No.

IN THE SUPREME COURT OF THE UNITED STATES

BERNARD ROSS HANSEN,
DIANE RENEE ERDMANN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On June 17, 2024, the Court granted review in *Stamatios Kousisis and Alpha Painting and Construction Co., Inc. v. United States*, No. 23-909, to consider the following question presented:

> Whether a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under the federal wire fraud statute, 18 U.S.C. § 1343.

This case involves the same question presented, including under the mail fraud statute, 18 U.S.C. § 1341.

RELATED PROCEEDINGS

(1) United States District Court, Western District of Washington; *United States v. Hansen, et al.*, No. 2:18-cr-00092-RAJ (June 6, 2022)

(2) United States Court of Appeals for the Ninth Circuit; *United States v. Hansen, et al.*, Nos. 22-30102 & 22-30103 (July 16, 2024)

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The Court of Appeals issued a memorandum decision at *United States v. Hansen, et al.*, 2024 WL 3423222 (9th Cir. 2024).

JURISDICTION

The Court of Appeals filed its decision on July 16, 2024. *See* App. 1-12.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1). *See also* Sup. Ct. R. 30(1) (regarding the computation of time with respect to federal holidays, including Columbus-Indigenous Peoples' Day).

STATUTORY PROVISIONS

18 U.S.C. § 1341 provides in pertinent part:

> 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

[1]As used herein, App. refers to Petitioners' consecutively paginated Appendix; "ER" to Excerpts of Record before the Ninth Circuit; "(Hansen)" to Hansen's direct appeal; and "(Erdmann)" to Erdmann's direct appeal.

> 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. § 1343 provides in pertinent part:

> 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.

STATEMENT OF THE CASE

Petitioners operated a precious metals business called Northwest Territorial Mint ("NWTM"). Hansen was NWTM's founder and sole owner. Erdmann was NWTM's vault manager. Petitioners were prosecuted for and convicted of mail and wire fraud for their roles in this business.

NWTM had three lines of business at issue in this case. The first was its "bullion" business, which involved the retail sale of precious metals—

typically coins and bars—to customers. 1-ER-191-210 (Hansen). The second was its "storage" business, in which customers paid NWTM to store their own precious metals inside NWTM's vaults. *Id.* The third was a "lease" business, which involved customers leasing their precious metals to NWTM, which NWTM could then use for its own purposes. *Id.*

The government claimed that Petitioners defrauded all three types of customers, in sum, by (1) lying to the bullion customers about when their orders would ship, how their money would be used at NWTM, and when they would receive refunds on canceled orders, as well as (2) stealing from the storage and lease customers to fulfill backlogged bullion orders. *See id.* It was undisputed that NWTM had delivery backlogs, and that some bullion customers ultimately did not receive their orders after NWTM sustained a large adverse legal judgment and filed for bankruptcy.

Particularly as to the bullion customers, Petitioners' principal defense was that even if the government established some deception in the inducement of sales transactions, Petitioners never intended to defraud the customers out of their money because they always intended, and attempted, to fulfill each order. Hansen Opening Brief at 36-43. Indeed, numerous government witnesses testified at trial to Petitioners' intent to fulfill each

order. *See* Hansen Opening Brief at 39-40 (record citations). Petitioners thus argued that the Government not only needed to prove deception, but also an intent to "cheat" NWTM's customers out of their money. *See United States v. Miller*, 953 F.3d 1095, 1101-04 (9th Cir. 2020).

The government, by contrast, argued that Petitioners' deceptive statements to customers about delivery times and refunds, standing alone, constituted fraud regardless of whether Petitioners actually intended for customers to receive their bullion or refunds:

> What you need to find on this element, and what the evidence in this case has shown, beyond a reasonable doubt, is that the defendants intended to deprive victims of money, or property through deceptions. That's it, that the lies told or caused to be told to people that made them part with their money or metal, even temporarily. . . . You do not need to find that the defendants never intended to fill customer orders, or that they intended permanently to steal customer money. That is not the law. . . . Those questions distract from what's really at issue in this case, which is whether defendants lied to their customers, to get them to part with their money or property, period.

14-ER-2809-2810 (Hansen).

As a legal matter, these disputes played out in a disagreement about the applicability of a Ninth Circuit model instruction that permits conviction even if Petitioners had a good faith intent to repay their

customers. 1-ER-173, 2721 (Hansen). Petitioners proposed, but did not receive, an alternative jury instruction that would have precluded convictions based solely on fraudulent inducement, arguing that:

> We're not claiming that Mr. Hansen believed [the customers] could be repaid on the bullion-sales side. We're saying that when the transaction occurred, there was no intent to deprive anybody of anything. They got either the property—the bullion that they ordered—or the right to a refund.

