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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12750

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

FRANK BELL, TYSON RHAME, JAMES SHAW
DEFENDANTS-APPELLANTS

Filed: August 14, 2024

Before: PRYOR, Chief Judge, PRYOR and BRASHER, Circuit Judges.

OPINION

PRYOR, Chief Judge.

This criminal appeal concerns currency sellers who defrauded retail investors and made false statements to federal agents. Tyson Rhame, James Shaw, and Frank Bell were owners and officers of Sterling Currency Group, a currency-exchange business that sold over $600 million worth of Iraqi dinar and other currencies. The

sellers promoted false rumors of an imminent dinar revaluation, concealed that Sterling paid to advertise on dinar-discussion web forums and conference calls, and falsely represented that Sterling planned to open physical currency-exchange kiosks across the country. Rhame and Bell also lied to federal agents when interviewed about their activities. After a five-week trial, the jury convicted the sellers of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, and false statements. The district court sentenced Rhame, Shaw, and Bell to 180, 95, and 84 months in prison, respectively. On appeal, the sellers challenge the sufficiency of the evidence, jury instructions, evidentiary admissions, and Rhame's sentence. We affirm the convictions and Rhame's sentence, except for the refusal to grant a downward departure, the appeal of which we dismiss for lack of jurisdiction.

I. BACKGROUND

Tyson Rhame and James Shaw founded and owned Sterling Currency Group, a currency-exchange business that sold mainly Iraqi dinar from 2004 until 2015. Sterling began in 2004 as a "garage- run" business, which operated out of Rhame's and Shaw's homes and sold millions of dollars' worth of currencies a year. In the early years, Rhame managed most of Sterling's daily operations, including compliance, banking, web content, shipping, logistics, and customer service. Shaw's wife helped fulfill orders, while Shaw remained mostly removed from daily operations.

Sterling began expanding in earnest in early 2010, and the company hired Frank Bell. Bell became Sterling's Chief Operating Officer in 2013. As the "compliance guy," Bell was responsible for legal compliance and training employees to adhere to laws and regulations.

Sterling's sale of the Iraqi dinar was legal. Much of its market was retail: most mainstream exchanges refuse to sell the dinar because the currency is pegged by the Iraqi government, the exchange rate remains mostly stable, and a non-market-driven currency is often unattractive to professional traders. But the dinar remained popular with retail investors because of perennial rumors that the Iraqi government would soon "revalu[e]" the currency and its value would skyrocket.

Sterling sold dinars to investors both outright and through layaway programs. Outright purchasers paid upfront and immediately received packages of dinars through the mail. Layaway purchasers paid an initial deposit equal to a percentage of their total purchase and were given a specified timeframe to pay off the remaining balance. Sterling offered more expensive, "guaranteed" layaway options—in which the investor would eventually receive the value of his deposit in dinars no matter if he paid off his balance—as well as cheaper, nonguaranteed options—in which the investor would forfeit his deposit if he did not pay in time.

Belief in the revaluation was a crucial incentive for layaway purchasers, who often lacked the cash needed for an outright purchase. Purchasers testified that their layaway deposits were a bet on revaluation occurring before their balances came due, such that their earnings from the currency appreciation could be used to pay off the remaining balance. But because no revaluation occurred, purchasers who failed to pay their balances in time forfeited tens of thousands of dollars in nonrefundable deposits. For example, one investor lost over $57,000 on 254 nonrefundable deposits, another lost over $40,000 on 320 deposits, and a third lost over $90,000 on 125 deposits. These forfeitures

occurred under the terms specified in the layaway contracts. The sellers knew that some cash-strapped layaway purchasers were motivated by the expectation of a revaluation. Sterling repeatedly received emails from purchasers who pleaded for extensions so that they would not miss the revaluation they believed imminent.

Dinar promoters used online forums regularly to spread the rumors that fueled layaway purchasers' belief in an imminent Iraqi dinar revaluation. Terrence Keller ran one forum called GET Team. Keller and other GET Team promoters posted often, hosted telephone conference calls, and ran chat sessions discussing the revaluation. Participants primarily discussed "rumors" of the likelihood of a revaluation, and Keller "quite often" stated that a revaluation was "happening tonight" or "tomorrow," though the rumors never panned out. But followers still believed that Keller had "knowledge" and "contacts with the Federal Reserve" who offered "an inside track to . . . the dinar world and when it would revalue." And followers believed that the revaluation would result in a "financial windfall" that would multiply the value of their dinar holdings.

Rhame, Shaw, and Bell did not believe that a revaluation was likely or imminent—and Bell even called the rumors of a rapid revaluation "mythology." For example, in November 2010, Shaw emailed Rhame to express concerns that he did not want "to risk everything based on [Rhame's] belief . . . that the Iraqi dinar will not [revalue] and it is ok to make millions of dollars in false promises to our customers," and that the sellers were "risking serious jail time as promoters of a ponzi scheme." Shaw's brother testified that Shaw never said that he expected the dinar to "skyrocket overnight" and, in fact, expected "[j]ust the opposite." Rhame wrote a memorandum to a compliance

consultant in 2011 that stated that dinar pricing appeared "very stable with no drastic changes in value expected in the coming year" and that "[n]o revaluation or denomination changes are expected."

Still, the sellers promoted misinformation in three ways. First, they encouraged the spread of false revaluation rumors both directly and through the GET Team. For example, Rhame wrote an article for the Sterling website that predicted a "sudden significant[] (overnight/over weekend) high revaluation" that could be "anywhere along the entire spectrum of rumored possibilities from $[0].01 to $1.49." And in late 2010, Sterling began partnering with the GET Team to spread misinformation. Eventually, Sterling paid the GET Team $4,000 a month. In exchange, Keller displayed Sterling ads, allowed Sterling representatives to join conference calls, and encouraged his followers to buy more dinars from Sterling. This partnership allowed Sterling to push its desired narrative. For example, in an email chain scheduling a Sterling appearance on a GET Team call, Keller told Bell, "what ever you would like to bring to the table Im game for it. . . . You are the group im pushing behind the picture." In a private message that Keller sent to a Sterling employee during a simultaneous public chat with followers, Keller bragged, "u like how I have them [the followers] talking and now they will buy more."

Second, the sellers concealed that Sterling paid for advertising on GET Team's website and in conference calls. Although Keller informed followers that Sterling was a "sponsor" of the site, he never revealed any financial details. Indeed, Keller sought reassurance of secrecy and emailed Rhame and Bell, "I want to make sure that our arrangement is between us and no one else . . . As no one

else needs to know about our arrangement . . . Please confirm." Bell responded, "Absolutely noone but us." A Sterling customer service manager testified that if investors asked whether Keller "was being paid to pump Sterling's [layaway program]," the "response would be no."

Third, the sellers told investors that Sterling planned to open physical exchange kiosks at airports around the country within days or hours of a revaluation, despite having no such plans. The airport plan was material to the deception because it lent credibility to the idea that a revaluation was likely and misled investors into believing that Sterling would provide the easiest and cheapest option to exchange dinars for dollars.

In 2015, federal agents twice interviewed Bell about his involvement with Sterling. Bell touted Sterling's legal compliance regime and distanced himself from the so-called "sketchy" online dinar promoters and forums. He explained that "there are a bunch of guys out there hyping [the dinar] . . . . They create a forum. They attract . . . people and they sell advertising. . . . [T]hey make good money because they generate a lot of traffic at their sites." Bell admitted that Sterling advertised on dinar forums, but he asserted that he affirmatively told promoters not to send business to Sterling.

Federal agents also interviewed Rhame. Rhame repeatedly denied ever promoting the dinar as a good investment, predicting a revaluation, or having anything to do with dinar promoters or forums. An agent asked, "[Y]ou've never—you personally or on your website or anything like that have ever said [anything] promoting [the dinar] as a good investment." Rhame responded, "Hell, no. . . . Never. You will never find that anywhere." The agent then asked whether Sterling had ever paid a dinar promotion site, and Rhame responded, "I'm 100% positive

that any website that we would be associated with . . . would have nothing to do with any kind of investment promotion or any revaluation or anything like that, because that's just not what we do." Rhame further asserted, "We do not promote anything. . . . and we don't incentivize anybody else to do it . . . . [I]f we advertise with somebody, there's no way in a million years we incentivized them to do that or anything else like that." He stated that Sterling's advertisements were limited to "strictly, you know, a posting of a banner."

A grand jury indicted Rhame, Shaw, Bell, and Keller. The indictment charged the four defendants with conspiracy to commit mail and wire fraud, 18 U.S.C. § 1349; aiding and abetting each other to commit four counts of mail fraud, *id.* §§ 2, 1341; and aiding and abetting each other to commit four counts of wire fraud, *id.* §§ 2, 1343, 1349. The indictment also charged Rhame, Shaw, and Bell with conspiracy to commit money laundering, *id.* § 1956(h); Rhame and Shaw with money laundering, *id.* §§ 2, 1957, 1952; and Rhame and Bell with making false statements to federal agents, *id.* § 1001(a)(2). The prosecution later dismissed 20 of the fraud and money laundering counts.

Over nearly five weeks of trial, the prosecution called 20 witnesses and introduced over 300 exhibits. The sellers objected to several evidentiary submissions, all of which the district court admitted. The district court admitted news articles and press releases warning that Iraqi dinar sales were a scam, to show that the sellers were on "notice" that their conduct was illegal. These included a Forbes article about "The Iraqi Dinar Scam"; a warning post from a blogger pseudonymously named "Nutrition Dude"; a purported Bank of America notice warning of dinar sales; and a CNBC news segment about the prosecution of Brad Huebner. Huebner was another dinar seller

who had hosted conference calls predicting a revaluation, lied about his business partner's military service, and falsely claimed to be starting hedge funds to service his buyers' imminent wealth. The district court gave limiting instructions accompanying these admissions. The district court also permitted Sterling investors to read aloud from previously admitted exhibits of the sellers' emails and other communications. And the district court admitted evidence of Rhame's lavish lifestyle to prove greed as his motive for money laundering and fraud.

The prosecution presented no evidence that Sterling violated its contractual obligations to investors. A case agent testified that every Sterling customer, so long as she paid outright or fulfilled the terms of her layaway program, received the dinars that she paid for. And no right to access airport exchanges was included as a term in any investor contract.

The sellers requested a jury instruction on the fraud counts. Their instruction distinguished between the intent to deceive and the intent to defraud, as described by this Court in *United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016). Although the sellers "agree[d] that *Takhalov* didn't say . . . the pattern jury instruction was wrong," they proposed that the district court add the highlighted language to the then-current version of instructions for mail fraud and wire fraud:

> To act with "intent to defraud" means to act knowingly and with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else. *Proving intent to deceive alone, meaning deception without the intent to cause loss or injury, is not sufficient to prove intent to defraud. And merely inducing someone, by means of trick or deceit, to enter a transaction that he or she*

> *otherwise would have avoided is insufficient to show fraud. It is not fraud if a Defendant or the Defendants tricked someone into entering a transaction but nevertheless gave the person exactly what they asked for and charged that person exactly what he or she agreed to pay.*

The district court rejected the proposal and instead used the pattern jury instructions. It instructed that "[a] 'scheme to defraud' includes any plan or course of action intended to deceive or cheat someone out of money or property using false or fraudulent pretenses, representations, or promises," and that "[t]o act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else." *See* Eleventh Circuit Pattern Jury Instructions, Criminal Cases O50.1, at 322–23 (Apr. 2016 ed.). Rhame and Bell also requested an instruction on the false statement counts that if "something is ambiguous, it's the government's burden to clear up that ambiguity." The district court also denied that request.

The jury convicted Rhame, Shaw, and Bell on all remaining counts of fraud conspiracy, mail fraud, wire fraud, and false statements. The jury acquitted the defendants of the money laundering and related conspiracy counts, and it acquitted Keller of all charges. Rhame, Shaw, and Bell moved for a new trial and for judgments of acquittal. The district court denied the motions. As those posttrial motions were pending, the Judicial Council for the Eleventh Circuit amended the pattern jury instructions to add language similar to the first sentence of the sellers' proposed fraud instruction. *See* Eleventh Circuit Pattern Jury Instructions, Criminal Cases O50.1, at 2 (Jan. 2019 rev.).

At sentencing, Rhame submitted over 60 letters attesting to his character, military service, and history of charitable deeds. After a weeklong sentencing hearing, the district court imposed within- or below-guidelines sentences for Rhame, Shaw, and Bell, of 180, 95, and 84 months in prison, respectively. The district court applied a sophisticated-means enhancement and a substantial-financial-hardship enhancement to Rhame's offense-level calculation, and it did not grant a downward departure based on Rhame's military service. The district court also applied an obstruction-of-justice enhancement based on Rhame's false testimony during a suppression hearing. Rhame had testified, in an effort to suppress his statements to federal agents, that an agent had directed him to end a call with his attorney. The district court made a credibility determination, based on the agent's contrary testimony, that Rhame had committed perjury.

