APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40779

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW JOHN THEILER; SUSAN L. HERTZBERG; DAVID WELDON KRAUS; THOMAS GRAY HARDAWAY,
Defendants-Appellants.

Filed: July 7, 2026

Appeal from the United States District Court
for the Eastern District of Texas
USDC Nos. 6:22-CR-3-1, 6:22-CR-3-2,
6:22-CR-3-3, 6:22-CR-3-5

Before HIGGINBOTHAM, SMITH, and OLDHAM, Circuit Judges.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A jury found Susan Hertzberg, Thomas "Gray" Hardaway, Matthew Theiler, and David Kraus guilty of conspiring to commit illegal remunerations under the Anti-

Kickback Statute (AKS).[1] On appeal, the defendants challenge the sufficiency of the evidence supporting their convictions and the district court's handling of the jury notes and instructions. We AFFIRM.

I

This case is about a conspiracy to pay doctors for patient referrals, generating a grave misappropriation of American taxpayer dollars. The participants include a laboratory testing company, hospitals, pass-through entities called Management Service Organizations (MSOs), and physicians.

A

Boston Heart Diagnostics, Inc. (BHD) develops advanced blood lipid tests used to diagnose heart disease and contracts with physicians and hospitals to deliver tests at a fixed price. The appellants are former BHD employees. Hertzberg served as CEO, Theiler served as vice president of sales, and Kraus and Hardaway were sales representatives covering Texas.

Little River Health Care owned two "critical-access" hospitals in the rural outskirts of Austin, Texas. Critical-access hospitals provide health care to underserved communities and receive, by virtue of servicing this population, cost-based reimbursements from Medicare that significantly exceed standard fixed reimbursement rates.

In early 2015, Little River CEO Jeffrey Madison contacted Hardaway about a potential partnership. Separately, Dr. Jonathan Sheinberg, a BHD client who leased his practice to Little River, encouraged Hertzberg to do

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[1] 18 U.S.C. § 371; 42 U.S.C. § 1320a-7b(b).

business with them. Little River and BHD entered a partnership agreement in March, whereby: (1) Little River would introduce BHD's tests to its network of affiliated physicians; (2) the physicians would refer their patients to Little River for BHD testing, and Little River would provide phlebotomy services for those physicians to reduce their overhead costs; (3) Little River would bill payors directly for the costs associated with BHD's tests under Little River's favorable insurance contracts; and (4) BHD would run the tests submitted by the affiliated physicians. The partnership aimed to minimize overhead costs and maximize profits for both companies by capitalizing on Little River's high reimbursement rates as a critical-access hospital.

BHD soon learned the mechanics of Little River's operation. The hospital used pass-through entities called MSOs to recruit physicians to affiliate or "partner" with the hospital.[2] Affiliation involved referring procedures to Little River to capture the benefits of its lucrative insurance contracts. Generally speaking, MSOs operate lawfully when they provide marketing, advertising, IT, or administrative services in exchange for a fee from the physician.[3] Little River's MSOs could provide these professional services to "affiliated" physicians without issue. But as the AKS prohibits kickbacks for referring services

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[2] The scheme involved several MSOs, including Ascend, Rise, LGBR, Regal, BenefitPro, Exit Therapy, and Benchmark, among others. A co-conspirator testified that the MSOs were "just a piece of paper" and that "the names were secondary" because "[i]t was all for the purpose of procuring referrals."

[3] *See, e.g., United States v. Sorensen*, 134 F.4th 493, 500–03 (7th Cir. 2025) (holding physician did not violate AKS by making payments to third-party MSO providing "only advertising services").

paid by federal health programs, the MSOs could not legally compensate Little River's network of physicians for referring federally insured patients.

BHD's Texas sales team—namely Hardaway, Kraus, Jeff Parnell, and Laura Howard, all of whom reported to Theiler—managed BHD's relationship with Little River on the ground. They visited physicians' offices with an MSO "marketer" to onboard physicians to Little River's network. They would conduct follow-up visits a "couple times a week." The marketers included Robert O'Neal, Christopher Gonzales, and Ruben Marioni, among others. O'Neal was considered the "architect" and gatekeeper, as marketers had to "go through" him to work with certain hospitals.

The profitability of Little River's model was patent. BHD's annualized revenue from the partnership reached $4.4 million by June 2015, $12.9 million by July, and $20.8 million by September. The average reimbursement for each test billed under the agreement doubled by September, rising from around $400 to $942. And the Texas sales representatives' rates for blood-test orders increased by 51 percent, 257 percent, and 300 percent.

Some were understandably wary of the model, like Jo-Anna Shore, BHD's vice president of hospitals. In November, Shore told Hertzberg that she did not "fully understand the Little River business model," *i.e.*, its "marketing arm (MSO?)" and "targeted provider market." Shore stated her "strong recommendation and request, is that we reel this in and ask the field to stand down on any further client bill engagement with hospitals, Critical Access or otherwise, until we have an opportunity to train." In response, Hertzberg paused expansion of Texas hospital partnerships, arranged a call with Little River to

learn more about its model, and hired Rob Rossi as vice president of compliance. Ultimately, Shore had persisting "questions" about the MSO model targeting physicians and advocated instead for a "joint venture" with Little River to "create a different approach."

Meanwhile, BHD "kept doing business with hospitals affiliated with MSOs," like Little River, and continued to see explosive revenue growth. From April 2015 to June 2016, BHD earned about $20.5 million in revenue from Little River, or $27 million with accounts receivable. Andy Flynn, a financial analyst, had projected annual revenues between $22 million and $142 million for the Little River partnership based on the average volume for BHD's clients nationwide. Although within Flynn's projected range, the partnership's growth was eye-popping—Little River was a 30-bed rural hospital operating out of trailers, yet within months it had grown to comprise a quarter of BHD's projected nationwide annual revenue.

BHD pursued a broader share of the Texas market in the spring of 2016, as Little River and some high-volume physicians had begun doing business with True Health, a competitor lab. Theiler, his sales team, and marketer O'Neal negotiated new partnerships with Integrity Transitional Hospital in Denton and Stamford Hospital near Abilene.

Despite BHD's record-setting revenues and expansion opportunities, trouble brewed in paradise. Hertzberg resigned on May 31, 2016, as her relationship with the company's new owner (Eurofins) and board chairman (Jonathan Lapin) soured over personnel changes, compensation, and strategic direction. Three

days later, Hertzberg and several other executives received a whistleblower complaint from hospital sales director Michael Ivers, detailing allegations of AKS violations within the company. Then came the exodus. Hertzberg publicly announced her resignation at the end of July and departed on August 9, 2016. Hardaway quit BHD that summer and continued working directly for the MSOs as a marketer. Theiler left in January 2017.

B

A grand jury indicted 18 defendants for conspiracy to commit illegal remunerations in violation of 18 U.S.C. § 371 on January 12, 2022. Hertzberg, Hardaway, Theiler, Kraus, and Madison proceeded to a joint trial. The case was tried to a jury between October 16 and November 28, 2023. The government presented 23 witnesses, including co-conspirators Parnell, Howard, O'Neal, and Marioni, among others. The evidence showed the conspirators used MSOs to recruit physicians to refer tests to hospitals and paid the physicians kickbacks based on referral volumes, then concealed the scheme through sham contracts and attestations.[4] Little River paid BHD employees to covertly work as MSO marketers. All defendants moved orally for acquittal after the government's case-in-chief and the close of evidence, and the court reserved its rulings.

[4] Although Little River's contracts purported not to pay MSOs in connection with federally insured patients, Marioni testified that the hospital paid him for sending referrals that were "both commercial and federal" and that Madison and his in-house counsel knew these provisions were "false."

At the charge conference, Hardaway requested an instruction that a defendant's good-faith belief in the lawfulness of his conduct is a complete defense to conspiracy.[5] The court refused, as the defendants could argue good faith based on the knowledge and willfulness instructions elsewhere in the charge.

The court submitted the case to the jury on November 28, 2023.[6] At 10:55 a.m. on November 29, the jury submitted a note that "Juror #12 is unwilling to change his mind based on the evidence provided and the instructions you provided" (note #3). Five minutes later, the jury added that "Juror #12 informed the jurors that his 'moral compass' would not allow him to be open minded. He also stated he would 'hang this jury'" (note #4). At 11:34 a.m., the court convened the parties, and it disclosed and read aloud only note #3. All agreed to the court's proposed response to note #3, delivered at 11:35 a.m., which read:

> I refer you to the instructions already provided. I further instruct you to continue deliberating in good faith

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[5] The proposed instruction included the following, among other things: (1) good faith is a complete defense because it is "inconsistent with willfully providing improper remuneration"; (2) good faith includes "a belief or opinion honestly held or an absence of malice or ill will"; and (3) "[i]n determining whether a defendant acted in good faith, you may consider whether he or she had discussions with legal counsel or involved legal counsel in the relevant transactions . . . even if the defendant does not rely on any specific advice of counsel as discussed below."

[6] In total, the jury sent four notes to the court throughout its two-and-half days of deliberation. Soon after the jury retired, it sent a note identifying the foreperson (note #1). Later that afternoon, the jury submitted a note that juror #1 wanted to speak with Judge Kernodle (note #2), but the request was withdrawn soon after. Only the jury's third and fourth notes are at issue in this appeal.

> until you reach a unanimous decision. You may be as leisurely in your deliberations as the occasion may require and should take all the time that you feel is necessary.

The jury returned a verdict the following morning. The court convened the parties and disclosed note #4, stating it was "very similar" to note #3 and that the court "did not directly respond to it."[7] No one objected or moved for mistrial. The court seated the jury and read the verdict—a unanimous finding that all five defendants were guilty of conspiring to violate the AKS. The court polled the jurors to ensure the verdict reflected their true intentions, and each affirmed so. The parties learned of note #4's content the next day.

The court denied the defendants' written motions for acquittal, or alternatively for a new trial. Hertzberg was sentenced to five years' probation, and Theiler, Kraus, and Hardaway were sentenced to prison for 18 months, 22 months, and 12 months and a day, respectively. All but Madison appealed.

The appellants raise overlapping claims before us. Hertzberg and Hardaway challenge the sufficiency of the evidence supporting (1) they knew of and joined the conspiracy, (2) the requisite federal nexus existed, and (3) they did not withdraw from the conspiracy. Theiler challenges only the sufficiency of the evidence supporting he knew of and joined the conspiracy. Hardaway and

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[7] It is unclear from the record whether the court read note #4 before or after convening the parties on November 29. When the court disclosed note #4 to the parties on November 30, it stated, "we did receive a second note from the jury in the process of our responding to the first note."