13-ER-2707-2708, 2721 (Hansen).

After the jury returned convictions, the District Court denied Petitioners' motions for relief under Fed. R. Crim. P. 29 and 33. App. 15-23. Those motions argued that the Government did not prove an intent to "cheat" for purposes of federal criminal fraud, and alternatively, that a new trial was necessitated by the District Court's faulty jury instruction. *See id.*

On appeal, Petitioners repeated their Rule 29 and 33 challenges in their opening briefs, reply briefs, and Fed. R. App. P. 28(j) letters. Those challenges further extended to oral argument, at which the panel expressly explored the contours of the Government's fraudulent inducement theory. *See* Oral Argument Video at 23:15.[2] Yet again, Petitioners maintained that

[2] https://www.youtube.com/watch?v=8KR2-MwrUm8 (last visited October 15, 2024).

under Ninth Circuit and other authorities, deception alone was not sufficient to prove an intent to "deceive *and* cheat[,]" as required by circuit precedent. *See Miller*, 53 F.3d at 1104 (emphasis added); *see also United States v. Milheiser*, 98 F.4th 935, 942-44 (9th Cir. 2024); *cf. United States v. Takhalov*, 827 F.3d 1307, 1312-14 (11th Cir. 2016). *See also* Oral Argument Video at 32:00-33:50.

In affirming the District Court's judgments, the Court of Appeals endorsed a fraudulent inducement theory, holding that Petitioners "made extensive material misrepresentations to NWTM customers *to secure orders* they could not—and did not—fulfill." App. 3 & n.1. (emphasis added). The Ninth Circuit thus embraced a theory under which an act of deception that could or ultimately does cause property harm establishes fraud, regardless of whether the defendant intended it. As Petitioners had argued, however, the law "does not define a scheme to defraud as an intent to deceive with recklessness about resulting harm." Hansen Reply Brief at 3, *citing* Model Penal Code § 2.02(2)(c) (defining recklessness).

The Court of Appeals further dismissed circuit authorities, including *Milhesier* and *Takhalov*, as "distinguishable," without meaningfully addressing Petitioners' arguments that (i) fraudulent inducement alone

cannot establish federal fraud, and (ii) the jury instructions curtailed Petitioners' ability to fully present their defense. App. 4-5. And, indeed, after the panel filed a decision that ignored Petitioners' jury instruction argument altogether, Petitioners requested rehearing, arguing that their Rule 33 claim was central to their contention that the jury instructions wrongly permitted the government to submit an overbroad theory of fraud. *See*, *e.g.*, *Milheiser*, 98 F.4th at 945. In response, the Court of Appeals issued an amended decision that dismissed Petitioners' argument in a cursory footnote:

> Because we conclude that *Milheiser* is distinguishable, we also reject Defendants' claim that the jury was improperly instructed as to the elements of fraud and their argument that the district court improperly denied their request for a new trial.

App. 5, n.1. The court, in effect, held that Petitioners' fraudulent inducement constituted federal criminal fraud because, in the panel's view, the deceptions at issue went to "nature of the bargain" as a matter of law. App. 2-5 & n.1.

REASONS FOR HOLDING OR GRANTING THE PETITION

The Court should hold or grant this joint petition for certiorari to vacate and remand the Ninth Circuit's judgment in light of this Court's upcoming decision in *Kousisis*. As noted above, the Court granted *certiorari* in *Kousisis* in June 2024, *see* 144 S. Ct. 2655 (2024), to review the judgment of the Third Circuit in *United States v. Kousisis*, 82 F.4th 230 (3rd Cir. 2023).

As described at length, Petitioners repeatedly argued at trial and on appeal that the jury could not properly convict them of mail and wire fraud solely because they employed deception to induce commercial exchanges if, as the evidence indicated, they intended ultimately to fulfill the customers' orders or issue refunds. *See supra*. The fact that subsequent liabilities and bankruptcy prevented Petitioners from fulfilling their intent does not mean they committed federal criminal fraud rather than, *e.g.*, a tort such as unlawful conversion. Brief for Petitioner, *Kousisis v. United States*, No. 23-909, 2024 WL 3903655, at *1, *40-41 ("Kousisis Brief") (citing state law examples).

Before this Court, Kousisis contends that the Government has pursued "audacious" theories of fraud to "criminalize garden-variety

disputes that have typically been the province of 'state contract and tort law.'" Kousisis Brief at *2. Most directly, *Kousisis* is poised to decide the very same issue Petitioners have been pressing: *viz.*, whether or not "deceptively inducing someone to enter into a transaction that does not contemplate harm to their property rights is [] mail or wire fraud." Kousisis Brief at *3 (internal citation omitted).