II. STANDARDS OF REVIEW

We review *de novo* the sufficiency of the evidence. *United States v. Watkins*, 42 F.4th 1278, 1282 (11th Cir. 2022). We interpret trial evidence in the light most favorable to the verdict and will not disturb the verdict "unless no trier of fact could have found guilt beyond a reasonable doubt." *Id.* (citation and internal quotation marks omitted). The evidence need not "exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States v. Williams*, 390 F.3d 1319, 1323–24 (11th Cir. 2004) (citation and internal quotation marks omitted).

We also review *de novo* the legal correctness of a jury instruction. *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). If the given instruction correctly states the law, we review for an abuse of discretion the refusal to

give a supplemental requested instruction. *See Watkins*, 42 F.4th at 1282.

We review evidentiary rulings for an abuse of discretion. *Id.*

We review *de novo* the application of the Sentencing Guidelines. *United States v. Perez*, 943 F.3d 1329, 1332 (11th Cir. 2019). We lack jurisdiction to review the denial of a downward departure from the Sentencing Guidelines unless the district court incorrectly concluded that it had no authority to depart. *United States v. Dudley*, 463 F.3d 1221, 1228 (11th Cir. 2006). We review for clear error the factual findings that support a sentencing enhancement. *United States v. Presendieu*, 880 F.3d 1228, 1248 n.12 (11th Cir. 2018). We also review for plain error a constitutional objection to a sentencing enhancement raised for the first time on appeal. *United States v. Maurya*, 25 F.4th 829, 836 (11th Cir. 2022).

III. DISCUSSION

We divide our discussion into six parts. First, we reject the sellers' arguments that the evidence does not support their fraud convictions. Second, we explain that the district court correctly instructed the jury on those counts. Third, we reject Rhame's and Bell's arguments that the evidence did not support their false statement convictions. Fourth, we explain that the district court correctly instructed the jury on those counts. Fifth, we explain that the district court did not commit evidentiary errors that warrant a new trial. Sixth, we explain that the district court did not err when it sentenced Rhame.

A. Evidence Supports the Fraud Convictions.

The sellers argue that the evidence is insufficient to support their mail fraud, wire fraud, and fraud conspiracy

convictions for three reasons. First, the sellers argue that the government's theory of fraud fails under *Takhalov*. Second, the sellers argue that the prosecution failed to prove that the sellers had lied about the revaluation or the airport plan. Third, on the conspiracy charge, the sellers argue that the prosecution failed to prove that the sellers agreed to commit an illegal act. We explain in turn why each challenge fails.

1. The Sellers' Misrepresentations Prove Their Intent to Defraud.

The sellers argue that because investors "received exactly [the dinar] they paid for," the prosecution's theory of fraud fails as a matter of law under *Takhalov*, 827 F.3d at 1315 (internal quotation marks and citation omitted). We disagree. This argument misunderstands our precedents.

To prove mail or wire fraud, the government must prove that the sellers intentionally participated in a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343. The federal fraud statutes prohibit "deceptive schemes to deprive the victim of money or property." *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (alterations adopted) (citation and internal quotation marks omitted). To prove an intent to defraud, the government must prove that the sellers either knew that they were making false statements or were acting with reckless indifference to the truth. *United States v. Wheeler*, 16 F.4th 805, 819 (11th Cir. 2021).

Intent to defraud also requires the intent to *harm* victims by misrepresenting "the value of the bargain." *Id.* The deception must go to the "nature of the bargain itself"—an ancillary lie will not suffice. *Takhalov*, 827 F.3d at 1314. A deception is illegal when a fraudster creates a

"discrepancy between benefits reasonably anticipated because of the misleading representations" and what the fraudster delivered. *Id.* (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987)). We explained in *Takhalov* that the "two *primary* forms" of fraudulent deception are when a fraudster lies about the price or about the characteristics of what he is selling. *Id.* at 1313–14 (emphasis added).

The "characteristics" of a good are not narrowly limited to its physical properties or authenticity. Whether a given characteristic affects a good's pecuniary value to the buyer, and figures materially into the bargain, is highly contextual. *See Neder v. United States*, 527 U.S. 1, 22 n.5 (1999) ("[A misrepresentation] is material if . . .'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" (quoting Restatement (Second) of Torts § 538 (Am. L. Inst. 1977)). Indeed, the test for a material deception "cannot be stated in the form of any definite rule, but must depend upon the circumstances of the transaction itself." *United States v. Feldman*, 931 F.3d 1245, 1272 (11th Cir. 2019) (W. Pryor, J., concurring) (quoting *Prosser and Keeton on Torts* § 108, at 753 (5th ed. 1984)).

A deception need not have a calculable price difference or result in a different tangible good or service being received to constitute fraud. In *United States v. Dynalectric Co.*, for example, we explained that contractors' bid-rigging scheme for government contracts could sustain a federal fraud conviction even if the scheme had not "cost the [government] or anyone else one red cent." 859 F.2d 1559, 1576 (11th Cir. 1988) (citation and internal quotation marks omitted). We held that the contractors' lies—that

their bids stemmed from competition instead of collusion—proved their fraudulent *intent*, even if they ultimately performed the agreed-upon services at a fair bid price. *Id.* at 1562, 1576; *see Feldman*, 931 F.3d at 1271 (W. Pryor, J., concurring) ("The gravamen of the scheme to defraud, in other words, was not any misrepresentation about 'the price' or 'the characteristics of' the bargained-for work." (quoting *Takhalov*, 827 F.3d at 1314)). Likewise, in *Wheeler*, we held that stock-sellers who had concealed how much they received in commissions, and who had misled investors about a stock's potential listing on a major exchange and association with a prominent technology company, had the requisite intent to defraud. *See* 16 F.4th at 820–21. That the price impact was indeterminate and that investors had "got the number of shares they bargained for at the price they bargained for" did not vitiate the stock-sellers' fraudulent intent. *Id.* at 816. And in *Watkins*, we held that a bank borrower's misrepresentations as to the true recipient of a loan went to the "very nature" of the bargain and so supported a bank fraud conviction. *See* 42 F.4th at 1286–87.

A jury could reasonably have found that Rhame, Shaw, and Bell deceived investors about a core attribute of the dinar: the odds of its appreciation. Investors were led to believe that their dinars would imminently skyrocket in value. That high probability of profit was an essential characteristic of the asset that investors thought they were purchasing. *See Takhalov*, 827 F.3d at 1314. It was *the* reason many made the purchase.

As the government explains, the sellers' fraud was no different from a lottery scam. If a customer buys a $10 lottery ticket because he is promised a one-in-ten chance of winning the jackpot, he has been defrauded if his actual odds of winning are one-in-a-million. The customer's out-

of-pocket loss might be zero—he wanted a $10 lottery ticket, and he received a $10 lottery ticket—but he has still been duped. He has suffered a pecuniary loss if he would not have paid $10 knowing his true odds. Just as the lottery fraudster is culpable for misleading customers about the odds of the jackpot, the sellers are culpable for falsehoods about the revaluation. And that the dinar's exchange rate was set by the Iraqi government does not mean that investors got "exactly what they paid for." Sterling charged exchange fees that were baked into the dinar price, and investors paid fees under the illusion that the revaluation would compensate them.

The record also establishes that the sellers' lies about the airport kiosks went to the core of the bargain with investors. The lies were not "ancillary" when investors chose to buy from Sterling *because of* its promised airport exchanges. One investor testified, for example, that the promised kiosks provided crucial assurance that secure exchange facilities would be available after the revaluation.

The wide geographic availability of airport kiosks was a service, tethered to the dinars, that Sterling promised to investors. If a car dealer falsely promised roadside assistance to customers and the promises materially influenced customers to buy from that dealer, the falsehoods would be actionable fraud. So too are the sellers' false promises of airport exchange services—even if the investors did not later need to use the exchange service. *See Shaw v. United States*, 137 S. Ct. 462, 467 (2016) (mail fraud is actionable "even if [victims] ultimately did not suffer unreimbursed loss"). Because a reasonable jury could have found that the sellers' lies about the revaluation and airport plan went to the nature of the bargain, those lies may prove the sellers' intent to defraud.

We have never held that the federal fraud statutes are categorically inapplicable to fraudulent inducement schemes. The sellers argue that misrepresentations that "simply influence[]" a counterparty to transact cannot constitute actionable fraud. Although "merely" establishing that a fraudster "induced the victim to enter into a transaction that he otherwise would have avoided" cannot prove fraudulent intent, *see Takhalov*, 827 F.3d at 1310 (alterations adopted) (citation and internal quotation marks omitted), *material* inducements may still be actionable fraud. Our precedents establish that fraudulent inducements about a collateral but still material matter are punishable under the federal statutes. *See Dynalectric Co.*, 859 F.2d at 1576; *Watkins*, 42 F.4th at 1286–87; *see also Feldman*, 931 F.3d at 1270 (W. Pryor, J., concurring). To be clear, the inducement scheme's perpetrators must still intend the deprivation of a victim's money or property. *See Wheeler*, 16 F.4th at 819. But both fraud-in-the-factum and fraudulent inducement schemes fit "squarely within the 'well-settled meaning' of 'actionable "fraud."'" *Feldman*, 931 F.3d at 1271 (W. Pryor, J., concurring) (quoting *Neder*, 527 U.S. at 22).

2. Evidence Proves that the Sellers Misled Investors About the Revaluation and the Airport Plan.

The sellers argue that the evidence was insufficient to prove that they misled investors about an imminent revaluation or lied about the airport plan. We will not overturn a jury verdict for lack of evidence unless no reasonable construction of the facts would allow a finding of guilt beyond a reasonable doubt. *Wheeler*, 16 F.4th at 819. A split verdict is further "evidence that the jury considered the charges carefully and individually, addressed the strength of the evidence on each charge, and reached a reasoned conclusion." *United States v. Siegelman*, 640

F.3d 1159, 1180 (11th Cir. 2011). And because the sellers' convictions were predicated on a conspiracy, Rhame, Shaw, and Bell are guilty if the evidence establishes that their coconspirators made misrepresentations in support of the conspiracy. *See Watkins*, 42 F.4th at 1284 ("[A] defendant may be convicted of [wire] fraud without personally committing each and every element of . . . [wire] fraud, so long as the defendant knowingly and willingly joined the criminal scheme." (second alternation in the original) (citation and internal quotation marks omitted)). The sellers' burden in challenging the sufficiency of the evidence is heavy, and they fail to meet it.

The record is replete with evidence that the sellers made false assurances about an imminent dinar revaluation, both directly and through the GET Team, despite their disbelief in the rumors. Examples of the sellers' misrepresentations are extensive, from Rhame's web article predicting a "sudden significant[] (overnight/over weekend) high revaluation," to Rhame's appearance in promotional videos, to Sterling's continued payments to Keller despite the sellers' knowledge that Keller was making false predictions and lying about his inside sources. The sellers promoted the dinar and encouraged Keller's propaganda despite believing the revaluation to be "mythology." Indeed, Shaw emailed Rhame to express concerns that he did not want "to risk everything based on [Rhame's] belief . . . that the Iraqi dinar will not [revalue]" and that he did not think "it is ok to make millions of dollars in false promises to our customers." That the rumors were purportedly a "prediction" about future events does not excuse the sellers: a jury may find "[d]eclarations of opinion as to future events which the declarant does not in fact hold" to be fraudulent. *United States v. Amrep Corp.*, 560 F.2d 539, 543 (2d Cir. 1977).

The evidence that the sellers lied about the airport plan is even stronger. In addition to the promises posted on the Sterling website that touted the company's ability to open satellite offices within hours or days of a revaluation, Rhame also directly emailed individual investors with assurances that Sterling had plans to operate at airports in Miami, New York, Dallas, and almost a dozen other cities. But Sterling had neither the plans nor the ability to open physical exchanges. Sterling employees testified that they had never seen any operational, training, or personnel materials related to any airport plan, and did not know of any employees capable of staffing the exchanges. Likewise, multiple airport representatives testified that Sterling never applied for the licenses necessary to operate as a currency exchange.

Last, we reject Shaw's argument that there was insufficient evidence that he participated in the fraud because he did not personally make any misrepresentations to investors. As Sterling's co-owner and bankroller, Shaw argues that he was merely a "big-picture investor with no involvement in day-to-day operations." But Shaw can be convicted even if his participation in the conspiracy was "slight" compared to his coconspirators'. *See Watkins*, 42 F.4th at 1285 (citation and internal quotation marks omitted). And the government may prove the elements of conspiracy and Shaw's participation "by circumstantial evidence." *See United States v. Moran*, 778 F.3d 942, 960 (11th Cir. 2015).

A jury could reasonably have found that Shaw knowingly participated in the fraudulent scheme. The record reflects that Shaw bankrolled Sterling's finances, was "instrumental" in managing Sterling's website where fraudulent promises were posted, understood that dinar pro-

moters were driving Sterling's sales, and knew that Sterling was promising investors that they could "exchange anywhere in the world within 12 hours of any revaluation." Indeed, in an email to Rhame, Shaw voiced concerns about Sterling's legality:

> The point is that [my wife] and I have worked way too hard in life for us to risk everything based on your belief (even if I agree with you) that the Iraqi dinar will not [revalue] and it is ok to make millions of dollars in false promises to our customers. Not only are we risking everything we own, we are risking serious jail time as promoters of a ponzi scheme.

