of trial." *United States v. Automated Medical Labs, Inc.,* 770 F.2d 399, 405 (4th Cir. 1985).

As to the first request, the Indictment does not identify Elbaz's co-conspirators except through pseudonyms. As discussed above, a conspiracy indictment does not need to name all coconspirators because it is "the existence of the conspiracy, rather than the particular identity of the conspirators" that is the essential element of the crime. *Am. Waste Fibers Co., Inc.,* 809 F.2d at 1046. But where specific individual co-conspirators are referenced in the Indictment in relation to specific acts, including the substantive wire fraud counts, Elbaz would be unable to prepare her defense without knowing who these individuals are. The Government asserts that many of these individuals have already been identified through its voluminous document production.

Although the Government has produced a smaller collection of documents specifically referenced in the Indictment and contends that those documents reveal the identities of most, but not all, of the Managers and Representatives referenced in the Indictment, Elbaz still asserts that she is not certain of the identities of some of these co-conspirators.

In a Supplement to the Government's Response to the Defendant's Motion for a Bill of Particulars, ECF No. 82, the Government reports that it has provided Elbaz with a key identifying the Managers and Representatives referenced in the Indictment. Based on this representation, the Court finds that there is no need for a Bill of Particulars on this point and will deny the Motion on this issue. *See United States v. Urban,* 404 F.3d 754, 772 (3d Cir. 2005) (noting that access to materials through discovery weakens the argument for a bill of particulars). If Elbaz disagrees that the identities of these alleged co-conspirators have been produced, it may renew its motion on this point.

Second, as to the identity of victims, the scheme as described in the Indictment may have had a very significant number of victims. The Government need not identify them all. *See Butler v. United States,* 317 F.3d 249, 256 (8th Cir. 1963). However, where the Indictment specifically references three victims in Maryland, Elbaz should have those names in order to prepare her defense. In the absence of safety concerns, the Court will require the Government to state the names of Victims A, B, and C referenced in the Indictment. *See United States v. Magalnik,* 160 F. Supp. 3d 909, 918 (W.D. Va. 2015) (in a case charging

the crime of harboring aliens illegally, requiring a bill of particulars stating the names of all foreign nationals allegedly harbored illegally).

Third, as to false statements made or caused to be made by Elbaz, the voluminous discovery makes it difficult for the defense to identify which statements by Elbaz will be at issue at trial. In *Magalnik,* the court ordered the Government to file a bill of particulars to list the specific documents out of 4,125 pages that "it intends to introduce at trial and explain[], in general terms, how each application is believed to be false or fraudulent." *Id.* In its Supplement, the Government reports that it has provided an index identifying all emails sent by Elbaz that have been produced, as well as two recorded statements. It has not reported how many emails are listed on that index. Although such disclosures are consistent with the discovery requirements of Rule 16, they do not address Elbaz's specific request for identification of the false statements made by or caused by Elbaz in furtherance of the wire fraud.

Given the volume of discovery and the broad time frame of the alleged conspiracy, the Court concludes that a bill of particulars is warranted. Although the Court will not require the Government to identify all false statements caused by Elbaz, it will direct the Government to include in its bill of particulars a list of the allegedly false statements made directly by Elbaz, if any, that it intends to introduce at trial, including the date of the statement and the person to whom it was made. *United States v. Rogers,* 617 F. Supp. 1024, 1029 (D. Colo. 1985) (requiring a bill of

particulars on the allegedly false statements made by defendants).

Fourth, Elbaz's identification in a bill of particulars of overt acts performed in Maryland is not necessary. The Court has already determined, based on the facts alleged in the Indictment, that venue is proper.

CONCLUSION

For the foregoing reasons, Elbaz's Motions to Dismiss are DENIED, the Motion to Strike is DENIED, and the Motion for a Bill of Particulars is GRANTED IN PART and DENIED IN PART. A separate Order shall issue.

Date: September 7,2018

THEODORE D. CHUANG
United States District Judge

APPENDIX C

FILED: November 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4019
(8:18-cr-00157-TDC-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LEE ELBAZ, a/k/a Lena Green

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk