No.

In the Supreme Court of the United States

JEFFREY BATIO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Matthew A. Lembo
PERKINS COIE LLP
1155 Ave. of the Americas,
22d Floor
New York, NY 10036

Jonathan I. Tietz
PERKINS COIE LLP
700 13th St. NW Suite 800
Washington, DC 20005

Andrew T. Dufresne
Counsel of Record
John S. Skilton
PERKINS COIE LLP
33 E. Main St. Suite 201
Madison, WI 53703
(608) 663-7460
adufresne@perkinscoie.com

QUESTION PRESENTED

Proving federal mail or wire fraud requires proving a defendant's specific intent to defraud. A defendant's good faith that his representations are true is a defense to fraudulent intent.

Alleged fraudulent schemes can vary in nature and scope. An alleged fraudulent scheme might involve just one kind of misrepresentation repeated to many different people. On the other hand, an alleged fraudulent scheme might involve many different kinds of alleged misrepresentations, and so a defendant might have different intent with respect to different kinds of statements.

Under the operative rule in the Seventh Circuit, a jury is required to disregard a defendant's good faith across the board if the defendant makes any false and fraudulent misrepresentations. Over petitioner's objection, the trial court so instructed the jury. The indictment in this case charged petitioner with a scheme that allegedly included financial misrepresentations, technological misrepresentations, track-record misrepresentations, and marketing misrepresentations. The jury convicted petitioner of mail and wire fraud.

The question presented is as follows:

Does it improperly deprive a defendant of his defense of good faith when a jury is instructed that, if the jury finds *any* "false and fraudulent representations," it must disregard a defendant's good faith in *all* representations?

STATEMENT OF RELATED PROCEEDINGS

United States Court of Appeals for the Seventh Circuit:

United States v. *Batio*, No. 21-3195 (Dec. 6, 2023; Jan. 18, 2024)

United States District Court for the Northern District of Illinois:

United States v. *Batio*, No. 16-cr-425 (Dec. 15, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

OTHER AUTHORITIES

In the Supreme Court of the United States

JEFFREY BATIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey Batio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a–8a) affirming Mr. Batio's conviction and sentence is unreported and appears at 2023 WL 8446388. The order of the court of appeals (App., *infra*, 40a) denying rehearing is unreported and appears at 2024 WL 198948. The opinion of the district court (App., *infra*, 9a–39a) denying petitioner's motion for judgment of acquittal or alternatively for a new trial is unreported and appears at 2020 WL 7353442. The district court's ruling (App., *infra*, 41a–47a) overruling Mr. Batio's jury instructions is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2023, and the court of appeals denied rehear-

ing on January 18, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1341 of the federal criminal code (Title 18) defines mail fraud:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. …

18 U.S.C. § 1341; see also App., *infra*, 65a (in full).

Section 1343 of the federal criminal code defines wire fraud:

> **Fraud by wire, radio, or television**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. …

18 U.S.C. § 1343; see also App., *infra*, 66a (in full).

INTRODUCTION

Courts have mostly cast aside the old and discredited doctrine of *falsus in uno, falsus in omnibus*—that is, the common-law notion that a witness who falsely testifies about one thing must be disbelieved about all things. The problem with that idea is that it removes a jury's discretion to determine truthfulness of individual statements. But some last vestiges of the doctrine remain, albeit under other names. That is this case.

This prosecution involved a wire-and-mail-fraud indictment, but it was an unusual one. Most fraud schemes are built on a central lie: a pyramid scheme, Ponzi scheme, a fake charity, a false identity. This one was not. Petitioner ran two small tech companies that tried very ambitiously to transform how consumers thought about multi-screen computing devices. They were not false moneymaking fronts but real product-development efforts. For a variety of reasons, however, those devices did not reach mass production, and the government cried foul. The government

alleged that *many* different categories of things petitioner Mr. Batio said were *all* lies, and in so doing argued that *everything* about his two technology companies was a fraudulent scheme.

For each of the statements that the government painted as fraudulent, Mr. Batio presented evidence that he believed the things he said. His defense turned in part on his good faith in the truth of those statements. But the district court, over petitioner's objection, instructed the jury that his good faith defense did not apply in the event that the jury found *some* "false and fraudulent representations." The consequence was that the jury was instructed to put petitioner on the hook for the whole sweep of his businesses' fundraising—to the tune of $5+ million—if the jury found that he had fraudulently misrepresented *anything*, even if the jury thought he believed the rest of what he said.

Things would have been different in another court. Although the courts of appeals agree that good faith is an absolute defense to mail or wire fraud, they do not agree on what happens if the jury finds only *some* misrepresentation. In some, like the Seventh Circuit, juries are instructed to negate good faith across the board if a defendant makes any false and fraudulent misrepresentation. Others define what does or does not constitute good faith, but they do not *negate* it wholesale.

This Court should grant the petition for a writ of certiorari, reverse the decision of the court of appeals, and clarify that a single false and fraudulent misrepresentation does not categorically negate good faith for *all* representations.

STATEMENT

A. Factual background

1. Jeffrey Batio spent nearly two decades of his life trying to develop revolutionary computing products for the masses. Pet'r C.A. Br. 5; App., *infra*, 71a. Mr. Batio launched his first tech company, Xentex, in the late 1990s to develop a multi-display laptop product called the Voyager. Pet'r C.A. Br. 5–7. But after the Voyager's contract manufacturer went bankrupt, Mr. Batio was unable to bring the product to a full-scale launch. *Id.* at 7.

2. After Xentex, Mr. Batio eventually founded and ran two other companies, Armada Systems LLC and Idealfuture, Inc., whose entire existence between 2003 and 2016 the government charged here as fraudulent. App., *infra*, 10a.

Mr. Batio founded Armada in 2003 to develop a multi-display desktop station called the Radian. See App., *infra*, 9a, 72a. Mr. Batio funded Armada's development projects by selling equity shares in the company. App., *infra*, 10a, 72a. After spending years designing the product and building several prototypes, Armada experienced financial difficulties as well and was never able to mass produce a product. See App., *infra*, 2a.

In 2013, Batio founded Idealfuture, which focused on developing a three-in-one mobile product called the Dragonfly. App., *infra*, 10a. Rather than sell equity shares, though, Batio turned to crowdfunding on the website Indiegogo, App., *infra*, 10a, 72a, which allowed individuals interested in his product to contribute to its development.

3. The government indicted Mr. Batio in June 2016 with respect to both Armada and Idealfuture. App., *infra*, 10a. It contended that neither firm had delivered a product. App., *infra*, 2a, 73a. At that time, Idealfuture had not

yet shuttered its doors or stopped its product-development efforts. To no surprise, it had to do so once Mr. Batio was indicted.

B. Procedural history

1. The government indicted Mr. Batio and alleged that the entire operation of his two companies Armada and Idealfuture was a criminally fraudulent scheme. See App., *infra*, 10a, 71a–83a.

The government indicted Mr. Batio on twelve counts of mail and wire fraud. See App., *infra*, 9a, 76a–83a. This case did not involve any sort of easy get-rich grift. Nor did it involve a typical fraudulent scheme characterized by a particular fraudulent misrepresentation common to the scheme's victims—like a Ponzi scheme, or using a false identity or fundraising for a fake charity. Instead, the government alleged a suite of *different kinds* of misrepresentations operating together. See also U.S. C.A. Br. 4, 25, 26 (government on appeal sorting the alleged misrepresentations into separate categories). Together, argued the government, those misrepresentations constituted a fraudulent scheme that deprived victims of over $5 million. App., *infra*, 10a.

The government alleged that Mr. Batio devised a scheme to defraud investors beginning in 2003, which he then perpetrated throughout the entire existence of both Armada and Idealfuture. *Id.* at 10a, 71a–75a ¶¶ 1–13. The indictment described that scheme as a series of distinct misrepresentations. *Id.* at 73a–76a ¶¶ 2–10, 12. For instance, the indictment alleged that Mr. Batio misrepresented the readiness of Armada's and Idealfuture's product development efforts, *id.* at 73a–75a ¶¶ 4–5, 8; that Mr. Batio misrepresented the status of partnership, licensing, or marketing discussions, *id.* at 74a ¶ 6; that Mr. Batio misrepresented the resources and staff that Ar-

mada and Idealfuture had, *id.* at 74a ¶ 7; that Mr. Batio misrepresented how funds would be used, *id.* at 75a ¶ 9; that Mr. Batio misrepresented that he would make Armada's financial records available for inspection, *id.* at 75a ¶ 10; and that Mr. Batio misrepresented that Armada's or Idealfuture's products would be sent to the public in particular time periods, *id.* at 74a–76a ¶¶ 8, 12.

2. The government tried Mr. Batio in May 2019. App., *infra*, 10a. The government's case at trial was circumstantial. Mr. Batio was not living the high life or enriching himself. There was no witness who said that Mr. Batio did not believe in his ventures. There was no dispute that Mr. Batio's companies actually engaged in product development; the government disputed whether those efforts were as far along as he claimed and whether those steps ultimately provided any value to funders or were instead just wasteful spending. See, *e.g.*, U.S. C.A. Br. 3–4, 68. The government's case was largely that Mr. Batio's representations were too improbable, in hindsight, not to have been knowing lies. See, *e.g.*, U.S. C.A. Br. 44–47. In turn, Mr. Batio's defense was that he said the things he did in good faith. App., *infra*, 46a. In other words, even if things would later change, he did not know that at the time based on the information he had. App., *infra*, 14a. His defense was that his product-development spending was not frivolous, that he worked with numerous third-party contractors on the basis of what they told him, and that he genuinely believed the things he told investors—even in those instances where others disagreed. In other words, Mr. Batio believed that he would perform the specific things that he said he would. Mr. Batio had different, specific evidence for each of the government's alleged types of fraudulent misrepresentations.

For instance:

- *Market readiness.* The government argued that Mr. Batio lied about the market-readiness or expected timeline of his products. App., *infra*, 15a. But Mr. Batio presented evidence that he worked heavily with third-party contractors and relayed their views, but also in some cases disagreed with their assessments based on his own judgment. See, *e.g.*, Pet'r C.A. Br. 48–52; Pet'r C.A. Reply Br. 27–28. He also presented evidence that those who worked directly with him believed him to be determined, excited, and enthusiastic about his technology. See, *e.g.*, Pet'r C.A. Br. 49–50.
- *Price point.* The government argued that Mr. Batio lied about the expected price point of the Radian and Dragonfly products as inconsistent with the likely costs of production. See, *e.g.*, U.S. C.A. Br. 5–7, 16–18, 45. But Mr. Batio presented evidence that early products are often sold at a loss, that he told investors of expected early losses, and that much of his pricing was aimed at capturing market share. See, *e.g.*, Pet'r C.A. Br. 18; Pet'r C.A. Reply Br. 10, 24–25.
- *Licensing discussions.* The government argued that Mr. Batio lied about the status of licensing discussions, such as with Sony. App., *infra*, 24a. But Mr. Batio presented evidence that he was meeting with a Sony executive in a manner that a reasonable person would view as promising. See, *e.g.*, Pet'r C.A. Br. 47–48; Pet'r C.A. Reply Br. 27.

- *Use of funds.* The government argued that Mr. Batio misrepresented to contributors or investors how the funds he raised would be used. App., *infra*, 18a. But Mr. Batio argued that he had not misrepresented how those funds would be used and had not promised to limit their use in any particular way. App., *infra*, 19a–20a; see also, *e.g.*, Pet'r C.A. Br. 18–19.

In the end, the government invited the jury to find that *everything* Mr. Batio said was essentially a lie. But the jury could have believed in Mr. Batio's good faith with respect to *some* categories (*e.g.*, technological readiness or likely pricing), regardless of what it believed about *others* (*e.g.*, access to financial records).

Mr. Batio moved at the close of the government's case and after trial for a new trial or a judgment of acquittal. App., *infra*, 9a–10a. The district court denied Mr. Batio's motion, reasoning in part that, for each category of alleged misrepresentation, there was sufficient evidence for the jury to find in the government's favor.

3. The case went to the jury. Over Mr. Batio's objection, the district court instructed the jury that one false and fraudulent misrepresentation would suffice to negate his good faith for *all* representations across the vast scope of the alleged scheme. See App., *infra*, 59a.

The court did so according to the Seventh Circuit's pattern jury instructions, App., *infra*, 14a (citing Seventh Circuit Pattern Jury Instructions (2012 ed.)), which that court of appeals presumes to accurately state the law, *United States* v. *Foy*, 50 F.4th 616, 623 (7th Cir. 2022).

The district court first instructed the jury as follows with respect to the defense of good faith:

> If the defendant acted in good faith, then he lacked the intent to defraud required to prove the offenses of mail and wire fraud charged … . The defendant acted in good faith if, at the time, he honestly believed the truthfulness and validity of the representations and promises that the government has charged as being false or fraudulent, as described in the portion of the indictment setting forth the scheme.
>
> The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud as charged … .

App., *infra*, 59a; *id.* at 14a, 67a–68a. But the district court immediately cabined that good-faith instruction with a conditional negation *in the event that* the defendant made false, fraudulent statements:

> A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud *if the defendant also knowingly made false and fraudulent representations*.

App., *infra*, 68a (emphasis added); *id.* at 14a, 59a; see also *id.* at 69a (pattern jury instruction 6.10). Mr. Batio objected to this conditional instruction that negated his good faith defense "if" he "also knowingly made false and fraudulent representations." App., *infra*, 14a, 46a.

4. The jury convicted Mr. Batio of mail and wire fraud in a general all-or-nothing verdict, App., *infra*, 84a, and the district court rejected his motion for acquittal or a new trial, App., *infra*, 9a-10a.

The district court sentenced Mr. Batio to 96 months in prison and imposed $5 million in restitution based on the *entirety* of his two businesses' fundraising over thirteen years. App., *infra*, 88a–89a; see also App., *infra*, 7a; Pet'r C.A. Br. 26, 66.

5. Mr. Batio appealed to the Court of Appeals for the Seventh Circuit. The court of appeals affirmed his conviction and sentence. App., *infra*, 1a–8a. In so doing, the Seventh Circuit rejected Mr. Batio's argument that he was entitled to acquittal or a new trial. App., *infra*, 2a–3a.

The Seventh Circuit also rejected Mr. Batio's challenge to the jury instructions. App., *infra*, 3a–5a. The court of appeals reasoned that the objected-to instruction appeared in the circuit's pattern jury instructions. App., *infra*, 4a. But the court acknowledged that the language of the instruction "may not be the most felicitous way of making the point" and that the "committee in charge of supervising the circuit's pattern jury instructions may want to review the subject." App., *infra*, 5a.

Mr. Batio also petitioned for panel and en banc rehearing, which the Seventh Circuit denied. App., *infra*, 40a.

REASONS FOR GRANTING THE PETITION

The government alleged that Mr. Batio ran an expansive thirteen-year expansive scheme comprising a collection of various types of misrepresentations: those about technology, about market-readiness, about pricing, about licensing, and about use of funds. The government's theory was that *every aspect* of Mr. Batio's funding was fraudulent.

At trial, Mr. Batio had to present evidence to counter each of the different categories of alleged misrepresentations that the government advanced. But the district court made things even worse by instructing the jury in a way

that deprived Mr. Batio of his full good faith defense. Mr. Batio's defense was that he believed the things he said and promised, even if others later expressed doubts. But the district court instructed the jury that it could disregard *all* of Mr. Batio's good faith if it found *any* "false and fraudulent" misrepresentations. After an eleven-day trial, the jury returned a guilty verdict. And the court of appeals upheld the contested jury instruction as properly stating the law.

The various courts of appeals agree that good faith is an absolute defense to mail or wire fraud. But they disagree about what happens to that defense if a jury finds *some* misrepresentation. In some, like the Seventh Circuit, juries are instructed to negate good faith across the board if a defendant makes any false and fraudulent misrepresentation. Other circuits are not so extreme, and simply make clear that *general overall optimism* is not the same as good faith without *negating* good faith. Under the Seventh Circuit's categorical approach, Mr. Batio was convicted and sentenced based on the whole $5+ million that his companies raised over thirteen years, even though the jury, in convicting, could have thought that he genuinely believed *nearly everything* he told funders.

This Court should grant the petition for a writ of certiorari, reverse the decision of the court of appeals, and clarify that a single false and fraudulent misrepresentation does not categorically negate good faith for *all* representations.

A. The Courts of Appeals are divided on whether proving just one misrepresentation suffices to negate a defendant's good faith across the scope of an entire alleged fraudulent scheme.

1. The courts of appeals that have criminal jurisdiction all agree that mail and wire fraud are specific-intent

crimes that require "intent to defraud." *United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006); see also, *e.g.*, *United States* v. *Young*, 470 U.S. 1, 32 (1985) (Brennan, J., concurring in part and dissenting in part); *United States* v. *Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996); *United States* v. *Walker*, 191 F.3d 326, 334 (2d Cir. 1999); *United States* v. *Carbo*, 572 F.3d 112, 116 (3d Cir. 2009); *United States* v. *Wynn*, 684 F.3d 473, 478 (4th Cir. 2012); *United States* v. *Frost*, 125 F.3d 346, 354 (6th Cir. 1997); *United States* v. *Weimert*, 819 F.3d 351, 355 (7th Cir. 2016); *United States* v. *Hagen*, 917 F.3d 668, 673 (8th Cir. 2019); *United States* v. *Garlick*, 240 F.3d 789, 792 (9th Cir. 2001); *United States* v. *Smith*, 133 F.3d 737, 742 (10th Cir. 1997); *United States* v. *Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). Mail and wire fraud require a "scheme … to defraud." 18 U.S.C. §§ 1341, 1343; see also *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008) ("The gravamen of the offense is the scheme to defraud … ."). To be guilty, a defendant must therefore possess specific fraudulent intent with respect to the charged scheme.

The courts of appeals also all agree that good faith—that is, an "honest belief in the truth of representations made by a defendant"—is a defense to fraudulent intent. See, *e.g.*, *United States* v. *Alkins*, 925 F.2d 541, 549–550 (2d Cir. 1991) ("Good faith is a complete defense to a mail fraud charge."); see also *New England Enters., Inc.* v. *United States*, 400 F.2d 58, 71 (1st Cir. 1968) ("It is settled law that good faith is a complete defense to a charge of mail fraud." (citing *Durland* v. *United States*, 161 U.S. 306 (1896))); *United States* v. *Khorozian*, 333 F.3d 498, 508 (3d Cir. 2003); *United States* v. *Bakker*, 925 F.2d 728, 738 (4th Cir. 1991); *United States* v. *Goss*, 650 F.2d 1336, 1344 (5th Cir. 1981); *United States* v. *Wall*, 130 F.3d 739, 746 (6th Cir. 1997); *United States* v. *Alexander*, 743 F.2d 472, 478 (7th Cir. 1984); *United States* v. *Bishop*, 825 F.2d 1278,

1283 (8th Cir. 1987); *United States* v. *Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979); *United States* v. *Alexander*, 849 F.2d 1293, 1301 (10th Cir. 1988); *United States* v. *Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984); *United States* v. *Diggs*, 613 F.2d 988, 1000 n.67 (D.C. Cir. 1979); *Young*, 470 U.S. at 32 (Brennan, J., concurring in part and dissenting in part) (explaining that, as a "specific-intent crime[]," "good faith therefore stands as a complete defense").

The courts of appeals do not agree, however, on how the good faith defense works if an alleged fraudulent scheme involves many different categories of alleged misrepresentations. That matters. Some allegedly fraudulent schemes are simple, like collecting checks for a fake charity. But other allegations are more complicated, and the government might allege that a defendant made many different kinds of fraudulent misrepresentations on issues like financials, technical capability, intellectual property, marketing, or the like.

The pattern jury instructions among the courts of appeals reflect a divide in whether *particular* false representations negate a defendant's good faith *across the board*. The instructions generally fall into two categories: either *negating* or *defining* good faith.

Instructions that negate good faith: The Seventh Circuit's pattern instruction, as explained above, categorically negates good faith in the event that the jury finds one applicable misrepresentation. Joining the Seventh Circuit in that categorical approach is the Sixth Circuit, whose pattern instructions state: "A defendant does not act in good faith if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others." Sixth Circuit Pattern Criminal Jury In-

structions § 10.04 (Mar. 21, 2021); *United States* v. *Semrau*, 693 F.3d 510, 528 (6th Cir. 2012) (endorsing Instruction § 10.04 as "sufficient to convey the essential legal elements" at issue). The Eleventh Circuit uses a categorical-negation instruction: "But an honest belief that a business venture would ultimately succeed doesn't constitute good faith if the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent." Eleventh Circuit Pattern Criminal Jury Instructions S17 (Mar. 10, 2022); *United States* v. *Del Campo*, 695 F. App'x 453, 457 (11th Cir. 2017) (citing approvingly the substance of the good-faith instruction while finding no error in failing to provide it); *United States* v. *Blanchet*, 518 F. App'x 932, 952 n.10 (11th Cir. 2013) ("But an honest belief that a business venture would ultimately succeed doesn't constitute good faith *if* the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent." (emphasis added)); *United States* v. *Beck*, No. 21-13582, 2023 WL 5016614 (11th Cir. Aug. 7, 2023) (same).

Instructions that define good faith: Other circuits' pattern instructions define good faith without conditionally negating it. Those instructions make clear that a defendant's belief in ultimate success *is not itself* a defense, but they do not phrase that point as a *negation* of good faith that is otherwise present.

For instance, the Ninth Circuit's pattern instructions provide: "You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant's belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime." Manual of Model Criminal

Jury Instructions for the District Courts of the Ninth Circuit § 4.13 Comment (Aug. 2023) (citing *United States* v. *Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993)). Other courts' instructions do not include such limiting language whatsoever, such as the First Circuit: "Even if you find that there were false statements or misrepresentations or omissions of material facts, they do not amount to fraud unless you also find that they were done with fraudulent intent. A defendant acts in good faith when he actually believed, one, that the plan would succeed; two, that promises made be kept; and, three, that representations made would be fulfilled." Pattern Criminal Jury Instructions for the District Courts of the First Circuit 158, 161 n.10 (Feb. 2015) (citing *United States* v. *Mueffelman*, 470 F.3d 33, 37, 41–42 (1st Cir. 2006)). The upshot is that many circuits have approved instructions that do not *negate* good faith but instead clarify that that a generalized belief in eventual success despite a knowing misrepresentation *is not in itself* good faith. See, *e.g.*, *Mueffelman*, 470 F.3d at 37 & n.2 ("While good faith is a defense to mail fraud, an honest belief in the ultimate success of an enterprise *is not, in itself, a defense*." (emphasis added) (quoting *Beecroft*, 608 F.2d at 757)); *United States* v. *Diamond*, 430 F.2d 688, 691 (5th Cir. 1970) ("The trial court was correct in stating that an honest belief in the ultimate success of the project *is not in itself a defense*." (emphasis added)); *United States* v. *Lombardo*, 582 F. App'x 601, 618 (6th Cir. 2014) ("[A] defendant's honest belief in the ultimate success of a venture is not in itself a defense to a charge of mail fraud." (citing *United States* v. *Stull*, 743 F.2d 439, 441, 445–446 (6th Cir. 1984))); see also *United States* v. *Preston*, 634 F.2d 1285, 1294–1295 (10th Cir. 1980) ("It is true that good faith is a defense in a mail fraud case. Good faith is employed to mean a genuine belief that the information being sent or given is true. Good faith does not mean an ultimate

hope or even faith that eventually the project will come out even.").

The Fourth, Eighth, and Ninth Circuits have approved instructions in between the Sixth, Seventh, and Eleventh Circuits' conditional negation and the other circuits' not-in-itself-a-defense formulation. *Bakker*, 925 F.2d at 738 ("[A]n honest belief on the part of the defendant that a particular business venture was sound and would ultimately succeed, would not in and of itself constitute good faith as used in these instructions *if* in carrying out that venture the defendant knowingly made false or fraudulent representations to others with specific intent to deceive them." (emphasis added)); *United States* v. *Cheatham*, 899 F.2d 747, 751 (8th Cir. 1990) ("On the other hand an honest belief on the part of the defendant that a particular business venture was sound and would ultimately succeed, would not in and of itself, constitute good faith … if in carrying out that venture the defendant knowingly made false or fraudulent representations to others with a specific intent to deceive them."); *United States* v. *Sigillito*, 759 F.3d 913, 939 (8th Cir. 2014) (same); *United States* v. *Burlingame*, 172 F. App'x 719, 721 (9th Cir. 2006) ("[A]n honest belief on the part of a defendant that a particular business venture was sound and would ultimately succeed would not in and of itself constitute good faith … if, in carrying out that venture, the defendant knowingly made false or fraudulent … representations to others with the specific intent to deceive them."). While those instructions are still conditional, they merely make clear what is and is not "good faith"—they do not negate the defense across the board if even one misrepresentation occurs.

At least two circuit courts have found conditional good-faith jury instructions to be problematic. *United*

States v. *Basile*, 570 F. App'x 252, 257 (3d Cir. 2014) (similar instructions were "confusing" because knowingly false statements might be relevant to one subject but not necessarily to another); *United States* v. *Rossomando*, 144 F.3d 197, 199 (2d Cir. 1998) (rejecting jury instruction that "[n]o amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the [victims] will excuse fraudulent actions or false representations by him to obtain money").

2. The upshot is this: In some circuits, a jury that concludes that a defendant has made one false or fraudulent misrepresentation can disregard that defendant's good faith as to all the other alleged misrepresentations within that scheme, no matter how broad the scheme or how narrow the misrepresentation.

That is what can happen in the circuits with a negating-good-faith instruction—and it is what happened in this case, as explained *infra*. On the other hand, the circuits with a defining-good-faith instruction simply make clear that vague overall good intentions don't shield a defendant from the consequences of particular false and fraudulent misrepresentations. But the defining-good-faith instructions also allow for a situation in which a defendant might make *some* false and fraudulent misrepresentations but still have good faith with respect to *most or all* of the representations within the scope of the alleged scheme.

3. This Court should resolve the disagreement among the circuits by granting the petition for a writ of certiorari and holding that establishing one false and fraudulent misrepresentation does not *categorically* negate a defendant's good faith for *all* alleged misrepresentations across the scope of an alleged fraudulent scheme.

That rule is correct because mail and wire fraud are specific-intent crimes that require showing an intent to defraud with respect to the alleged fraudulent scheme. See *supra*. It is also correct because holding otherwise would perpetuate an approach resembling the discredited doctrine of *falsus in uno, falsus in omnibus*, which Wigmore called an "absolutely false maxim." 3A Wigmore, Evidence in Trials at Common Law, § 1008, p. 982 (James H. Chadbourn ed., rev. ed. 1970); see also 4 A.L.R.2d 1077, § 3 (explaining that most jurisdictions have now rejected mandatory instruction under *falsus in uno* rule requiring jury to disregard testimony of witness found to willfully testify falsely as to one matter).

If, as here, the alleged scheme is predicated on several different types of misrepresentations—made at different times and contexts—showing one is not necessarily sufficient to establish an intent to defraud over the *full breadth of the scheme alleged* in the indictment. If so, making one false statement or misrepresentation does not categorically undo a defendant's good faith in other statements and representations he genuinely believed to be true. The only way to comport with due process is for the government to prove a defendant's fraudulent intent in a manner commensurate with the scheme alleged.

B. The Seventh Circuit's decision was incorrect.

1. The Seventh Circuit's rule *requires* the jury to categorically negate a "good faith" defense for one misrepresentation.

The Seventh Circuit follows the minority view that just one misrepresentation is enough to categorically negate a defendant's good faith in all representations. App., *infra*, 59a, 69a ("[a] defendant's honest and genuine belief that he will be able to perform what he promised *is not a*

defense to fraud *if* the defendant also knowingly made false and fraudulent representations" (emphasis added)).

In situations like this where the government defines a scheme using different categories of misrepresentations, made at different times and establishing a course of conduct of different scopes, and involving different corporate entities, it is possible that the government might prove a false statement or misrepresentation in one category (but not the others), and that some statements (but not others) might be made in good faith. Logically, a defendant in such a case would not have fraudulent intent with respect to *the scheme alleged*. Yet in the Seventh Circuit, that would still lead to a conviction for the full scope of the scheme alleged. Indeed, because the Seventh Circuit's instructions unambiguously cabin the good faith defense with an instruction that it "is not a defense" if a defendant makes false and fraudulent representations, the jury has no wiggle room. It *must* disregard good faith if it finds a relevant misrepresentation—no matter how strong the faith and no matter how small the fraudulent misrepresentation.

The implications of a categorical-negation instruction go beyond mere conviction. In the Seventh Circuit and the others that have adopted a categorical negation of good faith, that also means that defendants are at risk of *oversentencing*, because they may only have fraudulent intent for a fraction of an alleged scheme but be sentenced based on the whole thing.

2. Mr. Batio is entitled to a new trial because the jury could have erroneously convicted based on finding just one fraudulent misrepresentation.

Mr. Batio is entitled to a new trial with proper jury instructions that do not permit the jury to categorically

negate his good faith as to *all* alleged misrepresentations if the government proves *one*.

The correct rule is that, where an alleged scheme is based on various alleged misrepresentations, a jury cannot be instructed to disregard a defendant's good faith as to all representations within the scope of the scheme *simply because* it finds one misrepresentation. That rule holds the government to its proof to show specific intent to defraud that is commensurate with the alleged scheme.

In this case, if the jury followed the instructions that the district court gave, it could have convicted on a legally impermissible theory that negated Mr. Batio's good faith across the board if it thought that he made even one false and fraudulent misrepresentation. Indeed, the jury was *required* to.

It is no answer to suggest that a jury *could* have found *all* of Mr. Batio's statements to be fraudulent, because the jury's verdict was general. See *Ciminelli* v. *United States*, 598 U.S. 306, 316–317 (2023) (rejecting argument for alternative basis for affirmance based on facts in the record upon which a jury could have found guilt under permissible theory because instructed theory was erroneous). Because "the jury's verdict was a general one," there is "no way of knowing" whether the jury convicted Mr. Batio on a legally impermissible basis, which means the conviction must be set aside and Mr. Batio be granted a new trial. *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979).

There is indeed a substantial risk that the jury could have thought one or a small number of statements were false and fraudulent. The alleged misrepresentations fell into different categories—those about market-readiness, those about Mr. Batio's own history, and those about Mr. Batio's use of funds. U.S. C.A. Br. 4, 25–26. The government also sorted them into different timeframes—those

in 2005–2006, in 2007, in 2008, in 2009–2012, in 2013–2014, in 2015, and in 2016, corresponding to different phases of Mr. Batio's two businesses. C.A. Br. 5–7, 10, 12–13, 16, 21.

It is more plausible that the jury found *one or a few* of those statements to be misrepresentations than that it found *most or all* of them to be. For instance, a jury might have concluded that Mr. Batio's representations about licensing with Sony were unwarranted while still agreeing that he was reasonable to repeat what his contractors told him regarding technological readiness—or vice versa. That is especially true because the purpose of Mr. Batio's businesses was not personal enrichment but technological development. The district court's comments at the sentencing phase underscore that the jury could easily have concluded that much of what Mr. Batio said was in good faith and that his efforts were genuine:

> He wanted to be a success. That's what he was using the money for. He wasn't using it to go on expensive vacations or buy luxury goods or anything of that nature.
>
> But to say that that, by itself, means he wasn't engaged in fraud and that his intentions were pure, it—even if accurate, it doesn't really tell the whole story. …
>
> You are correct that he did not spend the money that he was collecting from investors for luxury goods, necessarily. He was supporting himself but not to the tune of millions. And he wasn't buying—going on expensive vacations or using the money to gamble or to engage in drug use. There is no indication of that at all. At the same time, that by itself doesn't mean that he wasn't engaged in a fraud.

> I know that he had what he believes are good intentions. But the fact is—again, this was an instruction that we gave to the jurors over Ms. Gambino's objection, I believe—is that a defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.
>
> So in recognizing that Mr. Batio hoped that it would all work out well for him, I can't look past the fact that he made, really, knowing false representations … .

App., *infra*, 93a–95a. The length of jury deliberations makes it more likely that the jury found one false and fraudulent misrepresentation (and therefore found enough under the instructions to negate Mr. Batio's defense) than to evaluate all the evidence and find a substantial number of false and fraudulent misrepresentations commensurate with the scope of the alleged scheme. After an eleven-day trial, the jury deliberated for mere minutes before returning their verdict, Pet'r C.A. Br. 24—which is more consistent with having found one or a few misrepresentations than finding all or most.

Things would have been different in a circuit that does not use negating-good-faith instructions. Consider *Steiger* v. *United States*, 373 F.2d 133 (10th Cir. 1967). That mail-fraud case involved an alleged fake profit-sharing referral scheme concerning household appliances. *Id.* at 134. The government alleged that the defendants fooled prospective purchasers into entering contracts through a variety of different categories of misrepresentations: (1) the roles or job titles of salespersons, (2) the value of the business, (3) the exclusivity of the technology, (4) the antici-

pated consumer demand, and (5) the long-time financial viability of the program. *Id.* at 134–135. A jury found the defendants guilty of mail fraud, and the court of appeals agreed that substantial evidence supported that verdict. *Id.* at 135. In other words, the jury necessarily found at least one false and fraudulent misrepresentation. But the court of appeals found error in the trial court's refusal to instruct the jury on the "complete defense" of good faith. *Ibid.*[1] Accordingly, it reversed the convictions and remanded for a new trial.

Under the Seventh Circuit's instructions, remand in *Steiger* would have been futile, because the jury's implicit finding of at least one misrepresentation would negate any possible impact that good faith could have. But the Tenth Circuit remanded anyway. Likewise, under the approach of the Tenth Circuit in *Steiger*, Mr. Batio's trial probably would have ended in a different way.

Mr. Batio is entitled to a new trial under the correct rule. Consistent with the correct rule, the new trial's instructions should omit the objected-to paragraph that permitted the jury to categorically disregard good faith as to *all* representations if it found *one* false and fraudulent misrepresentation.

---

[1] The requested instruction read: "If you believe that [the] defendants, … honestly and in good faith believed in the referral plan and in good faith intended to perform the referral plan as it was presented to the purchasers, then you must acquit these defendants and each of them on all Counts of the Indictment. You are further instructed that even though you may find that the referral plan was impracticable, if it was devised in good faith, and these defendants intended in good faith to perform it, then you must acquit [the] defendants …." *Id.* at 135–136.

C. The question presented is important and this case is a good vehicle.

This case is an ideal vehicle for resolving the important question presented.

1. This issue is important. Mens rea is a fundamental concept in our system of justice. The answer to the question presented will settle the scope of mens rea that turns otherwise lawful civil business activity into a felony—that is, whether making *one* false or fraudulent statement can transform an *entire* business into criminal fraud, regardless of whether some or all of the defendant's *other* statements are made in good faith.

Certainty on that question is necessary because otherwise the reach of the criminal fraud statutes is vague, and "a vague law is no law at all." *United States* v. *Davis*, 588 U.S. 445, 447 (2019). "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.* at 451.

This issue is also important because the nature of technological startups and their funding mechanisms mean that small businesses are increasingly at risk of nationwide criminal jurisdiction as crowdfunding platforms are increasingly available. Crowdfunding enables small teams or even individuals to wear all the metaphorical hats in a business endeavor—technical, marketing, and financial. But it also puts those multitasking individuals at risk of being accused of misrepresentations across a broad spectrum of categories. Indeed, that was what happened here—and answering the question would promote clarity and uniformity for businesses that crowdfund.

Crowdfunding is a recent phenomenon for funding new ventures. Ethan Mollick, *The Dynamics of Crowd-*

funding: An Exploratory Study, 29 J. Business Venturing 1, 1–2 (2014). The mechanisms of crowdfunding vary by campaign and by platform, but in a nutshell they allow creators and innovators without access to traditional modes of capital to jumpstart risky ideas by soliciting donations or investments from around the country or the world. The mechanism has even been encouraged by Congress. *Ibid.* Crowdfunding is unique among business funding structures in two ways that are relevant here.

First, it is widespread in geographic scope. While traditional modes of raising capital might draw from a particular geographic area (*e.g.*, a loan from a neighborhood bank), crowdfunding is distributed by design. The problem, though, is that businesses that employ crowdfunding are therefore potentially subject to contradictory criminal legal standards in many different jurisdictions.

Traditionally, businesses with a national footprint have achieved a certain size and sophistication, and they often have counsel on call for advice on liability. That leads to the second unique aspect of crowdfunding: crowdfunding makes national fundraising accessible to sole proprietors and other entities without the same resources as a traditionally funded medium- or large-scale company. Not only are those smaller business forms more likely to result in individuals being held criminally liable than for large corporations, but also, crowdfunded projects rarely deliver as originally predicted. This is in part because fundraising occurs before the typical iterative learning process of product development actually happens. *See* Mollick, *The Dynamics of Crowdfunding: An Exploratory Study* at 11. Outright obvious fraud is "rare," but a significant proportion of crowdfunded campaigns do not deliver in some respect, *id.* at 11–12 ("The majority of products were delayed, some substantially, and may, ultimately,

never be delivered. … Only 24.9% of projects delivered on time, and 33% had yet to deliver.")—which could, under a one-misrepresentation-will-do theory, be enough to go to a criminal jury.

Those two features of crowdfunding add up to situations like this, in which a small business based in California and trying to innovate can be hit with prosecution in Illinois and the entirety of a fourteen-year venture held criminal.

Criminal prosecutions involving crowdfunding are new too. A search of Westlaw for "crowdfunding" reveals only a few examples of federal wire- or mail-fraud prosecutions—all recent:

- *United States* v. *Kolfage* involved a crowdfunding campaign to build a wall between the United States and Mexico. No. 20 Cr. 412, 2021 WL 2117211 (S.D.N.Y. May 25, 2021); see also *United States* v. *Shea*, No. 20 Cr. 412, 2022 WL 4298704 (S.D.N.Y. Sept. 19, 2022) (same scheme).
- *Summers* v. *United States* involved a crowdfunding campaign involving commercial real estate. No. 22-cv-405, 2023 WL 263336 (M.D. Fla. Mar. 24, 2023).

That is it. At the same time, crowdfunding is widely acknowledged to be a growing and vital mechanism for promoting small businesses and for advancing social goals, like promotion of environmentally conscious or inclusivity focused businesses. See generally, *e.g.*, Bonnie Simpson et al., *Making the World a Better Place: How Crowdfunding Increases Consumer Demand for Social-Good Products*, 58 J. Marketing Rsch. 363 (2021); Ethan Mollick, *Crowdfunding Research*, Wharton Crowdfunding Study: U. Penn., https://crowdfunding.wharton.up-

enn.edu/research/. If prosecutions for crowdfunding increase and relevant standards remain unsettled, that uncertainty likely keeps many potential innovators away.

For those reasons, it is vital to achieve uniformity and clarity about what the government must prove to establish wire or mail fraud.

2. This case is also a good vehicle because the rule in the Seventh Circuit is both clear and wrong, and because Mr. Batio preserved his challenge to it.

The rule in the Seventh Circuit is clear that *any* misrepresentations can negate a defendant's good faith. The Seventh Circuit has held time and again that its "'[p]attern jury instructions are presumed to accurately state the law.'" *Foy*, 50 F.4th 623 (quoting *United States* v. *Freed*, 921 F.3d 716, 721 (7th Cir. 2019)). And the Seventh Circuit's pattern instructions first introduce the good faith defense, then negate it "if the defendant also knowingly made false and fraudulent representations." See *supra* at 9–10. The government argued that the pattern jury instruction correctly states the law in the Seventh Circuit and that the government only needed to show intent to defraud with respect to one misrepresentation. U.S. C.A. Br. 49–51.

Mr. Batio preserved this issue. He objected to the jury instruction that broadly negated his good faith defense, App., *infra*, 15a–16a, 42a–47a, 49a–50a, and he briefed that issue on appeal, see Pet'r C.A. Br. 55–59; Pet'r C.A. Reply Br. 29–31. The Seventh Circuit rejected Mr. Batio's argument, App., *infra*, 3a–5a, but agreed that there might be some problems with its pattern instruction, App., *infra*, 5a ("The committee in charge of supervising the circuit's pattern jury instructions may want to review the subject.").

The issue is also dispositive with respect to Mr. Batio's right to a new trial. Because of the objected-to instruction, the jury could have convicted Mr. Batio even if it did not find fraudulent intent commensurate with the scope of the alleged scheme. The government has never argued that the jury could *only* have found guilt on the facts at trial.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew T. Dufresne
Counsel of Record
Perkins Coie LLP
33 E. Main St. Suite 201
Madison, WI 53703
(608) 663-7460
adufresne@perkinscoie.com

June 14, 2024

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 18, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
AMY J. ST. EVE, *Circuit Judge*

No. 21-3195

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY BATIO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16 CR 425

Rebecca R. Pallmeyer, *Chief Judge*.

O R D E R

Jeffrey Batio was sentenced to 96 months' imprisonment, plus restitution exceeding $5 million, after a jury convicted him of mail and wire fraud. 18 U.S.C. §§ 1341, 1343. The indictment charged Batio with a long-running scheme to induce people to part with their money by representing that he had innovative computer products in late stages of development. But he and his firms (Armada Systems LLC and Ideal Future, Inc.) never delivered any products, and the jury evidently concluded that none of the promised products came anywhere near release.

Batio presents three arguments on appeal: that the evidence is insufficient; that the district judge should have ordered a new trial; and that the district judge's calculation of a $5 million loss is not adequately supported. We take up these arguments in order.

1. The district court issued a thorough opinion denying Batio's motion for acquittal or a new trial. 2020 U.S. Dist. LEXIS 235337 (N.D. Ill. Dec. 15, 2020). Batio concedes that he and his firms never delivered any products but contends that events outside his control account for this. He maintains that some suppliers went bankrupt and that the recession beginning in fall 2008 made fulfillment of his promises impossible. But as the district judge observed:

> His argument that the 2008 recession explains the failure of the Radian [one of the products] does not make chronological sense: Mikal Greaves stopped working as a consultant for Armada in May of 2008 because he had not been paid, and Matthew Vanderzee left the company in July of 2008 for the same reason—but the market did not crash until September of 2008. A rational jury could have concluded that the Radian failed not because of the re-

> cession, but because Mr. Batio was nowhere near completion of the product's engineering and had already run out of money by the summer of 2008.
>
> Despite these circumstances, Mr. Batio continued to tell investors that the Radian's launch was imminent between 2009 and 2012, even though Armada had no other employees and was not making significant progress on the Radian's design. Those statements could have induced investors like Gregory Cazel, Daniel Leo-Toulouse, David Schultz, and Susan Sklade to invest not once but multiple times.

2020 U.S. Dist. LEXIS 235337 at *11 (footnotes omitted). The judge also observed that Batio's promise to begin delivering the Dragonfly (another product) by the end of 2015 was fantasy and that "two companies he had hired to conduct feasibility studies, Fidus and Finn Sourcing, had determined that such a timeline was unrealistic." *Id.* at *12.

One more example. Batio promoted the Dragonfly to investors (and advance purchasers) as a combination laptop, tablet, and phone that was as thin as a dime. He produced a promotional video that purported to show how thin the device was. But all the video displayed was an empty shell—and even that shell was more than an inch thick, made to appear thin because the table on which it rested had been hollowed out so that only the top of the casing was visible. *Id.* at *15.

We could go on, but that is unnecessary. Batio was free to argue his position to the jury. He insisted that if there was any fraud there was more than one scheme, but the jury heard enough evidence to find that there was one decade-long scheme.

2. Batio offers two arguments in support of his request for another trial: first that the "good faith" instruction was erroneous, and second that an important witness was not allowed to testify.

a. The good-faith instruction given to the jury told it:

> If the defendant acted in good faith, then he lacked the intent to defraud required to prove the offenses of mail and wire fraud charged … . The defendant acted in good faith if, at the time, he honestly believed the truthfulness and validity of the representations and promises that the government has charged as being false or fraudulent, as described in the portion of the indictment setting forth the scheme.
>
> The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud … .
>
> A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.

This language comes straight from item 6.10 of the circuit's pattern criminal jury instructions. Batio nonetheless insists that the third paragraph spoils the first two by implying that even a single lie negates good faith. One court of appeals has removed language of this kind from its pattern instructions, deeming it potentially confusing.

We do not see a problem with this paragraph in this case, since "good faith" in a colloquial sense is not a defense to fraud. The sort of instruction that the judge gave here just restates, from the defense perspective, that the prosecution must prove intent to defraud—and that mak-

ing a statement that turns out to be wrong differs from fraud, a crime of specific intent. Batio does not take issue with any of the instructions telling the jury what the prosecution had to prove beyond a reasonable doubt.

The contested third paragraph reminds the jury of an important principle: a sincere belief that everything will work out does not authorize deceit. Take a mundane bank-fraud case. An entrepreneur obtains a loan of $1 million by representing that the business's assets are worth $10 million. Actually they are worth only $100,000, but the entrepreneur is confident that the business will succeed and that he can repay the bank. The lie is still criminal fraud, because the borrower has deceived the bank about the available security and thus about the bank's ability to collect if the business fails. Indeed, the lie is criminal even if the business succeeds and the bank collects every penny. See, e.g., *United States v. Radziszewski*, 474 F.3d 480, 485–86 (7th Cir. 2007); *United States v. Chandler*, 98 F.3d 711, 716 (2d Cir. 1996). The bank is still exposed to more risk than it agreed to bear, for the rate of interest it charged (a rate doubtless reduced by the falsehood). That same idea justifies the use of the third paragraph in this case, for the investors and advance purchasers were deceived into taking more risk than they had agreed to bear.

The language in the third paragraph may not be the most felicitous way of making the point, but Batio did not propose any improvement. The committee in charge of supervising the circuit's pattern jury instructions may want to review the subject. It is enough for now to say that the third paragraph, as given, did not relieve the prosecution of its burden on any issue in the case.

b. Batio proposed to call Ron Braver, a forensic accountant, to testify about how much money the businesses received and how it was spent. Braver produced charts

summarizing information in a QuickBooks database that Batio had furnished (and apparently altered while awaiting trial), plus statements that Batio made directly to Braver. The district judge ruled that the QuickBooks database represented Batio's preferred characterization of his financial transactions and that Braver could not serve as a means of getting Batio's statements about his finances into evidence, unless Batio himself testified. Batio declined to testify, and Braver said that he could not reconstruct the financial records from other sources in time for trial.

In the district court Batio characterized these events as ineffective assistance of counsel, and the district judge rejected his argument as so understood. 2020 U.S. Dist. LEXIS 235337 at *31–38. In this court Batio's new lawyer recasts this issue as a contention that he was denied compulsory process to obtain favorable evidence. That's hard to understand. Braver was willing to testify; Batio did not need compulsory process. The question is whether the proposed testimony satisfied the requirements of Fed. R. Evid. 702 for expert witnesses or Rule 1006 for summary witnesses. The district court ruled that using a forensic accountant to present what amounts to the defendant's own testimony, without putting the defendant on the stand, is not a reliable or appropriate use of either expert or summary testimony under the Rules of Evidence. That decision is sound. See, e.g., *Smith v. Illinois Department of Transportation*, 936 F.3d 554, 558 (7th Cir. 2019) (expert witnesses); *United States v. Oros*, 578 F.3d 703, 708 (7th Cir. 2009) (summary witnesses).

3. The district court adopted the presentence report's calculation of the loss as in the vicinity of $5 million. The PSR said $5.7 million, though the judge awarded only $5,086,269 in restitution and did not explain the differ-

ence. But the error, if any, runs in Batio's favor, so he cannot complain. And the fraud table in U.S.S.G. §2B1.1 treats any amount between $3.5 million and $9.5 million as equivalent for the purpose of calculating offense levels, so the judge did not need to pin down an exact loss.

Batio maintains that a figure in the neighborhood of $5 million depends on treating all of his business receipts between 2004 and 2016 as loss to the investors and buyers. Let us suppose that this is so. Why would that be error? The investors never saw a penny of return, and none of the customers received a product. From the perspective of the crime's victims, everything they sent to Batio vanished. Calling this a "loss" under the Sentencing Guidelines is straightforward. That Batio spent some of the money on employees, consultants, and subcontractors may show that his *profit* was under $5 million, but it does not diminish the *loss* that the investors and customers experienced.

Batio did not challenge the PSR's proposed restitution award; instead he asked for no prison time so that he could start paying restitution immediately. That strategic choice waives any objection to the award of restitution. Batio did object in writing to the PSR's calculation of loss, but at sentencing he did not mention that objection and argued only that his criminal history category had been overstated. Three times the district judge asked whether Batio had any other argument; three times counsel said no. The prosecutor maintains that this was waiver. Some decisions of this court support that characterization, while others imply that a written objection that is seemingly abandoned at sentencing still allows review for plain error. We need not attempt to reconcile those decisions, because they do not matter. If there was error at all (which we doubt), it does not meet the definition of plain error

under *United States v. Olano*, 507 U.S. 725 (1993).

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. 16 CR 425**
v.	)	**Judge Rebecca R. Pallmeyer**
JEFFREY BATIO,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

For more than twelve years, Jeffrey Batio lured investors into funding his computer-products businesses with false assurances that cutting-edge products were ready to hit the market. In fact, no products were ever ready for commercial production, and he used much of the funds he collected for personal expenses. Mr. Batio was convicted by a jury on six counts of mail fraud and six counts of wire fraud. He now moves for a judgment of acquittal or a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, respectively. In support of his motion, Mr. Batio argues that the evidence at trial was insufficient to convict him, that he was deprived of his constitutional rights to due process and a fair trial under the Fifth and Sixth Amendments, that there was significant prosecutorial misconduct, and that his prior counsel was

ineffective. For the reasons discussed below, Mr. Batio's motion is denied.

BACKGROUND

At times relevant to the superseding indictment, Mr. Batio was the Chief Executive Officer of two companies, Armada Systems LLC ("Armada") and Ideal Future, Inc. ("Ideal Future"). These companies were purportedly in the business of creating and selling innovative computer products, two of which are central to this case. The first product, the Radian, featured multiple monitors that could be attached to a desktop computer. The second product—known first as the Stealth, then the IF Convertible, and eventually the Dragonfly Futurefon ("Dragonfly")—was a folding laptop computer that could also be used as a tablet and as a smartphone. To raise money for Armada, Mr. Batio sold membership shares to investors. For Ideal Future, he used the crowdfunding website Indiegogo.com ("Indiegogo"), where customers submitted pre-orders for the IF Convertible and the Dragonfly, as well as various accessories and upgrades. Between approximately 2003 and 2016, Mr. Batio repeatedly represented that his products were ready for market, but in fact, they were nowhere near completion. The Government charged that this pattern of misrepresentations constituted a fraudulent scheme that deprived victims of over $5 million. (*See* Govt's Sur-Reply [303], 1–9.)

Mr. Batio was indicted in June 2016 and tried in May of 2019. At the close of the Government's case, he moved for a judgment of acquittal. (Def.'s Mot. Acquittal [212].) The court reserved decision on the motion and proceeded to hear the defense case per Rule 29(b).[1] Mr. Batio was

[1] *See* Tr. 1499:24–1500:3 (The Court: "I did see also on the docket that Ms. Gambino has filed a motion for a judgment of acquittal. And

convicted on May 31, 2019, and he filed a supplemental motion for acquittal or a new trial on July 1, 2019. (Def.'s Post-Trial Suppl. Mot. [221].) Since then, he has retained new counsel, and he now offers additional arguments in support of his original motion. (Def.'s Reply to Govt.'s Consolidated Response [300] (hereinafter "Def.'s Reply").)