In another email, he raised concerns about stoking investors' unrealistic expectations:

> [My wife] and I are concerned about getting letters to you thanking you for helping them with their hospital with their purchase of $20k for a $200k layaway and other similar letters. We are not Charlatans and I do not like making money under false pretenses . . . Our life is happy without swindling people.

This evidence is sufficient to prove Shaw's involvement. The jury could have reasonably found that all the sellers defrauded investors by misleading them about the likelihood of revaluation and the airport plan.

3. Evidence Proves that the Sellers Agreed to Commit an Illegal Act.

The sellers argue that the evidence is insufficient to prove that they agreed to commit an illegal act. We disagree. The government may prove agreement to join a conspiracy by inferences drawn from conspirators' conduct or by circumstantial evidence. *United States v. Gonzalez*, 834 F.3d 1206, 1214 (11th Cir. 2016).

The record is replete with both direct and circumstantial evidence that the sellers agreed with each other and with Keller fraudulently to promote Sterling's sales. There are extensive email communications. In one example, Rhame bragged, when he emailed Shaw his article predicting an imminent revaluation, that "this should get some people excited." In another, Shaw emailed Rhame that his wife was "was crying last night because she knows we are running an illegal operation." And Sterling's secret payments to Keller provide further evidence of culpable conduct. Keller repeatedly emailed the sellers to tout that his false revaluation rumors had "sent a butt load of customers to [Sterling's] site"; that he had generated a "ton of orders"; and "[Sterling is] the group [he was] pushing behind the picture." A jury could reasonably have found that the sellers agreed with each other and with Keller to sell dinars based on fraudulent representations.

B. The District Court Properly Instructed the Jury on the Fraud Charges.

The sellers argue that the district court erred by failing to give a *Takhalov* instruction on the fraud charges. We again disagree. The district court correctly instructed the jury.

The parties dispute the standard of review. Shaw argues that we should review the jury instructions *de novo* because the instructions misstated the law by omitting the sellers' proposed language. The government responds that we should review for abuse of discretion.

We review for an abuse of discretion. The pattern jury instructions given by the district court contained no errors. But the sellers argue that additional instructions were needed to fully communicate the elements of fraud. We have consistently reviewed similar challenges for an

abuse of discretion post-*Takhalov*. *See Watkins*, 42 F.4th at 1287 (refusal to give *Takhalov* instruction in a wire and bank fraud case); *United States v. Waters*, 937 F.3d 1344, 1353 (11th Cir. 2019) (same in wire fraud case).

The sellers proposed jury instructions that they said reflected the distinction that we drew in *Takhalov* between the intent to deceive and the intent to defraud. *See* 827 F.3d at 1313–14. The sellers proposed that the jury be instructed that "[p]roving intent to deceive alone, meaning deception without the intent to cause loss or injury, is not sufficient to prove intent to defraud." That language has since been incorporated into the Eleventh Circuit Pattern jury instructions. *See* Eleventh Circuit Pattern Jury Instructions, Criminal Cases O50.1, at 2 (Jan. 2019 rev.). The sellers also proposed the instruction that "[i]t is not fraud if" the sellers "tricked someone into entering a transaction but nevertheless gave the person exactly what they asked for and charged that person exactly what he or she agreed to pay." The Judicial Council has not adopted that language.

To prove reversible error, the sellers must establish that the requested jury instruction "(1) was a correct statement of the law; (2) was not adequately covered in the instructions given to the jury; (3) concerned an issue so substantive that its omission impaired the accused's ability to present a defense; and (4) dealt with an issue properly before the jury." *United States v. Westry*, 524 F.3d 1198, 1216 (11th Cir. 2008) (citation and internal quotation marks omitted). To be a correct statement of law, an instruction must be complete and not misleading. *United States v. Silverman*, 745 F.2d 1386, 1396 (11th Cir. 1984). We reverse "only if we are left with a substantial, ineradicable doubt as to whether the jury was properly

guided in its deliberations." *United States v. Dohan*, 508 F.3d 989, 993 (11th Cir. 2007).

The district court did not abuse its discretion by refusing to give the sellers' proposed instruction. Most of the instruction—that is, that "[i]t is not fraud if" the sellers "tricked someone into entering a transaction but nevertheless gave the person exactly what they asked for"—is an incomplete statement of the law and risked misleading the jury. *See Silverman*, 745 F.3d at 1396. That language presents only the sellers' theory of the case. The government posited that the sellers' misrepresentations did go to the "characteristics" of the dinar and so constituted actionable fraud, *see Takhalov*, 827 F.3d at 1314, but the defense posited that the misrepresentations were ancillary when investors received "exactly [the dinars] they asked for." By merely restating the sellers' defense theory, the proposed instruction was one-sided. It presented only a scenario that would not be fraud, while omitting scenarios that would be fraud, and so failed to instruct the jury how to tell the difference. We have affirmed the refusal to give supplemental instructions—"[t]hough composed of quotations from our opinion in *Takhalov*"—in a similar context because pairing the instructions with only the defense theory risked misleading the jury. *See Waters*, 937 F.3d at 1353 (affirming refusal of proposed *Tahkalov* instruction that was an "incomplete statement of the law" and "didn't tell the jurors how to tell the difference" between deceit and fraud (citation and internal quotation marks omitted)).

Nor did the omission of the instruction impair the sellers' ability to present a complete defense. *See Westry*, 524 F.3d at 1216; *United States v. Eckhardt*, 466 F.3d 938, 947–48 (11th Cir. 2006). The part of the sellers' instruction now incorporated into the current version of the Eleventh

Circuit pattern jury instructions—that is, that "[p]roving intent to deceive alone, meaning deception without the intent to cause loss or injury, is not sufficient to prove intent to defraud" was substantively incorporated in the district court's jury charge. The instruction that the district court gave explained that a "'scheme to defraud' includes any plan or course of action *intended* to deceive or cheat someone out of *money or property*." So when viewed as a whole, the district court's instruction made clear that the defendant must intend "to deceive the [victim] *and* deprive [him] of something of value." *Shaw*, 580 U.S. at 63. Because the district court's charge "addressed the substance" of the first sentence of the sellers' proposed instruction, the sellers' "ability to present an effective defense was [not] impaired." *Watkins*, 42 F.4th at 1287. The district court did not abuse its discretion when it refused to give the sellers' proposed instruction.

C. Evidence Supports Rhame's and Bell's False Statements Convictions.

Rhame and Bell argue that their convictions for false statements to federal agents cannot stand. They argue that the government failed to prove the falsity of their statements and that their statements were fundamentally ambiguous. We disagree.

To sustain the convictions for false statements, the prosecution must prove that the sellers made statements that were both false and material, that they had specific intent, and that the statements were within the jurisdiction of an agency of the United States. *United States v. Boffil-Rivera*, 607 F.3d 736, 740 (11th Cir. 2010). An answer to a line of *questioning* that is "fundamentally ambiguous" might be "insufficient as a matter of law" to support a conviction. *United States v. Manapat*, 928 F.2d

1097, 1099 (11th Cir. 1991) (citation and internal quotation marks omitted).

Sufficient evidence supported Rhame's four convictions for false statements. First, Rhame was charged for falsely stating that "he and Sterling had never advertised the Iraqi dinar as a good investment." In response to an agent's question, "[Y]ou've never—you personally or on your website or anything like that have ever . . . promot[ed] [the dinar] as a good investment," Rhame responded, "Hell, no. . . . Never. You will never find that anywhere." That statement is contradicted by a Sterling promotional video in which Rhame asserted that "the Iraqi dinar stands alone as one of the most promising investments today."

Second, Rhame was charged for falsely stating that "he and Sterling had never promoted and talked about a potential Iraqi dinar revaluation." Rhame and a federal agent had the following exchange:

> Agent: Along the lines of you don't promote the dinar as an investment, have you ever promoted or talked about on your website the RV or the revaluation?
>
> Rhame: Never.
>
> Agent: Okay.
>
> Rhame: Because that's not—it's not our job. It's not our place and—absolutely not.

That exchange is contradicted by Rhame's statements in Sterling promotional videos and his article on the Sterling website, titled "Iraqi Dinar Revaluation," in which he asserted that "sudden significant[] (overnight / over weekend) high revaluation seems very possible."

Third, Rhame was charged for falsely stating that "he and Sterling had never paid commissions to third parties

to promote Iraqi dinar sales." Rhame asserted, in an evasive and roundabout answer, that "our advertising, as a matter of fact we've had—I know we've had people in the past say, well, . . . I don't think we deal with anything like that at all anymore, but anybody that's ever said, hey, . . . we want to be paid based off how much, you know, currency we sell." An agent interjected, "Like a commission?" Rhame responded, "No. . . . No eff-ing way." Rhame's denial is contradicted by, for example, emails that discuss paying "a 2% sales commission" to a "campaign [that] will promote the purchase of Iraqi dinars," and emails offering to pay a promoter "$10 per referral" for sales.

Fourth, Rhame was charged for falsely stating that "he and Sterling had never incentivized other blogs and websites to promote Sterling's dinar sales." Rhame denied incentivizing promoters in the following exchange with an agent:

> Rhame: We do not promote anything. And we don't—and we don't incentivize anybody else to do it, just so you're—so we're crystal clear. We don't incentivize any—you know, if we advertise with somebody, there's no way in a million years we incentivized them to do that or anything else like that.
>
> . . .
>
> [M]y understanding is that if we have any advertisements anywhere on—on a website, it's strictly, you know, a posting of a banner.
>
> . . .
>
> Agent: So you're not—you're not aware of any—paying anybody on another blog or website like that to promote—

Rhame: I'll tell you. Hell, no. No way.

Agent: Okay.

Rhame: We don't do that.

Agent: Okay.

Rhame: Not in a million years.

Agent: Okay.

Rhame: No, we just don't do it.

Those statements are contradicted by Sterling's $4,000-per-month payments to Keller, who boasted that he had "been pumping the heck out of you guys [Sterling] on [his] site."

Sufficient evidence also supports Bell's two convictions for false statements. First, he was charged with falsely stating that "he and Sterling maintained a 'firewall' with Iraqi dinar promoters" and that "he affirmatively told promoters 'not to drive business' to Sterling's website." Second, Bell was charged with stating that he had "told [Keller] not to promote Sterling." In his second interview, agents asked Bell about the "firewall" comment from his first interview. An agent referenced an email between Keller and Bell in which Keller "indicates he's emailing you discussing that he's . . . promoted Sterling in the chat rooms." The agent stated that "[the email] kind of goes to my concern of—of, you know, you spoke of that firewall that you tried to keep . . . but then the promoters are sending direct messages [to you] about kind of what they're doing in these chat rooms to direct business to Sterling." Bell replied, "I've told him [Keller] I don't want him doing it and I don't want to hear about it." Bell's statements that he "maintained a firewall" and told promoters, Keller included, not to drive business to Sterling are con-

tradicted by his many emails encouraging Keller's promotion of Sterling. In one exchange, for example, Keller boasted, "I have a ton of peeps cashing in with you guys," and Bell responded, "That is terrific. Thanks for having me on the call." In another, Rhame emailed Bell, "We generally take care of [Keller] because he sends a lot of business our way."

Rhame and Bell's argument that their convictions cannot stand because their statements were ambiguous also fails. Our precedents preclude only prosecutions "based on fundamentally ambiguous *questions*." *E.g.*, *Manapat*, 928 F.2d at 1100 (emphasis added). "Precise *questioning* is imperative as a predicate" for criminal offenses based on perjury, *Bronston v. United States*, 409 U.S. 352, 362 (1973) (emphasis added), because of the "unfairness" of convicting a defendant when "the questions forming the basis of the charge are . . . vaguely and inarticulately phrased *by the interrogator*," *Manapat*, 928 F.2d at 1099 (citation and internal quotation marks omitted). The distinction between ambiguous questions and ambiguous answers is crucial: a criminal defendant escapes a perjury charge only if the federal agents asked an ambiguous question; he cannot wriggle out of the same charge through an evasive answer. Rhame and Bell's argument, premised on the ambiguity of their answers, fails as a matter of law.

There was nothing "fundamentally ambiguous" about Rhame's and Bell's statements or the agents' questions. The prosecution offered ample evidence to prove the falsity of the defendants' statements. And the agents' questions, when viewed in the conversations' context, are clear. The jury could have reasonably found, based on Rhame's and Bell's answers, that they lied to federal agents.

D. The District Court Properly Instructed the Jury on the False Statement Charges.

Rhame argues that the district court abused its discretion by refusing a proposed supplemental instruction on ambiguity. The sellers objected to the false statement pattern instructions at the charge hearing and requested an instruction reflecting the "clear case law that says that [if] something is ambiguous, it's the government's burden to clear up that ambiguity." Their proposed instruction added that "[t]he Government bears the burden of negating all literally truthful interpretations of a statement when the statement is ambiguous and subject to multiple interpretations" to the pattern instructions. The district court denied the request and used the pattern instructions for each false statement count. Denial of a proposed instruction is reversible error only if the proposal is "a correct statement of the law." *Westry*, 524 F.3d at 1216 (citation and internal quotation marks omitted).

