

APPENDIX

DOCUMENT	DATE	PAGE NO.
APPENDIX A: U.S. Court of Appeals for the Ninth Circuit, Opinion and Memorandum	September 5, 2025	1
APPENDIX B: U.S. District Court for the District of Oregon, Portland Division Second Amended Judgment	May 20, 2025	58
APPENDIX C: U.S. Court of Appeals for the Ninth Circuit, Petition for Rehearing <i>En Banc</i>	December 3, 2025	65
APPENDIX D: U.S. Court of Appeals for the Ninth Circuit, Panel Rehearing Denial	December 29, 2025	77
APPENDIX E: Jury Instruction Excerpt	May 8, 2023	79
APPENDIX F: Excerpts of Trial Transcript Volume 25	May 5, 2023	84
APPENDIX G: Excerpts of Trial Transcript Volume 8	April 12, 2023	95
APPENDIX H: Excerpts of Trial Transcript Volume 29	May 8, 2023	115
APPENDIX I: Excerpts of Trial Transcript Volume 31	May 10, 2023	118

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT J. JESENİK,

Defendant - Appellant.

No. 23-2282

D.C. No.
3:20-cr-00228-SI-1

OPINION

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW N. MACRITCHIE, AKA
Andrew MacRitchie,

Defendant - Appellant.

No. 23-2308

D.C. No.
3:20-cr-00228-SI-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

No. 23-2316

D.C. No.
3:20-cr-00228-SI-4

v.

BRIAN K. RICE,

Defendant - Appellant.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW N. MACRITCHIE, AKA
Andrew MacRitchie,

Defendant - Appellant.

No. 24-5402

D.C. No.

3:20-cr-00228-SI-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT J. JESENİK,

Defendant - Appellant.

No. 24-5404

D.C. No.

3:20-cr-00228-SI-1

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted April 2, 2025
San Francisco, California

September 5, 2025

Before: Andrew D. Hurwitz, Lucy H. Koh, and Anthony D.
Johnstone, Circuit Judges.

Opinion by Judge Hurwitz

SUMMARY*

Criminal Law

The panel affirmed three defendants' convictions arising out of the failure of Aequitas Management LLC, an investment management company.

Former Aequitas executives Robert Jesenik, Andrew MacRitchie, and Brian Rice were convicted of wire fraud and conspiracy to commit wire fraud. Jesenik was also convicted of making a false statement on a loan application.

The defendants contended that although they were charged in the operative indictment only with engaging in material misrepresentations and misleading half-truths, they may have been improperly convicted on an omissions theory of fraud without instructions requiring proof of a trusting relationship. Rejecting this contention, the panel wrote

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

(1) evidence of what the defendants did not disclose is probative of the materiality of a half-truth or misrepresentation, (2) the government did not argue that omissions alone were sufficient to prove fraud or present that theory to the jury, (3) the government sufficiently tethered non-disclosures to affirmative statements, and (4) the jury instructions fairly stated the law. Whether statements about Aequitas’s financial health were misleading half-truths, rather than general claims of financial success or subjective enthusiasm and puffing, was properly a question for the jury.

The panel rejected Rice’s challenge to the sufficiency of the evidence to support his conviction.

The panel rejected the defendants’ contentions that they were precluded from presenting a complete defense—arguments centered on disclosures in Private Placement Memoranda (PPMs) and audited financial statements. Consistent with other circuits that have addressed the issue, the panel held that contractual disclaimers do not render immaterial other representations in criminal wire fraud prosecutions. For the same reason, the panel rejected the argument that the defendants’ representations in sales pitches and marketing materials were immaterial to “accredited” investors. Nor did the district court err in admitting evidence of investors’ reliance on those representations.

Finding no abuse of discretion in the district court’s denial of a proposed jury instruction on “objective” materiality, the panel held that the instructions given to the jury fairly and adequately covered whether representations in sales pitches and marketing materials were material.

The panel rejected the defendants’ claims that the jury was prevented from considering defense theories about

elements other than materiality. To the extent the defendants challenged the district court's preclusion of evidence about investor negligence or non-reliance, their argument is foreclosed. The district court's evidentiary rulings did not prevent the defendants from urging legitimate disclosure-based defenses, and the jury instructions adequately covered the defendant's good-faith defense theory. The panel rejected the defendants' assertion that they were prejudiced by the government's statement in closing that "you can't disclose your way out of fraud."

The panel addressed other issues in a concurrently filed memorandum disposition.

COUNSEL

Hannah Horsley (argued) and Ryan W. Bounds, Assistant United States Attorneys; Suzanne Miles, Criminal Appellate Chief; Natalie K. Wight, United States Attorney; Office of the United States Attorney, United States Department of Justice, Portland, Oregon; Christopher Cardani, Assistant United States Attorney, Office of the United States Attorney, United States Department of Justice, Eugene, Oregon; for Plaintiff-Appellee.

Jessica G. Snyder (argued) and Conor Huseby, Assistant Federal Public Defenders; Elizabeth G. Daily, Appellate Chief; Office of the Federal Public Defender, Portland, Oregon; Anna M. Estevao (argued), Claire B. Buck, and Michael Tremonte, Sher Tremonte LLP, New York, New York; Angelo J. Calfo (argued), Angeli & Calfo LLC, Seattle, Washington; Henry C. Phillips, Morgan Lewis & Bockius LLP, Seattle, Washington; Brendan J. Anderson, Morgan Lewis & Bockius LLP, Washington, D.C.; for Defendants-Appellants.

OPINION

HURWITZ, Circuit Judge:

This case arises out of the failure of an investment management company. After the company was placed in receivership, Robert Jesenik, Andrew MacRitchie, and Brian Rice, former executives of the company, were indicted and eventually convicted of wire fraud and conspiracy to commit wire or mail fraud. Jesenik was also convicted of making a false statement on a loan application.

Each defendant has timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and affirm the convictions for the reasons in this opinion and in a concurrently filed memorandum disposition.

I.

Facts and Procedural Background

A. Facts¹

Aequitas Management LLC, an investment management company, was founded in the 1990s by Robert Jesenik, its Chief Executive Officer. Andrew MacRitchie, its Chief Compliance Officer, joined the company in 2007, and Brian Rice, an Executive Vice President, joined in 2014.

In the mid-2000s, Aequitas began purchasing discounted receivables from hospitals, later expanding to other businesses, and collected the debt through its affiliates. Sellers of the receivables executed recourse contracts,

¹ We recite the facts in the light most favorable to the government, the prevailing party below. *See, e.g., United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981) (per curiam).

agreeing to repurchase defaulted debt. Aequitas solicited the funds to purchase receivables through its Private Note Program (“Private Note”), managed by its affiliate Aequitas Commercial Finance (“ACF”), which issued secured subordinated promissory notes to investors. Starting in late 2014, Aequitas also solicited private investments through the Income Opportunity Fund II (“IOF II”) and Luxembourg Bond (“Lux Bond”).² Between June 2014 and February 2016, the period covered by the indictment, Aequitas raised approximately \$346 million from private investors, including \$167 million through Private Note, \$68 million through IOF II, and \$15 million through the Lux Bond.

Aequitas’s investors were required to be “accredited” under wealth and sophistication standards set by the Securities and Exchange Commission (“SEC”) for participation in the Regulation D private securities market. A majority were represented by Registered Investment Advisors (“RIAs”), some of whom also invested their own funds.

Investors were typically solicited through in-person sales pitches by Aequitas executives, sometimes using marketing materials such as a “tear sheet,” a one- or two- page summary of the investment, or a longer “pitch deck.” Before investors’ funds were released to Aequitas, they signed a subscription agreement and acknowledged reading a Private

² IOF II was a standalone fund, offering senior promissory notes, marketed to Registered Investment Advisors (“RIAs”). The Lux Bond was a debt instrument offered to European investors through a limited partnership in the Cayman Islands.

Placement Memorandum (“PPM”), a lengthy document describing the terms and potential risks of the investment.³

By 2014, one of Aequis’s largest receivables assets was student loan debt from Corinthian College. Because of defaults, Aequis was receiving cash payments of about \$4 million per month from Corinthian under a recourse agreement. But Corinthian stopped paying in June 2014 and later filed for bankruptcy.

Aequis accordingly faced dire short-term cash shortfalls. In response, it offered investors “blue-light specials,” promissory notes with short redemption periods and high interest rates. It also persuaded some investors to delay redemptions. These measures, however, provided only short-term relief. The shortfalls were exacerbated by Aequis’s spending on new offices, private jets, and corporate retreats.

The SEC began an investigation into Aequis in the spring of 2015. In November 2015, Aequis stopped paying Private Note redemptions, and in January 2016, it defaulted on its obligations to the Private Note investors. The company collapsed in March 2016 and was placed in receivership.

B. The Indictment

After Aequis collapsed, Jesenik, MacRitchie, and Rice were indicted on one count of conspiracy to commit mail and wire fraud, 18 U.S.C. § 1349; 28 counts of substantive wire fraud, 18 U.S.C. § 1343; and one count of conspiracy to commit money laundering, 18 U.S.C. § 1956(h). Jesenik

³ Consistent with the trial witnesses and the parties, we refer to subscription agreements, PPMs, and financial statements as “written disclosures” to distinguish them from written marketing materials.

was also charged with one count of making a false statement on a loan application, 18 U.S.C. § 1014. Three other Aequis executives—Brian Oliver, an Executive Vice President; Olaf Janke, Chief Financial Officer through early 2015; and Scott Gillis, Chief Financial Officer thereafter—entered guilty pleas to various charges. Oliver and Janke testified for the government at the joint trial of Jesenik, MacRitchie, and Rice.

The operative indictment alleged that the three defendants solicited investments through “material misrepresentations and misleading half-truths” about “the uses of investor money, the financial health and strength of Aequis, Aequis’s investments and investment strategies, and the inherent risks of those investments and investment strategies.” In particular, it alleged that the defendants represented to investors that their funds would be used to purchase receivables, but that Aequis actually “used the majority of new investor money to repay prior investors and to pay operating expenses,” because it “was consistently in liquidity and cash-flow crises.” It also alleged that Aequis “concealed [the] material facts” that it had “insufficient collateral to secure the notes it sold to investors,” and that the most valuable of its purported assets was an intercompany loan used as an artifice to conceal “accumulating operating losses.”

C. Trial

1. The Government’s Case

The government’s case focused on false or misleading statements to investors in sales pitches, discussions of existing investments, and marketing materials. The government presented evidence that the defendants misled

investors about “how their money was going to be used” and “how secure their investments were.”

Investors testified extensively about the importance of marketing materials, especially the tear sheets. One RIA testified that the tear sheet “is pretty much the bible in our industry” to explain investments to clients, and that most of her investors base their investment decisions on the tear sheets, rather than the “fairly generic” PPM. Other RIAs explained that the tear sheets were more valuable than the PPMs for their clients’ investment decisions because a “tear sheet is concise and tells you exactly what you need to know about every product you invest in,” while the PPM is so “voluminous,” “it has things in it that anybody would just not find.”⁴ Tear sheets, updated quarterly, were also the primary communication from Aequis to RIAs on “how the funds are doing.”

Several investors testified at trial about the importance of verbal communications with Aequis executives to their investment decisions. One RIA testified that he would “not deal with a company” unless he met with top executives, “the ones who really know what’s going on” and provide

⁴ When asked to explain the relationship between marketing materials and the PPM, Aequis’s general counsel explained:

The PPM was really a lawyer-driven document that was sort of the CYA to catch all the risk factors and all the things that could go wrong. The marketing materials were very much, “Here is how we are going to invest your money. Here is why investing with us is a good idea and how you’ll make money if you trust us to invest your money.”

Aequis’s head of marketing explained that the PPM was not a sales tool: “I don’t think [the PPM] was even placed in the shared marketing folder.”

“the information I need to service my clients.” The RIA testified that the “verbal communication that I received from the executives of Aequitas is paramount and far more significant than the PPM.” Investors testified that based on their direct communications with the defendants, they decided to invest in Aequitas, recommend Aequitas to clients, and keep their money in Aequitas.

One RIA testified that neither Jesenik, Rice, nor MacRitchie ever talked about the PPM when pitching him, and another testified that none of the defendants stated that their oral statements or the tear sheets should be modified by the PPM. Oliver, Jesenik’s former “No. 2” and head of fundraising, stated that he only got the sense a “handful” of times that the disclosures in the PPM changed someone’s decision to invest after an in-person meeting.

a. False Statements

i. Uses of Investor Funds

Oliver testified that he and Jesenik pitched investors hundreds of times on “win-win-win-win” investments in healthcare receivables that purportedly offered a built-in safety net, high rates of return, and social benefits to hospitals and patients. Investors found the pitch appealing: one testified that she was interested in healthcare receivables because they were “very secure,” “[d]ue to the fact that insurance companies make their payments for the most part, and the majority of individuals are honest people and pay their medical bills.”

For blue-light specials, Oliver explained that he and Jesenik developed additional talking points to “combat the potential concerns with investors that the funds are needed to solve a problem/crisis (cash losses, lawsuit, Corinthian, et cetera).” Specially designed marketing materials

highlighted that Aequitas was “seeking short-term liquidity” to pursue “new financing initiatives.”

Aequitas investors testified that they relied on representations by each of the defendants that their money would be used to purchase secure receivables. Consistent with those representations, Private Note tear sheets stated throughout the indictment period that investor funds would be used to buy receivables:

ACF uses proceeds from Private Note primarily to fund or finance the purchase of student loan receivables from educational providers, patient-pay receivables from healthcare providers, other private credit strategy receivables and loan portfolios, or direct collateralized loan and lease obligations, equities, and secured liquidity lines to affiliates for general corporate purposes.

The tear sheet for IOF II stated:

The Aequitas Income Opportunity Fund II (“IOF II” or the “Fund”) follows a value investing approach by acquiring or investing in receivables or loans. IOF II accomplishes this by investing in receivables, loans and leases, often at discounted prices, through Aequitas Capital. Aequitas Capital has established itself within large and inefficient credit markets, such as education, healthcare and private credit, where it provides unique

financing solutions to companies and their consumers.

The Lux Bond marketing materials indicated that investments would be backed by “pools of consumer loan receivables originated through Aequitas Capital’s platform,” “accessed through structures that provide investors significant credit enhancement.”

The reality was far different. Charles Foster, a CPA who performed a forensic accounting of Aequitas during its receivership, testified that he could not identify “meaningful amounts” of private investor funds used to buy receivables during the indictment period.

Aequitas continued to acquire receivables, but largely through bank financing. Because those receivables were collateral for the loans, they did not secure the great bulk of new private investments. Meanwhile, new private investments were overwhelmingly used to pay prior investors and fund operating expenses, because Aequitas’s remaining cash-generating investments were not profitable enough to fund its cash needs in the wake of Corinthian’s default.

In the fall of 2015, the Private Note tear sheet was revised to state that “ACF uses proceeds from Private Note primarily to repay prior investors.” Aequitas investors shown the document at trial testified they would never have invested had they known this. As one RIA put it, he would not have invested “a penny” of his clients’ money “[b]ecause that’s the definition of a Ponzi scheme.”

ii. Security of Investments and Aequitas's Financial Health

Oliver testified that a “strong selling point” was that clients’ investments were secure because, in addition to the “recourse element,” they were backed by Aequitas’s other assets. One RIA described Jesenik and Oliver “[t]elling me about their Private Notes; how successful they have been over the years; the fact that in 2008 during the credit crisis their company did not miss any payments to any of their investors and how prudent they were with the investments that they made over the years and how they grew their company over the years.”