LEGAL STANDARDS

A. Rule 29

Rule 29(a) provides that if a defendant moves for acquittal at the end of the government's case-in-chief or at the close of all the evidence, the trial court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." In ruling on such a motion, the court views the evidence "in the light most favorable to the government, and [ ] will overturn a jury verdict only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Ginsberg*, 971 F.3d 689, 695 (7th Cir. 2020) (quoting *United States v. Orlando*, 819 F.3d 1016, 1021 (7th Cir. 2016)). The court will not reweigh the evidence or second-guess the jury's determinations regarding the credibility of witnesses. *Ginsberg*, 971 F.3d at 695 (citing *United States v. Cardena*, 842 F.3d 959, 994 (7th Cir. 2016)).

A defendant challenging the sufficiency of the evidence faces a "nearly insurmountable hurdle." *See, e.g.*, *United States v. Garcia*, 919 F.3d 489, 496 (7th Cir. 2019) (collecting cases). But "the height of the hurdle depends

---

I will enter and continue that motion and give the government an opportunity to respond, but I don't want to keep the jurors waiting because it might take a little while for us to do that.").

directly on the strength of the government's evidence." *Garcia*, 919 F.3d at 496–97 (quoting *United States v. Jones*, 713 F.3d 336, 339 (7th Cir. 2013)). Bearing in mind that the burden of proof is much higher in criminal trials than civil trials, "If the evidence would not allow a civil case to survive a motion for summary judgment or a directed verdict, then the case has no business being given to a jury in a criminal trial." *Garcia*, 919 F.3d at 491. In other words, if the government has not proven the defendant's guilt by a preponderance of the evidence, then no rational jury could have convicted the defendant under the much tougher beyond-a-reasonable-doubt standard.

A. Rule 33

Under Rule 33, a court may, upon defendant's motion, vacate a conviction and grant a new trial "if the interest of justice so requires." Such a motion should be granted if "the substantial rights of the defendant have been jeopardized by errors or omissions during trial." *United States v. Eberhart*, 388 F.3d 1043, 1048 (7th Cir. 2004) (citation omitted), *rev'd on other grounds*, 546 U.S. 12 (2005). A new trial is appropriate, however, "only if the evidence preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. O'Brien*, 953 F.3d 449, 456 (7th Cir. 2020) (citing *United States v. Swan*, 486 F.3d 260, 266 (7th Cir. 2007)).

DISCUSSION

A. Timeliness

As a threshold matter, the court rejects the Government's argument that Mr. Batio's posttrial motion for acquittal or a new trial was untimely. (*See* Govt.'s Consolidated Response [227] at 2–3.) Under Rule 29(c)(1), a posttrial motion for acquittal must be filed 14 days after the

verdict or discharge of the jury. Similarly, under Rule 33(b)(2), motions for a new trial are due 14 days after the verdict. The court may, however, grant additional time for good cause on a party's motion. *See* FED. R. CRIM. P. 45(b)(1).

After the jury's verdict and discharge on May 31, 2019, Mr. Batio's trial counsel requested 30 days to submit post-trial motions, and the court granted that request on the record.[2] That ruling was unfortunately not reflected in a docket entry, but the court concludes that Mr. Batio had until July 1, 2019—exactly 30 days after the verdict—to submit a supplemental motion for acquittal and, in the alternative, a new trial. *See* FED. R. CRIM. P. 45(a)(1). Defense counsel did so, rendering Mr. Batio's motion timely.

B. Sufficiency of the Evidence

To establish that Mr. Batio committed mail fraud under 18 U.S.C. § 1341, the Government was required to prove beyond a reasonable doubt: (1) that the defendant knowingly devised or participated in a scheme to defraud as described in the indictment; (2) that the defendant did so with the intent to defraud; (3) that the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and (4) that for the purpose of carrying out the scheme or attempting to do so, the defendant used or caused the use of the United States mails in the manner charged in the particular count. (*See* Tr. 1583:13–1584:2 (instructing the jury).) The elements of wire fraud under 18 U.S.C. § 1343 are largely the same; to support a conviction of wire fraud, the Government had to prove beyond a reasonable doubt: (1) that the defendant

[2] See Tr. 1702:5–8 (The Court: "The ordinary schedule for post-trial motions?" Ms. Gambino: "Your Honor, if we could extend it by 30 days." The Court: "Sure.").

knowingly devised or participated in a scheme to defraud as described in the indictment; (2) that the defendant did so with the intent to defraud; (3) that the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and (4) that for the purpose of carrying out the scheme or attempting to do so, the defendant caused interstate wire communications to take place in the manner charged in the particular count. (*See* Tr. 1584:12–1585:1 (instructing the jury).) *See also United States v. McClellan*, 794 F.3d 743, 751–52 (7th Cir. 2015) (collecting cases on mail fraud elements); *United States v. Kelerchian*, 937 F.3d 895, 908–909 (7th Cir. 2019) (collecting cases on wire fraud elements).[3]

Mr. Batio argues that the Government's evidence was insufficient to convict him. Specifically, he contends that the Government's evidence did not show that he devised a scheme to defraud, that he had the requisite intent to defraud investors, or that his statements were materially false or fraudulent. (Def.'s Reply at 3–15.) In other words, Mr. Batio challenges the sufficiency of the evidence with respect to elements one, two, and three of §§ 1341 and 1343. He does not dispute that he used or caused the use of the mails or interstate wires in the manner described in the indictment. (*See generally* Superseding Indictment [93].)

---

[3] Furthermore, "the elements of wire fraud under 18 U.S.C. § 1343 directly parallel those of the mail fraud statute so that cases construing one are equally applicable to the other." *Kelerchian*, 937 F.3d at 909 n.2 (citation and quotation marks omitted).

1. Scheme to Defraud and Intent to Defraud

Following Seventh Circuit Pattern Jury Instructions, § 6.10 (2012 ed.), the court instructed the jury that "[a] scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another by a means of materially false or fraudulent pretenses, representations, or promises." (Tr. 1585:13–17.) A defendant acting in "good faith" lacks the intent to defraud "if at the time he honestly believed the truthfulness and validity of the representations and promises that the government has charged as being false or fraudulent as described in the portion of the indictment setting forth the scheme." (Tr. 1586:16–21.). But "[a] defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also . . . knowingly made false and fraudulent representations."[4] (Tr. 1587:1–4.) Notably, "[i]ntent to defraud may be established by circumstantial evidence." *McClellan*, 794 F.3d at 752 (citation and quotation marks omitted).

Mr. Batio argues that his statements were "based on the information that [he] had at a point in time, which information did at times later prove to be inaccurate or overly optimistic, but not deliberately false." (Def.'s Reply at 4.) He notes that the information provided in the Private Offering Memoranda ("POM") to Armada investors and the Indiegogo terms of use gave warnings about the risks of investing in a startup. (Def.'s Reply at 5.) Mr. Batio disputes the Government's assertion that he was never able to bring a product to market; he contends that the Voyager, a folding laptop computer, might have been com-

[4] The court gave this instruction over defense counsel's objection. (*See* Tr. 1413:3–23.)

pleted in 2003, had his foreign manufacturing contractor not run into financial difficulties. (Def.'s Reply at 7.) He also contends that the failure of the Radian, a dual-screen monitor, was due to circumstances outside his control—namely, the 2008 economic recession—an argument that he made numerous times at trial. (Def.'s Reply at 9.) Similarly, he contends that his legitimate efforts to bring the Dragonfly to market were unfairly thwarted by the Government's indictment of him in June of 2016. (Def.'s Reply at 14.)

Viewing the evidence in the light most favorable to the Government, however, the court concludes that there was sufficient evidence from which a rational jury could find beyond a reasonable doubt that Mr. Batio schemed to defraud Armada investors and Indiegogo contributors. First, the Government presented abundant evidence that Mr. Batio lied to investors about the market-readiness of his products. For example, the 2006 Armada POM projected revenues of $40 million over a one-year period, but the Radian was not yet ready for manufacturing, much less for sale to consumers. (*See* Tr. 874:9–22 (Gregory Cazel direct examination).) Investors cannot adequately assess the risks of investing when some of the information upon which they are relying is not merely overly optimistic but false. And written warnings about the risks of investing do not excuse fraudulent misrepresentations to investors. Written non-reliance clauses may preclude claims of fraud in some civil cases, but such clauses do not always defeat criminal fraud charges. *Compare Rissman v. Rissman*, 213 F.3d 381, 384 (7th Cir. 2000) (civil fraud), *with United States v. Ghilarducci*, 480 F.3d 542, 546–47 (7th Cir. 2007) (criminal fraud). In *Ghilarducci*, the court concluded that there was sufficient evidence to convict the defendant of wire fraud and other crimes despite contracts purporting to place victims on notice that no oral

representations would be honored. 480 F.3d at 546–47. Similarly, in *United States v. Garten*, 777 F.3d 392 (7th Cir. 2015), the defendant told timeshare owners that fine print in a contract did not apply to them but later pointed to the same language to justify a nonrefundable fee. 777 F.3d at 395–96. The court held that there was sufficient evidence of conspiracy to commit mail and wire fraud, notwithstanding the language in the contract. *Id.* at 400.

Second, the Voyager's success, or lack thereof, is ultimately unnecessary to the counts in the indictment, which concern statements Mr. Batio made regarding his later products: the Radian and the Dragonfly (a combination cell phone, tablet, and laptop), previously known as the Stealth and the IF Convertible. His argument that the 2008 recession explains the failure of the Radian does not make chronological sense: Mikal Greaves stopped working as a consultant for Armada in May of 2008 because he had not been paid, and Matthew Vanderzee left the company in July of 2008 for the same reason—but the market did not crash until September of 2008.[5] A rational jury could have concluded that the Radian failed not because of the recession, but because Mr. Batio was nowhere near completion of the product's engineering and had already run out of money by the summer of 2008.

Despite these circumstances, Mr. Batio continued to tell investors that the Radian's launch was imminent between 2009 and 2012, even though Armada had no other employees and was not making significant progress on the

[5] *See* Tr. 938:6–940:6 (Mikal Greaves direct examination) (explaining that there was "nobody else to do any of the work" on the Radian pilot run after he left in May of 2008); Tr. 529:7–10 (Matthew Vanderzee direct examination); Tr. 287:18–288:3 (Andrea Berrett direct examination) (testifying that she invested approximately one week before the stock market crashed).

Radian's design.[6] Those statements could have induced investors like Gregory Cazel, Daniel Leo-Toulouse, David Schultz, and Susan Sklade to invest not once but multiple times. *See* Superseding Indictment, Counts I–VII. Later, Mr. Batio continued making misleading statements to Indiegogo contributors that conceivably induced hundreds of people to support the Dragonfly's crowdfunding campaign. *See* Superseding Indictment, Counts VIII–XII. For example, Mr. Batio told Indiegogo contributors in an August 2015 update that "we will begin shipments [of the Dragonfly] by the end of the year." (Tr. 812:6–17 (Edward Nickow direct examination).) In fact, at that time, two companies he had hired to conduct feasibility studies, Fidus and Finn Sourcing, had determined that such a time-

---

[6] *See, e.g.*, Tr. 272:4–273:24 (Andrew Martin direct examination) (Armada Update, Dec. 9 2009 stated: "we began 2009 with a concerted effort to explore licensing and partnering opportunities" and "we are currently in discussions to co-market the Radian with Sony"); Tr. 876:12–879:8 (Gregory Cazel direct examination) (Armada Update, July 24, 2012 stated: "The Radian engineering is complete and is effectively ready to get into production.").

Mr. Batio also told investors that a web-based software product known as Virtoro was ready for market. (Armada Update, Dec. 9, 2009 stated: "we have created a unique software product that we will be introducing to market in Q1, 2010" and Virtoro "is now ready for market"). Mr. Vanderzee's testified, however, that it was merely a prototype at the time he left Armada in 2008. (*See* Tr. 498:25–500:12 (Matthew Vanderzee direct examination). Mr. Vanderzee was the only Armada employee with software experience, and he estimated that, from the time he left, it would have taken a team of 15 to 20 engineers six months to finalize the product. (*Id.* 488:25–489:11, 493:20–498:11.). Indeed, in 2011, Mr. Batio asked Mr. Vanderzee—then no longer an employee—for a summary of "what needs to be done to complete the [Virtoro] site in order to launch," confirming that the product could not have been "ready for market" at the time of the December 2009 update. (Tr. 496:14–15.)

line was unrealistic.[7] A rational jury could infer from this evidence that Mr. Batio made materially false statements to deceive and obtain money from investors. *See McClellan*, 794 F.3d at 752.

Mr. Batio assured investors that the money he solicited was used to develop his products. In fact, the timing of numerous cash withdrawals immediately following his fundraising pleas reasonably support a finding that he used investor funds to address personal financial difficulties, rather than to improve his products. For example, the Government's expert Jose Javier Ruiz testified that, of the $33,500 that Mr. Batio raised for Armada in December of 2011, $18,675 was transferred to his personal account—the existing balance of which was just $146 at the time. (Tr. 1272:11–1273:14.) Mr. Ruiz also testified that, in April of 2013, some of Mr. Batio's Quickbook entries were revised as loans to himself rather than expenses for his ex-wife. (Tr. 1259:20–1262:13.) By October of that year, the FBI was investigating Mr. Batio; the jury could have inferred that even before he was aware of that investigation, Mr. Batio recognized the impropriety of using investor funds for personal expenses and attempted to cover his tracks by recategorizing the withdrawals as loans. (*See* Tr. 1097:16–1098:21 (stipulating that an FBI Special Agent interviewed Mr. Batio on October 23, 2013 about his work for Armada and Ideal Future).) Similarly, Mr. Batio's failure to send investors Schedule K-1s (so that they could count their investments as losses for tax pur-

[7] *See* Tr. 982:1–986:9 (Vicki Irene Coughey direct examination) (testifying that Fidus estimated it would take at least two years from March 2015 to bring the Dragonfly to market); Tr. 623:16–624:25 (Gloria Maceiko direct examination) (testifying that Finn Sourcing determined it would be impossible to produce the Dragonfly with a dual-operating-system laptop by the end of 2015).

poses) suggests not only that he was not keeping complete financial records, but also that such records could have revealed comingling of company funds.[8] Investor John Sims, who volunteered to gather information for Armada's financial statements, testified that he repeatedly asked Mr. Batio for Armada's 2010 financial records, but when Mr. Batio finally sent him Armada financial statements for 2008, there were no supporting documents. (Tr. 1125:19–1130:14.) Furthermore, Mr. Batio never responded to Mr. Sims's request for the name and contact information of Armada's accountant. (Tr. 1164:8–14.)

Mr. Batio has consistently maintained that he used investor funds predominantly for business expenses and that there is nothing wrong with using some of the money he raised to support himself. (Def.'s Reply at 9, 15.) The court agrees that use of investor funds to pay Mr. Batio a salary would not by itself be improper; but that practice would also not excuse false statements. In support of his argument, defense counsel inaccurately characterizes a conversation out of the jury's hearing as reflecting a "holding" by this court that "the payment of rent is indicative of a legitimate business expense."[9] (Def.'s Reply at 9 n.9.) The court's remark was taken entirely out of context from a discussion about the admissibility of testimony

---

[8] *See, e.g.*, Tr. 242:1–24 (Cartic Vengkatrama direct examination) (testifying that he never received K-1s); Tr. 788:7–19 (Daniel Leo-Toulouse direct examination) (testifying that he did not get a K-1 after his first Armada investment in December 2004, and only received one for "the last two years [in 2011 and 2012] because we pushed so hard").

[9] The Court said: "Now, we don't know for sure what was happening with it, but it's only reasonable to conclude that if you spend that kind of money on commercial rent, that part of that is business. Ordinary people don't spend a huge amount on a commercial property unless they are in business with it." Tr. 1448:18–1449:1.

from Defendant's proposed expert, Ronald Braver; it does not constitute a holding that Mr. Batio's financial activities were lawful. Elsewhere in his reply brief, defense counsel also inaccurately characterizes the court's statement that "You could say, there is nothing improper about Mr. Batio having paid himself," as "holding" that his method of compensating himself was lawful. (Def.'s Reply at 15 (quoting Tr. 1452:13–14).) To the contrary, this comment was part of a discussion with Ms. Gambino about how Mr. Braver might reframe his testimony in a way that did not require him to present conclusions that were unsupported by admissible evidence.

A rational jury could also have been persuaded by witness Art Villa, who testified that Mr. Batio asked him to cut a hole in a tabletop so that a prototype of the Dragonfly, to be presented in a promotional video for Indiegogo, would appear thinner than it actually was. (Tr. 414:9–417:2.) Renderings of the Dragonfly on Indiegogo purported to show that the device would be as thin as a dime when folded (see Tr. 123:5–14 (Tschiltsch direct examination)), but the hole in the tabletop concealed about an inch of thickness. (Tr. 431:2–23 (Villa direct examination).) A reasonable jury could conclude that this effort to mislead viewers about the actual dimensions of the prototype was deceitful and fraudulent, in that it misrepresented Mr. Batio's progress in designing the device.

Mr. Villa's testimony suggests that the promotional video was deceptive in other ways, as well: the video was filmed at Mr. Villa's own company's facility (not an Armada facility) in October of 2015; and Bridget Hogan, who handled marketing for Ideal Future and acted as a model in the video, used a plastic enclosure designed to look like the purported Dragonfly Futurefon, but the product in fact had no calling or texting capabilities at the time. (Tr.