Rhame's requested instruction failed to provide a correct statement of the law. A federal agent need not negate all ambiguity in an interviewee's answer to sustain a false statement conviction; the agent is responsible only for asking unambiguous questions. *See Manapat*, 928 F.2d at 1099–1100; *see also Bronston*, 409 U.S. at 362. So the district court did not abuse its discretion when it omitted Rhame's ambiguity instruction.

E. No Evidentiary Error Warrants a New Trial.

The sellers argue that the district court committed three evidentiary errors that individually and cumulatively warrant a new trial. First, the sellers object to the admission of news reports and press releases that dinar sales were a scam. The government offered the evidence to prove that the sellers were on notice that their conduct

was illegal. Second, the sellers object because the prosecution called fraud victims to read aloud from previously admitted exhibits, about which the victims had no personal knowledge. Third, Rhame objects to the inclusion of evidence of his wealth and exclusion of evidence of his charitable donations. We reject each challenge in turn.

1. The Media Reports and Press Releases Were Not Hearsay or Unduly Prejudicial.

The sellers object that the admission of various media reports, press releases, and emails—all of which warned that dinar sales were a scam—were inadmissible hearsay and prejudicial. The challenged evidence includes a CNBC news video about convicted dinar seller Brad Huebner; a Forbes articled titled "You Can't Fix Stupid: The Iraqi Dinar Scam Lives"; a warning post from a blogger pseudonymously named "Nutrition Dude"; a purported Bank of America notice condemning the "Iraqi dinar scam"; and an email informing the sellers that a customer's bank refused to wire Sterling money for the dinar "scam." The sellers emailed links or attachments of the media exhibits to each other. The emails included concerned comments about the exhibits' contents, for example, "[t]his isn't good," and "not [a] great article." The district court admitted the video, the Bank of America warning, the emails, and the news articles with limiting instructions.

The sellers erroneously argue that the article and warnings were inadmissible hearsay. Hearsay is a statement, other than one made by the individual testifying at trial, offered to prove the truth of the matter asserted. FED. R. EVID. 801(c). Evidence admitted to prove the listener's state of mind is not hearsay. *United States v. Schlei*, 122 F.3d 944, 981 (11th Cir. 1997). The district court admitted the news reports, emails, and articles as

proof that the sellers were on notice of the wrongfulness of their conduct and of the fact that other individuals had been prosecuted for similar behavior. The evidence was not inadmissible hearsay. *See id.*

The sellers also argue that the reports, emails, and articles were unduly prejudicial and had limited probative value. *See* FED. R. EVID. 403. According to the sellers, media sources could not show the sellers' awareness of their wrongful conduct when the sellers correctly understood the act of selling dinars to be legal. Federal Rule of Evidence 403 provides that the district court has discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Exclusion under that rule "is an extraordinary remedy" that the district court "should invoke sparingly, and the balance should be struck in favor of admissibility." *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2011) (citation and internal quotation marks omitted). And a limiting instruction mitigates the risk of undue prejudice. *United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir. 2005). We must presume, in absence of contrary evidence, that the jury followed limiting instructions. *Id.* at 1352.

The district court did not abuse its discretion in admitting the media reports and press releases with limiting instructions. We presume that the jury followed the district court's instructions that the news articles could "not be considered for the truth of any of the matters asserted," and that reports of other dinar sellers' conduct "may have no bearing on what happened in [Sterling's] case or resemble the facts of [Sterling's] case." Nor can we say that the media reports were unfairly prejudicial in the light of the immense body of evidence—20 witnesses and nearly 300 other exhibits—introduced over nearly five weeks of

trial. Indeed, the sellers' own communications characterized their business as an "illegal operation" and a "ponzi scheme." The district court did not commit reversible error when it admitted the evidence.

2. The District Court Did Not Abuse Its Discretion When It Permitted Sterling Investors to Read Aloud from Previously Admitted Exhibits.

Rhame objects that the prosecution repeatedly called witnesses to read from exhibits about which they had no personal knowledge. He cites no rule or precedent to support his argument, but only highlights that the district court worried that the procedure might be "appealable." The prosecution called multiple Sterling investors—that is, fraud victims—to read aloud from particularly damaging exhibits of the sellers' emails and other communications. The parties had stipulated before trial to the authenticity of those exhibits. Rhame cites no authority for the proposition that witnesses cannot read from authenticated, previously admitted evidence. And our precedents say that they can do so. *See United States v. Willner*, 795 F.3d 1297, 1318 n.17 (11th Cir. 2015) ("Anyone can state what a document says or read from it if it has been admitted into evidence, and permitting this testimony was not error."). The district court did not abuse its discretion.

3. The District Court Properly Included Evidence of Rhame's Wealth and Excluded Evidence of His Charitable Donations.

The district court did not abuse its discretion when it admitted evidence of Rhame's lavish lifestyle and excluded evidence of his charitable donations. Rhame's lifestyle expenditures and accompanying photographs were admissible to prove his motive for fraud. *United States v.*

Bradley, 644 F.3d 1213, 1272 (11th Cir. 2011) ("The district court had broad discretion to admit the Government's 'wealth evidence' so long as it aided in proving or disproving a fact in issue."); *see also United States v. Hill*, 643 F.3d 807, 843 (11th Cir. 2011) ("[W]ith financial crimes, the more money, the more motive."). And his charitable donations were inadmissible character evidence. *See United States v. Langford*, 647 F.3d 1309, 1329 (11th Cir. 2011) (defendant's donations were inadmissible character evidence).

F. The District Court Lawfully Sentenced Rhame.

Rhame argues that the district court erred at sentencing in four ways: first, it should have granted a downward departure based on his military service; second, it erred by applying a sophisticated-means enhancement; third, it erred by applying an obstruction-of-justice enhancement; and fourth, it plainly erred by applying a substantial-financial-hardship enhancement. We address each argument in turn.

First, we lack jurisdiction to review the refusal to grant Rhame a downward departure under section 5H1.11 of the Sentencing Guidelines. *See* United States Sentencing Guidelines Manual § 5H1.11 (Nov. 2023). At the sentencing hearing, the district court entertained and then denied Rhame's motion for a section 5H1.11 downward departure based on his 32-year service career in the Air Force. "We lack jurisdiction to review a district court's decision to deny a downward departure unless the district court incorrectly believed that it lacked authority to grant the departure." *Dudley*, 463 F.3d at 1228. Absent contrary evidence, we assume that the district court understood that it had authority to depart downward. *Id.* Rhame does not argue that the district court believed that

it lacked authority to grant the departure; he instead argues that the district court failed to consider the length and meritorious nature of his service. Because nothing in the record suggests that the district court thought it lacked authority, we lack jurisdiction over this issue and must dismiss.

Second, the district court did not err by applying the two level sophisticated-means enhancement in connection with the fraud charges. *See* U.S.S.G. § 2B1.1(b)(10)(C). The guidelines define "sophisticated means" as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." *Id.* § 2B1.1 cmt. n.9(B). We have affirmed application of the enhancement when a criminal scheme "involved repetitive and coordinated activities by numerous individuals who used sophisticated technology to perpetrate and attempt to conceal the scheme." *United States v. Barrington*, 648 F.3d 1178, 1199 (11th Cir. 2011). A district court may apply the enhancement when only "some—but not all—aspects of a scheme are sophisticated." *Wheeler*, 16 F.4th at 830. The district court found that the sellers' scheme involved "repetitive coordinated activities and sophisticated technologies" to perpetrate fraud, and that Rhame "was an organizer and leader of the criminal activity." Those findings are supported by the record and sufficient to support the application of the enhancement.

Third, the district court did not err when it applied the two level obstruction-of-justice enhancement based on Rhame's perjury during a suppression hearing. *See* U.S.S.G. § 3C1.1. A district court may apply the enhancement if a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing" of his offense of conviction. *Id.* § 3C1.1(1). The

district court imposed the enhancement after it found that Rhame had "testified falsely" under oath during the suppression hearing, that the testimony was material, and that the falsity "was not based on mistake, confusion[,] or faulty memory." Rhame's false testimony was an effort to suppress, because of alleged *Miranda* violations, his statements during his interview with federal agents. Rhame testified that during the interview, an agent had "ma[de] [him] get off the phone" during a call with his attorney. An agent testified that Rhame had "hung up the phone on his own."

When, as here, an officer's testimony directly conflicts with a defendant's, "[c]redibility determinations are typically the province of the fact finder." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). We defer to the district court unless its "understanding of the facts appears to be unbelievable." *Id.* (citation and internal quotation marks omitted). The district court found the agents credible and found that the testimony and later behavior of Rhame's attorney "simply d[id] not support" Rhame's testimony that the agents had forced him to end the call. That credibility determination is not unbelievable, and the district court did not clearly err by applying an obstruction enhancement based on Rhame's perjury.

Fourth, the district court did not plainly err when it applied the six-level substantial-financial-hardship enhancement. *See* U.S.S.G. § 2B1.1(b)(2)(C) (providing a six-level increase for causing substantial financial hardship to 25 or more victims). Rhame argues that applying the substantial-financial-hardship enhancement violated the Ex Post Facto Clause, *see* U.S. CONST. art. 1, § 9, cl. 3, because the enhancement did not exist at the time of his offense in 2015. The Ex Post Facto Clause bars a defendant from being sentenced under a version of the guidelines

that would provide a *higher* sentencing range than the version in place at the time of his criminal conduct. *Peugh v. United States*, 569 U.S. 530, 533 (2013). We determine the relevant comparator range by looking at the entire manual in effect at the time of the conduct. *See United States v. Bailey*, 123 F.3d 1381, 1403–04 (11th Cir. 1997). Because Rhame did not raise this issue before the district court, we review it only for plain error. *See Maurya*, 25 F.4th at 836.

Rhame cannot prove that he would have been clearly entitled to a lower sentencing range under the comparator 2014 manual. To be sure, the 2014 manual did not include a substantial-financial-hardship enhancement, but it *did* include a general victim-impact enhancement that would have applied to Rhame. The 2014 manual provided that an offense involving 50 or more victims triggered a four-level increase, and an offense involving 250 or more victims triggered a six-level increase. U.S.S.G. § 2B1.1(b)(2)(B)–(C)(2014). The Sentencing Commission amended the guidelines in November 2015, after Sterling ceased operations, to add the hardship component but lower the victim-count threshold. The amendment provided for a four-level increase if an offense resulted in substantial financial hardship to five or more victims, and a six-level increase if an offense resulted in substantial financial hardship to 25 or more victims. *Id.* § 2B1.1 amend. 792. To trigger the highest available enhancement in 2018, the prosecution needed to prove substantial hardship to only 25 or more victims, so it highlighted only 32 of the over 600 victims who submitted impact statements. But based on the existence of the hundreds of others impacted, Rhame would likely have qualified for the six-level enhancement available under the 2014 manual. *See id.* § 2B1.1(b)(2)(C) (2014). Rhame cannot prove that he clearly would have been entitled to a lower sentencing

range under the guidelines in effect at the time of his conduct. *See United States v. Elbeblawy*, 899 F.3d 925, 939 (11th Cir. 2018).

Rhame argues that our decision in *Maurya* dictates the opposite conclusion. 25 F.4th at 836. We disagree. In *Maurya*, we held that that the district court plainly erred when it applied the substantial-financial-hardship enhancement (added in 2015) to an offense that occurred in 2014. *Id.* Importantly, the government conceded the error. *Id.* And we ruled that the error affected the defendant's substantial rights. *Id.* Here, the government makes no such concession. Instead, it argues that Rhame cannot prove that he would have received a lower guidelines range under the 2014 manual. Rhame does not meaningfully argue otherwise. Instead, he asserts that this conclusion is "incorrect" without explaining why. Under plain error review, the defendant must establish that any error was "clear or obvious" and affected "[his] substantial rights." *United States v. Ware*, 69 F.4th 830, 853 n.17 (11th Cir. 2023). Rhame's conclusory response falls short of satisfying this burden.

IV. CONCLUSION

We **AFFIRM** the sellers' convictions. We also **AFFIRM** Rhame's sentence, except as to his appeal of the district court's refusal to grant a downward departure; we **DISMISS** that part of his appeal for lack of jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12750

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

FRANK BELL, TYSON RHAME, JAMES SHAW,
DEFENDANTS-APPELLANTS.

Filed: November 08, 2024

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

Before: PRYOR, Chief Judge, PRYOR and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is **DENIED**, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is **DENIED**. FRAP 40.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:16-CR-00067-SCJ

UNITED STATES OF AMERICA,

v.