Aequitas executives also stressed the company’s assets, growth, and financial health to reassure concerned investors. One investor testified that he was convinced Corinthian’s collapse would have no impact on his investments based on a letter from Jesenik, MacRitchie, and Janke assuring investors that their investment was “strongly protected” by the collateral and cash flow of ACF and its growing portfolio of investments.

Marketing materials were consistent with these representations. For example, Private Note tear sheets indicated that promissory notes were supported by a lien on all assets of ACF and included a “collateral summary” showing the total value of ACF’s assets compared to the Private Note debt. Until revised in the fall of 2015, the summary indicated that ACF had twice as much collateral as was owed to them as a group, which was, as one investor

testified, “a very good profile,” and that approximately one-third of this collateral was receivables.⁵

In fact, only about half the total claimed value of assets—and only a fraction of ACF’s claimed receivables—was available as collateral for Private Note holders after deducting the senior interests of others, such as banks. Moreover, one of ACF’s largest purported assets, categorized on tear sheets as “corporate debt,” was a loan to its parent company, Aequitas Holdings (the “Holdings Note”), which used the money to pay operating expenses of other Aequitas affiliates. This loan, which grew dramatically during the indictment period, was severely undercollateralized. According to Foster, by the end of the indictment period, the debt on the Holdings Note was \$180 million, but at least \$110 million, and perhaps as much as \$170 million, could not be repaid in the event of liquidation. On top of this, the value of Aequitas’s third major asset category—equity investments—was based largely on unrealized gains in the estimated value of a company that serviced healthcare receivables.⁶ Investors testified that they would not have invested had they known the true nature of “corporate debt” or the actual amount of available collateral.

⁵ For example, the Q1 2015 tear sheet stated that ACF had assets with a “collateral value” of \$772,259,000 to support \$364,822,000 of “subordinated debt” and \$136,721,000 of “senior debt and credit facilities.” The asset allocation chart listed \$113,595,000 in education credit, \$41,832,000 in healthcare credit, \$26,505,000 in transportation credit, and \$28,816,000 in consumer and small business credit.

⁶ The revised Q3 2015 tear sheet removed the “corporate debt” category, replacing it with “loans to affiliates.” Taken together, equity investments and loans to affiliates comprised 84% of the assets purportedly backing Private Note investments.

b. The Defendants' Roles in the Conspiracy

Jesenik directed solicitation of new investments, efforts to persuade existing investors to delay redemptions, and use of new investor funds to manage ongoing cash shortfalls. Janke testified that “nothing” about Aequitas’s financial situation “went without his approval.” Jesenik also solicited investments directly.

MacRitchie oversaw and approved Aequitas’s marketing materials. He also directly solicited investments, especially in the Lux Bond, which he established.

Rice managed Aequitas’s sales to RIAs, for whom he became the primary contact in 2015, and personally solicited RIA investments in IOF II and Private Note. Rice also coordinated efforts to fundraise and delay redemptions.

Oliver and Janke testified that the defendants knew they were misleading investors about the uses of their funds and security of their investments. Top Aequitas executives, including the three defendants, were regularly apprised at executive committee meetings of the company’s financial situation, including its increasing operating losses and the value of the Holdings Note. Jesenik and Rice also received frequent “cash dash” emails, which documented Aequitas’s urgent cash shortfalls needed to repay prior investors and fund operating expenses. Emails documented the defendants’ coordination of fundraising efforts and allocation of new investor money to meet these shortfalls.

Two former Aequitas employees, Vanessa Dehaan and Jessica Cataudella, testified that during compliance testing in the spring of 2015, they became concerned that Aequitas was engaging in a Ponzi scheme. They raised their concerns to MacRitchie, who rebuffed them.

Dehaan and Cataudella then shared their concerns with Robert Holmen, who became general counsel in June 2015, shortly after the SEC investigation began. Over the summer and fall of 2015, Cataudella and Holmen sought to revise marketing materials and PPMs to accurately reflect Aequitas's uses of investor funds and the value of its assets. In describing those efforts, Cataudella explained that:

So it all has to connect. It all has to match. One cannot be saying one thing and then another document say, "Well, we are really not doing that," right. So, for instance, if you're soliciting investor assets, and you know that those assets may not be used for its intended purposes, you can't have a backstop, in my view, of a PPM.

....

It means you can't say to someone, "Well, we are not going to use your money for what we say we are going to use" and have that be okay; have no repercussions made.

In this testimony, Cataudella used a "tongue-in-cheek" phrase that she said was common in the compliance industry: "you can't disclose away fraud." Investors did not receive the revised materials until late 2015 and early 2016.

At a meeting attended by MacRitchie and Rice on September 1, 2015, Holmen raised concerns that Aequitas was at risk of being unable to pay its investors because ACF had net negative revenue and net negative equity, and over \$90 million of the then-\$150 million Holdings Note was unsupported by collateral. Holmen also observed that during July and August, several million dollars raised from IOF II

investors had been transferred to ACF to pay Private Note investors and operating expenses, and “point[ed] out that using one set of investors’ money to redeem investors at 100% out of a different fund that is in the red may be deemed a Ponzi scheme.” Holmen had raised his concerns with Jesenik the week before.

On September 1, Oliver sent Rice an email expressing concern that despite Holmen’s warnings of “compliance and disclosure risks around ACF being viewed as insolvent and having insufficient asset/collateral value to support the Private Note holders,” Aequitas would “fall into a false sense of security that we are in some accounting manner ‘making money’ when we are in fact burning it at an alarming pace.” Oliver sent a similar email to MacRitchie, who replied:

To be honest, though, we have been heading towards this point for a couple of years - spending money we don’t have, addicted to the Private Note investments. . . . We are heading for a big train wreck, and I don’t know how we avoid it.

Nonetheless, the defendants continued to solicit investments through Private Note, IOF II, and the Lux Bond to meet ongoing shortfalls without disclosing the facts underlying Holmen’s concerns.

On September 23, 2015, Oliver sent Rice an email about pitching RIAs on a “short term . . . bridge financing opportunity” to help Aequitas raise \$7-10 million to buy healthcare receivables, “[s]o we are singing from the same song sheet.” The “song sheet” email followed an internal email in which Oliver indicated that because of upcoming redemptions due to investors, Aequitas would have a \$6.5

million shortfall by the end of the month—assuming it could use \$6.4 million of new Lux Bond funds. Chris Bean, an RIA, testified that Rice told him on September 24 that Aequis was “urgently looking for cash” to capitalize on a “time-sensitive investment opportunity” to “exercise options on two businesses that were performing well,” and would offer up to \$10 million in Private Note with a 90-day redemption period and a high interest rate. Based on Rice’s representations, Bean’s clients committed \$4 million during the following week.

In multiple conversations with Bean during the fall of 2015, Rice did not disclose Aequis’s liquidity crisis, difficulty meeting payroll and late redemptions, the SEC investigation, or Holmen’s concerns. Bean testified that he would not have invested his clients’ money had he known these facts or that their money would not be used for a time-sensitive receivables investment opportunity.

On September 30, 2015, a European company invested \$5 million in the Lux Bond. MacRitchie then told Gillis that he “could loan up to \$3 M[illion] [to ACF] short term.” Although Holmen advised that the loan was risky, MacRitchie authorized it. Nicholas Mavroleon, who helped solicit Lux Bond investments and witnessed MacRitchie pitch the Lux Bond to European investors several times, testified that he had never heard MacRitchie mention the use of investments for affiliate loans. Mavroleon also testified that MacRitchie presented the Lux Bond as a “bankruptcy remote vehicle,” as did the pitch deck. In February 2016, Aequis informed the European company it could not repay the loan.

By early November 2015, Aequis had stopped paying Private Note redemptions, and on December 1, Oliver

internally circulated a draft letter explaining this to investors. Although Holmen had recommended ending Private Note fundraising on October 30, it continued thereafter, as the defendants attempted to reassure increasingly concerned investors. Brett Trowbridge, an investor who was told that his money would be used to buy receivables, signed a subscription agreement in November 2015, but delayed wiring investment funds to Aequis because he was concerned about the SEC investigation. Contrary to Holmen's advice, Trowbridge was not sent an updated tear sheet.

Trowbridge met with Oliver and Jesenik in December to discuss whether the company was healthy and his \$1.5 million investment was safe. At the meeting, Jesenik "talked about the big picture of the business; how well it was going"; about the company's expansion to New York and Europe; and said that the receivables business was "healthy and good." Jesenik assured Trowbridge that the SEC investigation would be resolved soon, and Oliver said the company's cash flow was positive. Neither mentioned liquidity problems or that Aequis had stopped paying redemptions. Trowbridge testified that he would not have invested had he received the updated tear sheet or Oliver's draft letter, and that he felt Jesenik lied to him.

2. The Defense

Jesenik and MacRitchie focused heavily on the PPMs and other written disclosures, particularly ACF's audited financial statements. Jesenik's counsel argued that:

[I]nformation conveyed to investors by Bob Jesenik was not a misleading half-truth. . . . The government wants to make this about

oral pitches and marketing materials, and it is about that. . . It is about everything investors were told. Simply put: If there is full disclosure, there is no fraud, right. There is no intent to deceive or cheat.

MacRitchie's counsel similarly argued:

There is no half-truth when the whole truth was provided. And there is no requirement that every piece of information be provided on a one-page marketing piece obviously.

These defendants stressed that documents other than the tear sheets disclosed critical facts about the use of investor funds and Aequitas's finances that were allegedly left out of verbal discussions and marketing materials. For example, the Private Note PPM's "Uses of Proceeds" section disclosed that some investor funds might be used to pay prior investors:

The Company generally pays the principal and interest of Secured Notes from the proceeds from repayments of loans, leases, subordinated debt investments and similar assets of the Company and sales of Company assets. From time to time, the Company may use proceeds of the sale of Secured Notes to repay the principal and interest of previously issued Secured Notes due principally to the illiquid nature of many of the Company's investments and to the Company's ongoing efforts to reduce its weighted average cost of capital by, in part, replacing Secured Notes

bearing higher interest rates with Secured Notes bearing lower interest rates.

It also disclosed that “[t]he Company uses proceeds to provide lines of credit for the benefit of its affiliates,” including to “[p]rovide working capital and operating liquidity.” A lengthy appendix of risk factors discussing the security of investments elaborated that: “from time to time a significant portion of the collateral securing the Secured Notes may be in the form of loans or other obligations owed to the Company by its affiliates.” An October 2014 supplement disclosed Corinthian’s default and the resulting possibility of a “material adverse effect” on Aequitas’s “operations and financial performance and its ability to repay the Secured Notes.”

Both tear sheets and PPMs directed potential investors to ACF’s financial statements. Serena Morones, a defense forensic accounting expert, testified that ACF’s audited financial statements disclosed Aequitas’s loans to affiliates, including the Holdings Note, and their growth over time. Morones also testified that the financial statements made plain that Aequitas had “very negative cash flow,” that most of its income was from unrealized, non-cash gains, and that the company depended on borrowing from banks and private investors to finance its operating losses. She further testified that, based on other information in the statements, a reader could “connect the dots” that investor funds were being used for operating expenses and redemptions.

Jesenik and MacRitchie argued that their written disclosures showed a lack of intent to defraud. They believed their investors read the PPMs, “the main document for explaining how the investment works,” and asserted that

they relied on lawyers and accountants who reviewed the PPMs and financial statements.

Jesenik and MacRitchie also attacked the credibility of investors who testified to basing investment decisions on verbal communications and marketing materials, emphasizing that RIAs in particular had due diligence obligations to their clients to read the PPMs and financial statements. Using the PPMs and financial statements extensively at trial, defense counsel cross-examined investors and RIAs, some of whom admitted that these documents conveyed information allegedly not disclosed by the defendants or in marketing materials.

For example, Bean, an RIA who invested in September 2015, acknowledged that the Private Note PPM disclosed that some funds could be used for operating expenses, and accurately disclosed risks related to cash-flow issues and insufficient or unavailable collateral, although he considered these to be worst-case, hypothetical scenarios rather than “a forecast or an expectation.” Bean also conceded that the PPM disclosed ACF’s loans to affiliates and that the audited financial statements disclosed that one of these loans was the then-\$120 million Holdings Note. And he further agreed that he told his clients that Aequis’s “balance sheet and audit report looks great,” even though the financial statements showed a net income loss of \$15 million in 2014; operating losses; and that a significant amount of ACF’s income was from unrealized gains in equity investments. Defense counsel also elicited testimony that Bean and another RIA had been sued by their clients for due diligence failures.

Addressing the latter end of the indictment period, Jesenik argued that he was an honest businessman who

believed in the company and kept fundraising so Aequis could survive the “bank run” brought on by the SEC investigation and exacerbated by the illiquid nature of its collateral. MacRitchie argued that he was outside the inner circle and only became aware of Aequis’s financial problems in the summer of 2015. Both emphasized that they supported changes to marketing materials once professionals told them they were needed.

Rice’s defense was different. He was not alleged to have become a co-conspirator until February 2015, when he began receiving “cash dash” emails. Rice argued that any misrepresentations he made to investors were the result of misrepresentations the other defendants made to him.

Rice conceded that he was aware of the cash shortfalls and, later, the Ponzi scheme concern, but thought these were short-term accounting issues that could be fixed. He argued that the PPMs and tear sheets existed before he arrived, and, like his co-defendants, that he supported updating PPMs and marketing materials in late 2015. Rice also argued that he did not mislead the RIAs into investing in receivables, because they had all already been pitched by Jesenik and Oliver and had done their own due diligence.

D. Verdicts and Sentences

After a six-week trial, a jury returned verdicts finding all defendants guilty of one count of conspiracy to commit mail and wire fraud and 28 counts of wire fraud. Jesenik was also found guilty of making a false statement on a loan application.⁷ Jesenik was sentenced to 168 months of

⁷ All defendants were acquitted of conspiracy to commit money laundering.

imprisonment; MacRitchie to 70 months; and Rice to 37 months. All timely appealed.

II.

We first address all defendants’ contention that they may have been convicted on an invalid legal theory of fraud and Rice’s challenge to the sufficiency of evidence.

A.

The elements of wire fraud in violation of 18 U.S.C. § 1343 are “(1) the existence of a scheme to defraud; (2) the use of wire, radio, or television to further the scheme; and (3) a specific intent to defraud.” *United States v. Lindsey*, 850 F.3d 1009, 1013 (9th Cir. 2017) (quoting *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013)).⁸ A “scheme to defraud” requires the use of “*material* falsehoods.” *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 20 (1999)). “[A] false statement is material if it has a natural tendency to influence, or is capable of influencing, the decisionmaker to whom the statement was addressed.” *United States v. Galecki*, 89 F.4th 713, 737 (9th Cir. 2023) (cleaned up).