If this Court embraces Kousisis's position, in some form, that a fraudulent inducement theory cannot support a federal fraud conviction, the Court of Appeals's judgment in this case cannot be reconciled with any such outcome. Moreover, this Court's decision in *Kousisis* could extend even more broadly than the position Petitioners argued in the Court of Appeals under prevailing circuit authorities, because Kousisis also takes aim at thorny materiality doctrines such as the "essence of the bargain." *See* Kousisis Brief, at *44-48.

CONCLUSION

For these reasons, Petitioners respectfully ask the Court to hold their petition pending its resolution of *Kousisis*. Should the Court's ruling in *Kousisis* call into question the government's theory of prosecution in this case, Petitioners respectfully request that the Court grant this petition, vacate the judgment below, and remand for further proceedings consistent with *Kousisis*.

Respectfully submitted,

Dated: October 15, 2024

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APPENDIX

NOT FOR PUBLICATION

FILED

JUL 16 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BERNARD ROSS HANSEN, AKA Ross B Hansen, Defendant-Appellant.	No. 22-30102 D.C. No. 2:18-cr-00092-RAJ-1 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DIANE RENEE ERDMANN, AKA Diane Renee, Defendant-Appellant.	No. 22-30103 D.C. No. 2:18-cr-00092-RAJ-2

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued and Submitted May 9, 2024
Seattle, Washington

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: MURGUIA, Chief Judge, and McKEOWN and OWENS, Circuit Judges.

Bernard Ross Hansen and Diane Renee Erdmann ("Defendants") appeal from their convictions for mail and wire fraud as the owner and vault manager, respectively, of the Northwest Territorial Mint ("NWTM"). As the parties are familiar with the facts, we do not recount them here. We affirm both Defendants' convictions and sentences.

1. Defendants primarily contend that the district court improperly denied their motion for acquittal based on insufficient evidence of their "specific intent to defraud" and the existence of a "scheme to defraud." *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008) (citing 18 U.S.C. §§ 1341, 1343). We review the denial of a motion for acquittal de novo. *United States v. Yates*, 16 F.4th 256, 264 (9th Cir. 2021). "There is sufficient evidence to support a conviction if, 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Sullivan*, 522 F.3d at 974 (citation omitted).

To prove intent to defraud, the jury must find that Defendants had "the intent to deceive *and* cheat—in other words, to deprive the victim of money or property by means of deception." *United States v. Miller*, 953 F.3d 1095, 1103 (9th Cir. 2020). This intent "may be established by circumstantial evidence." *United States v. Rogers*, 321 F.3d 1226, 1230 (9th Cir. 2003). Intent also "may be inferred from

misrepresentations made by the defendants, and the scheme itself may be probative circumstantial evidence of an intent to defraud." *Sullivan*, 522 F.3d at 974 (citation omitted). "[T]o prove a 'scheme to defraud,' the jury must find that the defendant employed 'material falsehoods.'" *United States v. Galecki*, 89 F.4th 713, 737 (9th Cir. 2023) (emphasis omitted) (citation omitted).

There is sufficient evidence to support Defendants' convictions. They made extensive material misrepresentations to NWTM customers to secure orders they could not—and did not—fulfill. Defendants told customers that NWTM "operate[s] as a brokerage" and "buy[s] to fill orders." But they used customer money for various expenses, such as Hansen's legal fees, business expansion, refunds to other customers, and Defendants' personal expenses. As Defendants concede, these spending decisions left them with very little cash flow to fulfill customer orders.

Even though they knew NWTM could not fulfill orders within eight to ten weeks, Defendants told customers that orders would be shipped within that time frame. Even after NWTM's general counsel informed Hansen that a consent decree between NWTM and the Washington Attorney General required the company to "tell customers the accurate expected timeframe for delivery," Hansen maintained that they were allowed to quote eight to ten weeks and ship in fourteen weeks.

Erdmann argues that there was insufficient evidence that she had a specific intent to defraud because she rarely interacted with customers. But she was "second in command" to Hansen, was in charge of "which orders would go and which would not," at times dictated the eight-to-ten week timeframe given to customers, and inflated inventory numbers.

Defendants' misrepresentations were material. One NWTM sales associate testified that discussing longer delivery times with customers would have led to a drop in sales. *See Galecki*, 89 F.4th at 737 ("'[A] false statement is material if it has "a natural tendency to influence[] or [is] capable of influencing"' the decisionmaker to whom the statement 'was addressed.'" (third alteration in original) (citation omitted)). The high number of customer complaints were "always, or almost always about the delivery times for bullion [the customers] had ordered."