TYSON RHAME, JAMES SHAW, AND FRANK BELL,
DEFENDANTS

Filed: March 25, 2020

ORDER

This matter appears before the Court on the Motions for New Trial filed by Defendant Tyson Rhame (Doc. No. [557]), Defendant Frank Bell (Doc. No. [559]), and Defendant James Shaw (Doc. No. [565]). The Government filed a consolidated response at Doc. No. [580]. Defendants filed reply briefs thereafter. Doc. Nos. [589], [594],

[599].[1] Defendants Rhame and Bell also filed Supplemental Briefs (regarding the *Brady* and false statement counts). Doc. Nos. [610], [618].

The Court held oral argument on April 15, 2019. Doc. No. [623].

Additional supplemental authority and briefing (pertaining to *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016)) was filed by the Government (Doc. Nos. [649], [651]). Defendants filed collective responses thereafter. Doc. Nos. [650], [652].

Federal Rule of Criminal Procedure 33 states in relevant part: "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The Eleventh Circuit has stated that the Rule 33 "interest of justice so requires" standard "is a broad standard. It is not limited to cases where the district court concludes that its prior ruling, upon which it bases the new trial, was legally erroneous." United States v. Vicaria, 12 F.3d 195, 198 (11th Cir. 1994). "The decision to grant or deny the new trial motion is within [the] sound discretion of the trial court . . . ." Id. (citations omitted).

"On a motion for a new trial based on the weight of the evidence, the court need not view the evidence in the light most favorable to the verdict. It may weigh the evidence and consider the credibility of the witnesses." United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir. 1985) (citations omitted). "If the court concludes that, 'despite

[1] Defendants have also filed motions to adopt the other's motions (Doc. Nos. [489],[568], [569]). Said adoption motions are GRANTED.

the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.'" Id.

"The decision to grant or deny a new trial motion based on the weight of the evidence is within the sound discretion of the trial court." Id. "While the district court's discretion is quite broad, there are limits to it. The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand. Motions for new trials based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really 'exceptional cases.'" Id. at pp. 1312–13 (citations omitted). After review, the Court finds that the case *sub judice* is not one of those "exceptional cases" in which the Court will exercise its power to interfere with the jury's factual findings. Martinez, 763 F.2d at 1314; see also United States v. Hernandez, 433 F.3d 1328, 1335 (11th Cir. 2005).

The Court addresses Defendants' individual arguments as follows.

A. Conspiracy, Mail Fraud, Wire Fraud

1. *Takhalov jury charge*

Defendants argue that a new trial is required because a critical jury instruction regarding the Eleventh Circuit's

United States v. Takhalov, 827 F.3d 1307 (2016) decision[2] was not given. Doc. No. [557-1], p. 14. More specifically, Defendants assert that the following language should have been added to the pattern jury charges instructions for mail and wire fraud:

> Proving intent to deceive alone, meaning the deception without the intent to cause loss or injury, is not sufficient to prove intent to defraud. And merely inducing someone, by means of a trick or deceit, to enter a transaction that he or she otherwise would have avoided is insufficient to show fraud. It is not fraud if a Defendant or the Defendants tricked someone into entering a transaction but nevertheless gave the person exactly what they asked for and charged that person exactly what he or she agreed to pay.

Doc. No. [557-1], p. 15 (citing Doc. No. [427]).

Defendants assert that there were more than sufficient facts to support the requested Takhalov instruction and that it was a correct statement of law. Doc. No. [557-1], p. 21. Defendants also assert that by failing to give the instruction, the Court essentially removed the Takhalov issue from the jury and "deprived the defense of the essential core of its defense." Doc. No. [565], p. 8.[3] Defendants also focus on the airport exchange policy and other

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[2] The Takhalov decision was previously discussed by the Court in a pretrial ruling (on Defendants' Motion to Dismiss the Indictment) at Doc. No. [264], pp. 13–17.

[3] The core of the defense is described as follows:

> While there may have been some misstatements made during the course of the marketing of the dinar, these misrepresentations amounted, at least, to instances of deceit, but not fraud. Every customer received precisely and exactly what they paid for: dinars at the current market rate, with the possibility that the dinar would increase in value at some point in the future. Nobody at

examples as illustrating the issues/facts as not being a "lie about future value." Id. at p. 12. Defendants assert that "the defense was entitled to a jury instruction that explained precisely what is and is not fraud in all instances that the jury could have considered in reaching its decision." Id. at p. 13. At oral argument, it was also noted that after the trial of this case, the Eleventh Circuit amended its pattern charge to include the first sentence from Defendants' proposed charge, i.e., "Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud."[4]

Defendants further assert that the theory of defense instruction that they drafted and that was ultimately given is no substitute for a correct statement of law reflected in the fraud instruction requested by the Defense. Doc. No. [594], p. 5. Defendants state that the "theory of defense deals with just . . . facts. Takhalov deals with the law." Id. at p. 9. Defendants also caution against using appellate standards in ruling on their pending motions for new trial, as inapplicable. Id. at p. 5.

In a concurring opinion in United States v. Feldman, 931 F.3d 1245, 1265 (11th Cir. 2019) (W. Pryor, J., concurring), Judge William H. Pryor Jr. noted a post-Takhalov United States Supreme Court opinion that appears to endorse (or otherwise adopt) a ruling made by Judge Learned Hand in which he stated "[a] man is none the less cheated out of his property, when he is induced to part

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> Sterling ever told any customer that the dinar was guaranteed to rise in value. Nobody at Sterling made any promise that the revaluation was just around the corner.

Doc. No. [565], p. 8.

[4] See http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedJAN2019.pdf.

with it by fraud, even if he gets a quid pro quo of equal value." Shaw v. United States, —U.S.—, 137 S. Ct. 462, 467 (2016) (citing United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932)) (internal quotations omitted).

After review, the Court adheres to its prior ruling (concerning future value)[5]—and allowing a theory of defense instruction, but declining to include the Defendants' proposed Takhalov language (as stated above) in the jury charge, as the totality of the proposed language concerning giving the victims what they paid for (and the absence of fraud) would not have applied here. In essence, this is a fraud in the inducement case and contrary to Defendants' arguments, the evidence showed that victims did not get exactly what they paid for, in that as the Government argues, there is evidence that the Sterling customers were being defrauded because they did not have the ability to exchange the dinar (that they bought at a mark-up) from Sterling, like they thought that they were going to be able to do at airport exchanges. Doc. No. [623], p. 165, lines 7–18. Essentially, the Government argues that the victims did not get the suite of services that were supposed to accompany the dinar. Id. at p. 166, lines 1–7.[6]

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[5] The future value ruling is at Doc. No. [264]; see also Doc. No. [544], T. 4578, 4583. The official decision to not include the Defendants' proposed Takhalov instruction was via email from the Court's law clerk, through a sentence, which stated: "Judge Jones will not add any of the proposed Takhalov instructions." See generally, Doc. No. [544], T. p. 4635, lines 1–8.

[6] The fact that no victim ever needed to use the airport exchange does not matter. "[O]ne can be convicted of mail or wire fraud 'even if his targeted victim never encountered the deception—or, if he encountered it, was not deceived.'" United States v. Mendez, 737 F. App'x 935, 943 (11th Cir. 2018) (citations omitted).

In addition, without more, the fact that the Judicial Council of the Eleventh Circuit approved changes (post-trial) to the pattern mail/wire fraud jury charges to include the first sentence from Defendants' above-stated proposed jury charge does not change this Court's decision.

On the whole, after questioning the soundness of the Court's prior ruling on a matter particularly within its discretion, i.e., the mail/wire fraud jury charge, the Court adheres to its trial ruling and does not find that the interest of justice warrants a new trial on the grounds asserted by Defendants. Vicaria, 12 F.3d at 199.

2. *Deliberate ignorance instruction*

In his motion, Defendant Bell asserts that the deliberate indifference instruction improperly singled him out and there was insufficient evidence to support the instruction. Doc. No. [559-1], p. 2.

After questioning the soundness of the Court's prior ruling on a matter particularly within its discretion, i.e., the deliberate ignorance jury charge, the Court does not find that the interest of justice warrants a new trial on the grounds asserted by Defendant Bell. Vicaria, 12 F.3d at 199.

3. *Variance*

Defendant Bell reincorporates his fatal variance arguments (from his motion for judgment of acquittal) into his motion for new trial. For the reasons stated in the Court's order on the acquittal motion, the Court denies the present motion on the same ground. The Court further finds that on this matter particularly within its discretion, the interest of justice does not warrant a new trial on the grounds asserted by Defendant Bell. Vicaria, 12 F.3d at 199.

4. *Exhibits and evidence presentation*

Defendants object to admitting several exhibits, "not for the truth of the matter asserted," but to show "notice to the Defendants." Doc. No. [565], p. 20. Defendants assert *inter alia* that the exhibits at issue were irrelevant and prejudicial hearsay, notice of "nothing" and inflammatory, with dissimilar content. Doc. No. [594], p. 11. More specifically, Defendants objects to a CNBC video, articles, customer emails, statement of mind emails, lifestyle evidence, and the Government's Exhibit 2. See generally Doc. No. [594]. Defendants also object to the Court's exclusion of charitable evidence and the Government's repeated use of witnesses to testify about documents about which they had no personal knowledge. Id.

After questioning the soundness of the Court's prior ruling on a matter particularly within its discretion, i.e., the admission of evidence and trial procedures, the Court adheres to its trial rulings (as stated at trial and in its rulings on the parties' motions in limine) and does not find that the interest of justice warrants a new trial on the grounds asserted by Defendants. Vicaria, 12 F.3d at 199.

5. *Prosecutorial conduct during closing argument*

Defendants assert that the Government knew that Government's Exhibit 2 [an email from Rhame to Defendant Shaw's wife, and copying Defendant Shaw][7] had noth-

[7] As stated in Defendants' brief, "[i]n its entirety, Government Exhibit 2, an email from Ty Rhame to Laurette Shaw and copied to Jim Shaw, states as follows:"

> This amendment is complete bullshit written for the purpose of obtaining banking. Jim and Ty are operation under the original partnership agreement. We are 50% partners and his ass will go to prison if mine does.

ing to do with the fraud charged in the indictment, but relied on Exhibit 2 in closing argument to "prove that Shaw and Rhame were motivated by greed to commit the fraud charged in the indictment and then 'proved' the point by showing that 'they' (even though only Rhame authored the email) knew that they were going to go to prison because they were 50% partners." Doc. No. [565], p. 16.[8] Defendants assert that the Court "erred in refusing to immediately sanction the prosecutor for the false impression it conveyed to the jury when requested by the defense." Doc. No. [565], citing Doc. No. [545], T. p. 4714, *et seq*. Defendants assert that "[a]llowing the prosecutor to rely on Exhibit 2 and Rhame's false statement about prison to prove that Rhame and Shaw were guilty of the mail and wire fraud conspiracy and the substantive mail fraud counts was error [and] [r]efusing to provide a limiting instruction or to correct the false closing argument presented by the prosecutor was error." Doc. No. [565], p. 19.

The Eleventh Circuit has held:

> To establish prosecutorial misconduct, "(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." See United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different. United States v. Wilson, 149 F.3d 1298, 1301 (11th

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Doc. No. [565], p. 15; see also Doc. No. [545], T. p. 4710–11.

[8] The Court's instruction to the jury about the exhibit being admitted to show "state of mind" is at T. p. 4042, Doc. No. [542-1] and the ruling to the attorneys concerning "opening the door" is at Doc. Nos. [542], T. p 4024; [542-1], T. 4040.

> Cir. 1998). When the record contains sufficient independent evidence of guilt, any error is harmless. United States v. Adams, 74 F.3d 1093, 1097–98 (11th Cir. 1996).

United States v. Eckhardt, 466 F.3d 938, 947 (11th Cir. 2006).

At trial, the Government indicated that the parties have different interpretations of the evidence and that the differing interpretations did not render a misrepresentation of the evidence to the jury. Doc. No. [545], T. p. 4719, lines 1–7. The Government also indicated that its argument was "rooted in fact and based upon the evidence before the jury." Id.; see also Doc. No. [580], pp. 58–59.

"This Court recognizes that 'the combination of prosecutorial misconduct and improper judicial conduct can, in an extreme case, deny a defendant a fair trial.'" United States v. Dohan, 508 F.3d 989, 994 (11th Cir. 2007) (citing United States v. Elkins, 885 F.2d 775, 787 (11th Cir. 1989)). However, in the case *sub judice*, "[t]here was no such misconduct here." Id. The Court agrees that Government's Exhibit 2 was subject to interpretation and the Government and Defendants have different interpretations as to the meaning of the exhibit. The difference in interpretations does not lend itself to a ruling that there was prosecutorial misconduct. Accordingly, a new trial is not warranted on this ground.

B. False Statements

1. *Jury instruction*

Defendant Rhame asserts that a critical jury instruction regarding "ambiguity for purposes of the false statement counts" was not given. Doc. No. [557-1], p. 14. De-

fendant Rhame asserts that the "failure to provide this instruction prevented the jury from finding Mr. Rhame's statements were ambiguous instead of false." Id. at p. 23. Defendant Rhame also notes the impact of not giving the requested instruction because with regards to Counts 33 and 34, the jury asked for a dictionary to define the words "incentivize" and "commission." Doc. No. [623], T. p. 75, lines 1–5.