False statements can include “misleading half-truths,” *see, e.g., United States v. Lloyd*, 807 F.3d 1128, 1153 (9th

⁸ The statute provides that a person commits wire fraud if:

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

18 U.S.C. § 1343.

Cir. 2015); *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967), representations that are partly true but misleading “because of [the defendant’s] failure to state additional or qualifying matter,” *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 188 (2016) (cleaned up). Even in the absence of a false statement, a conviction can be based on a failure to disclose material facts. *See United States v. Shields*, 844 F.3d 819, 822 (9th Cir. 2016). But wire fraud can be premised on such an omissions theory only if the defendant had a special “trusting relationship” with the victim. *Id.* at 823. That relationship is not required in fraud cases premised on misrepresentations, including half-truths. *See Lloyd*, 807 F.3d at 1153; *United States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986).

The defendants contend that although they were charged in the operative indictment only with engaging in “material misrepresentations and misleading half-truths,” the government really presented an omissions theory at trial.⁹ They argue that the district court therefore erred in denying proposed instructions requiring proof of a trusting relationship.

“We review de novo whether the Government’s theory of fraud at trial was legally valid.” *United States v. Milheiser*, 98 F.4th 935, 941 (9th Cir. 2024). “[A] general verdict that may rest on a legally invalid theory” cannot stand unless we are convinced beyond a reasonable doubt that presentation of the invalid theory “did not contribute to the jury’s verdict.” *United States v. Yates*, 16 F.4th 256, 269–70 (9th Cir. 2021) (cleaned up). Such an error is not

⁹ The original indictment also alleged the defendants engaged in “omissions of material facts.” This allegation was dropped in a superseding indictment.

harmless even “where the verdict is supportable on [another] ground.” *Yates v. United States*, 354 U.S. 298, 312 (1957).

B.

The defendants assert that the government improperly “focused [its case] on non-disclosure alone, rather than whether omitted information made any affirmative statement materially misleading.” They cite the government’s questioning of investors about whether they would have invested had they known certain undisclosed facts and the government’s discussion of that testimony in closing argument.

They object particularly to the government’s statement in closing argument that an RIA was “defrauded” because:

Brian Rice failed to disclose liquidity problems at Aequitas. He failed to disclose the SEC investigation, the payroll funding, or that the general counsel of Aequitas had raised concerns in early September that the firm was running a Ponzi scheme.

To the extent the defendants argue that it was error for the district court to allow the government to ask investors “would you have invested had you known” questions, or to discuss what the defendants did not disclose, we disagree. It is well-established that such evidence is probative of the materiality of a half-truth or misrepresentation. *See United States v. Laurienti*, 611 F.3d 530, 549 (9th Cir. 2010) (approving “[i]f you had known” questions).

And the government did not argue that omissions alone were sufficient to prove fraud or present that theory to the jury. Rather, the government elicited extensive testimony

about the relevant affirmative statements when questioning witnesses about non-disclosures, and stressed these affirmative statements in closing argument. For example, RIA Jeff Sica, whose 70 clients had invested a total of \$32 million in Private Note, testified that he became concerned about the security of those investments after Aequis refused to redeem a client's \$10 million note when it was due in April 2015, and only did so two months later.

Sica had previously been assured by Rice that Aequis "was very secure; that they had plenty of assets; that business was great." Later, when Sica asked why the redemption was late, Rice told him: "Well, we don't do a good job managing our liquidity. So it is not a matter that there are not assets; it's [that] the leadership needs to change." Around the time of a due diligence visit in October 2015, after Sica had requested redemption of all his clients' notes, he told Rice he suspected Aequis was a Ponzi scheme, and Rice denied it. He also testified that Rice continued to pitch him on Aequis products and tried to persuade him to delay redemptions into November 2015. At trial, the government asked Sica about the facts Rice failed to disclose in the context of this testimony, and in closing argument, the government's comments about what Rice "failed to disclose" followed discussion of Sica's interactions with Rice in the fall of 2015. Thus, the government sufficiently tethered Rice's non-disclosures to his affirmative statements.

C.

The defendants also claim that the district court erred in denying three proposed instructions: (1) "[a] nondisclosure [] can support a [wire] fraud charge *only* when there exists an independent duty that has been breached by the person so

charged”; (2) “omissions alone are not sufficient to support a charge of mail or wire fraud”; and (3) “[a]n omission alone – absent a connection to a half-truth – does not constitute a misrepresentation.”

“In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury’s deliberation.” *Lloyd*, 807 F.3d at 1164 (quoting *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000)). We determine whether an instruction misstates the law de novo but review its “language and formulation” for abuse of discretion. *United States v. Rodriguez*, 971 F.3d 1005, 1012 (9th Cir. 2020). Instructions are evaluated “as a whole, and in context,” *id.*, and we afford the trial judge “substantial latitude so long as the instructions fairly and adequately covered the issues presented,” *United States v. Moe*, 781 F.3d 1120, 1127 (9th Cir. 2015) (quoting *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996)).

At the defendants’ request, the district court defined “half-truth” in an instruction drawn directly from *Universal Health Servs., Inc.*, 579 U.S. at 188, and Ninth Circuit Model Criminal Jury Instruction 15.35. The instruction required the government to prove that a defendant “knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money by means of a false or fraudulent representations,” and then stated:

Deceitful statements of half-truths may constitute false or fraudulent representations. A half-truth is a representation that states the

truth only so far as it goes, while omitting critical qualifying information.

This instruction fairly stated the law. Had the defendants been charged under an omissions theory, the government would have been required to show a relationship giving rise to a duty to disclose. *See Shields*, 844 F.3d at 822–23; *United States v. Spanier*, 744 Fed. App’x 351, 353–54 (9th Cir. 2018). But these defendants were not so charged, and the district court therefore did not err in denying the defendants’ proposed “independent duty” instruction. *See United States v. Farrace*, 805 Fed. App’x 470, 473 (9th Cir. 2020). For the same reason, the district court did not abuse its discretion in denying the proposed instruction that “omissions alone are not sufficient to support a charge of mail or wire fraud” and that “[a]n omission alone – absent a connection to a half-truth – does not constitute a misrepresentation.”

Moreover, the district court instructed the jury shortly after the relevant portion of the government’s closing argument that because the indictment only alleged misrepresentations and half-truths, the argument about what the defendants failed to disclose was only relevant to whether the defendants made any “deceitful half-truths.” Using language nearly identical to the defendants’ proposed instruction, the court then told the jury that “[i]f all we have is an omission or a failure to disclose, that’s not actionable here.” That instruction fairly covered the substance of the defendants’ proposed instruction.

D.

“Puffing concerns expressions of opinion, as opposed to the knowingly false statements of fact which the law

proscribes.” *United States v. Tarallo*, 380 F.3d 1174, 1191 (9th Cir. 2004), *amended*, 413 F.3d 928 (9th Cir. 2005) (cleaned up). The defendants contend that their statements about Aequitas’s financial health were merely “generic claims of financial success” or “subjective enthusiasm and puffing.” We are not persuaded.

The defendants highlight the government’s emphasis in closing argument on investors’ testimony that they were misled by the defendants’ statements that Aequitas was “just doing outstanding” and “growing very rapidly,” focusing on a portion of the argument that followed the court’s supplemental instructions about half-truths and omissions:

All of those things that they were complaining about in that testimony that I summarized for you, those were omissions in service of the half-truths that, “Hey, everything at Aequitas is going great.”

But given the severe financial straits that Aequitas was in when these statements were made and the defendants’ knowledge of the company’s finances, a jury could well find them to be “knowingly false statements of fact.” *Tarallo*, 380 F.3d at 1191; *see United States v. Autuori*, 212 F.3d 105, 118–19 (2d Cir. 2000) (finding that a jury could infer that the defendant’s representations that PPM forecasts were “good” and “credible”; that a partnership project was “safe”; and that his prestigious accounting firm “stood behind the numbers” were not puffing, but rather “representations that contradicted his honest view”).

The defendants also claim that non-disclosures about liquidity problems, difficulty paying operating expenses, and an SEC investigation did not render general statements

about Aequitas’s financial health “half-truths” because they were insufficiently “tethered” to those claims or did not “pertain[] to the same topic.” They cite the Supreme Court’s “classic example of an actionable half-truth”: “the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property.” *Universal Health Servs.*, 579 U.S. at 188–89. In the context of this case, however, the defendants’ affirmative representations that Aequitas was in good financial health, made while soliciting purportedly secure investments in income-generating assets, have a plain nexus to non-disclosures about liquidity problems, difficulty paying operating expenses, and an SEC investigation concerning potential misuse of investor funds. Whether those representations were misleading half-truths was therefore properly a question for the jury.

E.

Rice challenges the sufficiency of evidence supporting his conviction. We must decide whether the evidence, viewed in the light most favorable to the government, is sufficient for a “rational trier of fact” to have “found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The evidence in this case satisfies that forgiving standard.

For example, four RIAs testified that Rice personally solicited them to invest in receivables during 2015 through IOF II and Private Note. Starting in February 2015, however, Rice had received “cash dash” emails indicating unequivocally that these funds would in fact be used for payroll and to repay prior investors. And, although Aequitas’s general counsel told Rice in September 2015 that Aequitas could be engaging in a Ponzi scheme, Rice

continued to facilitate investor due diligence visits and solicit investments to meet ongoing urgent cash shortfalls without disclosing the actual uses of investors' funds, the SEC investigation, or that the investments were not secure.

III.

We next address the defendants' contentions that they were precluded from presenting a complete defense. These arguments again center on disclosures in the PPMs and audited financial statements.

A.

1.

The defendants first assert that the district court erred in admitting any evidence of representations in sales pitches and marketing materials, and evidence that investors relied on these representations. They argue that disclaimers of reliance in the subscription agreements and PPMs rendered any representations outside those documents immaterial.¹⁰ They also argue that verbal representations and marketing materials could not be "objectively" material to Aequitas's "accredited" investors given the written disclosures, especially to RIAs with fiduciary duties to their clients.

We disagree. "[T]he focus of the mail fraud statute, like any criminal statute, is on the violator." *United States v.*

¹⁰ The Private Note and IOF II PPMs both stated:

No person has been authorized in connection with this Offering to give any information or make any representations other than those contained in this Memorandum or the Transaction documents and, if given or made, such information or representations must not be relied upon as having been authorized by the Company.

Weaver, 860 F.3d 90, 95 (2d Cir. 2017) (per curiam) (cleaned up). Proof of a scheme to defraud does not require showing that a victim relied on the defendant's falsehoods; it is sufficient that falsehoods were material. *Lindsey*, 850 F.3d at 1014. Materiality, as opposed to reliance, is an objective measure of a representation's "tendency to influence" "the decisionmaker to whom [it] was addressed." *Galecki*, 89 F.4th at 737 (cleaned up); *see also Lindsey*, 850 F.3d at 1013–14.

Whether a representation has a *tendency* to influence a decisionmaker is not the same question as whether the decisionmaker would be justified in relying on it. Justifiable reliance is relevant to civil liability for fraud, but not to criminal liability. *See Neder*, 527 U.S. at 24–25; *see also Weaver*, 860 F.3d at 95. Thus, consistent with other circuits that have addressed the issue, *see, e.g., Weaver*, 860 F.3d at 95–96; *United States v. Lucas*, 516 F.3d 316, 339–40 (5th Cir. 2008); *United States v. Ghilarducci*, 480 F.3d 542, 547 (7th Cir. 2007), we hold that contractual disclaimers do not render immaterial other representations in criminal wire fraud prosecutions.

For the same reason, we reject the argument that the defendants' representations in sales pitches and marketing materials were immaterial to "accredited" investors. To be sure, "materiality is judged in relation to the persons to whom the statement is addressed." *Galecki*, 89 F.4th at 737 (cleaned up). But "the wire fraud statute protects the naive as well as the worldly-wise." *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000) (cleaned up). Materiality is a question of fact for the jury, *see United States v. Gaudin*, 28 F.3d 943, 944 (9th Cir. 1994) (en banc), *aff'd*, 515 U.S. 506 (1995), and the district court properly left the materiality issue to the jury.

Nor did the district court err in admitting evidence of investors' reliance on these representations. Although not dispositive, a victim's reliance on the defendant's falsehoods is probative of materiality. *See Phillips v. United States*, 356 F.2d 297, 308 (9th Cir. 1965) ("Evidence that appellants' sales materials did in fact deceive persons to whom it was directed, causing them to rely upon it, tends to show that such materials were of the nature charged.").

2.

The defendants also argue that they were entitled to this proposed jury instruction on "objective" materiality:

Whether or not a statement is capable of influencing the decision-making body to which it was addressed is evaluated objectively. In considering whether a statement is material, you should consider the context in which the communications occurred, including any evidence about industry practice, agreements between the parties, the parties' professional status or accreditations, and other information known to the parties at the time the allegedly false statements were made. The government does not need to prove that the statement actually influenced any decisionmaker.

We find no abuse of discretion in the district court's denial of this instruction. The court accurately instructed the jury that:

An oral or written statement is material if it has a natural tendency to influence, or was

capable of influencing, a person to part with money. Neither proof of reliance on a false statement nor actual harm is needed to show materiality.

The jury was also instructed that “[i]n determining whether a scheme to defraud exists, you may consider not only a defendant’s words and statements, but also the circumstances in which those words and statements are used, considered as a whole.” *See* Ninth Circuit Model Criminal Jury Instruction 15.35. These instructions fairly and adequately covered whether representations in sales pitches and marketing materials were material.

B.

The defendants next assert that the jury was prevented from considering defense theories about elements other than materiality. We reject those claims.

1.

The district court granted a government pretrial motion to preclude evidence or argument that investors should have “exercised more due diligence or skepticism in their dealings with Aequitas” and that investors did not actually rely on the co-conspirators’ allegedly false statements. The defendants argue that the court then improperly limited their cross-examination of investors about the contents of the relevant disclosures and their “failure to read, understand, or appreciate” them.

To the extent that the defendants challenge the district court’s preclusion of evidence about investor negligence or non-reliance, their argument is foreclosed by *Lindsey*, a case involving mortgage fraud. We held there that “a bright-line

rule against evidence of individual lender behavior to disprove materiality is both a reasonable and necessary protection” because “evidence of individual lender behavior can easily touch on lender negligence, intentional disregard, or lack of reliance—none of which is a defense to mortgage fraud.” 850 F.3d at 1017.¹¹ We find no reason to adopt a different rule in this case, simply because the loans gave rise to promissory notes instead of mortgages.

The defendants also argue that evidence of investor negligence or non-reliance is admissible to impeach the investor “by confronting the investor with contradictory information provided to him by the defendants in the PPM,” and to show whether the defendants had an intent to defraud. The defendants cite the cross-examination of Bob Zamarripa, who invested \$12 million with Aequitas. Zamarripa testified that he was misled by Jesenik’s assurances that “a hundred percent” of his money would go to secure health care receivables and not to pay other investors. During cross-examination, Zamarripa testified that he had not read the subscription agreements and PPMs. The court admitted these documents, and allowed defense counsel to show Zamarripa one of the subscription agreements and ask whether it instructed him to read the PPM. However, the court sustained a series of relevancy objections when defense counsel attempted to ask more questions about the contents of the documents, given Zamarripa’s admission that he had not read them.