Kraus challenge the court's handling of the jury notes, arguing it (1) erred by not immediately disclosing note #4 and (2) instructed the jury with an erroneous *Allen* charge. Finally, Hardaway challenges the refusal of his good-faith instruction.

II

The district court had subject-matter jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. We review challenges to the sufficiency of the evidence de novo,[8] forfeited challenges to the district court's handling of jury notes for plain error,[9] and refusals of jury instructions for abuse of discretion.[10]

III

First, we assess Hertzberg's, Hardaway's, and Theiler's challenges to the sufficiency of the evidence. Then we discuss Kraus's and Hardaway's challenges to the district court's handling of the jury notes. And finally, we address Hardaway's challenge to the refusal of his good-faith instruction. For the reasons below, we find no error warranting reversal.

A

Although we review sufficiency-of-the-evidence challenges de novo, we are "highly deferential" to the jury's guilty verdict and draw all reasonable inferences in the

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[8] *United States v. Marchetti*, 96 F.4th 818, 823 (5th Cir. 2024).

[9] *United States v. Thomas*, 724 F.3d 632, 641 (5th Cir. 2013). Section II.B explores the appropriate standard of review for the jury-note related claims further, as the parties dispute it.

[10] *United States v. Shah*, 95 F.4th 328, 376 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 518 (2025).

prosecution's favor.[11] We "must affirm a conviction if . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,"[12] considering not "whether the jury correctly determined guilt or innocence, [only] whether the jury made a rational decision."[13] The verdict will be upheld so long as it is "not absurd, preposterous, foolish, or fanciful" based on the trial record.[14]

It is a crime to knowingly and willfully solicit, receive, offer, or pay a kickback "in return for referring an individual to a person for furnishing . . . any item or service for which payment may be made in whole or in part under a Federal health care program."[15] To act willfully means "with the specific intent to do something the law forbids or with bad purpose either to disobey or disregard the law."[16] To obtain a conspiracy conviction under the AKS, the government must prove beyond a reasonable doubt

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[11] *Marchetti*, 96 F.4th at 823–24 (citation omitted). "By moving for judgments of acquittal following the government's case-in-chief and again at the close of evidence, the [defendants] have preserved the de novo standard of review as to their evidentiary sufficiency argument." *United States v. Read*, 710 F.3d 219, 226 (5th Cir. 2012).

[12] *United States v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[13] *United States v. Lopez–Urbina*, 434 F.3d 750, 757 (5th Cir. 2005) (alteration in original) (citation omitted).

[14] *United States v. Sanders*, 952 F.3d 263, 273 (5th Cir. 2020) (citation omitted).

[15] 42 U.S.C. § 1320a-7b(b)(1), (2).

[16] *Shah*, 95 F.4th at 350 (cleaned up) (citation omitted); *see id.* (stating the criminal intent necessary to sustain a conspiracy conviction is the same as the underlying offense); 42 U.S.C. § 1320a-7b(b).

(1) "an agreement between two or more persons to pursue an unlawful objective," (2) "the defendant knew of the unlawful objective and voluntarily joined the conspiracy," and (3) the defendant committed "an overt act" in furtherance of the scheme.[17]

For the government to satisfy its burden of proof, "[d]irect evidence of a conspiracy is unnecessary; each element may be inferred from circumstantial evidence."[18] A defendant's "position of authority," "experience[ ] in the healthcare field," engagement in and concealment of "suspicious activities," "proximity to the fraudulent activities," and awareness of suspiciously "high profit margins" are all circumstantial evidence supporting knowledge of healthcare fraud.[19] Nevertheless, we do not "lightly infer[ ]" acquiescence in a conspiracy, as "'a verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference.'"[20]

Finally, for jurisdictional purposes, the AKS requires that payment "may be made by" or "*could* be paid for by

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[17] *Shah*, 95 F.4th at 350. No one challenges the sufficiency of the evidence as to the existence of an unlawful agreement and overt acts in furtherance of the scheme.

[18] *United States v. Willett*, 751 F.3d 335, 339 (5th Cir. 2014) (citation omitted); *see also United States v. Ganji*, 880 F.3d 760, 767 (5th Cir. 2018) ("[T]he jury may make factually based inferences."); *United States v. Simpson*, 741 F.3d 539, 547 (5th Cir. 2014) (stating voluntary participation and knowledge may be inferred from a "collection" of "surrounding circumstances" (citation omitted)).

[19] *Willett*, 751 F.3d at 340–41; *Marchetti*, 96 F.4th at 828; *United States v. Tooker*, 957 F.2d 1209, 1216, 1218 (5th Cir. 1992), *as amended on denial of reh'g* (May 8, 1992).

[20] *Ganji*, 880 F.3d at 767 (citations omitted).

a federal healthcare program."[21] To satisfy this federal nexus, the government must show the defendants "knowingly agreed to accept remuneration" in connection with referrals for "patients that *could* be federally insured."[22] It need not prove the defendants knew the conspiring physicians actually referred federally insured patients.[23]

1

Hertzberg argues her conviction is untenable as it rests on attenuated inferences from her position as CEO. She seeks vacatur of her conviction and acquittal on remand. We affirm, as the evidence of Hertzberg's (1) position of authority, (2) experience in the healthcare field, (3) awareness of suspiciously high profits, (4) proximity to fraudulent activities, (5) engagement and concealment of suspicious activities, and (6) financial stake in the scheme would enable a rational jury to infer she knowingly and willfully joined the conspiracy beyond a reasonable doubt.

The jury heard testimony that Hertzberg is an experienced, "brilliant" healthcare CEO, having led several companies before her six-year stint at BHD.[24] The jury learned Hertzberg is familiar with the AKS and how lab-

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[21] *Shah*, 95 F.4th at 352 (emphasis in original) (citations omitted); *see also id.* ("[A] person need not have actual knowledge of [the AKS] or specific intent to commit a violation of this section" (quoting 42 U.S.C. § 1320a-7b(h))).

[22] *Id.* (emphasis in original).

[23] *See id.*

[24] *See Willett*, 751 F.3d at 340 (stating position of authority is evidence supporting knowledge of healthcare fraud); *Marchetti*, 96 F.4th at 828 (same, as to experience in healthcare field).

testing companies may violate it.[25] Indeed, in 2011, Hertzberg herself alerted DOJ to potential AKS violations by a competitor lab. She reported that (1) the competitor lab was using a "marketing" company to pay "processing" and "handling" fees to physicians to induce orders at an inflated cost of $1,200 to $1,400 per test, compared to BHD's $370 tests, (2) sales representatives received unusually high compensation, and (3) the lab experienced "explosive growth" of a "couple hundred million dollars or more" over two years, which was "unheard of from what [Hertzberg] had seen in the industry."

So, Hertzberg knew the warning signs of illegal marketing operations in her field. A few months into the partnership, Little River and Hertzberg's subordinates told her that Little River's MSOs were legitimate marketing entities that recruited doctors into the hospital's network. By October 2015, she knew from Kraus that Little River worked with MSOs to "recruit providers for the Hospital network" and gave "leads" to BHD on physicians interested in "joining the MSO with access to their test offering," then Little River collected "favorable reimbursement" and paid BHD at higher rates than it could otherwise collect. She also learned that, in Kraus's view, BHD needed to "watch out for . . . MSO's who are overzealous, working with providers [whose] interests don't align with BHD." An experienced healthcare CEO—one who recently reported a competitor for improperly using marketing entities to induce and compensate physician refer-

[25] *See Read*, 710 F.3d at 226 (finding evidence sufficient for conspiracy where defendants were aware of regulations governing reimbursement, among other things).

rals—should have been, at minimum, suspicious that Little River's MSOs were "recruit[ing]" physicians without providing tangible services in return.

As with the competitor lab, Hertzberg witnessed the partnership's tremendous growth. Hertzberg received financial reports showing Little River drove BHD's annualized revenues up a net of $4.4 million in June 2015, $12.9 million by the next month, and $20.8 million by September. And by January 2016, she knew that physicians had grown 18.6 percent, hospital revenue had grown twelvefold, total revenue growth was up 51 percent from the year prior, and Texas grew more than any region.[26] Hertzberg received these reports with excitement, not concern. For instance, she responded to the September 2015 financials with, "WOWIE!!!!! HOW DO WE GET SOME MORE OF THAT???!!!!!!!"

Hertzberg also knew the average reimbursement per test from Little River was unusually high—between $900 and $1,200, compared to the usual $370—much like the competitor lab she reported to DOJ. She understood that Little River helped BHD set referral-volume records. Meanwhile, BHD's competitors were suffering from industry-wide negative trends after the "demise" of a competitor lab. Hertzberg told her board of directors that BHD had bounced back substantially in 2015, coinciding with the Little River partnership, while other labs "did not recover."

Defending her own lack of concern, Hertzberg emphasizes Flynn's testimony that the revenues from Little

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[26] *See Willett*, 751 F.3d at 340–42 (finding defendant's awareness of suspiciously high profit margins, along with position of authority, was evidence supporting knowledge of healthcare fraud).

River did not make him suspicious that kickbacks were afoot. But Flynn was a financial analyst, not a seasoned healthcare CEO who reported a competitor for similarly inexplicable profits and test costs. As BHD executive Theo McCormick put it, people "notice" when a rural hospital is outperforming every other client. Another executive, Shore, voiced her "confus[ion]" about how a rural hospital could generate such high revenues from patients "way outside" the critical-access geographic scope. As in *Willett*, the jury "could infer that [Hertzberg] knew about the [kickbacks] because [her] duties made [her] aware of the high profit margins that [BHD] was receiving on the [tests referred by physicians]."[27]

In addition to her financial knowledge, Hertzberg's knowledge of the MSOs' operations was sufficient for the jury to infer her awareness of "malfeasance."[28] Howard, a co-conspirator sales representative and marketer, testified that Hertzberg was "aware" that the "MSOs were helping [BHD's] sales reps in the field," and that the MSOs "drove" "the Boston relationship with [Little River]." Indeed, Hertzberg knew MSOs were the most common source of leads to Little River and that many referring physicians had specialties unrelated to BHD's cardiovascular focus, like neurologists and psychiatrists.[29]

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[27] *Id.* at 341.