Relying on *United States v. Milheiser*, 98 F.4th 935, 944 (9th Cir. 2024), Defendants argue that their misrepresentations did not go to the "nature of the bargain." But they did not deprive their customers "of accurate information alone." *Id.* at 942. They stated that customers would receive either bullion or a refund within a certain time frame, but the customers received neither. Defendants cite *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), but that out-of-circuit case is distinguishable for the same reason. *Id.* at 1312-14 (holding that

there was no fraud where "the alleged victims 'received exactly what they paid for,'" because "a defendant 'schemes to defraud' only if he schemes to 'depriv[e] [someone] of something of value'" (alterations in original) (citations omitted)).[1]

Even if the record supports conflicting inferences, we "must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution[] and must defer to that resolution." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (citation omitted). Because a rational trier of fact could have found the elements of mail and wire fraud beyond a reasonable doubt, there was sufficient evidence to support the Defendants' convictions.

2. Defendants next argue that Juror 34 was actually biased. They did not raise this claim at trial, so we review for plain error. *See United States v. Mitchell*, 568 F.3d 1147, 1149-50 (9th Cir. 2009). "[A]ctual bias is . . . the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (citation omitted). "A juror is . . . impartial 'only if he can lay aside his opinion and render a verdict based on the evidence presented in court.'" *Id.* at 1114 (citation omitted). Defendants did not move to dismiss Juror 34 for cause, so they "must show that the evidence of partiality before the district court was so

[1] Because we conclude that *Milheiser* is distinguishable, we also reject Defendants' claim that the jury was improperly instructed as to the elements of fraud and their argument that the district court improperly denied their request for a new trial.

indicative of impermissible juror bias that the court was obliged to strike [the juror] from the jury." *Mitchell*, 568 F.3d at 1151.

Defendants have not demonstrated plain error. They point out that Juror 34 indicated that it had crossed their mind that Defendants "must have done something" if "the federal government [was] spending so much time on them," and that they "ha[d] a negative view of criminal defense lawyers, because they try to get their clients off on technicalities." But, while the juror stated that they "hate[d] to see" a prosecution fail due to a "technicality," they also said, "that's the way the system should work," and "[e]veryone charged with anything deserves the best defense they can get[,] [s]o if there was a technicality, that is a legitimate technicality." Thus, the case Defendants rely on, *United States v. Kechedzian*, 902 F.3d 1023, 1030 (9th Cir. 2018)—in which a juror, who was asked three times whether she could be impartial, "explicitly noted that she was unsure if she could put her personal biases aside"—is distinguishable. Defendants also have not shown structural error. *See Sims v. Rowland*, 414 F.3d 1148, 1153 (9th Cir. 2005) (explaining that this court has "never held" that a district court commits structural error by failing to "investigate *potential* juror bias").

3. Defendants also claim that the district court's loss calculations for sentencing and restitution were unreasonable because—according to their expert—there was no reliable evidence of the loss amount. We review the district court's

application of the Sentencing Guidelines and restitution calculation for abuse of discretion, reviewing underlying factual findings for clear error. *See United States v. Garro*, 517 F.3d 1163, 1167 (9th Cir. 2008).

For sentencing "the court 'need only make a reasonable estimate of loss, given the available information.'" *United States v. Tadios*, 822 F.3d 501, 503 (9th Cir. 2016) (citation omitted). "[E]ven when a fact has an extremely disproportionate effect on the sentence," a district court need only find it by preponderance of the evidence. *United States v. Lucas*, 101 F.4th 1158, 1162 (9th Cir. 2024) (en banc).

"We may uphold a restitution order 'where the district court fails to make pertinent factual findings . . . when the basis of the district court's calculations is clear.'" *United States v. Anderson*, 741 F.3d 938, 951 (9th Cir. 2013) (ellipsis in original) (citation omitted). "[T]he district court may utilize only evidence that possesses sufficient indicia of reliability to support its probable accuracy." *Id.* at 951-52 (citation omitted).

The district court based its restitution amounts on the same loss calculations it used for sentencing and found there was "more than sufficient evidence to support" the government's loss amount. This evidence included: $4.4 million worth of missing property belonging to bullion storage customers, $3 million in

refunds owed to customers, $22 million in unfulfilled orders, and $1.5 million that NWTM owed to a specific customer.

These factual findings are not clearly erroneous, and they support Defendants' sentencing enhancement and restitution amount. The district court's refusal to discredit this evidence based on the testimony of a single defense expert was not clear error. Accordingly, the district court did not abuse its discretion.

Defendants next contend that the district court failed to rule on their objections under Federal Rule of Criminal Procedure 32. Because they did "not object at sentencing to [the] district court's compliance with the Rule, we review for plain error." *United States v. Wijegoonaratna*, 922 F.3d 983, 989 (9th Cir. 2019).