¹¹ Instead, defendants may seek to disprove materiality through generally accepted standards, *id.* at 1016, because “[t]he way the entire market has historically treated a statement or requirement says a lot about that statement or requirement’s natural capacity to influence a decision by market participants,” *id.* at 1017.

These evidentiary rulings did not prevent the defendants from urging legitimate disclosure-based defense theories. The court admitted PPMs, subscription agreements, and audited financials, and several investors admitted that those documents were material to their decisions. The court also admitted defense expert testimony about these documents, and allowed extensive questioning of investors who had read them about their contents.

Evidence of Aequitas investors' lengthy experience in the financial industry—and RIAs' due diligence obligations—was also admitted, as was testimony that some RIAs' former clients blamed them for their financial losses, and that two had been sued for negligence. The defendants were allowed to cross-examine investors about their claims that they had not read the PPMs and that they were unaware of Aequitas's financial difficulties. Over government objections, the district court allowed defense counsel to ask investors questions relevant to credibility “even if it may have the secondary effect of implying that there was inadequate due diligence.” The court also admitted testimony about the defendants' reliance on lawyers, accountants, and compliance professionals, and their support for revisions to the PPMs and tear sheets in response to those professionals' concerns.

2.

The district court's materiality instruction stated, in relevant part:

It is not a defense to a charge of mail or wire fraud or a charge of conspiracy to commit mail or wire fraud that an investor or registered investment advisor may have been

gullible, careless, naive, or negligent or even that an investor or registered investment advisor intentionally disregarded information.

The defendants argue that the instruction “suggested that disclosures could not be considered as to any issue” and that in the absence of “an accompanying admonition that truthful disclosures could be considered in connection with good faith or lack of a scheme to defraud, the instruction fundamentally misled the jury.”

We disagree. The instruction is drawn from *Lindsey*, in which we held that “negligence is not a defense to wire fraud” and “intentional disregard of relevant information is not a defense to wire fraud.” 850 F.3d at 1019. The defendants attempt to distinguish *Lindsey* because it focused on whether lenders’ disregard of relevant information was admissible to disprove the materiality of the defendant’s false statements, *see id.* at 1015–16, while they wished to use such evidence to argue other defenses.

To the extent the defendants argue that “if an investor felt misled, it was because the investor . . . chose to disregard part of the complete representation,” they effectively seek to urge that Aequitas’s investors were negligent. As *Lindsey* emphasizes, “negligence is not a defense to wire fraud.” *Id.* at 1015, 1019.

More importantly, the challenged instruction did not indicate that the written disclosures were irrelevant. Indeed, the defendants were permitted to argue that the written disclosures were accurate, material to investors, and indicative of the defendants’ good faith. In closing, Jesenik and MacRitchie both argued extensively that any alleged

misrepresentations did not qualify as half-truths in light of the disclosures. All defendants robustly argued that their provision of written disclosures to investors was evidence of good faith. And the defendants were allowed to attack the investors' credibility.

The jury was instructed that “[i]n determining whether a scheme to defraud exists, you may consider not only a defendant’s words and statements, but also the circumstances in which those words and statements are used, considered as a whole.” *See* Ninth Circuit Model Criminal Jury Instruction 15.35. Taken together with the court’s instructions on half-truths, materiality, good faith, fraudulent intent, and witness credibility, the “instructions, in their entirety, adequately cover[ed] th[e] defense theory.” *Moe*, 781 F.3d at 1127 (cleaned up).

3.

In its rebuttal, the government stated:

A few things about the jury instructions. You see here “negligence by the investors and the RIAs is not a defense to fraud.” So allegations that they should have done this and that they should have done that are not allegations [sic] to fraud if you find that the defendants acted with the intent to defraud.

You have other jury instructions. But the oral statements—in considering what evidence has been promoting the fraud, the oral statements by Mr. Jesenik, by Mr. Oliver, by Mr. Rice. The investor/RIA testimony about the tear sheets, the pitch decks that contain

false information. The cooperator testimony we provided and the written documentation.

The PPM—a lot of evidence about the PPM and whether they are in support of a reliance defense or good faith on the part of the defendants. Members of the jury, I suggest that’s not a proper defense. If you find that these defendants—who individually have to be assessed—but if you find that they approached or promoted—in approaching investors to give them money under false pretenses, “We are doing great; your money is going for receivables,” knowing that it is not, that’s fraud. The crime has been completed. And as Jessica Cataudella said, “You can’t disclose your way out of fraud,” meaning you can’t use the PPM, which has 50 pages of legalese, footnotes, warnings, buzzers, and bells that lawyers write and the SEC monitors, it’s important, no doubt, but it’s not important to this fraud because—

After MacRitchie’s counsel objected that the prosecutor misstated the burden of proof, the court instructed the jury that intent to defraud and good faith were defined in the jury instructions.

The defendants assert that they were prejudiced by the government’s statement in closing that “you can’t disclose your way out of fraud.” They claim that, like the court’s materiality instruction, this argument improperly indicated that jurors could not consider whether their purportedly truthful written disclosures cured other alleged misrepresentations or demonstrated good faith. Relatedly,

the defendants also contend that the district court erred in denying a proposed addition to the court’s instruction on the definition of a half-truth: “If the speaker does provide that critical qualifying information, the duty to speak is satisfied and the statement does not amount to a misrepresentation.” We reject the argument.

The government’s argument accurately recounted the testimony of Cataudella, the former Aequitas compliance officer, in which she said that “you can’t disclose away fraud” was a common phrase in the compliance industry.¹² In context, the argument was not improper, because whether the defendants’ written disclosures sufficed to make alleged misrepresentations not misleading was a question for the jury, and the jury was properly instructed on how to consider evidence of those disclosures. Moreover, the court gave a prompt curative instruction after the challenged statements, and “[j]urors are presumed to follow the court’s instructions.” *United States v. Reyes*, 660 F.3d 454, 468 (9th Cir. 2011).

IV.

For the reasons above, and those in the concurrently filed memorandum disposition, we affirm the judgments of conviction.

AFFIRMED.

¹² At trial, MacRitchie unsuccessfully objected to this statement as a lay opinion. MacRitchie does not pursue this argument on appeal.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d). The deadlines for seeking reconsideration of a non-dispositive order are set forth in 9th Cir. R. 27-10(a)(2).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

SEP 5 2025

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT J. JESENIK,

Defendant - Appellant.

No. 23-2282

D.C. No.

3:20-cr-00228-SI-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW N. MACRITCHIE, AKA
Andrew MacRitchie,

Defendant - Appellant.

No. 23-2308

D.C. No.

3:20-cr-00228-SI-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN K. RICE,

No. 23-2316

D.C. No.

3:20-cr-00228-SI-4

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

Defendant - Appellant.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW N. MACRITCHIE, AKA
Andrew MacRitchie,

Defendant - Appellant.

No. 24-5402

D.C. No.

3:20-cr-00228-SI-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT J. JESENIK,

Defendant - Appellant.

No. 24-5404

D.C. No.

3:20-cr-00228-SI-1

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted April 2, 2025
San Francisco, California

Before: HURWITZ, KOH, and JOHNSTONE, Circuit Judges.

Robert Jesenik, Andrew MacRitchie, and Brian Rice appeal their convictions for one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349 and 28 counts of substantive wire fraud in violation of 18 U.S.C. § 1343.

Jesenik also appeals his conviction for one count of making a false statement on a loan application in violation of 18 U.S.C. § 1014. For the reasons below and in a concurrently filed opinion, we affirm.

1. The district court did not abuse its discretion in denying severance. There is a “well-established . . . preference for joint trials where defendants have been jointly indicted.” *United States v. Hernandez–Orellana*, 539 F.3d 994, 1001 (9th Cir. 2008). Severance should be granted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Even if such a risk exists, limiting instructions and other measures “often will suffice to cure” it. *Id.*

Attempts by co-defendants to exculpate themselves by inculcating one another do not mandate severance unless a defendant “show[s] that the core of the codefendant’s defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant’s theory by the jury precludes acquittal of the defendant.” *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996). Although Rice claimed to have been misled by Jesenik and MacRitchie, Rice also asserted, as did the other defendants, that he was not involved in a conspiracy or scheme to defraud. A jury accepting Rice’s defense would therefore not be precluded from acquitting the other defendants.

Moreover, the district court took appropriate measures to mitigate any undue prejudice caused by joinder. After Rice’s opening statement accused Jesenik of deception, the court instructed the jury that opening statements are not evidence and each defendant’s guilt must be considered separately. Nor did the court abuse its discretion by allowing rebuttal arguments by Jesenik and MacRitchie. This was an appropriate form of “other relief” from the potential prejudice of joinder under Federal Rule of Criminal Procedure 14(a). *See United States v. Della Porta*, 653 F.3d 1043, 1051 n.3 (9th Cir. 2011) (noting that Rule 29.1 “neither sanctions nor prohibits the use of supplemental closing arguments in all cases”). Rice was not unfairly prejudiced by the rebuttals: neither Jesenik nor MacRitchie attempted to inculcate Rice, and Jesenik’s counsel argued repeatedly that Rice was not guilty.

2. The district court did not abuse its discretion in denying a mistrial after the prosecutor’s opening statement commented on cooperating co-conspirators’ guilty pleas. Even assuming that the prosecutor improperly implied that the defendants were guilty by association, *see United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981), the pleas were admissible for “evaluating witness credibility,” *id.*, and the district court repeatedly instructed the jury that they were not evidence of any defendant’s guilt, *see id.* at 1006–07.

3. The district court did not abuse its discretion by allowing several investors with significant experience in the finance industry to testify that they would

not have invested had they known Aequitas was using their funds to pay prior investors rather than to buy new assets. This testimony was “rationally based on” the perceptions of these witnesses, Fed. R. Evid. 701(a), given their experience in the finance industry, and helpful to the jury in determining facts at issue, *see* Fed. R. Evid. 701(b). The testimony did not run afoul of Federal Rule of Evidence 701(c) because the witnesses accurately used “Ponzi scheme” to mean a business that uses new investor funds to pay prior investors and did not purport to be giving a technical or legal opinion.¹

4. The district court also did not abuse its discretion in admitting expert testimony that Aequitas had “Ponzi-like features” and “badges of fraud.” The expert did not opine on an ultimate issue of law, because the defendants were not charged with running a Ponzi scheme, and the court so reminded the jury. The jury was also properly instructed that it should rely on the court’s definition of fraud, and that the witness was not opining whether the defendants had fraudulent intent or any fraud had occurred. *See* Fed. R. Evid. 704(b).

5. The district court did not abuse its discretion in admitting testimony by Jesenik’s longtime executive assistant that Aequitas’s chief financial officer would not have signed a loan application without Jesenik’s knowledge and approval. The

¹ On the one occasion that a lay witness began to provide a legal definition of the term “Ponzi scheme,” the district court properly halted the testimony and instructed the jury not to “take any legal definitions from” the witness.

witness had extensive first-hand observations of Jesenik's role in the company and his relationship with the former CFO, *see* Fed. R. Evid. 701(a), and this information was not otherwise available to the jury, *cf. United States v. Henke*, 222 F.3d 633, 641–42 (9th Cir. 2000).

6. The district court did not abuse its discretion in declining to give advice-of-counsel and advice-of-accountants instructions. The district court's general good-faith instruction “subsume[d]” those instructions. *United States v. Bush*, 626 F.3d 527, 540 (9th Cir. 2010).

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d). The deadlines for seeking reconsideration of a non-dispositive order are set forth in 9th Cir. R. 27-10(a)(2).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED			
	<i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			\$	\$
Principal Brief(s) <i>(Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief)</i>			\$	\$
Reply Brief / Cross-Appeal Reply Brief			\$	\$
Supplemental Brief(s)			\$	\$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee				\$
TOTAL:				\$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

Plaintiff,

v.

ANDREW N. MACRITCHIE

Defendant.

Date of Original Judgment: September 10, 2024*(or date of last amended judgment)*SECOND AMENDED JUDGMENT IN A
CRIMINAL CASE**Case No.: 3:20-CR-00228-SI-3****USM Number: 51977-510**Michael Tremonte and Anna Maria Estevao,
Defendant's AttorneyChristopher L. Cardani,
Assistant U.S. Attorney

THE DEFENDANT:

☒ was found guilty on Counts 1 through 29 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of the following offense(s):

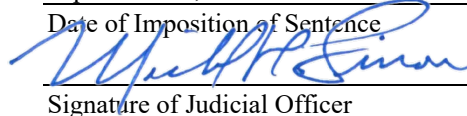
<u>Title, Section & Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number</u>
18:1349 - Conspiracy to Commit Mail and Wire Fraud	Beginning on or about June 2014 and continuing until February 2016	1s
18:1343 - Wire Fraud	Beginning on or about August 4, 2015 and continuing until December 30, 2015	2s-29s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) Count 30 of the Superseding Indictment and is discharged as to such count(s).☒ The underlying Indictment is dismissed on the motion of the United States.☒ The defendant shall pay a special assessment in the amount of \$100.00 for Counts 1 through 29 of the Superseding Indictment for a total of \$2,900.00 payable to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties Sheet.)**IT IS ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

September 07, 2023

Date of Imposition of Sentence



Signature of Judicial Officer

Michael H. Simon, U.S. District Judge

Name and Title of Judicial Officer

May 20, 2025

Date

AO 245B

Judgment in a Criminal Case - DISTRICT OF OREGON CUSTOMIZED (Rev. 10/2019)
Sheet 2 - ImprisonmentDEFENDANT: ANDREW N. MACRITCHIE
CASE NUMBER: 3:20-CR-00228-SI-3

Judgment-Page 2 of 7

IMPRISONMENT

As to Counts 1 through 29 of the Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **SEVENTY (70) MONTHS** on each count, with the sentences on all counts to be served **concurrently with** each other.

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

1. That the defendant be incarcerated to the Camp at Otisville, New York to be near family.

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

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

☐ at _____ on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2:00 P.M. on November 2, 2023.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

The Bureau of Prisons will determine the amount of prior custody that may be credited towards the service of sentence as authorized by Title 18 USC §3585(b) and the policies of the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, property, house, residence, vehicle, papers, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
2. You must not work in any type of employment without the prior approval of the probation officer.
3. If the judgment imposes a financial penalty, including any fine or restitution, you must pay the financial penalty in accordance with the Schedule of Payments sheet of the judgment. You must also notify the court of any changes in economic circumstances that might affect your ability to pay this financial penalty.
4. You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
5. You must not incur new credit charges, or open additional lines of credit without the approval of the probation officer.
6. You must not make application for any loan, or enter into any residential or business lease agreement, without the prior approval of the probation officer.
7. You must maintain a single checking account and/or savings account in your own name. You must deposit into this account all income, monetary gains or other pecuniary proceeds, and make use of this account for payment of all personal expenses. You must disclose all other accounts to the probation officer.

AO 245B

Judgment in a Criminal Case - DISTRICT OF OREGON CUSTOMIZED (Rev. 10/2019)
Sheet 5 - Criminal Monetary PenaltiesDEFENDANT: ANDREW N. MACRITCHIE
CASE NUMBER: 3:20-CR-00228-SI-3

Judgment-Page 6 of 7

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth in this judgment.