[28] *See United States v. Hesson*, 746 F. App'x 324, 334 (5th Cir. 2018) (unpublished) ("[W]hen an individual holds a position of authority within a company and remains within 'proximity to the fraudulent activities,' it is evidence that the defendant was aware of malfeasance within that company." (quoting *Willett*, 751 F.3d at 340)).

[29] *See United States v. Murthil*, 679 F. App'x 343, 349 (5th Cir. 2017) (unpublished) (finding evidence sufficient for conviction where government presented testimony that defendant, who had a leadership

And she would recall Kraus's warning to "watch out for" providers "[o]rdering testing on inappropriate patients" due to "MSO's who are overzealous, working with providers [whose] interests don't align with BHD or Hospital." It was not "foolish" for the jury to infer that an innocent healthcare CEO would have asked questions when she learned psychiatrists and neurologists were ordering high volumes of advanced blood lipid tests in response to outreach from marketing entities.[30]

The jury also heard testimony about Hertzberg's enduring "proximity to the fraudulent activities."[31] Hertzberg played a key role in the genesis of the Little River-BHD partnership, and she had calls and in-person meetings with co-defendant Madison and Dr. Sheinberg, among other Little River staff. She maintained a close, "loyal" working relationship with co-defendant Theiler and would join calls about Little River with the conspiring Texas sales team at least once a month. Howard testified "there was in-depth conversation about the MSOs and the influence that they provided" on these calls with Hertzberg.

And as time went on, Hertzberg's actions furthered the scheme's growth.[32] The jury heard that BHD's relationship with Little River "progressed largely due to the

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role in the company, "understood the healthcare regulations" and "knew her patients came from recruiters, not from doctor's referrals").

[30] *Sanders*, 952 F.3d at 273 (citation omitted).

[31] *Willett*, 751 F.3d at 340.

[32] *See United States v. Martinez*, 921 F.3d 452, 467 (5th Cir. 2019) (considering defendants' actions that furthered the conspiracy to determine sufficiency of evidence for knowledge); *United States v.*

activities of the senior management team." Hertzberg encouraged her sales employees to continue to grow BHD's business with Little River, asking them "what [they] would need to kick 2015 samples through the roof." She followed through, helping recruit Dr. Robert Megna, a rural physician who referred a high volume of lipid tests and had recently received a Medicare call that "spooked" him on the MSO-billing model. Howard testified that Dr. Megna became an MSO member afterward.

Hertzberg also participated in BHD's replication of the Little River deal with other hospitals in Texas. In December 2015, she discussed BHD's accounts with Integrity Transitional Hospital via email with co-conspirators. Kraus explained Integrity was a lead from Benchmark, an MSO they all knew to be "misleading and dirty" (so much so that Little River cut ties with it). Hertzberg was also involved in the genesis of BHD's partnership with Stamford Hospital, approving the pricing for the agreement in May 2016.[33]

Most telling is Hertzberg's response to Ivers's whistleblower complaint. He raised the following allegations: (1) BHD's partnerships with Little River and Integrity were "a Compliancy Disaster"; (2) people associated with Little River and Integrity have "broken the law as it relates to critical access hospitals, physician referral, billing

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Mauskar, 557 F.3d 219, 230 (5th Cir. 2009) (finding evidence sufficient for conspiracy where "the government would not have suffered the losses it did" without defendant's conduct); *Willett*, 751 F.3d at 342 (similar).

[33] The Stamford deal "replicate[d]" the Little River partnership, involving the same pricing, marketers, and physicians. It differed in that Stamford billed commercial payors and BHD billed Medicare, whereas Little River billed both commercial and government payors.

through [the hospitals] and much more with the association of the MSO's who are working on behalf of all parties"; (3) Little River and Integrity's "average patient requisition" was $1,200 per test, compared to BHD's $400 national average, and had "accounted for close to 30% of all of BHD's total gross yearly revenue"; (4) BHD's sales representatives were "tied" to these hospitals and "doing an extremely high volume of business"; (5) "those prescribing BHD testing . . . are in fact being incentivized through a model" in which they can partner or have an ownership stake; (6) Ivers had been told to ignore these hospitals and "never put anything in email regarding them"; and (7) the "VP of Sales" (Theiler) was "concealing customer data" concerning Little River, Integrity, and the Texas market.

Hertzberg emphasizes the complaint came on the heels of her resignation, as her power waned. But her looming departure from BHD did not impact her ability to report suspicious activities to the authorities; indeed, she knew whom to call at DOJ. Instead, Hertzberg approached Ivers—with the vice president of human resources by her side—and asked why he included so many people on his whistleblowing email. And the jury learned that Ivers was soon transferred from the hospital division, where he had decades of experience, to a "cardiology business development" role. Ivers's new supervisor "had no knowledge of hospital business," and the two had an "extremely adversarial, challenging, confrontational" relationship. Based on the evidence before it, a rational jury could conclude Hertzberg "fail[ed] to take remedial ac-

tion in response to an employee's concerns about company practices," indicating her complicity in the scheme.[34] As we found in *Marchetti*,

> [Hertzberg] was not just a low-level administrative employee caught up unknowingly in somebody else's conspiracy. There is sufficient evidence to infer that [Hertzberg] was put on notice that [Ivers] thought the scheme violated the AKS, was experienced in the healthcare field, and engaged in suspicious activities that allowed the jury to infer [she] was aware of unlawfulness.[35]

The jury also heard evidence suggesting concealment.[36] Hertzberg limited the distribution of Little River financial updates within the company, asking Flynn to "stop sending these updates to the distribution" and to "limit" circulation to herself and two others. Additionally, she interrupted Kraus's October 2015 presentation to the board on Little River. There, Kraus shared the explosive growth figures and explained how Little River used MSOs to recruit providers to its network. Hertzberg stood up and told the audience, "This isn't who we are, and this isn't clinically focused. This is not medically related." And Lapin, the board chairman, testified that he did not recall Hertzberg's telling him about "physician investors as referral sources to these rural hospitals" nor "involvement of MSOs in the hospital business."

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[34] *Hesson*, 746 F. App'x at 334 (citing *Willett*, 751 F.3d at 342).

[35] 96 F.4th at 828.

[36] *See Tooker*, 957 F.2d at 1216–18 (stating concealment suggests guilty knowledge).

Hertzberg's compliance efforts were also suspect. Lapin testified that BHD's "compliance committee" consisted of just Hertzberg, not a group external to senior management, which he found unusual. Rossi testified that although Hertzberg hired him as vice president of compliance, he felt "isolated" and "walled off," lacked the institutional knowledge to perform his role, and did not recall receiving questions from Hertzberg about MSOs or attending meetings with Little River. Lapin also testified that Hertzberg refused to grant access to the new general counsel after she vigorously opposed Lapin's decision to fire BHD's general counsel for withholding information from the board.

Finally, the jury heard evidence of Hertzberg's financial incentive to join and further the scheme.[37] Lapin testified that Hertzberg held a shareholder interest in BHD and stood to receive an "earnout" of up to $4.7 million from Eurofins after her departure. She was also eligible for performance bonuses.

Hertzberg also challenges the sufficiency of the jurisdictional federal nexus underlying her conspiracy conviction. We find the record sufficient to sustain a federal nexus. The government must show Hertzberg knew the referrals could have been for federally insured patients, not actual knowledge of such referrals.[38] Hertzberg knew that Little River's two rural hospitals were "paid a premium (3x standard rate) by government and private payors." Theiler informed her that Little River's "critical

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[37] *See Willett*, 751 F.3d at 340 (citing evidence that defendant benefited financially from the fraud in affirming conviction).

[38] *See Shah*, 95 F.4th at 352.

access" status allowed it "to receive cost-based reimbursement from Medicare, instead of the standard fixed reimbursement rates." And Flynn's financial updates to Hertzberg regularly included figures from BHD's partnerships with other MSO-affiliated hospitals, noting "annualized revenue is based on both ITH Client bill reqs and ITH reqs in which BHD is billing Government Payors directly." Flynn's disclaimer informed Hertzberg that, at least as to Integrity (whose accounts were derived from MSOs, like Little River), BHD ran tests for patients insured by federal programs.

Hertzberg emphasizes the exculpatory evidence before the jury. Evidence sufficient for conviction need not, however, "exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt."[39] Isolated acts with "benign explanation[s]" may be incriminating by virtue of their "number and joint operation,"[40] and "the jury is free to choose among reasonable constructions of the evidence."[41] Viewing the evidence in the light most favorable to the jury's verdict, a rational juror could have found Hertzberg knew of and joined the conspiracy based on the circumstantial evidence before it.

2

Hardaway also challenges the sufficiency of the evidence supporting he knew of and joined the conspiracy.

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[39] *United States v. Bermea*, 30 F.3d 1539, 1551 (5th Cir. 1994).

[40] *Vargas-Ocampo*, 747 F.3d at 303.

[41] *Bermea*, 30 F.3d at 1551; *see also Lopez–Urbina*, 434 F.3d at 757 (stating the court may not second-guess the jury's credibility determinations and weighing of the evidence).

He argues he innocently believed that Little River paid the MSOs to advertise services, and physicians received a genuine return on investment. But the jury heard direct evidence from a co-conspirator implicating Hardaway, and we find the circumstantial evidence concerning his (1) awareness of suspiciously high profits, (2) proximity to fraudulent activities, (3) engagement and concealment of suspicious activities, and (4) financial stake in the scheme would enable a rational jury to further infer he knowingly and willfully joined the conspiracy beyond a reasonable doubt.

Unlike Hertzberg, the prosecution offered direct evidence from a co-conspirator implicating Hardaway in the scheme.[42] Hardaway admits he knew Little River paid the MSOs and the MSOs paid physicians. And Marioni testified before the jury that Hardaway knew the MSO "made payments to physicians," knew "those payments were intended to induce referrals," and "seem[ed] to be familiar with those types of arrangements."

The jury also heard considerable circumstantial evidence that Hardaway understood the unlawful operations of the MSOs. In January 2016, Hardaway, Kraus, and Parnell prepared an executive summary for Hertzberg on the Little River partnership. The initial draft explained that marketers invite practitioners to invest in MSOs by purchasing shares, Little River remunerates the MSO, and the MSO disburses its profits among the practition-

[42] *Cf. United States v. Nora*, 988 F.3d 823, 832 (5th Cir. 2021) (stating although co-conspirators testified for the government, none testified the defendant "understood the unlawful or fraudulent purpose behind [the company's] practices").

ers who bought shares. Although the draft accurately described the model, Parnell removed mention of remunerating MSOs and paying doctors. Parnell testified his edits, which Hardaway received, were not an attempt to conceal the nature of the MSOs because "MSOs were so prevalent in the market that everyone seemed to have a grasp that physicians were investing, and it seemed like common knowledge to me."