Defendants have not shown plain error. The district court acknowledged Defendants' objections to its loss calculations and stated that "[w]hile challenges certainly can be raised . . . collectively, they do not warrant a variance to the degree your lawyers request," and that it "believe[d] that the loss amounts, as presented, [are] supported by the trial testimony and evidence," *See id.* at 990 (holding that the district court satisfied Rule 32 when it "ma[d]e clear that [it] was aware of [the defendant's] objections but disagreed with them").

4. Hansen separately argues that the district court improperly denied his motion for a new trial because the testimony by NWTM's former general counsel

and assistant general counsel was more prejudicial than probative. We review this claim for abuse of discretion. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). "If the court concludes that . . . a serious miscarriage of justice may have occurred, it may set aside the verdict[] [and] grant a new trial . . . ." *United States v. Alston*, 974 F.2d 1206, 1211-12 (9th Cir. 1992).

NWTM's former lawyers testified that they had conversed with Hansen about the dubious—in their view—legality of NWTM's business practices. The district court did not abuse its discretion in determining that admitting this testimony for the sole purpose of showing "what was communicated to [Hansen]" was permissible and did not constitute a serious miscarriage of justice. *See United States v. Graf*, 610 F.3d 1148, 1164-65 (9th Cir. 2010) (holding that similar testimony was admissible "to show that [the defendant] was on notice that his conduct was illegal").

5. Hansen next contends that his trial was unfair because "[t]he Government exceeded proper advocacy . . . by invoking analogies to Bernie Madoff and by disparaging the defense." Hansen did not make this objection at trial, so we review for plain error. *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1150 (9th Cir. 2012). "A criminal conviction will not be overturned on the basis of a prosecutor's comments unless in context they affected the fundamental fairness of the trial." *Id.*

Hansen has not met this high bar. He was the first to invoke Madoff in his opening statement and continually made references to Madoff throughout trial and in his closing argument. The government made only a few references to Madoff, all in its closing argument. *See United States v. Falsia*, 724 F.2d 1339, 1342 (9th Cir. 1983) ("[W]here the defendant opens the door to an argument, it is 'fair advocacy' for the prosecution to enter." (citation omitted)).

Hansen asserts that the government "disparaged the defense with numerous arguments that exceeded fair argument," such as calling the defense's arguments "a joke" and "a distraction." But none of the government's remarks were prejudicial enough to constitute plain error—let alone warrant overturning Hansen's convictions.

6. During deliberations, the jury asked a question about Instruction 22. Erdmann contends that the jury was confused because the instruction reflected an incorrect statement of co-schemer liability, and the district court inadequately responded to this confusion when it referred the jury back to the instructions as written. We review this purported error for abuse of discretion. *United States v. Warren*, 984 F.2d 325, 329 (9th Cir. 1993).

Erdmann contends that the jury should have been instructed that it was "required to find that each count at issue fell within the *scope* of her unlawful agreement." But in *United States v. Stapleton*, 293 F.3d 1111, 1118 (9th Cir.

2002), this court affirmed—in Erdmann's own words—"a co-schemer instruction that . . . omitted" what she terms "the scope requirement." Even though *Stapleton* acknowledged that vicarious liability law "dr[aws] a parallel to conspiracy law," it did not endorse the version of co-schemer liability Erdmann urges us to follow. *See id.* at 1115-18. As Erdmann acknowledges, Ninth Circuit Model Instruction 15.33 tracks the language affirmed in *Stapleton*, and Instruction 22 mirrors the model instruction. Erdmann does not rely on any cases holding that the "scope" element of co-conspirator liability from *Pinkerton v. United States*, 328 U.S. 640 (1946), is imported into co-schemer liability in cases like this—fraud cases with no conspiracy charge.

The district court thus did not abuse its discretion by referring the jury back to the language of the original instructions. "The necessity, extent and character of additional instructions are matters within the sound discretion of the trial court." *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979) (citation omitted). The court explained it did not want to give "more instructions that contradict each other." *See id.* (stating that when "attempting to respond to the question directly would . . . risk[] further confusion," a judge "act[s] appropriately in merely rereading the previously given . . . instructions"). Erdmann's reliance on *Warren* misses the mark. There, the possibility that the response the defendant requested would mislead the jury was "remote." 984 F.2d at 330. Here, the basis of

Erdmann's proposed response was—as addressed above—a novel and unsupported theory of co-schemer liability. Such a response would have misled the jury as to the correct legal standard.

Erdmann also advances a claim for relief under the cumulative-error doctrine. Because we reject all of her other claims of district court error, we do not reach this argument.

22-30102: AFFIRMED.

22-30103: AFFIRMED.

FILED

JUL 16 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DIANE RENEE ERDMANN, AKA Diane Renee, Defendant-Appellant.	No. 22-30103 D.C. No. 2:18-cr-00092-RAJ-2 Western District of Washington, Seattle ORDER

Before: MURGUIA, Chief Judge, and McKEOWN and OWENS, Circuit Judges.