	<u>Assessment</u> <u>(as noted on Sheet 1)</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA</u> <u>Assessment¹</u>	<u>JVTA</u> <u>Assessment²</u>	<u>TOTAL</u>
<u>TOTALS</u>	\$2,900	\$46,111,100	\$0.00	\$0.00	\$0.00	\$46,114,000

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

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

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

<u>Name of Payee</u>	<u>Total Amount of Loss³</u>	<u>Amount of Restitution</u> <u>Ordered</u>	<u>Priority Order or</u> <u>Percentage of Payment</u>
See sealed list of victim names and addresses.		\$46,111,100	
<u>TOTALS</u>		\$46,111,100	

☐ If applicable, restitution amount ordered pursuant to plea agreement: \$_____.

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

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

☒ The interest is waived for the ☐ fine and/or ☒ restitution.

☐ The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

Any payment shall be divided proportionately among the payees named unless otherwise specified.

¹ Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

² Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

³ Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment⁴ of the total criminal monetary penalties shall be as follows:

- A. ☐ Lump sum payment of \$_____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or
- B. ☒ Payment to begin immediately (may be combined with ☒ C, ☐ D, or ☐ E below); or
- C. ☒ If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than \$1,000, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately upon release from imprisonment.
- D. ☐ Any balance at the imposition of this sentence shall be paid in monthly installments of not less than \$_____, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately.
- E. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) \$25 per quarter if the defendant is not working in a prison industries program. . If the defendant received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, the defendant shall be required to apply the value of such resources to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

Nothing ordered herein shall affect the government's ability to collect up to the total amount of criminal monetary penalties imposed, pursuant to any existing collection authority.

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

**Clerk of Court
U.S. District Court - Oregon
1000 S.W. 3rd Ave., Ste. 740
Portland, OR 97204**

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ **Joint and Several**

Case Number

Defendant and Co-Defendant Names	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
3:20-cr-228-SI-1 Robert J. Jesenik	\$46,111,100	\$46,111,100	
3:20-cr-228-SI-3 Andrew M. MacRitchie	\$46,111,100	\$46,111,100	

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: \$689,662.37

⁴ Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

SEP 5 2025

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT J. JESENIK,

Defendant - Appellant.

No. 23-2282

D.C. No.

3:20-cr-00228-SI-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW N. MACRITCHIE, AKA
Andrew MacRitchie,

Defendant - Appellant.

No. 23-2308

D.C. No.

3:20-cr-00228-SI-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN K. RICE,

No. 23-2316

D.C. No.

3:20-cr-00228-SI-4

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

Defendant - Appellant.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW N. MACRITCHIE, AKA
Andrew MacRitchie,

Defendant - Appellant.

No. 24-5402

D.C. No.

3:20-cr-00228-SI-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT J. JESENIK,

Defendant - Appellant.

No. 24-5404

D.C. No.

3:20-cr-00228-SI-1

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted April 2, 2025
San Francisco, California

Before: HURWITZ, KOH, and JOHNSTONE, Circuit Judges.

Robert Jesenik, Andrew MacRitchie, and Brian Rice appeal their convictions for one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349 and 28 counts of substantive wire fraud in violation of 18 U.S.C. § 1343.

Jesenik also appeals his conviction for one count of making a false statement on a loan application in violation of 18 U.S.C. § 1014. For the reasons below and in a concurrently filed opinion, we affirm.

1. The district court did not abuse its discretion in denying severance. There is a “well-established . . . preference for joint trials where defendants have been jointly indicted.” *United States v. Hernandez–Orellana*, 539 F.3d 994, 1001 (9th Cir. 2008). Severance should be granted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Even if such a risk exists, limiting instructions and other measures “often will suffice to cure” it. *Id.*

Attempts by co-defendants to exculpate themselves by inculcating one another do not mandate severance unless a defendant “show[s] that the core of the codefendant’s defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant’s theory by the jury precludes acquittal of the defendant.” *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996). Although Rice claimed to have been misled by Jesenik and MacRitchie, Rice also asserted, as did the other defendants, that he was not involved in a conspiracy or scheme to defraud. A jury accepting Rice’s defense would therefore not be precluded from acquitting the other defendants.

Moreover, the district court took appropriate measures to mitigate any undue prejudice caused by joinder. After Rice’s opening statement accused Jesenik of deception, the court instructed the jury that opening statements are not evidence and each defendant’s guilt must be considered separately. Nor did the court abuse its discretion by allowing rebuttal arguments by Jesenik and MacRitchie. This was an appropriate form of “other relief” from the potential prejudice of joinder under Federal Rule of Criminal Procedure 14(a). *See United States v. Della Porta*, 653 F.3d 1043, 1051 n.3 (9th Cir. 2011) (noting that Rule 29.1 “neither sanctions nor prohibits the use of supplemental closing arguments in all cases”). Rice was not unfairly prejudiced by the rebuttals: neither Jesenik nor MacRitchie attempted to inculcate Rice, and Jesenik’s counsel argued repeatedly that Rice was not guilty.

2. The district court did not abuse its discretion in denying a mistrial after the prosecutor’s opening statement commented on cooperating co-conspirators’ guilty pleas. Even assuming that the prosecutor improperly implied that the defendants were guilty by association, *see United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981), the pleas were admissible for “evaluating witness credibility,” *id.*, and the district court repeatedly instructed the jury that they were not evidence of any defendant’s guilt, *see id.* at 1006–07.

3. The district court did not abuse its discretion by allowing several investors with significant experience in the finance industry to testify that they would

not have invested had they known Aequitas was using their funds to pay prior investors rather than to buy new assets. This testimony was “rationally based on” the perceptions of these witnesses, Fed. R. Evid. 701(a), given their experience in the finance industry, and helpful to the jury in determining facts at issue, *see* Fed. R. Evid. 701(b). The testimony did not run afoul of Federal Rule of Evidence 701(c) because the witnesses accurately used “Ponzi scheme” to mean a business that uses new investor funds to pay prior investors and did not purport to be giving a technical or legal opinion.¹

4. The district court also did not abuse its discretion in admitting expert testimony that Aequitas had “Ponzi-like features” and “badges of fraud.” The expert did not opine on an ultimate issue of law, because the defendants were not charged with running a Ponzi scheme, and the court so reminded the jury. The jury was also properly instructed that it should rely on the court’s definition of fraud, and that the witness was not opining whether the defendants had fraudulent intent or any fraud had occurred. *See* Fed. R. Evid. 704(b).

5. The district court did not abuse its discretion in admitting testimony by Jesenik’s longtime executive assistant that Aequitas’s chief financial officer would not have signed a loan application without Jesenik’s knowledge and approval. The

¹ On the one occasion that a lay witness began to provide a legal definition of the term “Ponzi scheme,” the district court properly halted the testimony and instructed the jury not to “take any legal definitions from” the witness.

witness had extensive first-hand observations of Jesenik's role in the company and his relationship with the former CFO, *see* Fed. R. Evid. 701(a), and this information was not otherwise available to the jury, *cf. United States v. Henke*, 222 F.3d 633, 641–42 (9th Cir. 2000).

6. The district court did not abuse its discretion in declining to give advice-of-counsel and advice-of-accountants instructions. The district court's general good-faith instruction “subsume[d]” those instructions. *United States v. Bush*, 626 F.3d 527, 540 (9th Cir. 2010).

AFFIRMED.

Nos. 23-2282, 23-2308, 25-5402, 24-5404

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee

v.

Andrew N. MacRitchie,
AKA Andrew MacRitchie

Defendant-Appellant

On Appeal from the United States District Court
for the District of Oregon
No. 3:20-CR-002288-SI-3
Hon. Michael H. Simon

PETITION OF DEFENDANT-APPELLANT
FOR REHEARING *EN BANC*

Counsel listed on the following page

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Andrew N. MacRitchie

GROUND FOR REHEARING

Mr. MacRitchie, alongside two codefendants, was convicted of conspiracy and wire fraud. The district court misapplied the law and the panel affirmed the convictions. Earlier today, Mr. MacRitchie's co-defendant Robert Jesenik filed a petition for rehearing *en banc* challenging, among other things, the panel's application of *United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2017) and holding that, while the government can use a lender's reliance on false statements to prove their materiality, a defendant cannot similarly use lack of reliance to disprove materiality.

Mr. Jesenik's arguments apply with equal force to the panel's error in affirming Mr. MacRitchie's conviction. In particular, the panel affirmed the district court's erroneous decisions to (1) prevent the defense from challenging government witnesses who claimed that they disregarded Mr. MacRitchie's truthful written disclosures, (2) admonished defense counsel against challenging

witnesses about claims that they never read those disclosures, and (3) instructed the jury that information an investor disregards is not a defense to fraud.

The panel should not have affirmed these decisions. It held that it was constrained by the holding in *Lindsey* that investor behavior is admissible to prove materiality but inadmissible to disprove materiality. However, as argued in Mr. Jesenik’s petition, *Lindsey*’s holding is inconsistent with both other Ninth Circuit and Supreme Court precedent. The Supreme Court has recently emphasized that proof of materiality provides an essential check on criminal wire fraud prosecutions. *Kousisis v. United States*, 605 U.S. 114, 131-32 (2025). In other fraud contexts, the Supreme Court has ruled that evidence of subjective non-reliance on a defendant’s disclosures is “very strong evidence” of lack of materiality. *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176, 194-195 (2016). There is no reason materiality should apply any differently in the wire fraud context. Indeed, Ninth Circuit precedent that a defendant’s constitutional right to present a defense includes “at a minimum” the right to put before a jury evidence that “might influence the determination of guilt” is yet more reason that *Lindsey*’s holding is incongruous. See *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010); accord *United States v. Thomas*, 32 F.3d 418, 420-21 (9th Cir. 1994). It is unconstitutional to allow evidence of an investor’s behavior

for the government but not the defense—especially considering the importance of materiality in wire fraud prosecutions.

Further, even if *Lindsey* had been correctly decided, the panel improperly expanded *Lindsey* to preclude valid defenses to fraud based on half-truths. Fraud prosecutions based on omission (like the prosecution below) are only actionable if the omission makes a true statement misleading—in other words, if the omission creates a “half-truth.” *Universal Health*, 579 U.S. at 188. Even so, the panel concluded that the district court did not err in instructing the jury that it is not a defense to wire fraud that the investor negligently or intentionally ignored information in disclosures. *Lindsey* concerned a prosecution based on false statements. Such a rule cannot reasonably apply in the half-truth context, because in such a case the investor’s conduct decides whether fraud occurred, regardless of the defendant’s good-faith effort to make relevant disclosures.

That is precisely why the policy rationale behind the *Lindsey* holding—that fraud liability should be focused on the defendant’s conduct, not the victim’s—does not support the panel’s holding. All parties agreed that the defendants provided all investors with disclosures that truthfully addressed the alleged omissions. By affirming a jury instruction that the investors’ “intentional disregard” of that information was not a defense, the court obviated *Lindsey*’s policy rationale and tied criminal liability to the alleged victim’s conduct rather

than the defendant's. Such an expansion threatens to create criminal liability where civil and regulatory liability does not exist. Under both federal and state civil securities laws and regulations, individuals may not be penalized for making material, truthful disclosures curing omissions when investors intentionally disregard the disclosure. *See, e.g.*, 17 C.F.R. § 230.501-506, Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Act of Act of 1934; Or. Rev. Stat. §§ 59.049, 59.135, 59.991, 59.995. It makes no sense to apply such a rule in the criminal context.

We hereby adopt and join all of the arguments in Mr. Jesenik's petition. For the precise reasons described in Mr. Jesenik's petition, and for the foregoing reasons, Mr. MacRitchie respectfully requests rehearing *en banc*.

Dated: December 3, 2025

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CERTIFICATE OF COMPLIANCE

In compliance with Fed. R. App. Proc. 40(d)(3) and Circuit Rule 40-1(b), this brief contains 728 words, as counted by the word-processing system used to prepare the document, excluding the parts of the brief exempted by Fed. R. App. P. 32.

Dated: December 3, 2025

/s/ Michael Tremonte

Michael Tremonte

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 29 2025

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT J. JESENIK,

Defendant - Appellant.

No. 23-2282

D.C. No.

3:20-cr-00228-SI-1

District of Oregon,
Portland

ORDER

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW N. MACRITCHIE, AKA
Andrew MacRitchie,

Defendant - Appellant.

No. 23-2308

D.C. No.

3:20-cr-00228-SI-3

District of Oregon,
Portland

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN K. RICE,

Defendant - Appellant.

No. 23-2316

D.C. No.

3:20-cr-00228-SI-4

District of Oregon,
Portland

UNITED STATES OF AMERICA,

No. 24-5402

Plaintiff - Appellee, v. ANDREW N. MACRITCHIE, AKA Andrew MacRitchie, Defendant - Appellant.	D.C. No. 3:20-cr-00228-SI-3 District of Oregon, Portland
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ROBERT J. JESENİK, Defendant - Appellant.	No. 24-5404 D.C. No. 3:20-cr-00228-SI-1 District of Oregon, Portland

Before: HURWITZ, KOH, and JOHNSTONE, Circuit Judges.

The panel has unanimously voted to deny Rice’s petition for panel rehearing, **Dkt. 119**. Judges Koh and Johnstone have voted to deny the petitions for rehearing en banc, and Judge Hurwitz so recommended. The petitions for rehearing en banc were circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 40(c).

The petitions for panel rehearing and rehearing en banc, **Dkt. 119, 120, and 121**, are DENIED.

COUNT 28: Wire Fraud
(December 30, 2015)
(Confirmation of \$354,000 wire to IOF II account
6621 at Bank of America)

COUNT 29: Wire Fraud
(December 29 and 30, 2015)
(Email exchange between Aequitas Investor Services
and an RIA; Subject: Stern - Case:
00011534:ref:_00D30XID._500333sJgdl:ref

COUNT 30: Conspiracy to Commit Money Laundering
(June 2014 through February 2016)

COUNT 31: False Statement on a Loan Application
(January 15, 2016)
(ONLY AGAINST MR. JESENİK)

Instruction No. 17: Mail and Wire Fraud: Generally

Before someone may be found guilty of mail or wire fraud, the government must prove each of the following four elements beyond a reasonable doubt:

First, a defendant knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money by means of false or fraudulent representations. Deceitful statements of half-truths may constitute false or fraudulent representations. A half-truth is a representation that states the truth only

so far as it goes, while omitting critical qualifying information;

Second, the statements made as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money;

Third, a defendant acted with the intent to defraud; that is, the intent to deceive and cheat; and

Fourth, for wire fraud, a defendant used or caused to be used an interstate wire communication to carry out an essential part of the scheme. Using the telephone or internet counts as a wire communication. For mail fraud, the defendant used or caused to be used the mail to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only a defendant's words and statements, but also the circumstances in which those words and statements are used, considered as a whole.

A wiring is caused when one knows that a wire will be used in the ordinary course of business or when one can reasonably foresee such use. It need not have been reasonably foreseeable to a defendant that the wire communication would be interstate or foreign in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate or foreign wire communication must have occurred in

furtherance of the scheme. It does not matter whether the wired material was itself false or deceptive, so long as the wire was used as a part of the scheme; nor does it matter for wire fraud whether the scheme or plan was successful or that any money or property was obtained.