417:4–427:2; Tr. 431:12–439:25.) The parties disagree over the proper terminology for this prototype (*see, e.g.*, Def.'s Reply at 26–27), and Mr. Batio contends that contributors should not have believed that they were purchasing a finished product when they paid for "perks" on Indiegogo. (*See* Tr. 77:2–22 (Thomas Morgan cross exam) (agreeing with defense counsel that "perks" are "items that may become available as rewards for participating in the campaign," including the Dragonfly, upgrades, and accessories)).) But investors testified that they did indeed believe that the product shown on Indiegogo could actually work as advertised and that they would eventually receive a functional Dragonfly. (*See, e.g.*, Tr. 36:18–20 (Thomas Morgan direct examination) (testifying that, at the time he purchased four Dragonfly Futurefons in November 2014, he believed that the Dragonfly would be delivered in approximately eight to ten months); Tr. 100:2–3 (Jeffrey Tschiltsch direct examination) ("People backed a physical, tangible product if they picked the perks that had the product in it."); Tr. 175:17–20 (Michael Doyle direct examination) (testifying that he expected to get a real device with Windows and Android capabilities); Tr. 191:18–22 (Richard Sutherland direct examination) (testifying that, after investing in 2014, he believed the Dragonfly would be delivered in the summer of 2015).) At least one victim invested again after viewing the misleading October 2015 video. (*See* Tr. 86:6–89:16 (Thomas Morgan direct examination) (testifying that he watched the video and continued purchasing upgrades for the Dragonfly until November 2015).) Other contributors closely followed updates from the Indiegogo campaign, even if they did not make additional payments.[10] Accordingly, a reasonable jury

[10] *See, e.g.*, Tr. 176:2–177:25 (Michael Doyle direct examination) (testifying that he viewed the October 2015 video after purchasing a

could have found that Mr. Batio intended to deceive and defraud his victims.

2. Materiality

Mr. Batio further argues that his statements to investors were not "intentionally materially misleading" because "it is not possible for updates [he] provided after the fact to influence a prior decision [to invest] retroactively." (Def.'s Reply at 16.) He contends that his updates "were only provided to pre-existing Armada and Indiegogo contributors, and only after they had already invested or contributed their money," and therefore such updates could not have been materially misleading. (*Id.* (emphases in original).) In other words, even if Mr. Batio made false assurances, the only people who received them had already invested.

As a factual matter, this argument is inaccurate. Not all investors gave money again after Mr. Batio posted his updates, but some did, as discussed below. As a legal matter, his argument lacks support under the law of this circuit, which is reflected in the jury instructions. At trial, the jury was instructed as follows: "A false or fraudulent pretense, representation, promise, omission, or concealment is 'material' if it is *capable* of influencing the decision of the person to whom it was addressed. It is not necessary that the false or fraudulent pretense, representation, promise, omission, or concealment actually have that influence or be relied on by the alleged victim as long as it is capable of doing so."[11] (Tr. 1586:2–9); *see also* Pattern

---

Dragonfly in November 2014); Tr. 358:8–359:13 (Victor De LaCruz direct examination) (testifying that, after purchasing a Dragonfly and upgrades in late 2014, he continued to follow updates on Indiegogo, including the October 2015 video).

[11] Mr. Batio's trial counsel objected to this instruction on the

Criminal Jury Instructions of the Seventh Circuit (2012 ed.) at 431; *United States v. O'Brien*, 953 F.3d 449, 460 (7th Cir. 2020) ("Materiality requires only the tendency or capability of influencing the victim; there is no requirement that the misrepresentations must have actually influenced the decision-maker or that the decision-maker in fact relied on the misrepresentations.") (citation omitted). Moreover, "The mail and wire fraud statutes can be violated whether or not there is any loss or damage to the victim of the crime or gain to the defendant."[12] (Tr. 1587:5–7); *see also* Pattern Criminal Jury Instructions of the Seventh Circuit (2012 ed.) at 440.

A rational jury could have found that Mr. Batio's statements were materially misleading because they were capable of influencing investors to give him money. The Government was not required to show that each alleged victim in fact relied upon Mr. Batio's misrepresentations. *See O'Brien*, 953 F.3d at 460. Instead, the Government presented evidence that many of Mr. Batio's communications to investors repeatedly misstated the degree of his progress on various products and were directly contradicted by the testimony of witnesses who had worked with him. For example, Mr. Batio's November 2008 update to Armada investors told them that the company was "ready for Radian production" and "actually beginning the process of building and shipping the first Radians" (Tr. 892:2–5). At that time, however, it had no manufacturing

---

grounds that it "unfairly lifts the burden on the government" by telling the jury "what the government doesn't have to do," (Tr. 1373:15–18), but the court overruled the objection. (*See* Tr. 1374:4–8 (noting that the instruction comes from the Seventh Circuit's pattern jury instructions for criminal trials).)

[12] This instruction, too, was given over the defense's objection. (*See* Tr. 1375:18–24.)

facility and no employees after the departure of Matthew Vanderzee in July of 2008.[13] Mr. Batio's December 2009 update boasted that Armada was in discussions with Sony to license the Radian and the Stealth. (Tr. 272:10-24.) But Andrew Martin, who then worked at Sony and agreed to test out the Radian, testified that his role had nothing to do with product development or licensing (Tr. 273:17–22), and that he found the product "kludgy . . . difficult to work with, and . . . less productive than if I hadn't had it at all." (Tr. 260:21–23.) In an email in September of 2011, Mr. Batio told investor Gregory Cazel that the Radian could run both Windows and Android operating systems, despite the fact that he had not yet determined whether that would be feasible. (Tr. 862:8–863:22 (Gregory Cazel direct examination).) Viewed in the light most favorable to the Government, these statements were capable of influencing investors' willingness to invest again in Armada despite years of delays.[14]

Mr. Batio's posts on Indiegogo in October and November of 2014 included statements that, according to numerous witnesses, influenced their decision to "pre-order" a Dragonfly, accessories, and upgrades. (*See, e.g.*, Tr.

---

[13] *See* Tr. 890:5–20 (Gregory Cazel direct examination) (testifying that Mr. Batio did not inform him that Armada was evicted from the San Jose manufacturing facility in September or October of 2008); Tr. 495:9–10 (Matthew Vanderzee direct examination).

[14] *See, e.g.*, Tr. 287:11–296:17 (Andrea Berrett direct examination) (testifying that she first invested $30,000 in Armada in 2008, but that Mr. Batio persuaded her to invest another $1,000 in 2011); Tr. 367:2–368:2 (Susan Sklade direct examination) (testifying that she invested four times between 2006 and 2011); Tr. 774:11–782:25 (Daniel Leo-Toulouse direct examination) (testifying that he invested an additional $5,000 in 2011 on top of $65,000 worth of investments since 2004 because "He'd keep calling and say, hey, we're so close. We need this amount of money in order to launch this product.").

33:21–34:12 (Thomas Morgan direct examination).) But at the time he made those posts, Mr. Batio had not yet figured out how to design a dual Windows-Android operating system,[15] which many contributors testified was a key feature driving their interest in the product. (*See, e.g.*, Tr. 31:11–21 (Thomas Morgan direct examination); Tr. 822:15–22 (Tim Sledz direct examination).) And the Dragonfly's detachable "Slingshot" smartphone did not have the ability to make calls. (*See* Tr. 679:11–680:7 (Mitch Gebheim direct examination).) By the summer of 2016, Mr. Batio's manufacturing contractor, Benchmark, was not able to produce a working cell phone, and they had told Mr. Batio as much. (*See* Tr. 674:15–75:2 (Mitch Gebheim direct examination).)

Mr. Batio's reliance on *United States v. Bogucki*, No. 18-cr-21, 2019 WL 1024959 (N.D. Cal. 2018) (granting a Rule 29 motion for acquittal), is misplaced. (*See* Def.'s Reply at 17.) Not only is that decision merely persuasive authority, as it was decided by a district court in the Ninth Circuit, but it is also distinguishable on its facts. Bogucki involved charges that the defendant, a trader at an investment bank, committed wire fraud affecting a financial institution by deceiving them in an options trade. The defendant and the financial institution were sophisticated parties negotiating at arm's length with the knowledge that each side had incentives to bluff or posture. *Bogucki*, 2019 WL 1024959 at *2–3. The district court in *Bogucki* determined that none of the defendant's statements were material, in part because "standards generally applied in

[15] *See* Tr. 623:8–624:3 (Gloria Maceiko direct examination) (testifying that two operating systems for the Dragonfly "would not be feasible with the time frame and amount of funding that was available" and that a prototype of an Android-only device would not be available until December of 2015 at the earliest).

the lending industry at the time are relevant to the materiality inquiry." *Id.* at *3 (citation and internal quotation marks omitted).[16] By contrast, the investors in this case were not financial institutions conducting arm's-length negotiations. Many of the victims had never invested in a start-up before. (*See e.g.*, Tr. 313:12–18 (Andrea Berrett cross examination); Tr. 399:15–19 (Susan Sklade cross examination); Tr. 894:8–10 (Gregory Cazel cross examination).) These investors did not think that Mr. Batio was merely bluffing when he announced that a product launch was imminent.

Mr. Batio's argument also misconstrues the nature of the charges in the indictment. The Government charged not that Mr. Batio's updates caused Armada investors to give him money in the first place, but that he repeatedly persuaded prior investors to give him even more money. (*See generally* Superseding Indictment.) Counts I–V and VII concern mailings that were sent to or received by Armada investors in late 2011. All four victims named in these counts had already invested, but they were moved to invest again after some form of communication from Mr. Batio. To take just one example, Armada investor Susan Sklade invested $2,500 (on top of the $39,000 that she had already invested since 2006) after a telephone conversation with Jeff Batio in August of 2011. (*See* Tr. 367:22–368:2, 380:19–383 (Susan Sklade direct examination).)

---

[16] *See also id.* at *6 ("Viewing the evidence in the light most favorable to the Government, there is simply no evidence in the record that, in the context of an arms-length transaction in which the parties bluffed and 'BS-[ed]' each other, operated as principals, looked out for their own interests, and understood the other party to be 'posturing,' rather than providing strictly true information, someone in [the financial institution's] position could, objectively, be induced by the statements in this case to part with money or property.").

Counts VI and VIII concern wire transfers on September 23, 2011 and July 24, 2012, respectively, for the purpose of fundraising for Armada. In the "Investor Update" email described in Count VIII, Mr. Batio announced that "We are launching the Ideal Future [IF] Convertible in 60 days." (Tr. 877:8–9 (Gregory Cazel direct examination).) But according to investor Cartic Vengkatrama, who Mr. Batio asked to advise him on the IF Convertible's development, "there was no product" in 2012, and the device (later renamed the Dragonfly) was not ready for crowdfunding. (Tr. 240:13–241:8.) Again, the email need not have actually induced investment in Mr. Batio's companies so long as his misrepresentations were capable of inducing investors to part with their money.

Mr. Batio's false statements not only reassured existing investors, but also encouraged new investment. Counts IX–XII concern wire transfers from Indiegogo contributors between October and November 2014. These transfers followed the start of Mr. Batio's second crowdfunding campaign, which began on October 1, 2014. (Tr. 27: 3–6 (stipulation).) Here, the Government did not have to prove that the contributors named in the indictment relied upon Mr. Batio's subsequent misrepresentations, such as the October 2015 video at Mr. Villa's prototyping facility. Rather, the Government had to show that the Indiegogo campaign involved a series of materially deceptive representations designed to obtain money from contributors. By the summer of 2016, Mr. Batio had still not determined how the device would run on both Windows and Android, he had not located a manufacturer with the ability to include a cell phone, and he could not deliver a product as thin as a dime when folded. Yet those are all promises that he made to Indiegogo contributors as early as October 2014.

Viewing the evidence in the light most favorable to the Government, a reasonable jury could find that the prosecution had carried its burden of proving every element of mail and wire fraud beyond a reasonable doubt.

C. Constitutional Arguments

Mr. Batio next argues that he was denied his constitutional rights to due process and a fair trial because the jury returned a verdict fairly quickly. While Mr. Batio contends that the jury deliberated for merely half an hour (Def.'s Reply at 28), the Government responds that it was closer to two hours between the time the jury began deliberating and when they delivered the verdict. (Gov't's Sur-reply at 16.) In any event, the Seventh Circuit has determined that the length of deliberations is an insufficient ground to establish denial of due process. "At best," brief deliberations are "a factor to be considered when deciding a motion for a new trial, and even then cannot be the only basis for granting a new trial." *United States v. Cunningham*, 108 F.3d 120, 124 (7th Cir. 1997) (citations omitted). Other circuits have reached the same conclusion. *See, e.g.*, *United States v. Burfoot*, 899 F.3d 326, 342 (4th Cir. 2018) (collecting cases) ("[J]uries are presumed to follow the judge's instructions, including the instruction to fully deliberate. . . . And the mere length of a jury's deliberation doesn't refute that presumption.").

Defense counsel correctly notes that the court itself anticipated the jury would continue deliberations on the following business day after closing arguments.[17] (Def.'s

[17] See Def.'s Reply at 29 (citing Tr. 1694: 1–4 (The Court: "I let [the jury] go as late as they want, but I am morally certain they're out of here within an hour or so. That would be my guess. I've been predicting all along they'll come back on Monday.")).

Reply at 29.) But speculation about the time it would take to return a verdict does not indicate that the actual length of the jury deliberations was so brief as to deny Mr. Batio his constitutional rights. Mr. Batio also argues that the jury's request for the summary of charges chart that the Government used during its closing argument indicates that they were "looking for an easy way out of proper deliberation." (Def.'s Reply at 28; *see* Tr. 1696:6–1698:14.) The jury's request may instead have reflected the opposite: that they wanted to carefully review the evidence, charge by charge. Regardless, the court sustained the defense objection at the time the request was made and declined to provide the jury with the chart, which was merely a demonstrative exhibit. (*See* Tr. 1698:15–18.) The jury then continued deliberating.[18] In the absence of any additional evidence that the jury failed to properly deliberate, the court concludes that there was no trial error depriving Mr. Batio of any substantial rights. *See United States v. Eberhart*, 388 F.3d 1043, 1048 (7th Cir. 2004).

D. Government Misconduct

Mr. Batio argues that he should be acquitted or granted a new trial because there was significant government misconduct. (Def.'s Reply at 20–28; *see also* Jeffrey Batio's Ex. of Gov't Prosecutorial Misconduct, Ex. 1 to Def.'s Reply [300-1].) He believes that the Government "create[d] an environment in which criminal charges are brought for what is essentially a civil matter" and "criminalized lawful aspects of startup culture." (Def.'s Reply at 20.)

[18] *See* Tr. 1698:25 ("Recess at 4:59 p.m., until 6:22 p.m.").

The Seventh Circuit has repeatedly declined to recognize a defense to a criminal conviction on the basis of "outrageous government conduct." *United States v. Smith*, 792 F.3d 760, 765 & n.27 (7th Cir. 2015) (collecting cases). Such conduct cannot be an independent basis for a new trial. *Id.* (citing *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) ("The gravity of the prosecutors' misconduct is relevant only insofar as it may shed light on the materiality of the infringement of the defendants' rights; it may support, but it can never compel, an inference that the prosecutors resorted to improper tactics because they were justifiably fearful that without such tactics the defendants might be acquitted.")).

Here, Mr. Batio has not alleged specific acts of government misconduct. Instead, his consolidated motion primarily reiterates his argument that he intended to bring his products to market in good faith. (Def.'s Reply at 21–26.) His most concrete allegation is that "the Government repeatedly took [his] written updates entirely out of context by failing to provide his follow-on statements that provided the necessary context." (Def.'s Reply at 26.) But this allegation, even if true, does not amount to prosecutorial misconduct; defense counsel could have rectified any mischaracterization by pointing out such omissions at trial.[19]

---

[19] Indeed, Mr. Batio argues that his trial attorney, Andrea Gambino, provided ineffective assistance of counsel by failing to provide "direct exculpatory evidence in the form of written follow-on statements Batio had made at the time" to refute what he contends were Government mischaracterizations. (Def.'s Reply at 34.) For the reasons discussed in Part D, however, this purported failure does not constitute ineffective assistance.

Mr. Batio also suggests that the decision to indict him in June of 2016 is itself evidence of misconduct because it halted his efforts to produce the Dragonfly. (Def.'s Reply at 28.) But the Government's decision to indict him, as an exercise of prosecutorial discretion, is not misconduct. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [a prosecutor's] discretion."). And there is substantial evidence that Mr. Batio would not have been able to manufacture the Dragonfly with Benchmark even if he had not been indicted. (*See* Tr. 700:2–702:2 (Mitch Gebheim direct examination) (testifying that Benchmark never actually signed a manufacturing contract with Mr. Batio, that Benchmark would not have been able to make the Dragonfly with a cell phone, and that the project ran out of funding in July of 2016).)

After a careful review of the record and the arguments in Mr. Batio's *pro se* letter, the court concludes that there is no evidence of prosecutorial misconduct that would justify a new trial.