As for the false statements jury charge, the Court finds no error in its rulings or that the interest of justice so requires a retrial on these counts of the indictment. Cf. United States v. Yearty, 430 F. App'x 787, 790 (11th Cir. 2011) ("The district court did not err in any of its rulings, let alone commit cumulative errors that would entitle [defendant] to a new trial.").

2. *Ambiguity*

Defendant Bell argues that the "firewall" term was ambiguous. Doc. No. [623], p. 85, line 16. The Court's ruling on this argument in the context of Defendant Bell's motion for judgment of acquittal controls.

3. *Takhalov*

Defendants Rhame and Bell argue that Takhalov is implicated in the false statements as well, because it goes to the underlying conduct. Doc. No. [623], pp. 76, 86. The Court does not agree. The above-stated Takhalov analysis controls.

C. Brady

Defendants state that they have identified three categories of undisclosed Brady material:

> (i) submissions to the FBI victim portal received prior to the completion of trial that contain Brady

> material, including material identified as such by Magistrate Judge Salinas;
>
> (ii) the fact that prosecutors decided to take down the FBI victim portal after Magistrate Judge Salinas ruled that it contained Brady material; and
>
> (iii) unmemorialized customer communications with US Attorney's Office secretary and victim impact coordinators (either with the US Attorney's Office or the FBI) that contain Brady material, including material identified as such by Magistrate Judge Salinas.

Doc. No. [634], p. 3.[9]

"To establish a Brady violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence), (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, (3) that the prosecution suppressed the

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[9] The Court recognizes that there was an additional Government production of documents to Defendants in July 2019 as described in the Government's Report of Brady Review. Doc. No. [644]. Those documents are: (A) six IRS-CI Memoranda of Interview from interviews conducted on June 3, 2015; (B) three communications from "happy" Sterling customers who want the dinar they purchased, including a July 11, 2018, voicemail from Tiffany Casper, f/k/a Tiffany Bolton; an August 7, 2018, email from Richard "Buzz" Brescoll; and a Complaint Referral Form from iC3 submitted by Erik Nelson on June 10, 2015; and (C) a Complaint Referral Form from iC3 submitted by Frank Bell on August 31, 2012. Doc. No. [644], p. 2. Defendants did not amend its above-stated three categories in subsequent briefing at Doc. No. [647]. Nevertheless, even in adding a fourth category of the documents produced in July 2019, the Court's analysis remains the same.

favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989) (citations omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Swindall, 971 F.2d 1531, 1555 (11th Cir. 1992) (citations and some quotations omitted).[10]

"The decisions which have construed the Brady doctrine make it absolutely clear that the remedy for a Brady violation is a new trial and that the remedy is available to a defendant only after a first trial has ended in a conviction and only after a defendant shows that there is a reasonable probability that had the Brady evidence been disclosed in time for use at trial, the first trial would not have resulted in a conviction." United States v. Presser, 844 F.2d 1275, 1286 (6th Cir. 1988).

In its response to Defendants' Brady arguments, the Government states "[t]o the extent the Sterling defendants have identified any undisclosed yet admissible information, they fail to establish that they were not otherwise aware of this information or that they could not have found the information through reasonable diligence. They also fail to establish that the information itself was not cumulative of other information in their possession prior to trial." Doc. No. [638], p. 1.

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[10] Defendants also cite the following habeas case from the Seventh Circuit, which this Court has considered in its analysis: Goudy v. Cummings, 922 F.3d 834, 842 (7th Cir. 2019) (holding that "the 'reasonable probability standard for materiality . . . is less rigorous than a preponderance of the evidence standard.' [Petitioner] must show only that 'the cumulative effect of all the suppressed information is to undermine confidence in the verdict.' . . . . We assess this cumulative effect 'in the context of the entire record.'") (citations omitted).

In reply, Defendants' argue that from the dozens of favorable questionnaire response that they have received in the post-trial Government production, they have "identified additional witnesses that meet the criteria established by this Court for admissibility of favorable customer evidence." Doc. No. [647], p. 37. Defendants further argue that the Government's actions prevented them from discovering the favorable questionnaire response (or the customer statements in them) before trial. Id. at p. 38. Defendants indicate that the Government created a "battle of materiality" at trial and "[n]ot all witnesses are created equal." Id. at pp. 43, 44. Defendants argue that the "test for cumulative evidence under Brady has never been applied in a 'battle of materiality' case, making the suppression of large amounts of customer reliance evidence under the mail and wire fraud statutes a matter of first impression." Id. at p. 46. In considering the evidence cumulatively, as required by the Brady analysis, Defendants assert that "[t]he government concealed over 350 questionnaire responses. The Defense has identified seven customers who provided affidavits or declarations for these post-trial filings and dozens more potential witnesses from the questionnaires whose testimony would support their materiality defense." Doc. No. [647], p. 46, n.7; see also Doc. No. [634], pp. 6–21). Defendants also assert that the Government failed to address its arguments of investigation bias, and reckless or intentional disregard for the truth. Doc. No. [647], p. 48 (citing Doc. No. [634], pp. 14–16). Defendants assert that they "should have been able to cross-examine FBI agents with the supposed 'shut-down' decision AUSA Krepp made after the Magistrate Judge's Order, and how that demonstrates the government's conscious efforts to avoid learning information inconsistent with its theories." Doc. No. [634], pp. 14–16. Defendants further assert that "[i]t now appears that the

government routinely failed to memorialize calls from customers—including favorable customers." Doc. No. [647], p. 49.[11]

The Court assumes without deciding the initial factors and focuses on the fourth prong of the analysis, i.e., that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989) (citations omitted). Here, after review of the entirety of the record, the Court agrees with the Government that the suppressed evidence at issue was cumulative. More specifically, the Court finds as stated by the Government that "[t]he questionnaire responses that the Government disclosed after trial were of the same exact nature as the responses the Government disclosed before trial, as well as the same as information in the various interview reports and civil forfeiture claims, and the same as the information the defendants represented that they could call customers to testify to." Doc. No. [638], p. 38. The Court also finds that the jury heard evidence of the same nature found in the questionnaires and still convicted Defendants. Id. The Court further finds that there is no reasonable probability that the outcome of the proceedings would have been different. The Court is unable to uphold Defendants' arguments to the contrary.

In regard to Defendants' arguments concerning investigational bias and reckless or intentional disregard for the truth, the Court recognizes that it has been held that "evidence justifying attack of 'the thoroughness and even

[11] Defendants state that the individuals spoke with "legal secretaries at the US Attorney's Office and with DOJ and FBI victim coordinators." Doc. No. [634], p. 16.

the good faith of the investigation' constitutes Brady material." United States v. Ruzicka, No. CR 16-246 (JRT/FLN), 2018 WL 614734, at *2 (D. Minn. Jan. 29, 2018) (citing Kyles v. Whitley, 514 U.S. 419 (1995)); see also Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011) ("The duty to disclose required by Brady includes the disclosure of evidence that may be used for impeachment purposes and evidence that may be used to attack the 'thoroughness and even the good faith of the investigation.'") (citations omitted). Yet, Defendants' arguments about the prosecution only seeking evidence helpful to its case, consciously avoiding receiving any evidence, and lack of memorialization are "too speculative to be availing." United States v. Morales, 746 F.3d 310, 317 (7th Cir. 2014); see also Ruzicka, 2018 WL 614734, at *2 (discussing the probative type of evidence contemplated by Brady). The speculative nature of Defendants' arguments are insufficient to show Brady materiality.

The Court concludes that Defendants have not established a Brady violation so as to warrant a new trial.

D. Cumulative Error Doctrine

Defendants assert the cumulative error doctrine in their arguments. "Under the cumulative-error doctrine, 'an aggregation of nonreversible errors . . . can yield a denial of the constitutional right to a fair trial." United States v. Hesser, 800 F.3d 1310, 1329 (11th Cir. 2015) (citations omitted). Here, the Court has not found error in its rulings, let alone commit cumulative errors that would entitle Defendants to a new trial. Cf. Yearty, 430 F. App'x at 790 ("The district court did not err in any of its rulings, let alone commit cumulative errors that would entitle [defendant] to a new trial.").

CONCLUSION

The Motions for New Trial filed by Defendant Tyson Rhame (Doc. No. [557]), Defendant Frank Bell (Doc. No. [559]), and Defendant James Shaw (Doc. No. [565]) are **DENIED**.[12] More specifically, the Court does *not* find that the interest of justice requires the grant of a new trial. The Court also does *not* find that despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred so as to warrant a new trial.

IT IS SO ORDERED this 25th day of March, 2020.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

[12] Sentencing dates will be set by separate notices. In addition, the matter of sanctioning Attorney Paul Calli for his trial conduct remains outstanding. Doc. Nos. [525], T. p. 444–58; [532], pp. 15 and 138.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:16-CR-00067-SCJ

UNITED STATES OF AMERICA,

v.

TYSON RHAME, JAMES SHAW, AND FRANK BELL,
DEFENDANTS

Filed: March 25, 2020

ORDER

This matter appears before the Court on the pending Motions for Judgment of Acquittal filed by Defendant Tyson Rhame (Doc. Nos. [488][1], [558]), Defendant James

[1] The motion (at Doc. No. [488]) was filed by Defendant Rhame during trial, at the conclusion of the Government's case.

Shaw (Doc. Nos. [487],[2] [564][3]), and Defendant Frank Bell (Doc. Nos. [489],[4] [566]).[5] The Government filed consolidated responses. Doc. Nos. [490], [580]. Defendants thereafter filed reply briefs. Doc. Nos. [589], [595], [598]. Defendant Bell subsequently filed a Notice of Immateriality of the Alleged False Statements in regard to Counts 35 and 36 of the Indictment. Doc. No. [615]. Defendants also filed a Notice of Supplemental Authority. Doc. No. [614].

During the trial phase of the case, the Court held oral argument on September 27, 2018. Doc. No. [541]. The Court ruled on certain portions of the motions at trial and took other portions of the motion under advisement.[6] The Court later noted its right to reserve ruling as to Counts 18, 19, and 21 of the Superseding Indictment. Doc. No. [542], T. p. 3952.[7]

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[2] The motion (at Doc. No. [487]) was filed by Defendant Shaw during trial, at the conclusion of the Government's case.

[3] The Court recognizes that there is a supplemental brief filed collectively by Defendants (Doc. No. [610]) that concerns the Brady issue. The Court will address the supplemental brief and related motions in a separate order.

[4] The motion (at Doc. No. [489]) was filed by Defendant Bell during trial, at the conclusion of the Government's case.

[5] Defendants have filed motions to adopt the other's motions (Doc. Nos. [489], [568], [569]). Said adoption motions are **GRANTED**. The Court also indicated that it considered the motions adopted, at trial. See Doc. No. [541-1], p. 60, lines 1–2.

[6] The Court will perfect the record as to its trial rulings at the conclusion of this Order.

[7] The First Superseding Criminal Indictment upon which the Government proceeded to trial is at Doc. No. [178]. A redacted indictment (to reflect the counts that were dismissed by the Government (see Doc. No. [500])) for the jury's use during deliberations is at Doc. No. [511]. The verdict forms are at Doc. Nos. [516], [517], and [518].

The trial of this case lasted from September 4, 2018 to October 9, 2018. Doc. Nos. [459], [515]. During which, there was testimony from a number of witnesses and hundreds of exhibits admitted into evidence.

On October 9, 2018, a jury convicted the above-named defendants of one count of conspiracy to commit wire and mail fraud (Count 1), two counts of mail fraud (Counts 3 and 4), and four counts of wire fraud (Counts 11, 14, 15, and 16) concerning a scheme to defraud Iraqi dinar investors. Doc. Nos. [516], [518], and [519]. Defendant Rhame was also convicted of four counts of making false statements to an FBI agent (Counts 31, 32, 33, 34). Defendant Bell was convicted of two counts of making false statements to an FBI agent (Counts 35, 36). Id. The jury acquitted the three defendants of money laundering charges (Count 18, 19, 21). Id. A fourth co-defendant, Terrence Keller, was acquitted of all charges for which he was named in the Superseding Indictment. Doc. No. [517].

After the jury's verdict, Defendants Rhame, Shaw, and Bell filed post-trial motions for judgments of acquittal and the Court held post-trial oral argument on April 15, 2019. Doc. No. [623]. The Court took all of the pending motions under advisement post-trial in the renewed motion context. Doc. No. [620]. The pending motions are now ripe for review.

The pending motions were made pursuant to Federal Rule of Criminal Procedure 29, which provides in relevant part:

> (a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.

. . . .

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion . . . after it returns a verdict of guilty . . . . If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

Fed. R. Crim. P. 29(a)–(c).