A mailing is caused when one knows that the mail will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive, so long as the mail was used as a part of the scheme; nor does it matter for mail fraud whether the scheme or plan was successful or that any money or property was obtained.

Instruction No. 18: Mail and Wire Fraud: Knowingly

In the first element of mail or wire fraud, I used the word “knowingly.” An act is done knowingly if a defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant’s words, acts, or omissions, along with all the other evidence, in deciding whether a defendant acted knowingly.

Instruction No. 19: Mail and Wire Fraud: Materiality

In the second element of mail or wire fraud, I used the word “material.” An oral or written statement is material if it has a natural tendency to influence, or was capable of influencing, a person to part with money. Neither proof of reliance on a false statement nor actual harm is needed to show materiality.

It is not a defense to a charge of mail or wire fraud or a charge of conspiracy to commit mail or wire fraud that an investor or registered investment advisor may have been gullible, careless, naïve, or negligent or even that an investor or registered investment advisor intentionally disregarded information.

Instruction No. 20: Mail and Wire Fraud: Intent to Defraud

In stating the third element of mail or wire fraud above, I said that the government must prove beyond a reasonable doubt that a defendant had the intent to defraud. An intent to defraud is an intent to deceive and cheat.

You may determine whether a defendant had an honest, good-faith belief in the truth of the specific alleged misrepresentations in deciding whether that defendant acted with an intent to defraud. If you find that a defendant had such an honest, good-faith belief, the necessary intent to defraud did not exist.

If you find beyond a reasonable doubt that a defendant did not act in good faith and intentionally made material misrepresentations or misleading half-truths, then a belief in the ultimate success of an enterprise, a belief that investors will sustain no economic loss, or a belief that investors eventually will be repaid is no defense to wire or mail fraud or conspiracy to commit wire or mail fraud.

Instruction No. 21: Mail and Wire Fraud: Ignorance of the Law

It is not a defense to a charge of mail or wire fraud that a defendant was ignorant of the law. For purposes of mail and wire fraud, although the government

must prove all the elements of that crime beyond a reasonable doubt, including intent to defraud, the government is not required to show that a defendant knew that his actions were unlawful, illegal, or a crime.

Instruction No. 22: Conspiracy: Generally

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. To determine that a conspiracy existed, you must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy, with each of you agreeing as to the specific crime that the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even if the person does not have full knowledge of all the details of the conspiracy. Further, one who willfully joins an existing conspiracy is as responsible for it as the originators.

1 wire fraud," and then bring the jury back to the first element,
2 "Although the Government must prove that a defendant knowingly
3 participated in a scheme or plan to defraud or a scheme or plan
4 for obtaining money by means of false or fraudulent
5 representations, the Government is not required to prove."

6 Just remind them, because they are not lawyers,
7 right -- we are talking about the meaning of a word that's in
8 an element from the previous instruction.

9 THE COURT: But that's why I begin 19 by stating, "In
10 the first element, I use the word 'knowingly.' Now let me tell
11 you more about what 'knowingly' means."

12 I'll think about that too.

13 MR. TREMONTE: Thank you, Your Honor.

14 THE COURT: Okay. Anybody want to talk about 20,
15 materiality and Lindsey?

16 MR. BOUNDS: Yes, Your Honor. The Government would
17 request, with respect to the negligence sentence, that we
18 insert "by an investor or RIA."

19 THE COURT: Yeah, I was thinking about that too.

20 MR. BOUNDS: In both instances.

21 THE COURT: Yeah. I was thinking the same thing.

22 Okay. Anybody want to talk about 21?

23 MR. PHILLIPS: Your Honor, before we move from 20 --

24 MR. HUSEBY: I would object to that, because I do
25 think from an intent to defraud perspective, I think our

1 clients are -- I mean, I think our clients are entitled to
2 believe that the RIAs, who have their own clients, are going to
3 explain the key documents to the investor. In fact, I think
4 Eric Davis said Fariba Ronnasi accused him of trying to steal
5 her clients when he talked to one of her clients. I think it
6 would be awkward for Mr. Jesenik to reach out to an investor
7 represented by a client.

8 So I feel like we do have the right to say, when they
9 provide these documents to an RIA, they're entitled to believe
10 that the RIA is going to do with them.

11 THE COURT: Let me ask a hypothetical question
12 unrelated to Mr. Jesenik. Take a hypothetical defendant who we
13 know -- it's just established has a specific intent to defraud.
14 No doubt about that. That defendant with specific intent to
15 defraud makes a material misrepresentation. No dispute about
16 that.

17 The recipient of that, whether it be an investor or
18 the investor's advisor with fiduciary duties like an RIA is
19 just oblivious. They have intentionally disregarded the
20 information put in front of them. So we have three things we
21 can prove: Specific intent to defraud; clear
22 misrepresentation; and intentional -- let alone negligent --
23 but intentional disregard of information that would have
24 prompted that person not to invest or not to recommend the
25 investment to their client.

1 Is that third element a defense to fraud? I'm being
2 rhetorical, because I think the obvious answer is no.

3 MR. HUSEBY: I think probably under -- our concern
4 isn't that the jury is going to reach -- that we're going to
5 argue or the jury is going to reach that conclusion. Our
6 concern is that -- at least my argument is going to be, they
7 didn't lie to the RIAs. They told the RIAs, "Here is what the
8 investment is about generally; here are the marketing
9 materials." These weren't bald-face lies. And they also
10 provided all the RIAs with the information they needed to
11 understand the investment fully, believing the RIAs did believe
12 that and would explain it to their clients.

13 I think if this is a case where a lawyer stands up
14 and says, "Great, everyone lied, but we are going to blame the
15 RIAs," that's a different matter than saying, "We communicated
16 to the RIAs this is what the investment is about generally.
17 This is what our business. Here is the story." And then also
18 gave them information that told them everything they needed to
19 know.

20 MR. TREMONTE: Your Honor, if I may add to that. We
21 agree with the negligence by an investor is not a defense to
22 fraud. We agree with that. We worry about even intentional
23 disregard of information for the following reasons: If the
24 information that was disregarded was accurate, then there was
25 no misrepresentation.

1 MR. BOUNDS: That's an entirely different question
2 from materiality.

3 THE COURT: But I'm thinking, though, to deal with
4 this and to avoid that ambiguity, I shouldn't say, "It is not a
5 defense to fraud," but I should say, "Does not show a lack of
6 materiality. Further, negligence by an investor or RIA, even
7 intentional disregard of information by an investor or RIA
8 does not disprove materiality."

9 MR. PHILLIPS: Your Honor, could I be heard on the
10 intentional disregard? I think the problem with that is that
11 materiality is an objective standard. We say in the paragraph
12 before --

13 THE COURT: That's correct.

14 MR. PHILLIPS: -- whether there is a natural
15 tendency. But then we insert into it, and I think it is likely
16 to be confusing that then the subjective intent of the investor
17 by intentionally disregarding is somehow --

18 THE COURT: Let me add a different argument, and that
19 is this isn't a case about intentional disregard. Maybe RIAs
20 or investors were negligent. Maybe they weren't. We don't
21 have anything to show intentional disregard, do we? So why
22 shouldn't I take out that clause? "Further negligence by an
23 investor or RIA is not a defense to fraud," period.

24 MR. HUSEBY: I prefer the formulation to say is
25 not --

1 THE COURT: I know. We haven't gotten there. We are
2 taking it one step at a time.

3 MR. PHILLIPS: We agree with that.

4 MR. BOUNDS: I think we have testimony from various
5 investors that they either did not read or at best casually
6 glanced at the PPM, and that should not be a basis for arguing
7 that the representations that they received were immaterial.

8 THE COURT: Okay. So assuming we keep that in, the
9 intentional disregard, then shouldn't that last clause be
10 modified, instead of reading "is not a defense to fraud,"
11 shouldn't it say "does not show lack of materiality"?

12 MR. CALFO: How about "bear on the issue of
13 materiality."

14 MR. BOUNDS: What was that?

15 MR. CALFO: "Does not bear on the issue of
16 materiality."

17 MR. DADHICH: Isn't that quote directly from Lindsey?

18 THE COURT: Yes. But that doesn't get you very far.
19 That's not the point.

20 MR. DADHICH: I agree. But the double negative is
21 confusing there. And if you don't have that provision --

22 THE COURT: Well, Mr. Calfo's suggestion doesn't have
23 double negatives.

24 MR. DADHICH: What was that suggestion?

25 THE COURT: "Does not bear on materiality."

1 "Further, negligence, by an investor or RIA, even
2 intentional disregard of information by an investor or RIA,
3 does not bear on materiality."

4 MR. CALFO: "Does not bear on the issue of" or "bear
5 on."

6 THE COURT: That probably is more technically
7 accurate and what Lindsey was trying to get at, isn't it?

8 MR. BOUNDS: I think it is a perfectly correct
9 statement of law. I am just wondering if it really addresses
10 the misleading argument that I anticipate being made that it is
11 still relevant to the defendants' state of mind and it isn't.
12 What's relevant to the defendants' state of mind is the amount
13 of information and the means by which they omitted it.

14 THE COURT: Isn't that what you are going to have to
15 argue to the jury? Isn't it their defense, "Okay, fine. Even
16 if our oral statements and our tear sheets were
17 misrepresentations, we gave them all of the information in the
18 private placement memorandum," which, by the way, I assume you
19 are going to argue, "No, you didn't." There is plenty of
20 argument for that.

21 But if the argument is going to be, "We gave them
22 plenty of information in the private placement memoranda," and
23 that shows, maybe even circumstantially, "We didn't have an
24 intent to defraud." Aren't they allowed to argue that, and you
25 can argue against it?

1 MR. BOUNDS: And that's exactly the sort of argument
2 that I would anticipate, but I would not expect to be a proper
3 part of that argument: "And the PPM was disregarded, and you
4 can't blame us."

5 THE COURT: There, in rebuttal, you can point them to
6 this last sentence of Instruction 20.

7 MR. BOUNDS: But that's my point. That's not a
8 materiality argument. This is going to their culpability
9 for --

10 THE COURT: Yeah.

11 MR. HUSEBY: I think --

12 THE COURT: I think Ryan is right. Part of what I'm
13 thinking there is this really interesting concept that this is
14 one circumstance where the criminal law can punish conduct that
15 the civil law would not compensate for.

16 If we had intentional disregard of information by an
17 investor, that investor would lose a civil lawsuit, because as
18 we all know, under civil fraud elements, reasonable reliance is
19 an element. And if the plaintiff-investor does not act
20 reasonably, then the plaintiff-investor can't recover. But as
21 Lindsey teaches us and makes it really explicit, that's not a
22 defense to criminal fraud.

23 MR. TREMONTE: But that goes to materiality and not
24 to intent. Again, we have to be free to argue, "Here is what
25 we thought was going on, and here is why." That's different

1 from saying, "Well, if they didn't read it, it's on them."

2 THE COURT: I'm certainly not going to stop you from
3 arguing, "We had no intent to defraud," and part of the
4 evidence of that is, "look at all the stuff in the private
5 placement memorandum." That's fine.

6 I think what Mr. Bounds is arguing is you can't argue
7 to the jury that, "Hey, they disregarded what was in the PPM.
8 That's not our fault. They lose. There is no crime."

9 MR. HUSEBY: I 100 percent agree with that. But here
10 is the problem: This is about materiality. What Mr. Bounds is
11 saying is, "Well, if the defense were to make an improper
12 argument about intent, then this instruction would be enough,"
13 right. And so he is saying, "Let's just confuse the jury" --

14 THE COURT: I don't think that's what he is saying.
15 Let's be fair.

16 MR. HUSEBY: Okay. But the effect it has, by
17 injecting this negligence idea into an intent argument, in
18 anticipation that we are going to make that argument, and we
19 are not. I'm not going to get up there and say, "Well, gee, if
20 they didn't read it, that's on them." I am just going to say,
21 "They didn't have the intent to deceive or cheat because they
22 believed they were reading it."

23 MR. TREMONTE: Right. And that's why this is really
24 a rebuttal issue and not a materiality instruction issue.

25 MR. DADHICH: Your Honor, I think we keep it as it

1 is, because in the trial itself there are objectionable
2 questions that they asked over and over again alluding to
3 victim negligence. I think it is a strong statement here to
4 distinguish between any sort of civil context and criminal
5 context is necessary.

6 MR. HUSEBY: We weren't alluding to victim
7 negligence. What we were alluding to is the fact that when
8 someone like Bob Zamarripa says, "I made the deal on a
9 handshake," but then his email showed his accounting firm met
10 with the auditing firm.

11 MR. BOUNDS: Well, I don't think that was the
12 objectionable questions to which Mr. Dadhich was referring. I
13 think we all recall well a series of questions, none of which
14 was admissible, specifically aimed at eliciting admissions from
15 the witness that they did not read the materials.

16 MR. HUSEBY: They're to trying to show that the
17 witnesses had, in fact, had read the material.

18 MR. CALFO: Your Honor, I think there is another
19 issue in addition to intent, and that's credibility. The
20 witnesses, they'd get up there and say, "I didn't look at the
21 PPMs. I didn't look at anything. All I cared about is what
22 Brian Oliver told me."

23 I think one of the things we were trying to do,
24 especially with the RIAs, is show that's not true. You're not
25 telling the truth. You knew X. You knew Y. Look, Fariba --

1 Ms. Ronnasi kept a file available for all of her investors and
2 says in her email, "If you need any PPM, we have got it right
3 here to send to you," yet she testified on the stand that she
4 never looks at PPMs -- that nobody looks at PPM, and the tear
5 sheet is the bible.

6 I just think you guys are running into a brick wall
7 here. I think you are really in trouble by preventing us to
8 argue credibility and also intent. We are not going to argue
9 victim negligence undercuts the issue of materiality.
10 Materiality is a dead-end for us, okay. Let's face it.
11 Materiality is a nothing argument. It has got to be intent or
12 credibility.

13 MR. TREMONTE: And I would like to add, Your Honor,
14 on the credibility issues there is an additional layer to this
15 that I've always thought was deeply problematic, and I thought
16 was especially problematic after the RIA witnesses. The
17 Government elicited testimony on direct; for example, from
18 Ms. Ronnasi that the tear sheet is the bible. That position by
19 an RIA principal contravenes federal law, right. And the
20 problem there is you had the Department of Justice implicitly
21 endorsing a position from a witness -- their own witness --
22 that was contrary to federal law.

23 So I think from our perspective, to box us out of
24 being able to being able to direct the jury's attention to the
25 credibility issues with some of the testimony about what the

1 RIA witnesses in particular did and didn't do with the
2 information they got, would be prejudicial.

3 MR. BOUNDS: I just want to emphasize, Your Honor,
4 that we thoroughly understand why some of the questions were
5 asked of some of the witnesses going to their credibility and
6 certainly do not think it objectionable to question the
7 credibility of a witness based on inconsistencies between
8 representations and conduct. I don't think that any of that
9 implicates an omission by an investor or an RIA. None of that
10 is relevant to whether they were credible when they said
11 something, unless it's inconsistent with another fact that they
12 represented, in which case I think that's a perfectly
13 appropriate argument.