The jury heard additional evidence of Hardaway's "proximity to the fraudulent activities," as he worked directly with co-conspirators to operate the scheme.[43] Hardaway was BHD's on-the-ground salesman who initially brought in Little River as a lead. He regularly teamed up with the co-conspirator marketers in the field to recruit and onboard physicians to Little River's network. And he participated in routine BHD sales calls discussing Little River, including a call in October 2015 where participants discussed the "influence" the MSOs provided.

The jury heard evidence of Hardaway's efforts to forward the scheme through hospital partnerships. Hardaway participated in BHD's expansion with Integrity, made possible by his and Parnell's dealings with Benchmark, a "dirty" MSO that Little River had "booted." To "solidify" the partnership, Hardaway joined Theiler for meetings with Integrity executives in January 2016. This

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[43] *Willett*, 751 F.3d at 340 (stating defendant's "proximity to the fraudulent activities" can lead to an inference of knowledge of fraud); *see also United States v. Thompson*, 761 F. App'x 283, 291 (5th Cir. 2019) (unpublished) (finding the defendant's "repeated exposure to the fraud" to be probative of his knowledge); *United States v. Brown*, 354 F. App'x 216, 221–22 (5th Cir. 2009) (unpublished) (finding defendant's "presen[ce] for many of the fraudulent transactions" was evidence sufficient for conspiracy conviction).

effort continued in the following months, as BHD pursued a similar partnership with Stamford. Hardaway told Marioni that BHD was "trying to do business with Stamford," Stamford was "replicating" the Little River Model, and if Marioni wanted a "home," he should "move [his] MSO physicians" to Stamford.

Hardaway also worked to strengthen the scheme's marketing apparatus. The jury learned that Hardaway and Stan Jones were principals of an MSO called LGRB and partners in another MSO called Rise. While working for BHD, Hardaway secretly negotiated a marketing contract between Little River, LGRB, and Rise, and he worked with Madison to pitch other sales representatives to join the MSO model.[44] Howard testified that she "got the idea from Gray Hardaway" to start her secret side hustle, Ascend MSO. And after leaving BHD, Hardaway did business with BHD's competitor in his capacity at Rise. He competed with Marioni's MSO business, offering one of Marioni's "high volume" physicians a $10,000 "sign-on bonus" to join Rise.

Moreover, Hardaway knew of the high revenues and inflated test costs accompanying the Little River partnership.[45] He knew BHD collected over $940 per test, more than double the usual amount. He knew how many BHD tests were ordered through his MSOs—109 in June, 492 in July, and 283 in one week of October. BHD's financial report for September 2015 revealed Hardaway as the

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[44] *See Tooker*, 957 F.2d at 1216–18 (stating concealment suggests guilty knowledge).

[45] *See Willett*, 751 F.3d at 341–42 (explaining factfinder may infer defendant's knowledge of illicit receipts where his duties made him aware of the commensurate high profit margins).

company's third-most productive sales representative with a 300 percent increase in requisitions.

Hardaway's financial benefits increased in proportion to these figures.[46] Sales representatives' commissions increased with revenues, and Hardaway got an additional "percentage of commissions" from Little River referrals because "he was involved in helping set [the partnership] up." Dr. Sheinberg testified that Hardaway was "beside himself" about this influx of cash. Hardaway also benefited financially through the partnership between Little River and Hardaway's MSOs. And people noticed—"[s]ome reps were asking questions about [Hardaway's] numbers" by October 2015.

Finally, the jury heard evidence supporting a federal nexus as to Hardaway—that he conspired knowing the kickbacks could come from federally insured patients.[47] In April 2015, Hardaway emailed a BHD requisition form stating that "they [Little River] plan to use the c panel for commercial and m panel for Medicare." He texted with Madison about "[h]ow we properly coordinate blood samples and paperwork and copies of insurance for you guys to bill, etc[.]," and the jury heard that Madison regularly compensated MSOs for referrals that were "both commercial and federal." Around August 2015, Hardaway emailed Jones (his partner marketer) about anticipated revenue from Little River, stating he "estimated 60% of reqs [referrals for BHD tests] being commercial." Federal case agent Jack Geren testified this meant the other 40 percent of referrals were covered by federal programs

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[46] *See id.* at 340 (citing evidence that defendant benefited financially from the fraud).

[47] *See Shah*, 95 F.4th at 352.

like Medicare. Similarly, the executive summary Hardaway helped draft for Hertzberg noted that Little River's "Critical Access" status allowed it "to receive cost-based reimbursements from Medicare, instead of fixed reimbursement rates." The jury could reasonably infer that he would not have included this information if he believed Little River billed only commercial payors for BHD tests. And regarding Hardaway's MSO, Rise, Parnell suggested physicians "could just send whatever they wanted" and that "Rise-invested doctors actually did send federal samples to Little River."

In sum, the jury heard direct evidence from Marioni implicating Hardaway in the scheme and considerable circumstantial evidence demonstrating the same. A rational jury could have found Hardaway—a key player in the sales operations of BHD and several Little River-affiliated MSOs—guilty of conspiracy to violate the AKS.

3

Theiler also challenges the sufficiency of the evidence supporting he knew of and joined the conspiracy. He claims to have overseen all the conspirators without conspiring himself and conducted only legitimate activities in the ordinary course of business. We find the evidence concerning his (1) position of authority, (2) experience in the healthcare field, (3) awareness of suspiciously high profits, (4) proximity to fraudulent activities, (5) engagement and concealment of suspicious activities, and (6) financial stake in the scheme would enable a rational jury to infer he knowingly and willfully joined the conspiracy beyond a reasonable doubt.

Like Hertzberg, Theiler was "very smart" and experienced in the healthcare industry. He knew of the explosive growth from the Little River partnership, as he received the same financial updates as Hertzberg and knew his subordinates' sales figures were extraordinary. And contrary to his characterization of the conspiracy as "bottom-up," Theiler stated BHD's relationships with Little River and Integrity "progressed largely due to the activities of the senior management team" that spent "considerable time" working "to assure that accounts are sustainable."[48]

Several witnesses testified to Theiler's accurate understanding of Little River's illicit model, enabling the jury to infer his knowledge of the scheme.[49] Howard testified that Theiler was "aware" that "MSOs were helping [BHD's] sales reps in the field." At a sales conference in October 2015, Parnell testified that he discussed MSOs with Theiler and that "everyone seemed to know the model and what was going on . . . that physicians had the opportunity to invest in" the MSOs, and he "[could not] imagine that [Theiler] would not know how [the MSOs] worked." That same month, Kraus told Theiler he "[found] out the MSO's working with Little River are not providing any management/administrative services for the office. The MSO's offer the access to testing . . .

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[48] *See Willett*, 751 F.3d at 341 (stating factfinder "could infer that [Theiler] knew about the [kickbacks] because he . . . had a position of authority in [BHD]" and "because his duties made him aware of the high profit margins that [BHD] was receiving on the [referrals]").

[49] *See United States v. Umawa Oke Imo*, 739 F.3d 226, 235 (5th Cir. 2014) ("[K]nowledge may be inferred from surrounding circumstances." (citation omitted)).

Heard their lawyer (Little River's) advised them to acquire practices in areas where they are ordering testing (Houston, Dallas) for compliance reasons/passing the sniff test." In other words, Kraus told Theiler that the MSOs were operating unlawfully by failing to provide tangible services and were covering it up. Soon after, Theiler also learned that MSOs were Little River's most common referral source and many of the referring physicians had "specialties that looked questionable, meaning they were not [BHD's] typical clients."

Even if Theiler missed the import of Kraus's words then, the scheme's illegality should have been apparent by February 2016. Theiler sent "questions about MSOs" to Rossi, the vice president of compliance, and he responded that MSOs must "service physicians" and cannot be a "sham" vehicle to pay physicians for referrals.[50] Knowing from Kraus that the MSOs were compensating physicians without providing any real services, an experienced executive like Theiler should have suspended, or at a minimum investigated, the partnership upon receiving this counsel from Rossi.

The jury also heard evidence concerning Theiler's "proximity to the fraudulent activities."[51] Theiler had regular calls with his supervisees, including Hardaway and several co-conspirators who testified for the government.

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[50] *See Murthil*, 679 F. App'x at 349 (finding evidence sufficient for conviction where government presented testimony that defendant, who had a leadership role in the company, "understood the healthcare regulations" and "knew [the] patients came from recruiters, not from doctor's referrals").

[51] *Willett*, 751 F.3d at 340.

They discussed the MSO model at work in BHD's hospital partnerships and "the influence [it] provided." Crucially, Theiler also worked closely with O'Neal, the "architect" of the illicit MSO model.[52] In January 2016, Theiler met with O'Neal in Dallas "to discuss how Boston Heart can be involved in [O'Neal's] pursuit of hospital growth," along with co-conspirators Howard and Gonzales and a neurologist. In February, Theiler spoke with O'Neal about expanding the MSO model to "5 hospitals in six months" with "phlebs or processors in each of the offices to triage the work to the right facilities" and using a "fee schedule" from BHD. And in March, Theiler and Shore met with O'Neal in Beaumont. When Shore left the room, Theiler and O'Neal discussed "the terms of the Stamford and Boston Heart arrangement," with the possibility of "more hospitals being brought into the fold." Theiler "appreciated working with the relationship, and then also said that [BHD's] stock had gone sky high, and he needed a story line." Soon after, Theiler finalized an NDA with O'Neal and copied him on the email thread executing the partnership agreement with Stamford. From this evidence, the jury could infer that working with the "architect" of the conspiracy to expand its operations revealed Theiler's knowledge of and agreement to join and further the scheme.[53]

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[52] *See Nora*, 988 F.3d at 833 (stating defendant's close relationship with the "chief facilitator of the fraud" is evidence supporting a conspiracy conviction).