In evaluating the sufficiency of the evidence, the Court is "'bound by the jury's credibility determinations, and by its rejection of the inferences raised by the defendant.'" United States v. Hernandez, 433 F.3d 1328, 1334 (11th Cir. 2005) (citations and alterations omitted).[8] "The evi-

[8] Stated another way, the Eleventh Circuit has held that "[a]ll credibility choices must be made in support of the jury's verdict," in the

dence does not have to 'exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt.'" Id. at 1335. "'Instead, the relevant question is 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.'" Id.; see also United States v. O'Keefe, 825 F.2d 314, 319 (11th Cir. 1987). To this regard, "[i]n rebutting the Government's evidence, '[i]t is not enough for a defendant to put forth a reasonable hypothesis of innocence, because the issue is not whether a jury reasonably could have acquitted but whether it reasonably could not have found guilt beyond a reasonable doubt.'" United States v. Maxwell, 579 F.3d 1282, 1299 (11th Cir. 2009).

The Eleventh Circuit has held that it "will not overturn a jury's verdict if there is 'any reasonable construction of the evidence [that] would have allowed the jury to find the defendant guilty beyond a reasonable doubt.'" United States v. Martin, 803 F.3d 581, 587 (11th Cir. 2015) (citations omitted). "'The test for sufficiency of the evidence is identical [,] regardless of whether the evidence is direct or circumstantial,' but if the government relied on circumstantial evidence, 'reasonable inferences, not mere speculation, must support the conviction." Id. (citations omitted).

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motion for judgment of acquittal context. United States v. Greer, 850 F.2d 1447, 1450 (11th Cir. 1988).

A. Sufficiency of the Evidence

1. *Conspiracy and substantive mail/wire fraud charges*

In their motions, all Defendants essentially argue that there was insufficient evidence in the record to support a finding beyond a reasonable doubt for the conspiracy, mail fraud, and wire fraud counts/convictions (Counts 1, 3, 4, 11, 14, 15, and 16 of the Superseding Indictment).

"The elements of mail and wire fraud are: (1) intentional participation in a scheme to defraud,[9] and, (2) the use of the interstate mails or wires in furtherance of that scheme. To sustain the related conspiracy convictions the Government was required to prove that [each Defendant] knew of and willfully joined in the unlawful scheme to defraud; circumstantial evidence can supply proof of knowledge of the scheme." United States v. Maxwell, 579 F.3d 1282, 1299 (11th Cir. 2009) (citations omitted). "'[T]he [G]overnment need not prove that the defendant knew all of the details or participated in every aspect of the conspiracy.' Instead, the government's burden is only

[9] "A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property. A misrepresentation is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision maker to whom it is addressed.'" Maxwell, 579 F.3d at 1299 (citations omitted). "[U]nder the mail fraud statute, it is just as unlawful to speak "half[-]truths" or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading. The statements need not be false or fraudulent on their face, and the accused need not misrepresent any fact, since all that is necessary is that the scheme be reasonably calculated to deceive persons of ordinary prudence and comprehension, and that the mail service of the United States be used in the execution of the scheme." United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982).

to prove that the defendant knew of 'the essential nature of the conspiracy.'" United States v. Moran, 778 F.3d 942, 960 (11th Cir. 2015) (citations omitted). "As for the voluntary joining element, the government can meet this burden through proof of surrounding circumstances such as acts committed by the defendant which furthered the purpose of the conspiracy." Id. at 961 (internal quotations and citations omitted).

In the case *sub judice*, the evidence, viewed in a light most favorable to the Government, reveals that the Government introduced sufficient evidence to uphold each conviction as to each of the three Defendants as a rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. More specifically, the evidence sufficiently established that Defendants knew of and voluntary joined a wire and mail fraud conspiracy and actively participated in wire and mail fraud by, as stated by the Government,[10] engaging in a "sophisticated scheme to defraud Iraqi dinar investors [of Sterling],[11] who were led to believe they would make untold millions after a massive revaluation." Doc. No. [580], p. 12.

The evidence also sufficiently established (under the above-stated standard) Defendant Rhame as being in large part the architect of the fraud scheme and being "involved in nearly every aspect of the fraudulent conduct,"

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[10] The Court adopts by reference the Government's recitation of the facts in its brief at Doc. No. [580], which the Court deems correct.

[11] As stated in the Superseding Indictment and established at trial, Sterling Currency Group, LLC ("Sterling") was a Georgia corporation that sold and exchanged "exotic currencies," including the Iraqi dinar. Doc. No. [178], p. 2, ¶ 2. Throughout this case, Defendants Rhame, Shaw, and Bell are collectively referred to as "the Sterling Defendants."

such as creating an article with false information about the imminent revaluation, falsely claiming that Sterling had plans to appear at numerous airports following a revaluation, causing promoters to spread false and misleading information about the Iraqi dinar, mocking his victims for falling for his false statements about the airport exchange, lying to FBI agents, and making a profit, showing his motive to commit the charged offenses. Doc. No. [580], p. 27.

The evidence also sufficiently established (under the above-stated standard) that Defendant Shaw was a willing member of the conspiracy and scheme to defraud, through his email correspondence, the testimony of his brother, and making a profit.

The evidence also sufficiently established (under the above-stated standard) that Defendant Bell joined the conspiracy, after he was hired to work at Sterling, by appearing on the GET Team[12] conference calls falsely telling GET Team listeners that Sterling had plans to appear at airports all over the country, post-revaluation, even though he never believed in the revaluation and considered it to be "mythology," coordinating a secret pumping relationship with co-defendant, Keller, lying to the FBI, and making a profit.

The Court recognizes the Defendants' numerous arguments in favor of their innocence; however, "[t]he problem with [these] argument[s] is that the jury was free to

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[12] As stated in the Superseding Indictment and established at trial, the "GET Team" was a trade name for a group of individuals, led by Terrence Keller, who ran a website, an internet chat forum, and weekly conference calls in which information was disseminated to participants concerning the potential investment value of the Iraqi dinar. Doc. No. [178], p. 3, ¶ 5.

disregard the testimony (as it obviously did) and, instead, to credit the contrary evidence presented by the Government's witnesses." United States v. Maxwell, 579 F.3d 1282, 1301 (11th Cir. 2009).

a. *Takhalov*

Defendant Rhame also argues that the evidence is insufficient as a matter of law under the Eleventh Circuit's holding in United States v. Takhalov, 827 F.3d 1307 (11th Cir. 2016), because "customers received the benefit of the bargain—either hard currency outright or the right to buy hard currency at a specified price once they paid the balance of a layaway order." Doc. No. [558-1], p. 14; Doc. Nos. [564], p. 6, n.1.[13]

However, the Government argues, and this Court agrees, that there is evidence that the Sterling customers were being defrauded because they did not have the ability to exchange the dinar (that they bought at a mark-up) from Sterling, like they thought that they were going to be able to do at airport exchanges. Doc. No. [623], p. 165, lines 7–18. Essentially, the Government argues that the victims did not get the suite of services that were supposed to accompany the dinar. Id. at p. 166, lines 1–7. The Government also argues that monetary loss is not an absolute requirement of wire fraud and in support of its argument, cites the case of United States v. Chan, 729 F. App'x 765, 769 (11th Cir. 2018) ("Relying on United States

[13] In a reply brief, Defendant Shaw argues that "the Takhalov instruction was critically important to the defense to explain why the airport exchange policy may have been deceptive, but it was not fraudulent." Doc. No. [589], p. 17. Defendant Shaw also raised arguments concerning improper evidence admitted at trial. Doc. No. [589], p. 18. The Court will address the propriety of the Takhalov instruction and the Court's admissibility rulings in the context of its separate order on the pending motions for new trial.

v. Takhalov, 827 F.3d 1307 (11th Cir. 2016), [the defendant] argues that he did not defraud his customers because they 'got exactly what they paid for' and as a result his statements did not mislead them about the 'nature of the bargain.' But his customers did not get 'exactly what they paid for' because they paid for supplements that were legal to sell and safe to consume."). After review, the Court upholds the Government's argument and citation of authority.

In rebuttal, Defendants assert *inter alia* that the Government's argument is a changed theory of prosecution. Doc. No. [623], p. 188, lines 1–8. However, the Court does not agree, as the customers remain the victims of the conspiracy and the Government's argument merely provides a rebuttal to Defendants' Takhalov argument.

b. Bell's joining of the conspiracy

Defendant Bell asserts that "[t]here is no evidence of an express or implied agreement among any combination of defendants to engage in mail or wire fraud by keeping the advertising relationship between Sterling and the GET Team secret or that Mr. Bell joined a conspiracy to spread lies about the dinar." Doc. No. [566-1], p. 18. Defendant Bell also states that he "simply continued the status quo—advertising—he did not knowingly join an illegal scheme." Id. at p. 21.

After review, the Court is unable to uphold Defendant Bell's arguments, as a review of the evidence shows and as correctly set forth in the Government's brief (at Doc. No. [580]) that Defendant Bell did more than just continue the status quo. In this case, Defendant Bell knew that the payments to Keller were causing Keller to spread information that Bell knew to be false to prospective investors. Doc. No. [580], p. 22. Also, "in recorded statements to the

FBI on May 28, 2015, and June 3, 2015, Bell unequivocally stated that he considered the [reevaluation, "RV"] theory to be 'mythology' and that he did not believe the revaluation was at all likely." Id. at p. 18. The Court also agrees with the Government that "ample evidence" authorized the jury to disagree with Defendants' strategy of claiming that Sterling's (and Bell's) relationship with Keller was "innocuous," "legal advertising." Id. at p. 26.

The Court is also unable to uphold Defendant Bell's arguments concerning the absence of evidence as to an express or implied agreement to engage in mail or wire fraud, as binding authority holds that "it is unnecessary for a conspiracy to be bottomed on an express or formal agreement. Oral statements of agreement are equally unnecessary. It is enough if a conspiracy to commit a crime can be inferred from the circumstances present in a given case." United States v. Ryan, 478 F.2d 1008, 1015 (5th Cir. 1973);[14] see also United States v. Parker, 839 F.2d 1473, 1478 (11th Cir. 1988) ("The record is void of any expressed agreement between appellants to defraud . . . customers. Conspiracy to defraud, however, 'may be inferred from the actions of the actors or by the circumstantial evidence of a scheme.'"). Here, the evidence was sufficient (under the above-stated standard) for the jury to infer from the circumstances a conspiracy to commit the crimes of mail and wire fraud on the part of each of the three Sterling Defendants.

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[14] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions rendered prior to the close of business on September 30, 1981 by the United States Court of Appeals for the Fifth Circuit.

c. Acquittal of Keller

Defendant Bell asserts that as to Count 1 and the acquittal of codefendant Keller: "[w]ithout Mr. Keller's involvement [as the jury acquitted him], there can be no overall, single agreement to defraud as it relates to [Defendant] Bell." Doc. No. [566-1], p. 22.

In its response brief, the Government cited the case of United States v. Andrews, 850 F.2d 1557, 1561 (11th Cir. 1988) for the Eleventh Circuit's binding authority and statement of law that "[c]onsistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand."

In light of this authority, the Court is unable to uphold Defendant Bell's arguments. The verdicts against Defendants Rhame, Shaw, and Bell can stand, despite the acquittal of Defendant Keller. Furthermore, the Sixth Circuit case favoring acquittal and relied upon by Defendants, United States v. Fahra, 643 F. App'x 480 (6th Cir. 2016), is distinguishable as the Sixth Circuit appeared to distinguish away the above-stated principle of law (concerning consistent verdicts being unrequired in joint trials for conspiracy) on the ground that the district court's ruling on the Rule 29 motion at trial was deferred and "the jury's decision [was] therefore of no concern or consequence." Id. at 491. However, in the case *sub judice*, the Court did not defer its Rule 29 ruling on the conspiracy count and the jury's verdict is of consequence in consideration of the present renewed Rule 29 motion context.

d. Variance

In his motion for judgment of acquittal, Defendant Bell also asserts that "the evidence and the jury's verdicts, particularly the complete acquittal of Mr. Keller,

conclusively demonstrate that a material and prejudicial variance occurred, which requires Mr. Bell's acquittal as to Count 1 and the substantive mail and wire fraud counts." Doc. No. [566-1], pp. 1–2. According to Defendant Bell, "Sterling's dissemination of the pre-2011 airport plan information in no way relied on Mr. Keller or Mr. Bell. Thus, it is impossible for Mr. Bell to have joined an overall illegal scheme/conspiracy." Doc. No. [566-1], p. 29. Mr. Bell further argues that "the only way the jury could have convicted [him] was to transfer their finding of guilt regarding the content on Sterling's website (i.e., the pre-2011 airport exchange plan and articles, which Mr. Bell had nothing to do with and which were removed before Mr. Bell joined the company). He asserts that the jury essentially expanded liability to Mr. Bell simply because he worked at Sterling at some point, which is improper." Doc. No. [566-1], p. 30. Defendant Bell correctly sets forth the law regarding fatal variances as follows:

> "A variance exists when the proof at trial deviates from the allegations in the indictment but the essential elements of the offense are the same." United States v. Peterson, No. 7:07-CR-22-HL, 2009 WL 4831700, at *5 (M.D. Ga. Nov. 3, 2008 (citing United States v. Young, 39 F. 3d 1561, 1566 (11th Cir. 1994)). A variance is fatal only if it was material and substantially prejudiced the defendant. Id.