14 THE COURT: Thank you, all.

15 MR. TREMONTE: Just to make it concrete, I think the
16 argument would be, No. 1, insofar as we knew, they got all this
17 stuff. And then No. 2, Witness X took the stand and said,
18 "Yeah, I didn't read it. That's really not plausible, ladies
19 and gentlemen. That's not consistent with what you would
20 expect of a principal of an RIA. There was other evidence from
21 which you know that they have these obligations, and so you
22 should disregard it."

23 THE COURT: Understood. Thank you all very much.
24 I'll think about it.

25 Anything on 21, intent to defraud.

R. Zamarripa - D

1 people money back, the primary investment, that they would be
2 able to tap those lines of credit with Goldman Sachs and
3 Wells Fargo. And I asked if they had used that to date, and
4 the answer was "no."

5 Q What about investor money? Why was that important for you
6 to ask about whether investor money would be used to pay
7 redemptions and interest?

8 A Well, to me, that is a classic Ponzi scheme. If you're
9 basically taking other people's money to pay other people's
10 investments, it's a Ponzi scheme. You are not creating any
11 value. You are using other people's money to pay --

12 MS. ESTEVAO: Objection. Lay opinion.

13 THE COURT: Overruled.

14 BY MR. DADHICH:

15 Q You said "you're not creating any value." What does that
16 mean? Explain that for the jury.

17 A Well, to me, if you're having a business, you've got to
18 create value and continue to sustain it through profits of your
19 primary business. And that's how you pay your bills and you
20 pay your employees. And in this case, it was in my view that
21 it is just a -- if you're using investor money to pay off
22 interest and redemptions of other investors, the business
23 itself isn't creating any profit. You're basically creating a
24 Ponzi scheme.

25 Q Would you willingly invest in a Ponzi scheme?

R. Zamarripa - X

1 A Not that I remember.

2 Q Isn't it true, or do you know, that there is a trade-off
3 in getting that higher yield for these Private Notes? That's
4 why it's subordinated; that there is a trade-off there?

5 A I thought the notes were going to buy receivables that
6 were fully recourse by the hospitals they were buying from. So
7 it made sense that it was low risk to me regardless of that
8 interest payment that was made.

9 Q Are you aware whether the private placement memorandum
10 that was in place at the time specifically said that your
11 security interests would be subordinated -- subject to
12 subornation to a senior creditor?

13 THE COURT: Is there a relevancy objection to that?

14 MR. DADHICH: Yes, Your Honor. Same objection.

15 THE COURT: Sustained.

16 THE WITNESS: Could you repeat the question?

17 THE COURT: No. I'm sustaining the objection, so you
18 don't have to answer it. He is going to ask another question.

19 MR. OLSON: Your Honor, at this time I would like to
20 offer the PPM of this time period.

21 THE COURT: You may.

22 MR. OLSON: Which is 1414.

23 THE COURT: Any objection to 1414?

24 MR. DADHICH: Can we be shown of it? Maybe some
25 particular parts of it?

R. Zamarripa - X

1 THE COURT: Any objection to this exhibit?

2 MR. DADHICH: None, Your Honor.

3 MS. ESTEVAO: No, Your Honor.

4 MR. CALFO: No, Your Honor.

5 THE COURT: Received.

6 BY MR. OLSON:

7 Q If we could go to page 20 of that document, the PDF page.

8 Make that paragraph large.

9 Sir, does this paragraph tell you that your security
10 interest in the collateral -- I would highlight this last page
11 here. Does this tell the reader that, in practical effect, the
12 security interest in the collateral in favor of subordinated
13 note holders may be junior to the security interest in favor of
14 the lender providing the credit facility to the subsidiary?

15 MR. DADHICH: Objection. Relevance.

16 THE COURT: Sustained.

17 BY MR. OLSON:

18 Q If we could go to the next paragraph here. Enlarge that
19 paragraph. If you could highlight this sentence right here.
20 Actually go up to currently.

21 Sir, would you agree that these two sentences tell
22 the reader that there is a senior indebtedness to the
23 company --

24 MR. DADHICH: Objection. Relevance, Your Honor.

25 THE COURT: Sustained.

R. Zamarripa - X

1 BY MR. OLSON:

2 Q You didn't read any of this when you made your --

3 MR. DADHICH: Objection. Relevance, Your Honor.

4 THE COURT: I think we have already covered that, so
5 I'll sustain it.

6 BY MR. OLSON:

7 Q If we can go to page 14 of the document. I think another
8 thing you've said is that it was your understanding, from what
9 Mr. Jesenik said in this initial meeting, was that he told you
10 that the only thing that the company was investing in was
11 healthcare receivables. Is that part of what you're alleging
12 against Mr. Jesenik?

13 A That was my understanding, yes.

14 Q And that there was -- have you testified or are you saying
15 that's one of the reasons why you invested in this; that it was
16 solely healthcare receivables?

17 A That was the only reason I made my initial investments,
18 correct.

19 Q Okay. Now, if we could go to page 8 of the PDF. I'm
20 sorry. Page 14 of the PDF.

21 You see here it talks about educational receivables.

22 MR. DADHICH: Objection. Relevance, Your Honor.

23 THE COURT: Sustained.

24 BY MR. OLSON:

25 Q All right. You can take that down.

R. Zamarripa - X

1 So that first investment that you made, Aequitas
2 timely redeemed your initial investment without any problem; is
3 that correct?

4 A I'm not sure they redeemed the investment or if we rolled
5 it over.

6 Q You successfully received interest --

7 A Correct.

8 Q -- on these accounts?

9 And as far as that first investment goes, you don't
10 know how Aequitas used your money, do you?

11 A Well, I thought I did, but obviously I didn't.

12 Q But you don't actually know what they did with your money,
13 do you?

14 MR. DADHICH: Objection. Speculation.

15 THE COURT: Mr. Zamarripa, you know what you were
16 told. You don't know what they actually did. Is that correct?

17 THE WITNESS: That's correct.

18 THE COURT: Overruled.

19 Next question.

20 BY MR. OLSON:

21 Q All right. Let's move on to this bridge loan that you
22 talked about that happened in November of 2014. So it was
23 termed a "bridge loan." Does that mean anything to you, that
24 term, "bridge loan"?

25 A Well, what I believe it to mean is that it is just a

R. Zamarripa - X

1 short-term loan until they get the proper funding in place to
2 pay the loan -- that short-term loan back. So it is bridge
3 loan for 90 days, or whatever term it was, and they should get
4 funding and be able to pay the money back.

5 Q So is it your understanding then that when you would get
6 paid back, it would be as a result of some new loan coming in
7 to redeem you?

8 A Well, yeah. I did not know what the specifics were, but I
9 expected to get it paid back in 90 days on the terms.

10 Q Sure. I understand. But you're not expecting -- you're
11 expecting to be repaid with some kind of new investor money,
12 correct?

13 MR. DADHICH: Objection. Speculation, Your Honor.

14 THE COURT: One moment. Did you have an
15 understanding of how you would be repaid?

16 THE WITNESS: No.

17 THE COURT: Next question.

18 BY MR. OLSON:

19 Q Okay. In your direct examination, you testified that you
20 were pitched that this was a high-interest, short-term bridge
21 loan, correct?

22 A Correct.

23 Q And that it was needed for some purchase of receivables,
24 correct?

25 A Correct.

R. Zamarripa - X

1 Q So did that tell you that they were going to take your
2 money and purchase some receivables?

3 A That's what I thought.

4 Q But did you not also testify, in this same pitch that they
5 gave you, that they would be raising more money to pay you
6 back? Didn't you testify to that?

7 A Not "potentially." I thought they would be raising more
8 money, but I didn't know exactly how it would get paid back.

9 Q Raising more money how?

10 A To get more investors, I assume.

11 Q So new investors would come along and pay you back?

12 A I did not have the understanding that's how I was going to
13 get paid back.

14 Q Isn't that what you just said?

15 A I said that they were going to raise money -- thinking
16 about it now, I guess if they were raising more money, somehow
17 they would pay the bridge note back, and I really didn't think
18 about how that money would get paid back. Obviously, now, it
19 was with other people's money.

20 Q As you sit here today, do you actually know how they spent
21 your money?

22 A No.

23 Q Now, the first time that note came due, 90 days out, so
24 that would have been early February? Early February?

25 A Correct.

R. Zamarripa - X

1 Q At that point somebody asked you to extend. Did
2 Mr. Oliver ask you to extend it?

3 A That's what I recall.

4 Q What you were told at that time is the reason was because
5 Aequitas was having trouble raising money to pay you off?

6 A Correct.

7 Q That was your testimony, correct?

8 A Correct.

9 Q So you knew at that time that they were having trouble
10 raising new investor money to pay you off?

11 A New investor money to buy receivables, yes. And my
12 understanding was that they were having trouble -- they were
13 having either redemptions -- they were having cash-flow issues.
14 Whether they were using investors' money to pay me back, it was
15 a bridge loan. So potentially that bridge loan was essentially
16 buying my share of the receivables back. So if you think about
17 it, if they were using investor money to pay my bridge loan
18 back, I got the money back, and the loans that they gave took
19 my place on the slot. So I just looked at it as it was a --
20 they had a cash-flow issue, and they were raising money to buy
21 more -- to buy receivables and pay off the bridge note.

22 Q By the way, you testified that Mr. Jesenik told you --
23 when they had these liquidity or cash crunch times, they could
24 just draw on a bank line. So as we're into 2015, why didn't
25 you just demand that they pay you with one of these bank lines?

R. Zamarripa - X

1 A I demanded to get paid. I didn't know how they were going
2 to pay it, but I demanded to get paid.

3 Q Well, why didn't you demand that they pay you on the
4 Wells Fargo line?

5 A What's the difference?

6 Q Or the Goldman line?

7 A I didn't care how I got paid -- whether it was Goldman or
8 Wells Fargo. I wanted the bridge note payment made, and I was
9 certainly demanding on that.

10 Q No dispute on that.

11 So same series of questions here, Mr. Zamarripa.
12 When you invested in November of 2014, you signed a
13 subscription agreement, correct?

14 A Correct.

15 Q If we could pull up Defense Exhibit 1417.

16 THE COURT: Are you offering it?

17 MR. OLSON: Yes.

18 THE COURT: Any objection to 1417?

19 COUNSEL: No, Your Honor.

20 THE COURT: Received. 1417.

21 BY MR. OLSON:

22 Q Let's scroll to the 19th page of the PDF. It should be
23 your signature line on there. Let's just confirm that.

24 Is that you?

25 A Yes.

R. Zamarripa - X

1 Q It's dated November 10th, 2014, in the amount of
2 \$2,500,000?

3 A Correct.

4 Q Okay. Similar question: Before signing this, did you
5 read this document?

6 A Not to my knowledge.

7 Q Not to your knowledge, you didn't read it at all?

8 A I might have perused it, but I don't recall reading it in
9 detail.

10 MR. DADHICH: Objection. Relevance to this line of
11 questioning, Your Honor.

12 THE COURT: I'm going to sustain it -- not to that
13 question. But if there is a timely objection, I anticipate
14 sustaining it.

15 BY MR. OLSON:

16 Q So if there are -- well, let me ask this question: You
17 didn't read it, but were you aware of the provisions that were
18 in it?

19 A Not particularly, no.

20 Q Did somebody describe to you the provisions that were in
21 it?

22 A Not that I recall.

23 Q For example, did anyone describe to you a paragraph about
24 due diligence?

25 MR. DADHICH: Objection. Relevance.

R. Zamarripa - X

1 THE COURT: Overruled.

2 THE WITNESS: Not that I recall.

3 BY MR. OLSON:

4 Q Did anyone describe to you a paragraph about
5 sophistication?

6 MR. DADHICH: Objection. Relevance.

7 THE COURT: Overruled.

8 THE WITNESS: Not that I recall.

9 BY MR. OLSON:

10 Q Did anyone describe to you a paragraph about suitability?

11 A Not that I recall.

12 Q Did you consult anyone about the risks --

13 MR. DADHICH: Objection. Relevance.

14 THE COURT: Overruled. Generally let's let the
15 question be completed before stating an objection.

16 MR. DADHICH: Yes, Your Honor.

17 BY MR. OLSON:

18 Q Did you consult with anyone regarding the riskiness or
19 non-riskiness of this particular investment?

20 A No, not that I recall.

21 Q Did you read a private placement memorandum that would
22 have been in effect at the time this subscription agreement?

23 A Certainly not in detail, no.

24 Q But you received one?

25 A I may have.

R. Zamarripa - X

1 Q Did you consult a CPA or an attorney or any other
2 professional regarding this particular investment?

3 A Not that I recall.

4 Q I'm going to briefly show you this particular private
5 placement memorandum, which we have received in evidence, I
6 believe already, as Exhibit 1422. Again, this is kind of a
7 generic one. It is not necessarily the one you physically
8 received, but I'll represent to you that this is one that was
9 in effect at the time of your investment. So if we can go to
10 page 9 of the PDF number. You see below there where it says
11 "sources of repayment"?

12 A Yes.

13 Q Does the document say that "source of your repayment for
14 your investment could be proceeds from future capital raises"?

15 MR. DADHICH: Objection.

16 THE COURT: Sustained.

17 Let me explain to the jury a little bit about why I'm
18 sustaining the objections, and I'll give you more legal
19 instructions later. But under the criminal law of mail fraud
20 and wire fraud, we don't blame the victim. If fraud has been
21 committed -- and that's going to be your decision later to
22 decide whether or not a scheme to defraud has been committed or
23 a conspiracy to defraud has been entered into -- that's
24 sufficient. We do not ask under the criminal law whether or
25 not the victim in any way was negligent in incurring the loss.

R. Zamarripa - X

1 I will give you the details about this later in my final
2 instructions.

3 But I'm sustaining these objections because it is
4 irrelevant whether or not the victim of an alleged criminal
5 fraud was or was not negligent, and we do not seek to blame the
6 victim of a criminal fraud.

7 This is not a civil trial. Mr. Zamarripa is not
8 suing to recover money back. Different legal principles may
9 apply and do apply in a civil lawsuit. This is not a civil
10 lawsuit. This is a criminal case. And as I will instruct you
11 more fully at the end of the trial, in criminal cases, the
12 victim's negligence, or not, is irrelevant.

13 You may proceed.

14 BY MR. OLSON:

15 Q Mr. Zamarripa, my purpose is not to cast blame on you. My
16 purpose is to ask you questions about what Aequitas disclosed
17 or attempted to disclose to you. So on this next page -- if
18 you could turn to the next page, there is a section there
19 called "use of proceeds." If we could highlight the first
20 paragraph.

21 MR. DADHICH: I'm going to launch the same objection.

22 THE COURT: Let me ask you, Mr. Zamarripa: Did you
23 read this?

24 THE WITNESS: No. I think I stated a couple of times
25 that I haven't really read it. I didn't go into it in any

R. Zamarripa - X

1 detail. It is like other -- I'm not the only one probably --

2 THE COURT: Let's not speculate about that. Let's
3 talk about what you know. The objection is sustained. I think
4 nothing else in this document is now going to be relevant.

5 MR. OLSON: Okay. Your Honor, could we be heard at
6 sidebar?

7 THE COURT: Yes.

8 (Discussion was held off the record at sidebar.)