[53] *See Willett*, 751 F.3d at 340 (emphasizing defendant's "proximity to the fraudulent activities" can lead to inference of knowledge); *Brown*, 354 F. App'x at 221–22 (citing defendant's "presen[ce] for many of the fraudulent transactions" as evidence sufficient for conspiracy);

The jury also heard evidence consistent with Theiler's concealment of the scheme.[54] Ivers directly implicated Theiler in his whistleblower complaint, alleging Theiler was "concealing customer data" concerning Little River, Integrity, and the Texas market. The prosecution corroborated Ivers's claim throughout trial. In October 2015, Theiler stated BHD staff were talking about Little River "way too openly, which is not good." At various points, Theiler told his team, "You guys don't send me emails about MSOs" and "just don't send me any emails about MSOs, please," which Parnell interpreted as Theiler not "want[ing] a paper trail."[55] When preparing his team for presentations on Little River, Theiler instructed them to "steer clear of pricing and profitability" and "stay away from reimbursement." The jury also learned that Theiler did not include Shore—the vice president of hospitals—in discussions with O'Neal and sales representatives about BHD's Texas hospital partnerships utilizing the MSO model.

Finally, the jury heard evidence of Theiler's financial stake in the scheme.[56] His "earnout potential" from Eurofins as a BHD shareholder was up to $750,000, and he was eligible for performance bonuses. A rational jury could have inferred from the above evidence that Theiler

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Thompson, 761 F. App'x at 291 (finding the defendant's "repeated exposure to the fraud" to be probative of his knowledge).

[54] *See Tooker*, 957 F.2d at 1216–18 (stating concealment suggests guilty knowledge).

[55] *See id.* at 1218 (stating defendant "did not act openly but surreptitiously").

[56] *See Willett*, 751 F.3d at 340 (citing evidence that defendant benefited financially from the fraud in affirming conspiracy conviction).

knew of and joined the conspiracy, so we affirm his conviction.

4

We turn now to Hertzberg's and Hardaway's alternative argument that the jury irrationally concluded neither of them withdrew from the conspiracy. To prove the affirmative defense of withdrawal, a defendant must show by a preponderance of the evidence that he or she "acted affirmatively to defeat or disavow the purpose of the conspiracy" and communicated those acts in a "manner reasonably calculated to reach his or her conspirators."[57] "[M]ere cessation"[58] or "reduced . . . participation" is insufficient,[59] nor can a defendant show withdrawal if he or she continues to receive benefits from the conspiracy.[60]

Withdrawal must also be timely. "The statute of limitations for a conspiracy charge begins to run when the defendant withdraws,"[61] and such charges carry a five-

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[57] *United States v. Killian*, 639 F.2d 206, 209 (5th Cir. Unit A 1981).

[58] *United States v. Heard*, 709 F.3d 413, 428 (5th Cir. 2013).

[59] *United States v. Hoffman*, 901 F.3d 523, 545 (5th Cir. 2018); *see also Smith v. United States*, 568 U.S. 106, 114 (2013) (explaining defendant's responsibility for the conspiracy's acts "endures even if he is entirely *inactive* after joining it" (emphasis in original)).

[60] *See United States v. Girard*, 744 F.2d 1170, 1172 (5th Cir. 1984) (stating conspiracy continues until defendant "ha[s] realized fully his anticipated economic benefits" and that this approach accords with the law of other circuits); *see also United States v. Berger*, 224 F.3d 107, 118 (2d Cir. 2000) (stating defendant "must not receive any additional benefits from the conspiracy" to show withdrawal).

[61] *Heard*, 709 F.3d at 427.

year limitations period under the AKS.[62] So here, as the government indicted the defendants on January 12, 2022, Hertzberg and Hardaway must show they withdrew from the conspiracy before January 12, 2017.[63]

Hertzberg contends a rational jury could not find she remained an active conspirator past January 12, 2017.[64] She cites two affirmative acts "defeat[ing] or disavow[ing]" the conspiracy: her separation from BHD in the summer of 2016 and her "refusal" to sign the Stamford partnership agreement in June 2016. Considering the trial record, a rational jury could find that neither act was sufficient to constitute withdrawal.

First, the evidence does not suggest Hertzberg's resignation was motivated by a desire to "defeat or disavow" the conspiracy.[65] She resigned because of tensions with Eurofins unrelated to the scheme. And when faced with Ivers's whistleblower complaint after her resignation, Hertzberg's conduct did not evince an intent to thwart the conspiracy.[66] The jury could expect a repentant CEO with one foot out the door to report suspicious conduct to the authorities (as she had before). Instead, Hertzberg chastised Ivers for sending his complaint to "so many people," and he soon found himself working in a different department.

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[62] 18 U.S.C. §§ 371, 3282(a).

[63] *See Heard*, 709 F.3d at 427–28.

[64] *Killian*, 639 F.2d at 209.

[65] *Id.*

[66] *See Hesson*, 746 F. App'x at 334 (finding defendant's "fail[ure] to take remedial action in response to an employee's concerns about company practices" indicative of involvement in scheme).

Second, the jury heard evidence disputing Hertzberg's claim that she "refused" to sign the Stamford partnership agreement. There is no evidence that the agreement was sent to her for approval, and even if it had been, her independent signatory authority was already stripped.[67] Refusal presupposes a choice exists, yet Hertzberg could not have signed the agreement even if she wanted to. Moreover, her argument is hard to square with her approval of Stamford's pricing scheme shortly before her resignation.

Additionally, there was sufficient evidence for the jury to conclude Hertzberg continued to have a financial stake in the scheme after her departure and within the statute of limitations. Hertzberg did not release her earnout interest until she signed her settlement agreement on November 8, 2019, well within the limitations period.

Hardaway also contends that even if the evidence was sufficient for his conviction, there was sufficient evidence of his withdrawal. He claims to have "publicly resigned from Boston Heart in July 2016, thereby disassociating himself entirely from the conspiracy, and from that time forward had nothing to do with the alleged unlawful conduct." This argument fails to persuade. Hardaway may have left BHD in 2016, but the jury heard evidence of his continued involvement in the conspiracy through his MSOs. Moreover, the jury heard evidence suggesting

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[67] Stamford sent BHD a partially executed contract the day after Hertzberg resigned. Kim Bracuti (BHD's CFO) signed it on June 1, 2016, as she had for the Little River deal. Hertzberg's successor, Tom Burnell, re-signed the Stamford contract on August 11, 2016 (Bracuti apparently was not the proper signatory).

Hardaway's "disavowal" by resignation was not reasonably calculated to reach his co-conspirators at BHD.[68] He gave no notice to Hertzberg or Theiler; they heard only through the grapevine that Hardaway's "numbers were going down and looked like he was leaving to go somewhere else for employment." A rational jury could find by a preponderance that Hardaway did not timely withdraw.

In conclusion, we affirm the challenged convictions as there was sufficient evidence from which a rational jury could find Hertzberg, Hardaway, and Theiler guilty of conspiring to violate the AKS.

B

Kraus and Hardaway challenge the district court's disclosure of jury note #4 and response to note #3, seeking a new trial. As a threshold issue, the parties dispute the standard of review. The government urges review for plain error because Kraus and Hardaway failed to object below.[69] Kraus and Hardaway contend that de novo review governs their disclosure claim and abuse of discretion governs their response claim,[70] as "Note 4 was not disclosed in a way that gave the parties an opportunity to object" and impacted their ability to adequately assess

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[68] *Killian*, 639 F.2d at 209.

[69] Fed. R. Crim. P. 51(b); *United States v. McClatchy*, 249 F.3d 348, 359 (5th Cir. 2001) (stating the court reviews for plain error when the defendant fails to object to the district court's supplemental instruction).

[70] *United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir. 1976) (reviewing unpreserved jury-note challenges for harmless error); *United States v. Jordan*, 851 F.3d 393, 398 (5th Cir. 2017) (preserved challenges to the district court's responses to jury notes are reviewed "for abuse of discretion, subject to harmless error analysis").

the court's response to note #3. For the reasons that follow, we find Kraus's and Hardaway's claims fail regardless of whether we review for plain error or under the less deferential standards urged.[71]

1

Kraus and Hardaway challenge the district court's failure to disclose note #4 immediately upon receipt. "Federal Rule of Criminal Procedure 43 guarantees a defendant the right to be present at every stage of the trial. That right requires that '[w]hen a communication is received from the jury, counsel should be informed of its substance and afforded an opportunity to be heard before a supplemental charge is given.'"[72]

Even under de novo review, the district court did not err by disclosing note #4 the morning after its submission. Our review of unpreserved jury-note challenges for harmless error has typically involved the district court's undisclosed responses to the jury, not undisclosed notes from the jury.[73] We have acknowledged that "[g]ranting counsel the opportunity to object only *after* the supplemental instruction has been delivered is too little, too late."[74] But our precedent does not prescribe a right to be

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[71] *See United States v. Miles*, 360 F.3d 472, 483 (5th Cir. 2004) (leaving open the question of whether the defendant's challenge to the court's handling of jury notes and *Allen* charge was reviewed for abuse of discretion or plain error, reasoning that the defendant's claims failed under either standard).

[72] *United States v. Bieganowski*, 313 F.3d 264, 293 (5th Cir. 2002) (citation omitted).

[73] *See, e.g., United States v. Sylvester*, 143 F.3d 923, 928–29 (5th Cir. 1998); *Bieganowski*, 313 F.3d at 293; *McDuffie*, 542 F.2d at 241.

[74] *Sylvester*, 143 F.3d at 928 (emphasis in original).

immediately notified of every jury note, especially when the court determines in its sound discretion that the note does not warrant a response. Instead, defendants have a right to be heard "*before a supplemental charge is given.*"[75] Here, the court did not respond to note #4, so no supplemental charge was given.[76] And the court told the parties about note #4 the next time they assembled in the courtroom.

Moreover, any error in failing to immediately disclose note #4 was harmless. Kraus and Hardaway contend they would have moved for mistrial or requested an *Allen* charge if note #4's contents were revealed before the jury reached a verdict. The district court correctly dismissed this argument, citing the "remarkabl[e] similar[ity]" and temporal proximity between the third and fourth notes and the parties' failure to raise any objection. And the court made clear that it would have denied a motion for mistrial and declined to give an *Allen* charge so early in the deliberative process.

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Kraus and Hardaway further challenge the court's responses to the jury notes. They contend the jury would

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[75] *Bieganowski*, 313 F.3d at 293 (emphasis added) (quoting *McDuffie*, 542 F.2d at 241)); *cf. Rogers v. United States*, 422 U.S. 35, 38 (1975) (stating "trial judge in a civil case had 'erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction'" (citation omitted)).

[76] *Cf. Bieganowski*, 313 F.3d at 293 (defendant's right to be present at trial was violated when district court gave supplemental instruction without informing the parties first); *Sylvester*, 143 F.3d at 928 (same).

have understood the court's response to note #3 as a response to both the third and fourth notes given their back-to-back submissions. As note #4 referenced the juror's "moral compass" leading him to "hang the jury," Hardaway and Kraus argue the court should have responded again with a full *Allen* charge and its failure to do so rendered its prior response an erroneous *Allen* charge.