E. Ineffective Assistance of Counsel

Finally, Mr. Batio contends that his counsel prior to and at trial was so deficient as to violate his Sixth Amendment right to counsel. (Def.'s Reply at 29.) It is unusual for defendants to raise ineffective assistance arguments in post-trial motions. *See United States v. Taglia*, 922 F.2d 413, 417 (7th Cir. 1991) (noting that a defendant may "ask the district judge for a new trial on the basis either of what the trial record discloses about his lawyer's performance or of extrinsic evidence"). The Seventh Circuit

counsels against making such claims on direct appeal. *See United States v. Cates*, 950 F.3d 453, 456 (7th Cir. 2020) ("Raising an ineffective-assistance claim on direct appeal is almost always imprudent.") Unless a record of allegedly ineffective assistance was developed in the trial court, "[e]ssential evidence of counsel's actions and reasoning will simply be lacking," so defendants are ordinarily better served by waiting to develop a full record on collateral attack under 28 U.S.C. § 2255. *Id.* at 457. Nonetheless, because Mr. Batio has retained new counsel and is raising ineffective assistance as part of his motion for a new trial, the court may properly address these arguments now. *See Taglia*, 922 F.2d at 417–18 (noting that a defendant may "ask the district judge for a new trial on the ground that the trial record [alone] shows a denial of effective assistance, . . . [but] every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight").

To make out an ineffective assistance of counsel claim, a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." Id. (citation omitted). This objective standard considers the totality of the circumstances, but "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Hence, the bar for establishing ineffective assistance of counsel is quite high. *See Jordan v. Hepp*, 831 F.3d 837, 846 (7th Cir. 2016). Furthermore, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S.

at 691. To establish prejudice, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Mr. Batio argues that his trial counsel, Andrea Gambino, "was perpetually unprepared and unwilling to provide for [his] defense, and her ineffective assistance left [him] virtually defenseless." (Def.'s Reply at 36.) He claims that Ms. Gambino did not make herself available for trial preparations with him and, as a result, they were not on the same page about his defense strategy. (Def.'s Reply at 32, 34.) He also complains that Ms. Gambino decided to call Mr. Braver as a summary witness rather than an expert witness (Def.'s Reply at 30–31), that she did not interview witnesses Mr. Batio had identified as critical to his defense (Def.'s Reply at 32), and that she did not call FBI Agent Gregory LaBerta to testify, even though he had testified before both grand juries. (Def.'s Reply at 33.) Finally, Mr. Batio claims that he wanted to testify, but Ms. Gambino did not help him prepare despite his requests. (Def.'s Reply at 35.)

Mr. Batio also makes complaints against Attorney Lisa Wood, a Federal Defender panel attorney who represented him pre-trial. (*See generally* Tr. of Hr'g on Mot. for Leave to Withdraw [234]; Tr. of Status Conference [236] (Dec. 21, 2018) (granting motion to substitute counsel).) Specifically, he argues that Ms. Wood failed to tender data to Ms. Gambino in a timely fashion, who was therefore delayed in passing it along to intended witness Ronald Braver. (Def.'s Reply at 30.) Mr. Batio believes that Ms. Wood's decision to call Mr. Braver as a summary witness rather than an expert witness—a decision that Ms. Gambino later adopted—was outside the bounds of professionally competent assistance and prejudiced him

because Mr. Braver was unable to testify as an expert. (Def.'s Reply at 30–31.)

After reviewing the record, the court concludes that Ms. Wood and Ms. Gambino provided reasonably effective assistance. It is simply not true that Ms. Gambino "did not prepare with [Mr. Batio], interview *any* witnesses, or consider or present *any* evidence." (Def.'s Reply at 36 (emphases in original).) She devoted substantial attention to Mr. Braver's proposed testimony. Ms. Gambino called Robert Sherwood, who testified about startup culture in general and "tech startups" in particular. (*See* Tr. 1503–1573 (Mr. Sherwood direct, cross, and redirect examination).) This testimony was evidence that the jury could have considered during its deliberations. The fact that Ms. Gambino did not introduce exhibits along with Mr. Sherwood's testimony speaks more to his lack of personal knowledge regarding Mr. Batio's businesses than to Ms. Gambino's failure to mount a defense.

Mr. Batio also cannot reasonably claim that Ms. Gambino prevented him from testifying. This Court admonished him numerous times to ensure that his waiver of his right to testify was knowing and voluntary. (*See* Tr. 1386:24–1387:20 (explaining the Defendant's Fifth Amendment right to testify); Tr. 1574:3–8 (reminding the Defendant of his right to take the stand).) Mr. Batio ultimately decided not to testify. (Tr. 1574:12.) There is no basis here for the conclusion that this decision was not knowing and voluntary.

Mr. Batio's remaining complaints against Ms. Gambino and Ms. Wood boil down to disagreements over trial strategy. When assessing the effectiveness of counsel, "courts must defer to any strategic decision the lawyer made that falls within the 'wide range of reasonable professional assistance,' even if that strategy was ultimately

unsuccessful." *Shaw v. Wilson*, 721 F.3d 908, 914 (7th Cir. 2013) (quoting *Strickland*, 466 U.S. at 689). "If counsel has investigated witnesses and consciously decided not to call them, the decision is probably strategic," and counsel's decision "to call or not to call a witness is generally not subject to review." *United States v. Berg*, 714 F.3d 490, 499 (7th Cir. 2013) (citation and quotation marks omitted).

The record does not provide definitive explanations for some of Ms. Wood and Ms. Gambino's strategic decisions, such as Ms. Gambino's decision not to call members of the Armada Advisory Board as witnesses. But Mr. Batio has not requested an evidentiary hearing that might add substance to his ineffective assistance of counsel claims, and "if there is no reason to suppose that a hearing would produce evidence justifying the grant of a new trial, there is no reason to hold a hearing." *United States v. Taglia*, 922 F.2d 413, 419 (7th Cir. 1991). Mr. Batio did attach a letter from one Armada Advisory Board member, Douglas Fitz, who reported that he had "frequent contact" with Mr. Batio; had visited the production facility, which Mr. Fitz believed was "well equipped"; did not "witness or suspect fraud"; and does not believe "society will be better served" by Mr. Batio's facing a criminal conviction. (See Letter from Douglas Fitz to the Court of 12/19/19, Attachment 4-A to Def.'s Reply). Notably, Mr. Fitz also stated that he is "not familiar with the preparations for production of the mobile device involved in the Indiegogo campaign." (*Id.*) There is little likelihood that such testimony, had it been presented, would have resulted in a different outcome. The court concludes that an evidentiary hearing on this and other ineffective assistance claims is unnecessary.

Even if any of their alleged missteps amounted to ineffective assistance, Mr. Batio has failed to demonstrate that counsel's errors were prejudicial. In particular, he has not demonstrated a reasonable probability that Mr. Braver's testimony, had it been admitted, would have led to a different outcome at trial. Mr. Braver was prepared to testify that $4.5 million of Mr. Batio's expenses between 2004 and 2016 were business-related. (*See* Ronald Braver Findings, Attachment 2 to Def.'s Reply, at 4.) At first glance, that testimony might have helped Mr. Batio's case, but before Mr. Braver was called to testify, it became clear that there was no foundation for his conclusions as to which amounts were personal expenses and which were business expenses. (*See* Tr. 1393:13–1395:19.) The court directed that Mr. Braver testify only after editing the charts he planned to present so that they stopped short of classifying certain payments as business expenses. (Tr. 1404:1–25; Tr. 1406:16–1407:9). Contrary to Mr. Batio's assertions (Def.'s Reply at 31), Ms. Gambino did not ignore the court's suggestion that Mr. Braver reframe his data. Rather, Ms. Gambino made the decision not to call Mr. Braver because he would not have been able to reconfigure his charts in time for trial. (*See* Tr. 1499:12–13.) Without such modifications, those charts were inadmissible because they presented summaries of expenses based only on Mr. Braver's conversations with Mr. Batio. (*See* Tr. 1419:10–1421:9; Tr. 1429:15–1431:12.) In other words, Mr. Braver's opinions about the bona fides of Mr. Batio's use of his investment funds rested on Mr. Batio's own statements. Mr. Batio himself either failed to keep supporting documentation of his expenses or, if he did so, failed to turn them over to the Government, so the financial records were not in evidence. (*See* Tr. 1475:14–17.) Thus, because there was no foundation for Mr. Braver's conclusions without Mr. Batio's own tes-

timony (*see* Tr. 1459:19–1460:6), Ms. Gambino's strategic decision not to call Mr. Braver was eminently reasonable and not prejudicial.

Finally, Mr. Batio contends that his trial counsel was ineffective in failing to file requests for exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he argues that "[t]he Government withheld a significant amount of exonerating evidence" at the grand jury stage by not showing the grand jury his prototypes and other evidence indicating that he was working to develop his products. (Def.'s Reply at 35 & n.31.) This argument has no purchase at this stage of the proceedings: post-trial, the question is not whether the grand jury had probable cause to indict him, but whether a reasonable jury could find that the Government's evidence at trial established the elements of mail and wire fraud beyond a reasonable doubt. Some of Mr. Batio's prototypes were in evidence at trial, yet the jury seems to have been persuaded by the Government's characterization of them as inculpatory, rather than exculpatory. Moreover, Mr. Batio's suggestion that "withholding" such evidence violates Brady is mistaken. (Def.'s Reply at 35.) Mr. Batio was already in possession of prototypes and other evidence that he believed would exonerate him, so the Government had no obligation to turn over such evidence for his defense. *See United States v. Lawson*, 810 F.3d 1032, 1043 (7th Cir. 2016) (noting that evidence is not "suppressed" within the meaning of Brady if it was "available to the defendant through the exercise of reasonable diligence") (citations omitted). Trial counsel was not ineffective for failing to request access to Defendant's own evidence at trial.

CONCLUSION

For the reasons stated above, the motion for a judgment of acquittal or a new trial is denied.

ENTER:

Date:
December 15, 2020

[s/]
REBECCA R. PALLMEYER
United States District Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 18, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
AMY J. ST. EVE, *Circuit Judge*

No. 21-3195

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY BATIO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16 CR 425

Rebecca R. Pallmeyer, *Chief Judge*.

O R D E R

Defendant-Appellant filed a petition for rehearing and rehearing en banc on January 3, 2024. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY BATIO, Defendant.	Docket No. 16 CR 425 Chicago, Illinois May 29, 2019 9:40 a.m.

VOLUME 9B
TRANSCRIPT OF PROCEEDINGS – Trial
BEFORE THE HONORABLE
REBECCA R. PALLMEYER

APPEARANCES:

For the Plaintiff: HON. JOHN R. LAUSCH JR.
UNITED STATES ATTORNEY
BY: MS. JACQUELINE STERN
MR. MATTHEW SCHNEIDER
219 South Dearborn, 5th Floor
Chicago, Illinois 60604

For the Defendant: LAW OFFICES OF
ANDRÉA E. GAMBINO
BY: MS. ANDRÉA E. GAMBINO
53 West Jackson Boulevard,
Suite 1332
Chicago, Illinois 60604

Court Reporter: FRANCES WARD, CSR, RPR, RMR, FCRR
Official Court Reporter
219 S. Dearborn Street, Suite 2524A
Chicago, Illinois 60604
(312) 435-5561
frances_ward@ilnd.uscourts.gov

THE CLERK: 16 CR 425, United States versus Jeffrey Batio.

* * *

[*1407] * * * THE COURT: All right. Are there other issues we need to go over this afternoon?

* * * **[*1408]** * * *

MS. STERN: Okay.

And then, Judge, I have adapted the "good faith" instruction. But I would object to the "good faith" objection. I can hand it up.

But, Judge, I went to the jury pattern instructions, and for that particular -- for the good faith, they cite a case, which -- I pulled out the case and then the case that it cited.

THE COURT: Okay.

MS. STERN: I will hand them up, Judge.

One is called *U.S. v. Givens*. That's the one that's cited by the later one. And then *U.S. v. Prude*, which is cited by the pattern instructions.

(Documents tendered.)

MS. STERN: And both of them say essentially that a good faith instruction isn't needed if it's covered by the

jury instructions; for example, for mail fraud or wire fraud.

MS. GAMBINO: Your Honor, the problem with this -- first of all, none of these cases say that you can't give an instruction. They just say that it's not reversible or harmful error to have done so.

Second of all, the committee comments say very **[*1409]** specifically in Comment 1 that it's to be used with specific intent to defraud, for instance.

So a lot of the cases in which they say it's not required or not necessary have to do with tax, have to do with different kinds of fraud. That's true.

But the whole basis is that they make the conclusion that it's obvious that if you have intent to defraud and good faith are mutually exclusive -- well, I think it's legally obvious to us -- I don't think that that's the first thing that pops into the head of a juror.

And we are entitled to have the defense instruction, which says that -- you know, otherwise there would be no point in having this instruction at all, because in every mail fraud and every wire fraud and every other kind of fraud case, you are going to have instructions which talk about knowledge, which talk about the intent to defraud and that sort of thing.

MS. STERN: Well, you might not because, for example, one of those cases is a voter fraud case, where it wouldn't have the type of "scheme" language and the "knowledge" definition.

One of the cases, the first one, *Givens*, is a mail fraud case, and it basically says, once you have given the standard jury instruction that talks about knowledge, talks about intent, you have covered the issue of good faith,

[*1410] because you can't have both good faith and knowing false statements.

MS. GAMBINO: That's precisely why there should be a defense instruction which says what good faith is, because, you know, the obvious, contrary to intent to defraud is no intent to defraud is not good faith.

And good faith is a very specific instruction. And it's used to -- as the committee comments with specific intent to defraud cases. We don't have a definition of "knowledge" in this case, and we don't have anything that says anything at all with respect to the specific intent to defraud.

So I do think that, in the interest of -- while, from the government's point of view and the Court's point of view, it's not necessary after the water is already under the bridge and the judge has denied the ability to present it, they also don't say that this is a useless instruction we should never give.

In this particular case, I think it's important that the jury know that if somebody acted in good faith and they believed that, then he lacked the intent to defraud.

MS. STERN: We do have an instruction that says a person acts with intent to defraud if he acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant or another.

[*1411] So that does cover the issue of the, can't be acting with good faith if you are acting knowingly with intent to deceive or cheat.

MS. GAMBINO: Well, except that they don't know that good faith -- that considering a person's good faith is an option. The bases are not covered from a defense point

of view. They are covered from the government's point of view. That's -- the whole point of having a defense instruction is that this points out what it is that we are focusing on.

THE COURT: All right. Well, with respect to the two cases that I'm looking at, I will begin with the case involving -- I think it's voter fraud, *United States v. Prude*, P-r-u-d-e. Really, I don't see this case as being particularly useful.

MS. STERN: That's the case cited by the pattern instruction.

THE COURT: Correct.

Indeed, the court in that case observed that the defendant's proposed instruction was, "More clearly worded and more directly links the relevant concepts for the jury."

In any case, the court goes on to say, "When you look at the instructions on a whole, they adequately apprise the jury, and any weakness in the instruction, because it did not contain the specific language of mistake rather than good faith, did not dilute impermissibly the defendant's basic **[*1412]** point."

So I don't think that's overwhelming support for the notion that the Court should not give a good faith instruction.

A better case for the government is the second -- is the later one, the one -- actually earlier one, *United States v. Givens*. That's a case where the court held that the defendant was not entitled to a specific good faith instruction because, considering the instructions as a whole, the jury was adequately instructed upon his theory of defense.

There, too, the court really does not say that giving a good faith instruction -- a specific good faith instruction

would have been error. It, to the contrary, says that it's not error not to give that instruction so long as the instructions overall make it clear that if the defendant acted in good faith, he was not guilty of mail fraud.

For that reason, the refusal to give a more specific good faith instruction is not, under the circumstances of this case, an error.

I guess I don't regard the Court of Appeals saying that failure to give an instruction is not error as an affirmative statement that the Court should not give an instruction when it's the defendant's theory.

I think the instruction should be given with that **[*1413]** additional paragraph that the government proposes.

MS. STERN: Judge --

MS. GAMBINO: Your Honor, the problem with that additional paragraph, as pointed out in *Kudo*, it says that the third paragraph is only when justified by the evidence. And the example it gives is it's saying to a federal agent, you know, yes, I lied, but I thought it would turn out for the good.

We are not saying here, yes, I lied. We are saying here, we didn't lie. We told the truth to the best of our ability, and we acted in good faith.

THE COURT: Right. But I think that fits perfectly with this third paragraph. "A defendant's honest and genuine belief that he will be able to perform what he promised" – I think that's what you are saying -- "is not a defense to fraud if the defendant also knowingly made false and fraudulent representations."

The government is going to say, he may very well have honestly and genuinely believed that some of the things

that he was promising would be carried out, but he also, at the same time, made statements and representations that he knew to be false.

So I do think it fits.

MS. STERN: Thank you, Judge.

THE COURT: All right. * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY BATIO, Defendant.	Docket No. 16 CR 425 Chicago, Illinois May 29, 2019 9:40 a.m.

VOLUME 10A
TRANSCRIPT OF PROCEEDINGS – Trial
BEFORE THE HONORABLE
REBECCA R. PALLMEYER

APPEARANCES:

For the Plaintiff: HON. JOHN R. LAUSCH JR.
UNITED STATES ATTORNEY
BY: MS. JACQUELINE STERN
MR. MATTHEW SCHNEIDER
219 South Dearborn, 5th Floor
Chicago, Illinois 60604

For the Defendant: LAW OFFICES OF
ANDRÉA E. GAMBINO
BY: MS. ANDRÉA E. GAMBINO
53 West Jackson Boulevard,
Suite 1332
Chicago, Illinois 60604

Court Reporter: FRANCES WARD, CSR, RPR, RMR, FCRR
Official Court Reporter
219 S. Dearborn Street, Suite 2524A
Chicago, Illinois 60604
(312) 435-5561
frances_ward@ilnd.uscourts.gov

THE CLERK: 16 CR 425, United States versus Jeffrey Batio.