Doc. No. [566-1], p. 27.

"Substantial prejudice is present if 'the proof at trial differed so greatly from the charges that [the defendant] was unfairly surprised and was unable to prepare an adequate defense.'" United States v. Roopnarine, 718 F. App'x 797, 805 (11th Cir. 2017); see also United States v. Lander, 668 F.3d 1289, 1295 (11th Cir. 2012) ("To find substantial prejudice, we have ordinarily considered whether

'the proof at trial differed so greatly from the charges that [defendant] was unfairly surprised and was unable to prepare an adequate defense.'").

In response to Defendant Bell's arguments, the Government cites the case of United States v. Caporale, 806 F.2d 1487, 1499 (11th Cir. 1986) to assert that Defendant Bell fails to establish that a material variance occurred at trial. Doc. No. [580], p. 36. In Caporale, the Eleventh Circuit stated: "even if the evidence arguably establishes multiple conspiracies, there is no material variance from an indictment charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment." 806 F.2d at 1499–500. "In determining whether a reasonable trier of fact could have found a single conspiracy, the courts in this Circuit have looked at three factors: 1) whether a common goal existed, 2) the nature of the scheme, and 3) overlap of participants." Id. at 1500. In addition, it has been held that if "a defendant's actions facilitated the endeavors of other coconspirators or facilitated the venture as a whole,' then a single conspiracy is shown." United States v. Chandler, 388 F.3d 796, 811 (11th Cir. 2004).

The Government also referenced the fact that the jury received a multiple conspiracies instruction in which the jury was instructed that they had to find one conspiracy and if they found multiple conspiracies, to acquit. Doc. No. [623], T. p. 175, lines 1–14; see also Doc. No. [510], p. 21.

After review, the Court concludes that there was no material variance in this case and even if one had been shown, Defendants have not established how a material variance affected their substantial rights, as the indictment was sufficient to put the Defendants on notice of the

conspiracy crime for which they were charged and convicted and there has been no showing of unfair surprise or inadequate opportunity to prepare a defense. Caporale, 806 F.2d at 1500 ("Even if the evidence did not support the jury's finding of a single conspiracy, thereby creating a material variance between the proof and the indictment, [defendants] must still show that the variance affected their substantial rights."). More specifically, the Court agrees with the Government that because the jury received a multiple conspiracies instruction, "the jury already made the factual determination that the defendants were part of a single conspiracy." Doc. No. [580], p. 37. It is also presumed that juries follow the instructions given by a district court. See United States v. Mosquera, 886 F.3d 1032, 1042 (11th Cir. 2018) (citations omitted). The Court is also unable to find that the proof at trial deviated from the allegations in the Indictment, as the Court agrees with the Government that the Superseding Indictment alleged the "very conduct that the Government proved at trial," i.e., that Defendants "engaged in a scheme to defraud Iraqi dinar investors." Doc. No. [580], p. 37.

2. *False Statements Charges*

Defendants Rhame and Bell also argue that there was insufficient evidence to support their false statements convictions, 18 U.S.C. § 1001.

"To sustain a conviction for violation of 18 U.S.C. [§] 1001, the government must prove (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States." United States v. Boffil-Rivera, 607 F.3d 736, 740 (11th Cir. 2010) (citations and quotations omitted).

a. Rhame

More specifically, Defendant Rhame asserts that "[t]here was zero evidence that Mr. Rhame made a false statement with specific intent, as opposed to being simply wrong or mistaken when asked about matters dating from three, four, or five years previously." Doc. No. [558-1], p. 15. Defendant Rhame also asserts that "the case agent who questioned Mr. Rhame chose not to resolve the ambiguities that the case agent had created and chose to ignore the distinctions Mr. Rhame drew between advertising and promoting, and between current practices and past practices." Id.

In its brief, the Government set forth the evidence that sufficiently established that a reasonable juror could have concluded that Defendant Rhame intentionally lied to the FBI agents. Doc. No. [580], pp. 32–33. The Court upholds the Government's argument and recitation of the evidence and finds that there was sufficient evidence for a jury to have found the essential elements of the crime of false statements (as to each particular count alleged against Defendant Rhame) beyond a reasonable doubt.

b. Bell

Defendant Bell argues that there is insufficient evidence in the record to support a finding beyond a reasonable doubt that he knowingly and willfully lied to the FBI agent on May 28, 2015 and June 3, 2015. Doc. No. [566-1], p. 1. As to Count 35, Defendant Bell also asserts ambiguity and absence of intent to deceive arguments. Doc. No. [566-1], pp. 33–39. Defendant Bell further asserts by example that in speaking with the FBI, he used the term "firewall" in discussing the "guys out there hyping" the dinar. Doc. No. [566-1], pp. 13–14. Defendant Bell states

that he was not asked what he meant by the term "firewall," and FBI Agent Ryskoski testified that he did not know what Mr. Bell meant by the term. Id. at p. 14 (citing Doc. No. [534], T. pp. 2739, 2744). "Agent Ryskoski also admitted that none of Merriam Webster's dictionary definitions for the term 'firewall' applied to Mr. Bell's statement." Id. (citing T. pp. 2741–44). Defendant Bell also asserts that neither FBI agent, who interviewed him, asked when and how he told Mr. Keller not to direct business to Sterling. Id. at p. 16. Defendant Bell further states that "[t]here are a host of reasonable interpretations of what Mr. Bell could have meant by both statements." Id. at p. 36. As to Count 36, Defendant Bell asserts that his statement was "undefined at the time of the interview or otherwise," and the "[h]ow and when . . . was not established." Doc. No. [566-1], p. 40. Defendant Bell also asserts an absence of sufficient evidence to establish that he intended to deceive the FBI. Id.

Defendant Bell cites a number of cases regarding ambiguity; however, the Court will not focus on the cases that involved an ambiguous question which resulted in an ambiguous answer. Those cases are distinguishable because here, Defendant Bell does not appear to be arguing that there was ambiguity in the FBI's questions, just that the ambiguity was in the responses that he gave (for which the FBI failed to ask follow up questions to determine what particular terms meant). See generally, Doc. No. [559], p. 18. The Court also notes that Defendant Bell has cited a number of non-binding, out of circuit decisions. Id. at p. 17. This Court declines to overturn Defendant Bell's conviction based on non-binding authority.

Ultimately, the Court rules based on a quote from a Second Circuit case cited within the Eleventh Circuit's case of United States v. Manpat, 928 F.2d 1097, 1099 (11th

Cir. 1991), from which it appears to this Court that the Eleventh Circuit approves this statement of law. To this regard, "[a]bsent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of [Defendant Bell's] answer was for the jury." United States v. Bonacorsa, 528 F.2d 1218, 1221 (2d Cir. 1976).[15]

Thus, because the jury was entitled to determine the meaning of Defendant Bell's statements, a reasonable jury could have concluded there was sufficient evidence to have found the essential elements of the crime of false statements (as to each particular count alleged against Defendant Bell) beyond a reasonable doubt.[16]

As stated above, Defendant Bell has also filed a Notice of Immateriality of Alleged False Statements. Doc. No. [615]. In this notice, Defendant Bell asserts that neither of his statements at issue in Counts 35 and 36 "can be material because they could not reasonably have affected any decision by the FBI." Id. at p. 2. Defendant Bell further states: "[t]here is no legal requirement that a company like Sterling establish a 'firewall' or that an entity like Mr. Keller's not 'direct' business to or 'promote' one of its advertisers." Id. Defendant Bell further states: "if [he] had

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[15] The Court recognizes that the Bonacorsa case involved a perjury prosecution, as opposed to a false statement prosecution, at issue here; however, the reasoning is equally applicable. See Manapat, 928 F.2d at 1099 (holding that "[t]he reasoning in cases concerning [the perjury statute] is equally applicable to the issue in this case [involving false statements], and we therefore look to those cases to guide our inquiry.").

[16] In its brief, the Government set forth the evidence that sufficiently established that a reasonable juror could have concluded that Defendant Bell intentionally lied to the FBI agents. Doc. No. [580], pp. 32–34. The Court adopts the Government's recitation of evidence for purposes of this Order.

provided what the government asserts is the true information, this would not reasonably have spurred any action by the FBI." Id.

As correctly noted by the Government in its brief, to be material, a "statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." Doc. No. [580], p. 12 (citing United States v. Gaudin, 515 U.S. 506, 509 (1995)). "The government is not required to prove that the statement had actual influence. 'The false statement must simply have the capacity to impair or pervert the functioning of a government agency.' The statement does not have to be relied upon and can be material even if it is ignored and never read." United States v. Boffil-Rivera, 607 F.3d 736, 741–42 (11th Cir. 2010) (citations omitted). "It is only the defendant's scienter that is relevant." United States v. White, 765 F.2d 1469, 1482 (11th Cir. 1985).

"[I]n considering materiality this court undertakes a plenary review, for materiality is a question of law." United States v. White, 765 F.2d 1469, 1473 (11th Cir. 1985).

After review, Defendant Bell's argument fails because for the statements that Defendant Bell made to be material, there does not have to be a legal requirement for Sterling to establish a firewall or for Mr. Keller to not direct business to Sterling. See generally United States v. Fern, 696 F.2d 1269, 1274 (11th Cir. 1983) (rejecting argument that a statement was not material because there "was nothing to investigate" and because the law required the tax claim for refund to be in writing). As stated above, to be material, the false statement must simply have the capacity to impair or pervert the functioning of a government agency. Here, Defendant Bell's false statements had

"the capacity to impair the [FBI's] investigation." United States v. Marion, 418 F. App'x 847, 850 (11th Cir. 2011); see also Nelson v. United States, No. 3:10-CR-23-J-32JBT, 2019 WL 1763226, at *5 (M.D. Fla. Apr. 22, 2019) (holding that the "false statement had the capacity to impair or pervert the FBI's criminal investigation.") (quotations omitted).

Accordingly, the Court declines to uphold Defendant Bell's immateriality arguments.

In summary, the Court upholds the Government's argument and recitation of the evidence and finds that there was sufficient evidence for a jury to have found the essential elements of the crime of false statements (as to each particular count alleged against Defendant Bell) beyond a reasonable doubt.

CONCLUSION

For purposes of perfecting the record, the Court notes that its trial rulings on the trial motions for judgment of acquittal (Doc. Nos. [487], [488], and [489]) were as follows:[17]

> As to Mr. Rhame (Doc. No. [488]), the motion was denied as to Counts 1, 3, 4, 31, 32, 33, and 34. The Court took Counts 15, 18, 19, and 21 under advisement.[18]

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[17] While the transcript shows that the Court initially granted the Defendants' motions for directed verdict on twenty other various counts—after discussion (Doc. No. [541], T. p. 3898), the Court clarified its ruling (Doc. No. [543], T. p. 4165–66) and by separate written order, the Court granted the Government's verbal motion to dismiss Counts 2, 5, 6, 7, 8, 9, 10, 12, 13, 17, 20, 22, 23, 24, 25, 26, 27, 28, 29, and 30 of the Superseding Indictment. Doc. No. [500].

[18] See Trial Transcript, Doc. No. [541-2], T. p. 3896.

As to Mr. Bell (Doc. No. [489]), the motion was denied as to Counts 3, 4, 35 and 36. The Court took Counts 1, 15, and 18 under advisement. The next day, the Court denied the motion as to Count 1.[19]

As to Mr. Shaw (Doc. No. [487]), the Court took Counts 1, 15, 17, and 19, 21 under advisement. The motion was denied as to Counts 3 and 5. The next day, the Court denied the motion as to Count 1.[20]

The Court later denied the motions as to Count 15[21] and reserved ruling as to Counts 18, 19, and 21.[22]

The post-trial *renewed* Motions for Judgment of Acquittal filed by Defendant Tyson Rhame (Doc. No. [558]), Defendant James Shaw (Doc. No. [564]), and Defendant Frank Bell (Doc. No. [566]) are **DENIED**. As for each count for which Defendants were found guilty in the jury's verdict, after viewing the evidence in the light most favorable to the prosecution, the Court finds that any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

Defendants have also filed motions to adopt each other's motions (Doc. Nos. [489], [568], [569]). Said adoption motions are **GRANTED**.[23]

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[19] Doc. No. [542], T. p. 3952.

[20] Doc. No. [542], T. p. 3952.

[21] Doc. No. [542-2], T. p. 4159, lines 9–12.

[22] Doc. No. [544], T. p. 4558, lines 20–25; and T. p. 4563, lines 15–20.

[23] A ruling on the pending motions for new trial will follow by separate order. See United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir. 1985) ("a motion for new trial made on the ground that the verdict is contrary to the weight of the evidence raises issues very different

IT IS SO ORDERED this 25th day of March, 2020.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

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from a motion for judgment of acquittal notwithstanding the verdict, which is based on the sufficiency of the evidence.").