"[D]istrict courts enjoy 'wide latitude in deciding how to respond to questions from the jury,'"[77] including whether "to use a written charge" or "reply to a jury's request for additional instructions."[78] If the jury struggles to reach a verdict and notifies the court, the judge may respond with a special supplemental instruction—an *Allen* charge—which typically (1) reminds the jury of its duty to deliberate and the government's burden of proof, (2) urges the jury to "forego their differences and come to a unanimous decision" without surrendering their honest convictions, (3) mentions that the case will remain open and possibly retried if the jury fails to reach a ver-

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[77] *United States v. Hale*, 685 F.3d 522, 544 (5th Cir. 2012) (citation omitted); *see also Sylvester*, 143 F.3d at 927, 929 (treating responses to jury questions as supplemental instructions considered part of the charge).

[78] *United States v. Acosta*, 763 F.2d 671, 677 (5th Cir. 1985); *see also United States v. Hitt*, 473 F.3d 146, 153 (5th Cir. 2006) ("District courts have broad discretion to give *Allen* charges when the jury indicates deadlock.").

dict, and (4) tells them to take all the time they feel is necessary.[79] If an *Allen* charge is given, we review its "compliance with two requirements: (1) the semantic deviation from approved *Allen* charges cannot be so prejudicial as to require reversal, and (2) the circumstances surrounding the giving of an approved *Allen* charge must not be coercive."[80]

Even if we review for abuse of discretion, Kraus's and Hardaway's claims fail. Before scrutinizing the instruction under *Allen* and its progeny, we first ask whether the district court's response to note #3 may fairly be described as an *Allen* charge. *Sylvester* is instructive.[81] There, after deliberating for a few hours, the jury sent a note stating, "We cannot agree—Some members will never vote guilty because there is no physical evidence and the word cocaine was never used in the conversations."[82] The court convened the jury and the parties, reread portions of the charge concerning the offense elements and key definitions, and gave a supplemental instruction explaining the burden of proof as to each count and the weight of circumstantial evidence.[83] We found that the supplemental instruction was not an *Allen* charge simply because the jury's note opened with "[w]e

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[79] 5TH CIR. PATTERN JURY INSTR. CRIM. No. 1.54 (2024); *United States v. Eghobor*, 812 F.3d 352, 357 n.2 (5th Cir. 2015) (citation omitted).

[80] *United States v. Heath*, 970 F.2d 1397, 1406 (5th Cir. 1992) (internal quotation marks and citation omitted).

[81] *See* 143 F.3d at 927–28.

[82] *Id.* at 926–27.

[83] *Id.* at 927.

cannot agree," although that phrase may in some circumstances indicate deadlock warranting an *Allen* charge.[84] Instead, "the instruction focused on the legal issues . . . rather than on the possible deadlock."[85]

Here, the district court responded to the jury's note that juror #12 was "unwilling to change his mind based on the evidence provided and the instructions you provided" with the following:

> I refer you to the instructions already provided. I further instruct you to continue deliberating in good faith until you reach a unanimous decision. You may be as leisurely in your deliberations as the occasion may require and should take all the time that you feel is necessary.

As in *Sylvester*, "[w]hile we agree with the appellants that the supplemental instruction was deficient as an *Allen* charge, we do not agree that it *was* an *Allen* charge."[86] *Sylvester* shows that magic words do not transform supplemental instructions into dynamite charges; indeed, "*Allen* charges are creatures of nuance."[87] Here, the district court tracked *Sylvester*, responding to early signs of deadlock by directing the jury to the instructions already given. Note #4's mention of juror #12's "moral compass" and intent to "hang this jury" did not transform the court's prior instruction into an *Allen* charge.

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[84] *Id.* at 927–28.

[85] *Id.* at 928.

[86] *Id.* at 927–28 (emphasis in original).

[87] *Id.* at 927.

Moreover, the district court did not err by declining to respond to note #4 with a full *Allen* charge. The district court found notes #3 and #4 very similar, as note #4 lacked new questions or signs of deadlock.[88] The court made clear that any response it might have given to note #4 would simply have repeated the response to note #3, then reasonably concluded that "separately responding to the fourth note could potentially confuse and disrupt the jury."[89] "[T]here is no error in the district court's refusal to submit a written charge, unless in the totality of the circumstances of the case the written response to the jury's inquiries created an unbalanced charge prejudicial to the defendants," and Kraus and Hardaway have made no such showing.[90]

Even if the failure to give a full *Allen* charge was error, it was harmless. Kraus and Hardaway insist the court needed to remind the jury not to sacrifice their conscientious beliefs for the sake of rendering a verdict. But that instruction was in the charge already: "Each of you must decide the case for yourself . . . do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for

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[88] Note #3 stated juror #12 was "unwilling to change his mind based on the evidence provided and the instructions you provided." Note #4 stated juror #12's "'moral compass' would not allow him to be open minded" and that "he would 'hang this jury.'" In our view, note #4 simply fleshed out note #3—note #4 explains why juror #12 was "unwilling to change his mind."

[89] *See United States v. Bayer*, 331 U.S. 532, 536 (1947) ("The trial judge[,] in the light of the whole trial and with the jury before him[,] may feel that to repeat the same words would make them no more clear, and to indulge in variations of statement might well confuse.").

[90] *Acosta*, 763 F.2d at 677.

the mere purpose of returning a verdict." And the court pointed the jury back to these original instructions in response to note #3. Assuming arguendo the jurors understood the court's singular response to cover notes #3 and #4 and then reread the instructions, they would have been reminded of their duty to not give up their conscientious beliefs. We conclude that the district court did not err in its handling of the jury notes.

C

Finally, we address the district court's refusal of Hardaway's requested good-faith instruction. To prevail, he must show the proposed instruction is "substantively correct," "not substantially covered" in the charge, and concerns an "important point" such that its omission "seriously impairs the defendant's ability to effectively present a particular defense."[91]

We review "under an 'exceedingly deferential' abuse of discretion standard."[92] "[T]he omission of a good faith jury instruction is not an abuse of discretion if the defendant is able to present his good faith defense to the jury through, *inter alia*, witnesses, closing arguments, and the other jury instructions."[93] And "[k]ey among these other jury instructions are those related to 'knowing' and 'willful' conduct because good-faith reliance defenses depend on disproving knowing or willful elements of the crime."[94]

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[91] *Shah*, 95 F.4th at 376–77 (citation omitted).

[92] *Id.* at 376 (citation omitted).

[93] *Id.* at 377.

[94] *Id.* (citation omitted).

Hardaway's argument "fails because the jury instructions the court gave covered the good-faith instruction it denied."[95] The district court instructed jurors that the government must prove Hardaway "knew the unlawful purpose" of the kickback conspiracy and "willfully" joined in it. The charge defined "knowingly" to mean "that the act was done voluntarily and intentionally, not because of mistake or accident," and it defined "willfully" to mean "that the act was committed voluntarily and purposely with the specific intent to do something the law forbids, that is to say, with the bad purpose to either disobey or disregard the law." We have affirmed the denial of a good-faith instruction where the charge includes this language.[96] "The instructions defining specific intent, 'knowingly,' and 'willingly' make plain that the jury was required to acquit [Hardaway] if, because of his good faith, he lacked specific intent."[97] Indeed, he made that argument to the jury in closing.

Hardaway argues *Shah* and similar cases are distinguishable because the district court instructed the jury regarding a defendant's "good faith reliance on the advice of counsel," creating "an erroneous belief that good faith is a defense only if all the elements for an advice-of-counsel defense are met."[98] Hardaway cites several district

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[95] *Id.* (citation omitted).

[96] *See, e.g., id.*; *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998); *United States v. Frame*, 236 F. App'x 15, 18 (5th Cir. 2007) (unpublished).

[97] *Frame*, 236 F. App'x at 18.

[98] Hardaway did not raise a "good faith reliance on advice of counsel" defense per se. Instead, he argued to the jury that because his MSO was "vetted by lawyers," he believed in good faith that all the MSOs were operating in compliance with the law. His proposed instruction

court cases where the court included separate good-faith and advice-of-counsel instructions in conspiracy jury charges.

That some judges have chosen to include general good-faith instructions in similar cases does not mean the district court abused its discretion by not doing so here. As the district court noted, the omission of a general good-faith instruction did not prevent Hardaway from arguing he "lacked scienter" because he believed "that a lawyer had looked at this and never raised a red flag." Indeed, the court stated, "I'm not going to limit them from referencing evidence that includes the involvement of lawyers . . . it's incumbent upon the Government to cite the instructions on advice of counsel and point out that this Defendant is not relying on the advice-of-counsel defense, and they can't satisfy it," to which the government agreed. Applying the "'exceedingly deferential' abuse of discretion standard," the court did not err here by denying Hardaway's proffered instruction.

IV

We AFFIRM Hertzberg's, Hardaway's, Theiler's, and Kraus's convictions, as we conclude (1) a rational jury could find that Hertzberg, Hardaway, and Theiler knowingly and willfully joined a conspiracy to commit illegal remunerations; (2) a rational jury could find sufficient evidence of a federal nexus as to Hertzberg and Hardaway; (3) a rational jury could find by a preponderance of the

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would have prompted the jury to "consider whether [Hardaway] had discussions with legal counsel or involved legal counsel in the relevant transactions . . . even if the defendant does not rely on any specific advice of counsel as discussed below [in advice-of-counsel defense instructions]."

evidence that Hertzberg and Hardaway did not withdraw from the conspiracy; (4) the district court did not err—plainly or otherwise—in disclosing and responding to the jury notes; and (5) the district court did not abuse its discretion by refusing Hardaway's good-faith instruction.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Case No. 6:22-cr-3-JDK

UNITED STATES OF AMERICA

v.

SUSAN L. HERTZBERG, ET AL.

Filed: August 8, 2024

MEMORANDUM OPINION AND ORDER

Before JEREMY D. KERNODLE, United States District Judge.

Following a jury trial, Defendants Jeffrey Madison, Susan Hertzberg, Matthew Theiler, David Kraus, and Thomas Gray Hardaway moved for judgments of acquittal, or alternatively, for a new trial. Docket Nos. 1009 (Kraus), 1049 (Madison), 1050 (Hertzberg), 1051 (Hardaway), 1055 (Hardaway), 1061 (Theiler), 1064 (Kraus). For the reasons stated below, the Court **DENIES** the motions.