9 (Proceedings resumed:)

10 THE COURT: The next question, Mr. Olson.

11 BY MR. OLSON:

12 Q You and Mr. Szabo played golf on a weekly basis in 2014
13 and 2015, didn't you?

14 A I would not say a weekly basis. We did play some golf
15 together but not weekly. That's not correct.

16 MR. OLSON: I have no further questions.

17 THE COURT: Ms. Estevao, you may inquire on behalf of
18 Mr. MacRitchie.

19 MS. ESTEVAO: Do you mind if we have a minute to
20 switch?

21 THE COURT: You may have a minute.

22 CROSS-EXAMINATION

23 BY MS. ESTEVAO:

24 Q Good morning.

25 A Good morning.

R. Zamarripa - ReX

1 Mr. Calfo's examination, anything further?

2 MR. DADHICH: No, Your Honor.

3 Thank you.

4 THE COURT: Mr. Zamarripa, thank you very much. You
5 may be excused from all subpoenas. And thank you for being
6 here.

7 Members of the jury, we will take our lunch recess.
8 If I could get you to indulge me a little bit and reconvene at
9 1:10, please.

10 (Open court; jury not present:)

11 THE COURT: May I ask is that the back doors be
12 closed, please.

13 We are here without the jury. Relax.

14 I think Mr. Olson and Mr. Calfo and Ms. Estevao, if
15 you want -- you wanted to put something on the record about our
16 sidebar conference. You may put whatever you want on the
17 record.

18 MR. OLSON: Well, Your Honor, I'll go first.
19 Understanding this witness testified that he did not read these
20 documents, or skimmed through them, I think it is still a
21 relevant and viable line of questioning to ask about -- what's
22 his understanding was of what's being disclosed in these
23 documents, even if he didn't read them at the time, because it
24 goes to an intent to defraud. If certain things are in fact
25 being disclosed, they are disclosed in these documents.

1 It also goes to the issue of this witness's
2 credibility, which I didn't mention at sidebar but Mr. Calfo
3 did. He testified about three misrepresentations that were
4 made in this initial meeting, two of which are pretty clearly
5 against the language of the PPM. The other one about the Ponzi
6 thing is pretty well covered by the PPM as well.

7 So the fact that those provisions in there -- are in
8 there -- about Private Note being subordinated to banks, about
9 how the lines of credit are for the very purpose of purchasing
10 receivables, not just to redeem previous investors, calling
11 those to this witness's attention and having him testify about
12 it, even if he didn't read the document at the time, is
13 relevant to his credibility. It calls into question whether he
14 is accurately recalling this conversation that happened in
15 early 2012.

16 Issues like this, I think, are going to continue to
17 crop up. I can understand why some of my questions may be
18 perceived as blaming the victim. But there are many, many
19 purposes that are legitimate that we ought to be able to
20 inquire into with these investors and these RIAs.

21 THE COURT: All right. So to the extent it may arise
22 it in the future, you're welcome to submit further briefing. I
23 will consider it.

24 Ms. Estevao, I assume on behalf of Mr. MacRitchie,
25 you join in what Mr. Olson has said.

1 Is there anything else you want to add at this time?

2 MS. ESTEVAO: These issues have been briefed, as the
3 Court is aware.

4 THE COURT: And I have ruled on them too. Look at my
5 motion in limine ruling 404 in the docket related to motion in
6 limine No. 8 and also related to Mr. MacRitchie's first motion
7 in limine. But if you want to brief it again, you're welcome
8 to. Right now, I just want you to make your record, and then
9 we will move on.

10 MS. ESTEVAO: I would just say it appears as if the
11 Government is taking some liberties with respect to the
12 specific motion in limine ruling. It appears as if they are
13 basing their case, when it comes to the investor witnesses who
14 are testifying, that they're eliciting a huge amount of
15 subjective reliance --

16 THE COURT: To show materiality?

17 MS. ESTEVAO: Yes. While we understand the Court's
18 ruling with respect to the relevance of that testimony, in some
19 form and some amount the prejudice is really compounded by the
20 amount to which the Government is relying on here.

21 THE COURT: Thank you.

22 Mr. Calfo, I assume, on behalf of Mr. Rice, you join
23 in what Mr. Olson and Ms. Estevao said. Do you want to add
24 anything else for the record?

25 MR. CALFO: I do, Your Honor.

1 THE COURT: You may.

2 MR. CALFO: Respectfully, I think the Court's ruling
3 on this assumes that the witness is telling the truth about
4 whether he saw the PPM or not. I think it is a critical issue
5 in the case. Whether it's accurate for the investors to come
6 up and say, "I signed the subscription agreement, promising
7 that I looked at it," and then get up on the stand and say, "I
8 didn't look at any of it, I didn't read the subscription
9 agreement," I think it calls into question their credibility.

10 To the extent the Court is not allowing the
11 information to be elicited about what was in the PPMs or the
12 subscription agreement because of this witness's testimony, I
13 think it assumes the facts that the jury needs to decide, which
14 is whether or not these people are going to get up on the stand
15 now, because they're embarrassed, Your Honor, frankly, and say,
16 "I didn't read the PPM," whether that's an accurate or credible
17 statement.

18 THE COURT: I'm not assuming anything about the
19 credibility of the witness. I do think that once the witness
20 has said that he didn't read something there, everything else
21 is becoming cumulative.

22 Mr. Dadhich, does the Government want to put anything
23 on the record?

24 MR. CALFO: I'm not done yet, Your Honor.

25 THE COURT: Well, then finish.

1 MR. CALFO: The point you just made, Your Honor, that
2 once the witness has said it, then it becomes irrelevant is
3 what I'm pointing the Court to.

4 THE COURT: I understand. I'm not making any
5 findings on credibility.

6 MR. CALFO: The other thing I wanted to point out,
7 Your Honor, I know the Court said that I can still argue intent
8 to defraud based on the PPM. However, if these witnesses'
9 testimony that they didn't read the PPM is allowed to go
10 unchallenged, and it becomes that we hear a lot of victims
11 saying "no one reads it," then --

12 THE COURT: I'm not going to let a witness say that
13 "no one else reads it." I'm going to let a witness talk about
14 what he or she read and what he or she was told and with whom
15 he or she consulted.

16 MR. CALFO: Right. But having the effect of ten
17 people coming in and saying, "I didn't read it," I think
18 undermines the intent to defraud argument that we're making.
19 So I think that the defendants should be able to argue that
20 these people should not be believed when it comes to them
21 nothing reading the PPMs.

22 Secondly, the defendants should be permitted to argue
23 that intent to defraud without the obstacle that is being
24 placed in front of us, that we can't even ask them whether they
25 read it and understood it, because they have testified to the

1 Court that they didn't read it.

2 That's my record, Your Honor.

3 THE COURT: Thank you. I also think if someone says
4 they didn't read something, asking them how they would now
5 understand it is irrelevant.

6 Mr. Dadhich, is there anything you want to put on the
7 record?

8 MR. DADHICH: Nothing, Your Honor, unless you need
9 something from the Government.

10 THE COURT: No, I don't. As I said at sidebar, I do
11 think that asking the witnesses what they heard and what they
12 relied upon is relevant to materiality under the Lindsey
13 decision. I think that it is fair to ask them if they read the
14 PPM and/or the subscription agreement. But if they say, no,
15 they didn't, then I think, under 403, anything that is in the
16 subscription agreement or the PPM is both irrelevant and
17 insufficiently probative to outweigh the waste of time and the
18 cumulativeness and the risk of confusing the jury on the
19 issues.

20 See you all at 1:10.

21 (Recess.)

22

23

24

25

Closing Argument

1 loaning to third-party companies, not Aequitas to Aequitas for
2 Aequitas; paid back only if Aequitas could pay it back.

3 Olaf Janke said the same thing. "Corporate debt is
4 misleading. Corporate debt would mean that you are lending to
5 independent third parties, not to yourself. Not taking it from
6 one pocket and putting it in another pocket and calling it an
7 asset."

8 And Bob Holmen, the general counsel, when he finally
9 arrived on the scene and found what he found: "Because
10 corporate debt could imply, if one reads the PPM, it talks
11 about going out to companies that need the debt financing.
12 Lumping the loans to affiliates into that as corporate loans
13 would be misleading."

14 Jeff Sica: "I would not have invested had I known
15 the term 'corporate debt' included an intercompany loan from
16 Aequitas to Aequitas."

17 In fact, it was almost entirely intercompany loans
18 from Aequitas to Aequitas.

19 Jeff Sica went on: "It is extremely misleading,
20 because Mr. MacRitchie" -- remember, this is 543. This is the
21 email that Mr. MacRitchie sent to him in response to a concern
22 of one of the clients where they found some article talking
23 about some plaintiffs' attorneys who were trash-talking
24 Aequitas. So Mr. MacRitchie, chief of compliance, gets on the
25 old email and writes him back: "Don't worry. Everything is

Closing Argument

1 fabulous. We have got all these assets; all these corporate
2 debt assets."

3 Mr. MacRitchie is saying, "An intercompany loan is an
4 asset when an intercompany loan is a liability and we do not
5 know what the collateral is behind that loan." It turns out,
6 not much.

7 Chris Bean: "Our understanding of corporate debt
8 would be loans to companies. It was certainly our expectation
9 that there were loans to external companies, not related
10 companies."

11 And everyone who testified in this case, except
12 Mr. MacRitchie, told you that the tear sheets mattered.
13 Mr. MacRitchie told you that no one would invest based on a
14 one-page tear sheet. But that's not what the actual investors
15 and RIAs told you. "The tear sheet is the bible in our
16 industry. It describes everything you need to know about the
17 investment." You heard that from Fariba Ronnasi. She had
18 \$60 million in Aequitas, based on their marketing materials.

19 "The tear sheet" -- Chris Bean -- "has to be
20 extremely accurate, or it has no value to me as an advisor or
21 to our clients." And of course not. Why would it?

22 Jessica Cataudella testified, "You cannot disclose
23 away fraud. You can't make your marketing materials irrelevant
24 by hiding a bunch of stuff in PPM legalese. A PPM cannot be
25 used to justify and backstop fraudulent representations made on

Closing Argument

1 the front end by somebody on the sales team," or maybe somebody
2 not on the sales team. Maybe by each and every one of these
3 defendants -- Mr. Jesenik, Mr. MacRitchie, Mr. Rice. They all
4 made these misrepresentations orally as well as allowing these
5 false and misleading marketing materials to go out.

6 So let's talk about the importance of oral
7 representations. Brian Oliver told you about how they worked.
8 "Jesenik walked people through the story using the pitch deck.
9 He just flipped by the legalese disclaimer stuff in the pitch
10 deck. I don't have any specific memories of Jesenik using the
11 PPM in an investor presentation. When you are in a sales mode,
12 when you don't stop to talk about all the ways you can lose
13 your money, that isn't a path to success. The process was the
14 meetings, the tear sheet, and the pitch decks. And for the
15 most part, the sale was closed at that point. The PPM and
16 subscription document were sent later, and I don't actually
17 know whether they review those documents or not."

18 And that was backed up by the people he spoke to, the
19 RIAs. The PPM is all about hypothetical risks and was drafted
20 in 2013, although it was updated for purposes of most of this
21 indictment period in October of 2014.

22 "Tear sheets are updated quarterly and capture
23 realtime information from Aequitas." That's what Chris Bean
24 told you.

25 "Verbal communication from Aequitas executives are

Rebuttal Argument

1 two-and-a-half is not at all unreasonable for a rebuttal
2 argument. But that said, to get to two-and-a-half means that
3 you've got less than an hour.

4 Are you going to do less than an hour?

5 MR. CARDANI: Yes, Your Honor.

6 THE COURT: Okay. Let's bring in the jury.

7 (Open court; jury present:)

8 THE COURT: Welcome back, members of the jury.

9 Mr. Cardani, you may continue.

10 MR. CARDANI: Thank you.

11 There are two exhibits I just want to bring to your
12 attention. I'm not going to get into them at all. But they
13 are 225 and the 515. Those are exhibit relevant to Mr. Holmen
14 and some of his efforts to try to dig into the problems.

15 Now, Mr. Holmen talked about dealing with
16 Mr. Jesenik, and I believe the testimony was that, at first, he
17 thought Mr. Jesenik was interested in meaningful changes, but
18 then after a while -- I think he used the words "lip service."
19 Mr. Holmen then went to a more aggressive attempt to deal with
20 the fundraising problem by being more aggressive with the
21 marketing materials, because the ACF fundraising he was trying
22 to stop and that he thought he got a commitment from
23 Mr. Jesenik would stop, did not stop.

24 The Mazer memo. You have heard a lot about the Mazer
25 memo. This is someone who brought a lot of serious problems to

Rebuttal Argument

1 the company's attention. Mr. Holmen told the outside lawyers,
2 "Some of his facts are wrong, but he is more right than wrong."

3 As far as the analysis that he did that the defense
4 is talking about and relying upon, Mr. Holmen was putting his
5 general counsel hat on, trying to protect the company, getting
6 ready for an SEC review, but also he is working on a separate
7 track to really try to close down the fundraising. I think
8 you've heard quite a bit about that.

9 Okay. Now, the PPM issue. I wanted to make one more
10 point on the PPM, and that came from Jessica Cataudella. What
11 she stated in her testimony was when there is a discrepancy
12 between what's going on on the fundraising front through the
13 salespeople and through the marketing material versus the PPM,
14 that that's a problem. That's a problem for compliance
15 officers.

16 And she used the words, I believe, "You can't
17 disclose your way out of fraud." I think what she was meaning
18 by that is you can't have people out there on the fundraising
19 front saying one thing and then relying on a lawyerly type of
20 PPM to "backstop" was her word -- as a "backstop."

21 The Deloitte audit. You've heard a lot about the
22 Deloitte audit. And just a quick few comments on that.

23 Deloitte never audited the Holdings, okay. That's
24 one of the real problems, and the company's finances were in
25 Holdings, and they never audited that. They never audited for

Rebuttal Argument

1 criminal fraud. They did not audit the marketing materials.
2 They were not at the pitches to evaluate any of that. And
3 Mr. Oliver said, in the run-up to the 2015 audit, he was asked
4 by Deloitte whether he knew of any fraud. "I said no, and that
5 was false."

6 Regarding the equity, we have heard in the closings,
7 we have been criticized for not spending more time on the
8 equity side of the business. Members of the jury, not one
9 investor that you've heard from, the RIAs or the individual
10 investors, were ever pitched equity investments. What led them
11 to invest was this win/win/win and the debt service, acquiring
12 the medical and student debt. That's why they felt it was
13 safe, and they were not pitched on the idea of, "Hey, we've got
14 this winning lottery ticket called 'CarePayment'; give us a
15 bunch of money." That's not what you heard from the investors

16 So we have some slides here that I'm going to ask my
17 colleagues to bring up before you. I want to first focus on
18 Mr. MacRitchie and some of the closing comments that you've
19 heard about through his counsel. If we could start going
20 through these.

21 The questions for you, after the closings, have shown
22 up in the screen. As I alluded to earlier, he was CCO starting
23 way back in 2007. What was he doing for that long other than
24 acquiring the knowledge of what a CCO should be doing?

25 Did he pitch investors was a big question that has