* * *

[*1439] * * * THE COURT: With respect to pattern instructions, we also talked about a proposal the government had made with respect to its proposed Instruction No. 27.

I know there has been an objection to that. And I looked at the case law, the one case where the Seventh Circuit refers to this as a pattern instruction. And I observed, when did it get taken out, because it's no longer certainly in the current pattern instructions.

In fact, I was able to do some research on this, and we looked at the 1999 pattern instructions, and it's not there. And we looked at the 1994 instructions, and it's not there. And we looked at the 1983 instructions, and it's not there. And then we looked at the very first Seventh Circuit **[*1440]** pattern instructions ever in 1963, and it's not there.

So with complete respect to my colleagues upstairs, I think when they referred to this as a Seventh Circuit pattern, that's just not true.

So I am really loath to give instructions that are not pattern instructions. And in this case, where I have

adopted the defense instruction regarding good faith but added that last paragraph, over defendant's objection, about the honest and genuine belief not being a defense as long as there were also knowingly false and fraudulent statements, I think that covers the issue sufficiently, and I am going to sustain the objection to 27.

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY BATIO, Defendant.	Docket No. 16 CR 425 Chicago, Illinois May 31, 2019 9:07 a.m.

VOLUME 11-A
TRANSCRIPT OF PROCEEDINGS – Trial
BEFORE THE HONORABLE
REBECCA R. PALLMEYER,
and a Jury

APPEARANCES:

For the Government: MS. JACQUELINE O. STERN
MR. MATTHEW M. SCHNEIDER
Assistant United States Attorneys
Honorable John R. Lausch Jr.
United States Attorney
219 S. Dearborn Street, 5th Floor
Chicago, IL 60604

For the Defendant: MS. ANDRÉA E. GAMBINO
Law Offices of Andréa E. Gambino
53 West Jackson Boulevard,
Suite 1332

	Chicago, IL 60604
Also Present:	MR. JEFFREY BATIO
Court Reporter:	LAURA R. RENKE, CSR, RDR, CRR Official Court Reporter 219 S. Dearborn Street, Room 1432 Chicago, IL 60604 312.435.6053 laura_renke@ilnd.uscourts.gov

* * * **[*1578]** * * * THE COURT: Ladies and gentlemen, the next step here in this case is that I will be instructing you on the law. We'll take a short lunch recess. And then you'll hear closing arguments and retire to deliberate on your verdict.

My instructions are not long. I will provide written copies of them for you, so if you feel you missed something, don't worry. You're going to have a written copy.

Members of the jury, I will now instruct you on the law that you must follow in deciding this case. I will also give you a copy of these instructions to use in the jury room. You must follow all of my instructions about the law, even if you disagree with them. This includes the instructions that I gave you before the trial, any instructions I gave you during the trial, and the instructions I'm giving you now.

As jurors, you have two duties. One, your first duty is to decide the facts from the evidence that you saw and heard here in court. This is your job, not mine or anybody else's. Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proven the defendant guilty beyond a reasonable doubt.

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion **[*1579]** influence you. In addition, do not let any person's race, color, religion, national ancestry, or gender influence you.

You must not take anything I said or did during the trial as indicating that I have any opinion about the evidence or about what I think your verdict should be.

The charges against the defendant are in a document called an indictment. You will have a copy of the indictment during your deliberations.

The indictment in this case charges that the defendant committed the crimes of mail fraud and wire fraud. The defendant has pleaded not guilty to these charges.

The indictment is simply the formal way of telling a defendant what crimes he is accused of committing. It is not evidence that the defendant is guilty. It does not even raise a suspicion of guilt.

The defendant is presumed innocent of each and every one of the charges. This presumption continues throughout the case, including during your deliberations. It is not overcome unless from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence. He is not **[*1580]** required to produce any evidence at all.

You must make your decision based only on the evidence that you saw and heard here in court. Do not consider anything you may have seen or heard outside of

court, including anything in the newspaper, television, radio, the Internet, or any other source.

The evidence includes only what the witnesses said when they were testifying under oath, the exhibits that I admitted into evidence, and the stipulations that the lawyers agreed to. A stipulation is an agreement that certain facts are true or that a witness would have given certain testimony.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers' questions and objections, likewise, are not evidence.

A lawyer does have a duty to object if he or she thinks a question is improper. If I sustained objections to questions the lawyers ask, you simply don't speculate on what the answers might have been.

If during the trial I struck testimony or exhibits from the record or told you to disregard something, you must not consider it.

Give the evidence whatever weight you decide it deserves. Use your common sense in weighing the evidence, and **[*1581]** consider the evidence in light of your own everyday experience.

People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences as long as they are based on the evidence.

You may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

Do not make any decisions simply by counting the number of witnesses who testified about a certain point.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

What is important is how truthful and accurate the witnesses were and how much weight you think their testimony deserves.

A defendant has an absolute right not to testify. You may not consider in any way the fact that the defendant chose not to testify. You should not even discuss it in your **[*1582]** deliberations.

Part of your job as jurors is to decide how believable each witness was and how much weight to give to each witness's testimony. You may accept all of what a witness has said -- says, or part of it, or none of it.

Some factors you may consider include:

The intelligence of the witness;

The witness's ability and opportunity to see, hear, or know the things the witness testified about;

The witness's memory;

The witness's demeanor;

Whether the witness had any bias, prejudice, or other reason to lie or slant the testimony;

The truthfulness and accuracy of the witness's testimony in light of the other evidence presented; and

Inconsistent or consistent statements or conduct by the witness.

It is proper for an attorney to interview any witness in preparation for a trial.

You have seen certain videos. I will provide you with the videos and a device with instructions on its use. It's up to you to decide whether to watch the videos during your deliberations. You may, if you wish, rely on your recollections of what you saw during the trial.

Certain summary charts were admitted in evidence. You **[*1583]** may use those summary charts as evidence, even though the underlying documents are not here. The accuracy of the summary charts has been challenged. It is up to you to decide how much weight to give to the summaries.

If you have taken notes during the trial, you may use those notes during your deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

Counts I, II, III, IV, V, and VII of the indictment charge the defendant with mail fraud. In order for you to find the defendant guilty of this charge, the government must prove each of the four following elements beyond a reasonable doubt:

(1) That the defendant knowingly devised or participated in a scheme to defraud as described in the indictment; and

(2) That the defendant did so with the intent to defraud; and

(3) That the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and

(4) That for the purpose of carrying out the scheme or attempting to do so, the defendant used or caused the use of **[*1584]** the United States mails in the manner charged in the particular count.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt as to the charge you are considering, then you should find the defendant guilty of that charge.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt as to the charge you are considering, then you should find the defendant not guilty of that charge.

Counts VI, VIII, IX, X, XI, and XII of the indictment charge the defendant with wire fraud. In order for you to find the defendant guilty of this charge, the government must prove each of the four following elements beyond a reasonable doubt:

(1) That the defendant knowingly devised or participated in a scheme to defraud as described in Count I; and

(2) That the defendant did so with the intent to defraud; and

(3) The scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and

(4) That for the purpose of carrying out the scheme or attempting to do so, the defendant caused interstate wire communications to take place in the manner charged in the **[*1585]** particular count.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt as to the charge you are considering, then you should find the defendant guilty of that charge.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt as to the charge you are considering, then you should find the defendant not guilty of the charge.

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another by a means of materially false or fraudulent pretenses, representations, or promises.

A materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or the concealment of material information.

In considering whether the government has proven a scheme to defraud, the government must prove one or more of the false or fraudulent pretenses, representations, or promises charged in the portion of the indictment describing the scheme be proved beyond a reasonable

doubt. The government, however, **[*1586]** is not required to prove all of them.

A false or fraudulent pretense, representation, promise, omission, or concealment is "material" if it is capable of influencing the decision of the person to whom it was addressed.

It is not necessary that the false or fraudulent pretense, representation, promise, omission, or concealment actually have that influence or be relied on by the alleged victim as long as it is capable of doing so.

A person acts with intent to defraud if he acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant or another.

If the defendant acted in good faith, then he lacked the intent to defraud required to prove the offenses of mail and wire fraud charged in Counts I through XII. The defendant acted in good faith if at the time he honestly believed the truthfulness and validity of the representations and promises that the government has charged as being false or fraudulent as described in the portion of the indictment setting forth the scheme.

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud as charged in Counts I through XII.

[*1587] A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also made knowing -- knowingly made false and fraudulent representations.

The mail and wire fraud statutes can be violated whether or not there is any loss or damage to the victim

of the crime or gain to the defendant. The government need not prove that the scheme to defraud actually succeeded.

A wire transfer of funds and an e-mail each constitutes a transmission by means of wire communication. With respect to the counts charging mail fraud, the government must prove that the United States mails were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails to take place, the defendant need not actually intend that use to make -- to take place. You must find that the defendant knew this use would actually occur or that the defendant knew that it would occur in the ordinary course of business or that the fact -- or that the defendant knew facts from which that use could reasonably have been foreseen.

The defendant need not actually or personally use the mail.

Although an item mailed need not itself contain a fraudulent representation or promise or a request for money, it **[*1588]** must carry out or attempt to carry out the scheme.

In connection with whether a mailing was made, you may consider evidence of the habit or the routine practice of a person.

Each separate use of the mail in furtherance of the scheme to defraud constitutes a separate offense.

With respect to the counts charging wire fraud, the government must prove that interstate communication facilities were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to cause -- use or cause the use of interstate wire communications to take place, the defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur or that the -- or that the defendant knew that it would occur in the ordinary course of business or that the defendant knew facts from which that use could reasonably have been foreseen. However, the government does not have to prove that the defendant knew that the wire communication was of an interstate nature.

The defendant need not actually or personally use interstate communication facilities.

Although an item communicated interstate need not itself contain a fraudulent representation or promise or request for money, it must carry out or attempt to carry out **[*1589]** the scheme.

In connection with whether a wire transmission was made, you may consider evidence of the habit or the routine practice of a person.

Each separate use of interstate communication facilities in furtherance of the scheme to defraud constitutes a separate offense.

The indictment charges that the crimes happened "on or about" certain dates. The government must prove that the crimes happened reasonably close to the dates. The government is not required to prove that the crimes happened on those exact dates.

The defendant has been accused of more than one crime. The number of charges is not evidence of guilt and should not influence your decision.

You must consider each charge separately. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any other charge.

In deciding your verdict, you should not consider the possible punishment for the defendant. If you decide that the government has proved the defendant guilty beyond a reasonable doubt, then it will be my job to decide on the appropriate punishment.

A person acts knowingly if he realizes what he is doing and is aware of the nature of his conduct and does not **[*1590]** act through ignorance, mistake, or accident. In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crimecharged.

If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he personally committed them.

Once you are all in the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. You may discuss the case only when all jurors are present.

Once you start deliberating, you do not communicate about the case or your deliberations with anyone except other members of your jury. You may not communicate with others about your case -- about the case or your deliberations by any means. This includes oral or written communication, as well as any electronic method of com-

munication, such as telephone, cell phone, smartphone, iPhone, BlackBerry, computer, text messaging, instant messaging, the Internet, chat rooms, blogs, websites, or services like Facebook, MySpace, LinkedIn, YouTube, Twitter, or any other method of communication.

[*1591] If you need to communicate with me while you are deliberating, send a note through the court security officer. The note should be signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you do not communicate with me except by a written note. I may have to talk to the lawyers about your message, so it may take me some time to get back to you. You may continue your deliberations while you wait for my answer.

Please be advised transcripts of trial testimony are not available to you. You must rely on your collective memory of the testimony.

If you send me a message, do not include the breakdown of any votes you may have conducted. In other words, do not tell me that you are split 6-6 or 8-4 or whatever vote your happen -- whatever your vote happens to be.

A verdict form has been prepared for you. You will take this form with you to the jury room.

And I will show it to you right now. It's just a two-page jury verdict form. And the name of the court and the name of the case appears here. My name appears here too.

And it reads as follows: "With respect to the charges set forth in the indictment, we, the jury, find defendant Jeffrey Batio" -- each count is listed, and then there's a line for "Not Guilty" or "Guilty." You choose the appropriate box and check it.

[*1592] The last page is simply your signature page. There's room for the date, signatures of each juror, and a signature for the foreperson.

When you've reached a unanimous verdict, your foreperson will fill in and date and sign the verdict form and each of you will sign it. Advise the court security officer when you have reached a verdict. When you come back to the courtroom, I will read the verdict aloud.

The verdict must represent the considered judgment of each juror. Your verdict, whether it's guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to your fellow jurors' opinions. Discuss your differences with an open mind. Do not hesitate to reexamine your own view and change your opinion if you come to believe it is wrong, but you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of fellow jurors or just so that there can be a unanimous verdict.

The jurors should give fair and equal consideration to all of the evidence. You should deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole **[*1593]** interest is to determine whether the government has proved its case beyond a reasonable doubt.

That concludes my instructions.

* * *

APPENDIX G

18 U.S.C. § 1341 – Frauds and Swindles

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

APPENDIX H

18 U.S.C. § 1343 – Fraud by Wire, Radio, or Television

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

APPENDIX I

Excerpt, Jury Instructions, Dkt. No. 218 (N.D. Ill. May 31, 2019)

* * *

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another by means of materially false or fraudulent pretenses, representations or promises.

A materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or the concealment of material information.

* * *

In considering whether the government has proven a scheme to defraud, the government must prove one or more of the false or fraudulent pretenses, representations, or promises charged in the portion of the indictment describing the scheme beyond a reasonable doubt. The government, however, is not required to prove all of them.

* * *

If the defendant acted in good faith, then he lacked the intent to defraud required to prove the offenses of mail and wire fraud charged in Counts 1-12. The defendant acted in good faith if, at the time, he honestly believed the truthfulness and validity of the representations and promises that the government has charged as being false

or fraudulent, as described in the portion of the indictment setting forth the scheme.

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud as charged in Counts 1-12.

A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.

APPENDIX J

PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT

(2012 Ed.)

Prepared by
The Committee on Federal Criminal Jury Instructions
of the Seventh Circuit

* * *

6.10 GOOD FAITH – FRAUD/FALSE STATEMENTS/MISREPRESENTATIONS

If the defendant acted in good faith, then he lacked the [intent to defraud; willfulness; etc.] required to prove the offense[s] of [identify the offenses] charged in Count[s] ___. The defendant acted in good faith if, at the time, he honestly believed the [truthfulness; validity; insert other specific term] that the government has charged as being [false; fraudulent; insert term used in charge].

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted [with intent to defraud; willfully; etc.] as charged in Count[s] ___.

[A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.]

Committee Comment

The Seventh Circuit has questioned whether a good faith instruction provides any useful information beyond that contained in the pattern instruction defining "knowledge." *See United States v. Prude*, 489 F.3d 873, 882 (7th Cir. 2007); *United States v. Mutuc*, 349 F.3d 930, 935–36 (7th Cir. 2003). For this reason, as a general rule, this instruction should not be used in cases in which the government is required only to prove that the defendant acted "knowingly." Rather, it should be used in cases in which the government must prove some form of "specific intent," such as intent to defraud or willfulness.

The third paragraph of the instruction should be given only when warranted by the evidence. As the court observed in *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008), "[a] person who tells a material lie to a federal agency can't say 'yes, but I thought it would all work out to the good' or some such thing. Intentional deceit on a material issue is a crime, whether or not the defendant thought that he had a good excuse for trying to deceive the federal agency or the potential customers." See also *United States v. Radziszewski*, 474 F.3d 480, 485–86 (7th Cir. 2007). Indeed, in this situation, it is arguable that no good faith instruction should be given at all. *Caputo*, 517 F.3d at 942.

APPENDIX K

FILED
MAY 31 2018
THOMAS G. BRUTON
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 16 CR 425
v.	)	Violations: Title 18, United States Code, Sections 1341 and 1343
JEFFREY BATIO	)	

Superseding Indictment

JUDGE PALLMEYER
MAGISTRATE JUDGE GILBERT

COUNT ONE

The SPECIAL DECEMBER 2017 GRAND JURY charges:

1. At times material to this superseding indictment:

a. Defendant JEFFREY BATIO was the Chief Executive Officer of two companies, Armada Systems LLC, and Idealfuture, Inc. Defendant BATIO identified both companies as being in the business of creating, licensing, and selling high-end, cutting-edge desktop and laptop computers, as well as computer software and hardware.

b. Armada and Idealfuture advertised a laptop computer that was described as being a 3-in-1 portable folding laptop computer, which combined a laptop, a tablet, and a smart phone, with a full-size folding keyboard (the "laptop"). The laptop was known by various names at different times, including the Stealth, the IF Convertible, and the Dragonfly Futurefon. Armada also advertised similar folding laptop computers called the Voyager and the Phantom.

c. Armada and Idealfuture also advertised a computer product called the Radian, identified as a multi-screen computer device, which had two, three, or four monitors, which could be used together, attached to a desktop computer. Another model of the Radian was described as being a dual-screen laptop computer.

d. Defendant BATIO sold membership shares in Armada, and obtained loans for Armada from individuals and entities (hereinafter collectively referred to as investors).

e. Defendant BATIO's company, Idealfuture, obtained money from individuals through a crowdfunding website, Indiegogo.com, which facilitated raising funds from the public for various purposes, including for the development and sale of products. Idealfuture raised money from individuals ("customers") by selling, and promising to deliver, the IF Convertible and the Dragonfly Futurefon to customers, who submitted pre-orders and paid for those products in advance.

f. Armada, which was an Illinois limited liability company, had two subsidiaries, Xen Systems LLC and Titara LLC, which were involved in marketing products for Armada.