I. INTRODUCTION

On January 12, 2022, the grand jury charged eighteen Defendants with conspiracy to commit illegal remunerations in violation of 18 U.S.C. § 371. Docket No. 1. The

indictment alleged a years-long conspiracy to pay physicians across Texas to refer their patients to two rural Texas hospitals, Little River Healthcare and Stamford Hospital, for laboratory tests performed by Boston Heart Diagnostics. To conceal the conspiracy, the conspirators invited the physicians to join management service organizations (MSOs), which did not provide any "services" but in fact remunerated the physicians for their patient referrals. The conspiracy included remuneration for tests that were later reimbursed by federal payors.

Five Defendants—Madison, Hertzberg, Theiler, Kraus, and Hardaway—proceeded to trial. Madison is the former Chief Executive Officer of Little River. The others are former officers and employees of Boston Heart: Hertzberg is the former Chief Executive Officer, Theiler is the former Vice President of Sales and Marketing, Kraus is a former Regional Sales Director, and Hardaway is a former Sales Representative.

The case was tried to a jury over a six-week period—from October 16 to November 28, 2023. At trial, the Government presented the testimony of twenty-three witnesses, including from co-conspirators Dr. Jason DeMattia (Trial Tr. 628–747), Ruben Marioni (*id.* 749–1166), Todd Cook (*id.* 1205–1743), Jeff Parnell (*id.* 1749–2108), Dr. Heriberto Salinas (*id.* 2109–65), Christopher Gonzales (*id.* 2190–2488), Laura Howard (*id.* 2676–3085), and Robert O'Neal (*id.* 4755–5070). The case agent, Jack Geren, also testified for the Government (*id.* 3509–4165). The Government, moreover, introduced nearly 500 exhibits to establish the elements of the charged crime against each of the Defendants.

Following the close of the Government's case-in-chief, Defendants moved for judgments of acquittal. *Id.* 5151–

5209. The Court reserved decision on the motion. *Id.* 5209. Defendants then presented testimony from three witnesses in their cases-in-chief: Dr. Jonathan Sheinberg (*id.* 5234–5403), the initial physician who worked with Boston Heart and Little River; Rosalynn Gill (*id.* 5404–53), a colleague of Hertzberg while at Boston Heart; and Ryan Downton (*id.* 5489–5806), former in-house counsel for Little River. Defendants rested after two days of testimony.

The Court notes that, despite the length of trial and detailed evidence, the twelve jurors and two alternates were attentive, diligent, and conscientious. Nearly every juror took copious notes throughout the trial. They listened to the testimony carefully, reviewed the exhibits as they were admitted, and performed their service admirably. The Court is immensely grateful for their service. The case was submitted to the jury on November 28, 2023. Two days later, the jury unanimously returned guilty verdicts for all five Defendants. *Id.* 6272–73; *see also* Docket No. 1020.

The post-verdict motions followed.

II. LEGAL STANDARD

Federal Rule of Criminal Procedure 29(c) permits a defendant to move for a judgment of acquittal after a guilty verdict. The "relevant question" in deciding a Rule 29 motion "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Valle*, 538 F.3d 341, 344 (5th Cir. 2008) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original); *see also United States v. Hernandez-Palacios*, 838 F.2d 1346,

1348 (5th Cir. 1988) (explaining that the Court must "giv[e] the Government the benefit of all reasonable inferences and credibility choices"). "The standard for a sufficiency claim is high." *United States v. Achobe*, 560 F.3d 259, 263 (5th Cir. 2008); *see also United States v. Moreno-Gonzalez*, 662 F.3d 369, 372 (5th Cir. 2011) ("Our review of the sufficiency of the evidence is 'highly deferential to the verdict.'" (quoting *United States v. Harris*, 293 F.3d 863, 869 (5th Cir. 2002))). "The jury's constitutional role in deciding criminal trials leaves little room for judicial second-guessing." *United States v. Crittenden*, 46 F.4th 292, 296 (5th Cir. 2022) (en banc). Review of a jury verdict is therefore "quite limited." *Id.* (quoting *Burks v. United States*, 437 U.S. 1, 16 (1978)); *see also Moreno-Gonzalez*, 662 F.3d at 372 ("We must ensure that our inquiry is 'limited to whether the jury's verdict was reasonable, not whether we believe it to be correct.'" (quoting *United States v. Williams*, 264 F.3d 561, 576 (5th Cir. 2001))). "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States v. Lage*, 183 F.3d 374, 382 (5th Cir. 1999).

Federal Rule of Criminal Procedure 33(a) also permits a defendant to seek a new trial "if the interest of justice so requires." A new trial should be granted "only in exceptional cases." *United States v. Robertson*, 110 F.3d 1113, 1120 n.11 (5th Cir. 1997); *see also United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018) (stating that a new trial is an "exceptional remedy."). There are two such "exceptional cases" for granting a new trial. *Crittenden*, 46 F.4th at 296–97. The first is when "error infects the trial—perhaps the erroneous admission or exclusion of evidence, inflammatory comments by a lawyer, or faulty

jury instructions." *Id.* at 296; *see also Hoffman*, 901 F.3d at 552 ("A new trial request can also be based on procedural problems with the trial if they caused a miscarriage of justice."). The second is when the evidence weighs "heavily against the verdict." *Crittenden*, 46 F.4th at 297 (quoting *Robertson*, 110 F.3d at 1118). In considering a new trial, the Court may not "reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Robertson*, 110 F.3d at 1118. Rather, a new trial should be granted only if the evidence "preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id.*; *see also United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005) (stating that, in deciding a Rule 33 motion, a court must not "entirely usurp the jury's function . . . or simply set aside a jury's verdict because it runs counter to [the] result the district court believed was more appropriate."). Deciding a Rule 33 motion is within the Court's discretion, but such discretion "should be exercised with caution." *Robertson*, 110 F.3d at 1120 n.11.

III. DISCUSSION

Defendants each moved for a judgment of acquittal, which the Court addresses in Part A below. They also alternatively moved for a new trial, which is addressed in Part B.

A. Motions for Acquittal

In their motions for acquittal, Defendants primarily argue that no reasonable juror could have found them guilty of conspiracy to commit illegal remunerations beyond a reasonable doubt. After viewing the evidence in the light most favorable to the Government, *see Valle*, 538 F.3d at 344, the Court disagrees.

As noted above, Count One of the Indictment charged Defendants with conspiracy to commit illegal remunerations in violation of 18 U.S.C. § 371. Docket No. 1. To convict under § 371, the Government must prove beyond a reasonable doubt:

> (1) an agreement between two or more persons to pursue [the] unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the members of the conspiracy in furtherance of the objective of the conspiracy.

United States v. Marchetti, 96 F.4th 818, 824 (5th Cir. 2024) (quoting *United States v. Barnes*, 979 F.3d 283, 295 (5th Cir. 2020)) (alteration in original).[1] The Government

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[1] While some defendants claim that they challenge all elements of the charged crime, no defendant meaningfully briefs whether the first element (the existence of the conspiracy) was proven. *See* Docket No. 1009 at 3–4 (Kraus); Docket No. 1049 at 15 (Madison); Docket No. 1062 at 7 (Theiler). Accordingly, the Court considers a challenge to the first element waived. *See United States v. Herrera*, 313 F.3d 882, 884 (5th Cir. 2002) ("Where . . . a defendant asserts specific grounds for a specific element of a specific count for a Rule 29 motion [for acquittal], he waives all others for that specific count."). In any event, there was substantial evidence at trial of the existence of a conspiracy. *See, e.g.*, GX-12, GX-18 (Boston Heart contracts with Little River and Stamford, respectively); GX-287 (e-mail confirming that doctors were remunerated through MSOs); GX-289 (confirming that MSOs were merely conduits that did not provide management or administrative services); GX-286 (confirming that Boston Heart sales representatives worked with MSO representatives to induce doctors to order Boston Heart tests through the hospitals); Trial Tr. 4958–59, 5122 (O'Neal testifying that physicians would send both federal and private referrals in exchange for remuneration disguised as profits from investments shares in MSOs).

offered two possible objectives that violate the Anti-Kickback Statute ("AKS"): (1) violation of 42 U.S.C. § 1320a-7b(b)(1) and (2) violation of 42 U.S.C. § 1320a-7b(b)(2). Subsection (b)(1) prohibits "knowingly and willfully *solicit[ing] or receiv[ing]* any remuneration (including any kickback, bribe, or rebate) directly or indirectly . . . in return for referring an individual to a person for the furnishing . . . of any . . . service for which payment may be made in whole or in part under a Federal health care program." (emphasis added). Subsection (b)(2) prohibits "knowingly and willfully *offer[ring] or pay[ing]* any remuneration (including any kickback, bribe, or rebate) directly or indirectly . . . to any person to induce such person . . . to refer an individual to a person for the furnishing . . . of any . . . service for which payment may be made in whole or in part under a Federal health care program." (emphasis added). The degree of criminal intent required for a conspiracy charge is the same as the underlying substantive offense—here, "knowingly and willfully." *United States v. Njoku*, 737 F.3d 55, 63–64 (5th Cir. 2013) (discussing requisite mental state for conspiracy to violate the AKS).

The Court addresses each Defendant in turn.

1. Madison

Former CEO of Little River Jeffrey Madison raises three grounds for acquittal.

a. Statute-of-Limitations Defense

Madison first argues that the last overt act in furtherance of the conspiracy occurred more than five years before the indictment was issued—and thus the indictment is barred by 18 U.S.C. § 3282(a). Docket No. 1049 at 5. Madison claims that the Government proved at most the

existence of two separate conspiracies: one involving Boston Heart and Little River and another involving Boston Heart and Stamford Hospital. *Id.* at 7. And he contends that the last overt act involving the Boston Heart/Little River conspiracy occurred in December 2016—more than five years before the January 12, 2022 indictment. Alternatively, Madison argues that he withdrew from the conspiracy more than five years before the January 2022 indictment. *Id.* at 9. Both arguments fail.