The memorandum disposition filed on June 17, 2024, is hereby amended. The superseding amended memorandum disposition will be filed concurrently with this order.

The Petition for Panel Rehearing is DENIED. No further petitions for rehearing or petitions for rehearing en banc will be entertained.

FILED

JUL 16 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BERNARD ROSS HANSEN, AKA Ross B Hansen, Defendant-Appellant.	No. 22-30102 D.C. No. 2:18-cr-00092-RAJ-1 Western District of Washington, Seattle ORDER

Before: MURGUIA, Chief Judge, and McKEOWN and OWENS, Circuit Judges.

The memorandum disposition filed on June 17, 2024, is hereby amended. The superseding amended memorandum disposition will be filed concurrently with this order.

The Petition for Panel Rehearing is DENIED. No further petitions for rehearing or petitions for rehearing en banc will be entertained.

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. BERNARD ROSS HANSEN and DIANE RENEE ERDMANN, Defendants.	No. CR18-092RAJ **ORDER ON DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 29 OR, IN THE ALTERNATIVE, FOR A NEW TRIAL UNDER RULE 33**

I. INTRODUCTION

THIS MATTER comes before the Court upon defendants' Motion for Judgment of Acquittal Under Rule 29 or, in the Alternative, for a New Trial Under Rule 33. Dkt. # 359. Having considered the motion, the government's response (Dkt. # 362), and the files and pleadings herein, the Court **DENIES** the motion.

II. DISCUSSION

Defendants' motion has two parts. First, defendants seek acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure. Second, defendants seek, in the alternative, a new trial under Rule 33(a). The Court addresses both requests in turn.

A. Motion for Judgment of Acquittal

Defendants' motion is principally founded on Rule 29(c). Both defendants move for acquittal because, according to them, there was insufficient evidence at trial for the jury to convict them of mail and wire fraud. To that end, defendants raise three

arguments. First, they say that, to prove mail or wire fraud, the government was required to prove an intent to deceive and cheat, yet there was no evidence of an intent to cheat Northwest Territorial Mint ("NWTM") customers. Second, they say that the government's case was improperly based on omissions, not misrepresentations. Finally, they say that the government failed to prove that defendants participated in a scheme to defraud storage customers.

All three arguments fail, and defendants are not entitled to a new trial under Rule 29. Their arguments fail because, at trial, there was ample evidence to find that both defendants had made misrepresentations to NWTM customers, depriving them of their money or property. Viewing that evidence in light most favorable to the prosecution, the Court concludes that a rational trier of fact could have found the essential elements of mail and wire fraud beyond a reasonable doubt.

i. Legal Standard

When evidence is insufficient to sustain a conviction, Federal Rule of Criminal Procedure 29 permits a court to set aside a jury verdict and enter an acquittal. Fed. R. Crim. P. 29. Under Rule 29, the court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). The court's inquiry is two-fold. *Id.* First, the court must "consider the evidence presented at trial in the light most favorable to the prosecution." *Id.* at 1164. "Conflicting evidence is to be resolved in favor of the jury verdict, and 'all reasonable inferences are to be drawn in favor of the government.'" *United States v. Corona-Verbera*, 509 F.3d 1105, 1117 (9th Cir. 2007) (quoting *United States v. Alvarez–Valenzuela*, 231 F.3d 1198, 1201-02 (9th Cir. 2000)). Second, the court must determine whether the evidence, "so viewed," is adequate to allow "*any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Nevils*, 598 F.3d at 1164

(emphasis in original) (alteration omitted) (quoting *Jackson*, 443 U.S. at 319).

ii. Intent to Deceive and Cheat

Defendants first argue that mail and wire fraud, under *United States v. Miller*, require the intent to deceive and cheat and that the government failed to prove the "essential element" of cheating. 953 F.3d 1095, 1103 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1085, 208 L. Ed. 2d 539 (2021); Dkt. # 359 at 6-8. Defendants say that there was no evidence of cheating because, with respect to NWTM's bullion customers, defendants "intended to honor th[eir] agreement." Dkt. # 359 at 8. According to defendants, their representations to bullion customers simply maintained that the customers would *either* receive their metals within a certain amount of time *or* they would be entitled to receive a payment for their bullion. Dkt. # 359 at 3. Defendants say that they intended to make good on those promises and thus had no intent to "cheat" NWTM customers. *Id.* at 6-9.