2. Beginning no later than in or about September 2003, and continuing until in or about at least June 2016, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, devised, intended to devise, and participated in a scheme to defraud investors and customers, and to obtain their money and property by means of false and fraudulent pretenses, representations and promises, and concealment of material facts, which scheme is more fully described below.

3. It was part of the scheme that defendant BATIO fraudulently obtained and retained money from investors and customers for the purposes of financing his purported computer technology businesses and of enriching himself. As a part of this fraudulent financing scheme, for more than ten years, defendant BATIO falsely represented to investors and customers that his businesses had successfully created and developed new computer technology products, that investors' funds would be used to develop and manufacture those products, and that those products were about to be manufactured or licensed. Although defendant Batio used investors' and customers' funds to operate his businesses, he also misappropriated funds for his own personal benefit.

4. It was further part of the scheme that defendant BATIO falsely represented to investors and customers that Armada and Idealfuture had completed the engineering on the 3-in-l folding laptop computer, and the Radian multi-screen system, and that the companies were in the final stages of bringing those products to market. Defendant BATIO falsely represented that his companies were preparing for production of the 3-in-l folding laptop com-

puter, and the Radian, and that production would start within months, even though he knew that those products were not complete and that production would not start within the identified time frame.

5. It was further part of the scheme that defendant BATIO gave Armada investors Confidential Private Offering Memoranda that contained false representations, including Memoranda from 2006 and 2008 that falsely represented that the Radian was virtually complete from a design standpoint, and that the Radian was approaching market readiness. In fact, defendant BATIO knew that the Radian was not complete or approaching market readiness during any of those years.

6. It was further part of the scheme that defendant BATIO made statements to investors that made it falsely appear that he was successfully engaged in on-going discussions with certain large technology companies concerning partnership deals, licensing agreements, and marketing contracts relating to the laptop computer and the Radian. In fact, defendant BATIO knew that his limited contacts with those technology companies primarily consisted of his sales pitches, and they had not progressed to the stage of actually discussing partnerships, licensing, or marketing contracts.

7. It was further part of the scheme that defendant BATIO made statements to investors that made it falsely appear that his companies had more resources than they actually had, including larger, more successful operations, and a larger staff.

8. It was further part of the scheme that defendant BATIO attempted to obtain additional funding, and to lull investors, by falsely representing that his companies were achieving their stated goals. Defendant sent Investor Up-

dates and emails to investors falsely representing that the production, licensing, and sale of the 3-in-l folding laptop computer and the Radian was imminent, even though defendant BATIO knew that those products were not completed, and could not be sold commercially in the near future.

9. It was further part of the scheme that defendant BATIO falsely represented to investors that the investors' funds would be used to operate Armada, and to develop, manufacture, and market Armada's products. In fact, defendant BATIO knew that not all of the investors' funds would be used in that manner, because defendant BATIO intended to use, and did use, a portion of the investors' funds to pay for personal expenses, including vacations, rent, credit card charges, and car expenses.

10. It was further part of the scheme that defendant BATIO falsely represented to certain investors that he would make Armada's financial records available to them for review. In fact, defendant BATIO refused to allow investors to review Armada's records, despite investors' requests to do so.

11. It was further part of the scheme that, as the years passed and Armada failed to produce or license any products, defendant BATIO changed the name of the company, and changed the name of the 3-in-l folding laptop twice, thereby concealing the fact that defendant BATIO was continuing to raise money, based on the same false representations that he had made for many years. In or about 2011, defendant BATIO notified Armada investors that he had rebranded the Armada company with a new name: Idealfuture. In or about 2013, defendant BATIO notified Armada investors that Armada's Stealth Laptop was being launched by Idealfuture with a new name - the

IF Convertible. Defendant BATIO subsequently renamed the IF Convertible as the Dragonfly Futurefon.

12. It was further part of the scheme that defendant BATIO raised funds over the internet, through the company's website, and through a crowd-funding website, Indiegogo, by offering advance sales of the 3-in-l folding laptop and falsely representing that the laptop would be sent to customers within a specified time period. In fact, BATIO knew that the IF Convertible/Dragonfly laptop had not been completed and could not be delivered within the promised time frame.

13. It was further part of the scheme that defendant BATIO concealed, misrepresented, and hid and caused to be concealed, misrepresented and hidden, the existence of the scheme, the purpose of the scheme and acts done in furtherance of the scheme.

14. It was further part of the scheme that as a result of his actions, defendant BATIO caused a loss to investors and customers of at least approximately $2 million.

15. On or about August 15, 2011, at Bartlett, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be delivered by U.S. mail, a stock certificate for shares of Armada stock, which was sent to Investor Da.Toul. in Bartlett, Illinois, relating to his investment in Armada;

In violation of Title 18, United States Code, Section 1341.

COUNT TWO

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about August 15, 2011, at Plainfield, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be delivered by U.S. mail, a stock certificate for shares of Armada stock, which was sent to Investor Su.Ski. in Plainfield, Illinois, relating to her investment in Armada;

In violation of Title 18, United States Code, Section 1341.

COUNT THREE

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

3. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

4. On or about August 18, 2011, at Plainfield, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be deposited, to be sent and delivered by U.S. mail, from Plainfield, Illinois to California, a check in the amount of $2,500 from Investor Su.Ski., which was an investment in Armada;

In violation of Title 18, United States Code, Section 1341.

COUNT FOUR

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about September 1, 2011, at Lake in the Hills, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be deposited, to be sent and delivered by U.S. mail, from Lake in the Hills, Illinois to California, a check in the amount of $5,000 from Investor Gre.Caz., which was an investment in Armada;

In violation of Title 18, United States Code, Section 1341.

COUNT FIVE

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about September 16, 2011, at Bartlett, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be deposited, to be sent and delivered by U.S. mail, from Bartlett, Illinois to Cali-

fornia, a check in the amount of $5,000 from Investor Da.Toul., which was an investment in Armada;

In violation of Title 18, United States Code, Section 1341.

COUNT SIX

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about September 23, 2011, at Lake in the Hills, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be transmitted by means. of wire communication in interstate commerce, certain writings, signs and signals, namely an interstate transfer of funds, in the amount of $5,000, from Lake in the Hills, Illinois, to California, through the Fed Wire system, from Investor Ore.Caz., which was an investment in Armada;

In violation of Title 18, United States Code, Section 1343.

COUNT SEVEN

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about December 15, 2011, at Elgin, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be deposited, to be sent and delivered by U.S. mail, from Elgin, Illinois to California, a check in the amount of $2,500, and a signed subscription agreement, from Investor Da.Schu., relating to an investment in Armada;

In violation of Title 18, United States Code, Section 1341.

COUNT EIGHT

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about July 24, 2012, at Bartlett, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be transmitted by means of wire communication in interstate commerce, certain writings, signs and signals, namely an Investor Update, which was an interstate electronic email message from defendant BATIO in California to investors, including to Investor Da.Toul. in Bartlett, Illinois, through an email server located outside of Illinois, which email contained false representations;

In violation of Title 18, United States Code, Section 1343.

COUNT NINE

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about October 23, 2014, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be transmitted by means of wire communication in interstate commerce, certain writings, signs and signals, namely, an online payment to Indiegogo in the amount of approximately $200, paid through PayPal (an online payments system), made in Rolling Meadows, Illinois and processed through Minnesota, which payment was made by customer Vic.DeLaCr. to purchase a Dragonfly Futurefon from Idealfuture;

In violation of Title 18, United States Code, Section 1343.

COUNT TEN

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about October 25, 2014, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be transmitted by means of wire communication in interstate commerce, certain writings, signs and signals, namely, an online payment to

Indiegogo in the amount of approximately $400, paid through Stripe, Inc. (an online payments system), made in Woodridge, Illinois and processed outside of Illinois, which payment was made by customer Ti.Sle. to purchase a Dragonfly Futurefon from Idealfuture;

In violation of Title 18, United States Code, Section 1343.

COUNT ELEVEN

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about November 7, 2014, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be transmitted by means of wire communication in interstate commerce, certain writings, signs and signals, namely, an online payment to Indiegogo in the amount of approximately $400, paid through Stripe, Inc. (an online payments system), made in Long Grove, Illinois and processed outside of Illinois, which payment was made by customer An.Frie. to purchase a Dragonfly Futurefon from Idealfuture;

In violation of Title 18, United States Code, Section 1343.

COUNT TWELVE

The SPECIAL DECEMBER 2017 GRANT JURY further charges:

1. Paragraphs 1 through 14 of Count One of this superseding indictment are incorporated here.

2. On or about November 14, 2014, in the Northern District of Illinois, Eastern Division, and elsewhere,

JEFFREY BATIO,

defendant herein, for the purpose of executing the scheme to defraud, knowingly caused to be transmitted by means of wire communication in interstate commerce, certain writings, signs and signals, namely, an online payment to Indiegogo in the amount of approximately $400, paid through Stripe, Inc. (an online payments system), made in Glen Ellyn, Illlinois and processed outside of Illinois, which payment was made by customer Mic.Doy. to purchase a Dragonfly Futurefon from Idealfuture;

In violation of Title 18, United States Code, Section 1343.

A TRUE BILL:

_____
FOREPERSON

_____
UNITED STATES ATTORNEY

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

United States of America,	)	
Plaintiff,	)	**No. 16 CR 425**
v.	)	
Jeffrey Batio,	)	**Judge Rebecca R. Pallmeyer**
Defendants.	)	

ORDER

Jury Trial held on 5/31/2019. Jury Deliberations held and concluded. The Jury returns a verdict of Guilty as to Counts 1s, 2s, 3s, 4s, 5s, 6s, 7s, 8s, 9s, 10s, 11s, and 12s. Judgment of guilty entered. Cause referred to the probation office for a presentence investigation. Sentencing set 9/3/2019 at 11:30 AM. The Probation Officer is directed to provide counsel for both sides with their sentencing recommendation. Trial Ends - Jury.

Pursuant to 18 U.S.C. § 3664(d)(1), if restitution is being sought in this case, 60 days prior to the sentencing date, the Government shall provide the Probation Office and the courtroom deputy an electronic standardized spreadsheet (available on the Court's website) with a list of victims and their full current contact information. This list shall include any amounts subject to restitution. If the Government is not able to provide the full victim list 60 days prior to sentencing, the Assistant United States At-

torney will file a motion to request an extension of time to compile the information, to the extent permitted by 18 U.S.C. § 3664(d)(5).

ENTER:

[s/]
REBECCA R. PALLMEYER
United States District Judge

Dated: May 31, 2019

(T:4:30)

APPENDIX M

UNITED STATES DISTRICT COURT
Northern District of Illinois

UNITED STATES OF AMERICA v. JEFFREY BATIO	**JUDGMENT IN A CRIMINAL CASE** Case Number: 1:16-CR-0425(1) USM Number: 51368-424 Thomas More Leinenweber Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) 1s through 12s after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:1341.F Frauds and Swindles	11/14/2014	1s-5s
18:1343.F Fraud by Wires, Radio, or Television	11/14/2014	6s
18:1341.F Frauds and Swindles	11/14/2014	7s
18:1343.F Fraud by Wires, Radio, or Television	11/14/2014	8s-12s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

November 15, 2021

Date of Imposition of Judgment

[s/]

Signature of Judge
Rebecca R. Pallmeyer,
United States District Judge

Name and Title of Judge

December 21, 2021
Date

DEFENDANT: JEFFREY BATIO

CASE NUMBER: 1:16-CR-00425(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Nintey-six (96) months as to count One (1) through count Twelve (12) of the Superseding Indictment, terms to run concurrently. Cost Waived.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at on
- ☐ as notified by the United States Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ☒ before 2:00 pm on 12/20/2021.
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office. * * *

DEFENDANT: JEFFREY BATIO

CASE NUMBER: 1:16-CR-00425(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**Restitution**	**Fine**	**JVTA Assessment****
TOTALS	$1,200.00	$5,086,269.00	$.00	$.00

☐ The determination of restitution is deferred until . *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to **18 U.S.C. § 3664(i)**, all nonfederal victims must be paid before the United States is paid.

See attached pages

☒ Restitution amount ordered pursuant to plea agreement $ 5,086,269.00

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to **18 U.S.C. § 3612(f)**. All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to **18 U.S.C. § 3612(g)**.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the .

☐ the interest requirement for the is modified as follows:

☐ The defendant's non-exempt assets, if any, are subject to immediate execution to satisfy any outstanding restitution or fine obligations.

* * *

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY BATIO, Defendant.	Docket No. 16 CR 425 Chicago, Illinois November 15, 2021 1:45 p.m.

TRANSCRIPT OF PROCEEDINGS – Sentencing
BEFORE THE HONORABLE
REBECCA R. PALLMEYER

APPEARANCES:

For the Plaintiff: HON. JOHN R. LAUSCH JR.
UNITED STATES ATTORNEY
BY: MS. JACQUELINE STERN
MR. MATTHEW SCHNEIDER
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604

For the Defendant: LEINENWEBER BARONI & DAFFADA, LLC
BY: MR. THOMAS M. LEINENWEBER

120 North LaSalle Street,
Suite 2000
Chicago, Illinois 60602

LAW OFFICES OF MATTHEW J. MCQUAID
BY: MR. MATTHEW J. McQUAID
53 West Jackson Boulevard,
Suite 1062
Chicago, Illinois 60604

Also Present: Ms. Missy Kolbe, Probation Officer

Court Reporter: FRANCES WARD, CSR, RPR, RMR, FCRR
Official Court Reporter
219 S. Dearborn Street, Suite 2524A
Chicago, Illinois 60604
(312) 435-5561
frances_ward@ilnd.uscourts.gov

[*81] (The following proceedings were had via videoconference:)

THE CLERK: 16 CR 425, United States versus Jeffrey Batio.

THE COURT: Well, let me start again.

We got appearances for the record.

And I was just commenting that I have had a chance to review my own notes on this case and some other materials, just to get my thinking in order.

Let me just make a couple of points.

First, Mr. Leinenweber, I think, accurately explained that he does not think that Mr. Batio believes he was com-

mitting a crime. I think that's important to keep in mind for a couple of reasons.

I would disagree with Mr. Leinenweber that fraud artists or people that are engaged in fraud routinely use that money for nothing -- no reasons other -- use the money for no purposes other than greed.

I have seen many situations over the years. People have a variety of motivations for doing what they are doing.

I think I could agree with you, Mr. Leinenweber, that nothing about this record suggests that Mr. Batio was buying yachts or living the high life or even acting like a high roller with his friends.

He was, indeed, concerned about the product that he **[*82]** was developing. I don't think -- I personally don't have any doubts about that.

He wanted to be a success. That's what he was using the money for. He wasn't using it to go on expensive vacations or buy luxury goods or anything of that nature.

But to say that that, by itself, means he wasn't engaged in fraud and that his intentions were pure, it -- even if accurate, it doesn't really tell the whole story.

I think it's important to remember that one of the things that we told the jurors when we gave their instruction -- I believe this was over Ms. Gambino's objection -- was that defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.

And I know that Mr. -- I believe that Mr. Batio disagrees with that as a statement of the law. But my understanding -- yes. Yes.

MR. LEINENWEBER: Your Honor, I'm sorry to interrupt you.

THE COURT: Okay. There is something wrong with the microphone, maybe?

MR. LEINENWEBER: Sorry, Judge. It's Tom. Can I jump out, your Honor? I'm sorry.

THE COURT: Of course. That's fine. That's fine.

[*83] MR. LEINENWEBER: My apologies. I will be right back.

(Brief pause.)

MS. STERN: Judge, I can hear you fine, so I think it might be his microphone.

THE COURT: I hope so. I hope he is able to hear me.

MR. LEINENWEBER: I'm back. I am hoping that will work.

THE COURT: All right. Well, let me try this again.

I think I began by saying that you told us -- and I agree with you -- that Mr. Batio believes that he did not commit a crime or that he wasn't committing a crime. He truly believed this.

And I think he genuinely believes that his efforts would ultimately bear fruit on behalf of these investors.

You are correct that he did not spend the money that he was collecting from investors for luxury goods, necessarily. He was supporting himself but not to the tune of millions. And he wasn't buying -- going on expensive vacations or using the money to gamble or to engage in drug use. There is no indication of that at all. At the same time, that by itself doesn't mean that he wasn't engaged in a fraud.

[*84] I know that he had what he believes are good intentions. But the fact is -- again, this was an instruction that we gave to the jurors over Ms. Gambino's objection, I believe -- is that a defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.

So in recognizing that Mr. Batio hoped that it would all work out well for him, I can't look past the fact that he made, really, knowing false representations, including cutting the hole in the table to make it appear that his prototype product was sooner than it was; using a model to carry around a piece of plastic, a hollow piece of plastic, and suggesting that it was functional; telling investors that he had a functioning or near-functioning manufacturing apparatus when really he did not; and continuing to accept money from people that -- who had relied on him and were just assured by him that it was only a matter of time before all things would work out.

* * *