The Court agrees that, under *Miller*, mail and wire fraud require an "intent to deceive *and* cheat." 953 F.3d at 1103 (emphasis in original). That is, "mere deception" is not enough. *Id.* at 1101. A defendant must act not only with the intent to make false statements or use other forms of deception; the defendant must also use that deception "to deprive a victim of money or property." *Id.*

Here, however, there was ample evidence that defendants not only deceived customers but also cheated them, by depriving them of their money or property. The government's summary of that evidence accurately reflects the Court's recollection: Defendants caused false statements to be made so that they could obtain bullion customers' money. Dkt. # 362 at 2-3. They caused former employees to lie about delivery times, informing customers that their orders would be delivered in 8 to 10 weeks, even though defendants knew that those promises were false. *Id.* Defendants also misled customers into believing that their money would be used to fulfill their bullion orders, when in fact the money was commingled to pay company expenses and fill past metal orders. *Id.* There was also evidence that, upon customer inquiry, defendants made

misrepresentations about the status of their bullion orders, for example by representing that orders were filled in order of payment or that delays were caused by unprecedented demand, when neither of those things were true. *Id.* Finally, there was evidence that defendants lied about the availability of refunds, such as by falsely telling customers that NWTM had to sell metals before returning customer money. *Id.* In the end, these misrepresentations caused an enormous deprivation: at the time of the NWTM bankruptcy, there were more than $25 million worth of outstanding bullion orders. *Id.* In all, the Court finds that this is ample evidence of defendants depriving NWTM customers of their money, hence ample evidence of defendants "cheating" customers. And, relying on this evidence, a rational jury could have found this element satisfied beyond a reasonable doubt.

What is more, defendants' "intent to honor their agreement" argument is akin to an "intent to repay" argument, which was squarely rejected by the Ninth Circuit in *Miller*: the "intent[] to pay back the funds . . . deceptively obtained . . . is not a defense at all." 953 F.3d at 1103. To prove mail or wire fraud, the government did not need to prove that defendants intended to "permanently deprive a victim of money or property," as defendants here seem to suggest. *Id.*

Lastly, defendants cite a string of out-of-circuit cases to support a "nature of the bargain" argument. Dkt. # 359 at 6-8. According to defendants, there can be no fraud if a deceptive scheme does not "affect[] the nature of the bargain" between NWTM and its customers. *Id.* Defendants argue that, whatever deception they may have committed, they did not intend to deprive customers of their bargain. That bargain, defendants say, was simply that customers would get their metals within a certain time or they would get a payment. Defendants argue that there can be no fraud because they intended to deliver on that bargain.

This argument fails for many reasons. To start, the authority comes from other circuits and is therefore not binding on this Court. More importantly, this "nature of the

bargain" argument goes the same way as defendants' "deceive and cheat" argument above.

The "nature of the bargain" doctrine posits that "deceiving" and "defrauding" are different: one may deceive another without defrauding them. *United States v. Takhalov*, 827 F.3d 1307, 1312-13 (11th Cir.) What makes deceit fraudulent, and thus criminal, is using deceit to deprive another of something of value. *Id.*

Judge Thapar illustrated the doctrine best:

> Consider the following two scenarios. In the first, a man wants to exchange a dollar into four quarters without going to the bank. He calls his neighbor on his cell phone and says that his child is very ill. His neighbor runs over, and when she arrives he asks her to make change for him. She agrees; the quarters pass to the man; the dollar passes to the woman; and they part ways. She later learns that the child was just fine all along. The second scenario is identical to the first, except that instead of giving the woman a true dollar, he gives her a counterfeit one.
>
> The first scenario is not wire fraud; the second one is. Although the transaction would not have occurred but-for the lie in the first scenario—the woman would have remained home except for the phony sickness—the man nevertheless did not intend to "*depriv[e] [the woman] of something of value* by trick, deceit, [and so on]." *Bradley*, 644 F.3d at 1240. But in the second scenario he did intend to do so.
>
> More specifically, the difference between the scenarios is that, in the first scenario, the man did not lie about the nature of the bargain: he promised to give the woman a true dollar in exchange for the quarters, and he did just that. In the second, he lied about the nature of the bargain: he promised to give her a true dollar but gave her a fake one instead.

Id. (emphasis added).

The "deceiving" and "defrauding" distinction set forth in *Takhalov* is virtually identical to the "deceiving" and "cheating" distinction outlined in *Miller*. 953 F.3d at 1101-03. Hence, defendants' "nature of the bargain" argument produces the same result. As explained above, there was ample evidence that defendants both deceived and defrauded NWTM customers. This was not a matter of defendants merely using

deception to induce a deal and no more. Instead, defendants used deception to defraud customers of something of value, namely millions of dollars. Thus, the entire nature of the bargain proved to be a lie, and defendants are not entitled to a new trial on these grounds.

iii. Omissions and Nondisclosures

Defendants next argue that there was insufficient evidence of defendants' false statements. Dkt. # 359 at 8-9. They say that, in fact, the government's case rested not on false statements to bullion customers but rather "what was not disclosed" to those customers. In effect, defendants say, the government advanced an omissions fraud theory, which must fail given that defendants owed no duty to disclose information to their customers.

The Court denies defendants' premise: This is not an omissions case. Nor did the government try it as one. Instead, at trial, the government solicited and relied on evidence of defendants' affirmative misrepresentations. As set forth in the previous section, there was copious evidence of defendants' misrepresentations about delivery times, use of customer money, status of previous bullion orders, and availability of refunds. What is more, when instructing the jury, the Court did not instruct them to consider omitted facts. *Compare* Dkt. # 344 at 19-21 *with* Model Crim. Jury Instr. 9th Cir. 8.121 & 8.124 (2021) (omitting "omitted facts" instruction). The Court did instruct the jury, however, that they were permitted to consider "[d]eceitful statements of half-truths." Dkt. # 344 at 19-21.

To the extent that the government argued about what was not disclosed to NWTM customers, those arguments were directed at defendants' overall fraudulent scheme, which included deceitful half-truths. *See United States v. Woods*, 335 F.3d 993, 997-1000 (9th Cir. 2003); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979) ("Deceitful statements of half-truths or the concealment of material facts is actual fraud under the statute.").

Thus, defendants' second argument fails on the facts and the law. Viewing all the evidence in the government's favor, the Court concludes that there was sufficient evidence to find affirmative misrepresentations and a fraudulent scheme.

iv. Storage Customers

Finally, defendants argue that there was insufficient evidence of a fraudulent scheme with respect to NWTM storage customers. Dkt. # 359 at 9-10. Besides defrauding bullion customers, defendants were also convicted for defrauding NWTM's storage customers, those who did not buy bullion from NWTM but instead stored the bullion they already owned with the company.

NWTM stored customer bullion at three locations. Defendants say that the government's evidence was insufficient because the government failed to put forth enough evidence about one of the three locations. Dkt. # 359 at 9. Defendants acknowledge that the government presented evidence that two of three NWTM storage locations had depleted bullion stores. *Id.* Yet defendants say that there was no evidence about the stored bullion in the company's third storage location in Dayton, Nevada. *Id.* Without that evidence, they say, "the government could not prove that NWTM failed to possess adequate metals to cover the holdings of its storage customers." *Id.* at 9-10.

Like defendants' previous arguments, this argument also fails. There was sufficient evidence for a reasonable jury to conclude that defendants defrauded NWTM's storage customers. The government's summary of that evidence accurately reflects the Court's recollection: There was testimony that storage customers understood that NWTM and defendants would keep the customers' stored bullion separate from the bullion used in NWTM's business. Dkt. # 362 at 4-5. Testimony further revealed that defendants removed storage-customer-owned bullion from storage to fulfill bullion customer orders. *Id.* In all, the evidence revealed that across all NWTM locations about $5 million worth of stored bullion was missing. *Id.*

A lack of evidence about bullion stores at Dayton does not, itself, warrant relief

under Rule 29, as defendants say. To prove mail and wire fraud, the government only needed to prove a scheme or artifice to defraud. It did not need to prove the specific stored amounts at Dayton or prove that NWTM was unable to cover the holdings of storage customers. Instead, the government only needed to prove to a jury that defendants defrauded NWTM's storage customers. On that front, viewing the evidence in the government's favor, the Court concludes that there was sufficient evidence for a reasonable jury to find just that. Here, there was evidence that defendants stole stored customer bullion and dwindled storage reserves by millions of dollars.

B. Motion for a New Trial

Federal Rule of Criminal Procedure Rule 33(a) allows a court, on defendant's motion, to "vacate any judgment and grant a new trial if the interest of justice so requires." Unlike a Rule 29 motion, "[t]he district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)). That said, a motion for a new trial is to be granted "only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Pimental*, 654 F.2d 538, 545 (9th Cir. 1981). Moreover, a trial court may grant a motion for new trial where, in its judgment, "a serious miscarriage of justice may have occurred." *Alston*, 974 F.2d at 1211-12.

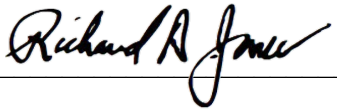
The Court finds no miscarriage of justice, and no need for a new trial, here. Defendants merely rehash their trial arguments and argue that the "weight of the evidence was contrary to the verdict." Dkt. # 359. As explained above, the evidence supporting defendants' fraud conviction was prolific. Even evaluating the evidence on its own, and not in the government's favor, the Court still concludes that the evidence weighs heavily in favor of conviction and that the jury conviction was greatly supported.

/ / /

III. CONCLUSION

For the foregoing reasons, the defendants' motion is **DENIED.** Dkt. # 359.

DATED this 21st of April, 2022.



The Honorable Richard A. Jones
United States District Court Judge