1. The Court will not disturb the "jury's finding that the Government proved a single conspiracy unless the evidence and all reasonable inferences, examined in the light most favorable to the Government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt." *United States v. Shah*, 95 F.4th 328, 361 (5th Cir. 2024) (citing *United States v. Beacham*, 774 F.3d 267, 273 (5th Cir. 2014)); *see also United States v. Shows Urquidi*, 71 F.4th 357, 382 (5th Cir. 2023) (upholding jury finding of a single conspiracy because, *inter alia*, there was an "overlapping of participants" throughout a cartel's multi-regional operations). "The principal considerations in counting conspiracies are (1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of the participants in the various dealings." *United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995). A single conspiracy can be found despite a lapse of time, change in membership, or a shifting emphasis in the locale of operations. *United States v. DeVarona*, 872 F.2d 114, 119 (5th Cir. 1989). "[A] common plan is not transformed into several plans on account of internal personnel changes." *United States v. Elam*, 678 F.2d 1234, 1247 (5th Cir. 1982). But an overlapping membership in various activities and interconnection between relationships

may indicate a "single continuing plan or scheme." *United States v. DeLeon*, 641 F.2d 330, 334 (5th Cir. 1981); *see also United States v. Lindell*, 881 F.2d 1313, 1318 (5th Cir. 1989) (finding a single conspiracy where the evidence "reveal[ed] a substantial identity of facts or participants" where the conspiratorial objective was a large-scale narcotics transaction). Further, a "[s]ingle conspiracy exists where a 'key man' is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal." *Shows Urquidi*, 71 F.4th at 382 (quoting *United States v. Richerson*, 833 F.2d 1147, 1154 (5th Cir. 1987)).

Here, the Government offered overwhelming evidence of a single conspiracy—one unified by a "substantial identity of facts or participants." *See Lindell*, 881 F.2d at 1318. For example, the Government offered evidence that many of the co-conspirators who negotiated the Little River arrangement also negotiated, approved, and managed the arrangement with Stamford. GX-349; GX-366; GX-393; GX-451; GX-464; GX-611; GX-615; GX-688; GX-840; *see also* Trial Tr. 4929–32. Defendants Laura Howard and Chris Gonzales recruited physicians to refer patients to both Little River and Stamford. GX-286, GX-291 at 3; GX-383, GX-594 at 3; GX-627. Boston Heart conducted testing for both Little River and Stamford. GX-12; GX-17; GX-18. And the MSO conspirators, including Robert O'Neal, Ruben Marioni, Scott Jacobs, and Dr. Jason DeMattia, worked with both hospitals. GX-289; GX-329 at 4; GX-476; GX-487; GX-611; GX-627; GX-652; GX-1032; *see also* Trial Tr. 983–84, 2136–37, 2295–96, 2839, 4850, 4915–16, 4945, 4957–58, 5135.

Additionally, Robert O'Neal testified that he and others began to work with Stamford before the termination

of the relationship with Little River. Trial Tr. 4960. These conspirators were "key men" unifying different aspects of the conspiracy. *See Shows Urquidi*, 71 F.4th at 382. Madison argues that there must have been two conspiracies because Little River and Stamford were competitors. Docket No. 1049 at 7–8. But the Government presented evidence that any competition helped rather than hindered the conspiracy. *See* GX-470 (highlighting doctors moving between competing MSOs); GX-568 (Madison describing competition with other hospitals and wanting increased cooperation with Boston Heart); GX-837 (listing competing marketers that Little River utilized). And "[t]he fact that some participants in the scheme are in competition does not preclude a finding of a single conspiracy." *See United States v. Morgan*, 117 F.3d 849, 859 (5th Cir. 1997) (citing *United States v. Wilson*, 116 F.3d 1066, 1076 (5th Cir. 1997), *vacated in part on other grounds, United States v. Brown*, 123 F.3d 213 (5th Cir. 1997)); *Wilson*, 116 F.3d at 1076 ("A single conspiracy may exist between two or more individuals . . . in competition with one another . . . who knowingly participate with the same core conspirators in pursuit of a common goal." (citing *Richerson*, 833 F.2d at 1154)).

The evidence, moreover, established a "common goal" among the conspirators. *See Shows Urquidi*, 71 F.4th at 382. The Government set out the common goal in the indictment: "to unlawfully enrich themselves by paying and receiving kickbacks in exchange for" patient referrals "for which payment was or might be made by a federal program." Docket No. 1 ¶ 3. And the evidence at trial, as stated above, bore out this common goal, which was advanced rather than defeated by the presence of multiple hospitals. *See Richerson*, 833 F.2d at 1153 ("Given these

broad 'common goals' the common objective test may have become a mere matter of semantics."); *Shows Urquidi*, 71 F.4th at 381 (collecting cases and finding one conspiracy where codefendants collectively "carr[ied] out the Cartel's affairs through a pattern of racketeering activity"); *United States v. Thomas*, 12 F.3d 1350, 1357 (5th Cir. 1994) (upholding jury finding of single conspiracy because the defendants had a "common goal of distributing illegal drugs for profit," even though not all defendants were aware of all codefendants). Viewing the evidence and all reasonable inferences in the light most favorable to the Government, the Court concludes that a reasonable juror could find a single conspiracy here. *See Shah*, 95 F.4th at 361.

The Government also presented more than enough evidence that an overt act occurred within the limitations period (on or after January 12, 2017). *See, e.g.*, GX-903; GX-906; GX-907; GX-909; GX-910; GX-911; GX-912; GX-918 (payments between conspirators); GX-299, GX-476; GX-482; GX-487; GX-635; GX-1060 (meetings, communications, and conduct about expansion of conspiracy to Stamford). *See Shah*, 95 F.4th at 361.[2]

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[2] Not only did the Government provide evidence of a single conspiracy, but it also proved that an overt act related to Little River occurred within the limitations period. Little River continued to communicate with Robert O'Neal in April 2017 regarding the continued payments from Little River to O'Neal's MSO. *See* GX-1060 at 3 ("Ascend is entitled to ongoing collections to and through July 21, 2017 under the Little River Contracts."). And because the conspiracy here included illegally paying physicians for referrals, facilitating payment of kickbacks to physicians by negotiating collections with the MSO is an overt act in furtherance of the conspiracy. *See United States v. Girard*, 744 F.2d 1170, 1172 (5th Cir. 1984); *United States v. Mennuti*, 679 F.2d 1032, 1035 (2d. Cir. 1982).

2. Alternatively, Madison argues that he withdrew from the conspiracy more than five years before he was indicted. Madison cites a letter sent by Little River to Robert O'Neal's MSO on December 22, 2016, in which "[Little River] terminated all its volume-based relationships with marketers." Docket No. 1049 at 9 (citing Trial Tr. 983–86, 1028–30, 5665–66; Madison Exs. 71 and 72; GX-92).

"A defendant is presumed to continue in a conspiracy unless he makes a substantial affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose." *United States v. Torres*, 114 F.3d 520, 525 (5th Cir. 1997). "'Establishing individual withdrawal [is] a burden that rest[s] firmly on the defendant regardless of when the purported withdrawal took place'—a burden perfectly consistent with due process because withdrawal is an affirmative defense, not an element of the charged offense." *United States v. Vargas*, 6 F.4th 616, 624 (5th Cir. 2021) (quoting *Smith v. United States*, 568 U.S. 106, 110 (2013)). "'In order to show withdrawal, the defendant must show that he has committed affirmative acts inconsistent with the object of the conspiracy that are communicated in a manner reasonably calculated to reach conspirators.'" *Id.* (quoting *United States v. Heard*, 709 F.3d 413, 428 (5th Cir. 2013)). And, because the jury determined this issue against Madison, the Court can overrule this part of the verdict and find withdrawal only if Madison "can show that [withdrawal] is the only reasonable view of the evidence." *Id.* (quoting *Hoffman*, 901 F.3d at 545).

Madison has failed to make this showing. The letter cited by Madison did not terminate Little River's agreements immediately, but on January 21, 2017—within the

five-year limitations period. *See* Madison Exs. 71 and 72. While sending a termination letter may be some evidence of a withdrawal, a juror could also credit the delayed termination date as the date of withdrawal, which is what the Government argued to the jury. *See* Trial Tr. 6255–56; *see also Hoffman*, 901 F.3d at 544–45 (declining to disrupt the jury's rejection of withdrawal despite a dated termination letter); *see also Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop.*, 2021 WL 409982, at *6 (E.D. Pa. Feb. 5, 2021) (finding as a matter of law that the effective date of resignation, not the date of transmission of the resignation letter, served as the date of withdrawal from the charged conspiracy). Other evidence, moreover, cut against Madison's withdrawal theory. For example, Little River continued to communicate with Robert O'Neal in April 2017 regarding continued payments from Little River to O'Neal's MSO. *See* GX-1060 at 3 ("Ascend is entitled to ongoing collections to and through July 21, 2017, under the Little River Contracts."). On these facts, a reasonable juror could find that Madison did not "disavow[ ] or defeat[ ]" the conspiracy's purpose. *See Hoffman*, 901 F.3d at 545 (quoting *Smith*, 568 U.S. at 133) (finding that "continuing to help [the conspiracy] along even if only from the sidelines" indicated a lack of withdrawal).

Madison's first argument fails.

b. Advice-of-Counsel Defense

Madison next argues that he relied on the opinions of Ryan Downton, Little River's in-house counsel, and Adam Aseron, the hospital's outside counsel, regarding the legality of Little River's lab program and marketing arrangements. Docket No. 1049 at 13. Madison contends

that this alleged reliance negates the intent element of the crime. *Id.*

"A successful advice-of-counsel defense negates willfulness by 'creat[ing] (or perpetuat[ing]) an honest misunderstanding of one's legal duties.'" *Shah*, 95 F.4th at 378 (quoting *United States v. Mathes*, 151 F.3d 251, 255 (5th Cir. 1988)). To meet the elements of an advice-of-counsel defense, a defendant must take the following steps: "(1) before taking action, the defendant in good faith sought the advice of an attorney; (2) for the purpose of securing advice on the lawfulness of potential future conduct; (3) gave a full and accurate report of all material facts; and (4) the defendant acted strictly in accordance with the attorney's advice." *Id.* (citing *United States v. Bush*, 599 F.2d 72, 77 n.12 (5th Cir. 1979)). In reviewing the record on this point, the Court must consider whether the evidence and all reasonable inferences, examined in the light most favorable to the Government, could preclude reasonable jurors from finding that Madison had the requisite intent beyond a reasonable doubt. *See id.* at 361; *see also Smith*, 568 U.S. at 113 ("The [Government] is foreclosed from shifting the burden of proof to the defendant only 'when an affirmative defense *does* negate an element of the crime.'" (quoting *Martin v. Ohio*, 480 U.S. 228, 237 (1987) (Powell, J., dissenting))).

Again, the evidence does not support Madison's argument. The Government here presented substantial evidence of Madison's intent, including testimony from his co-conspirators that Madison knew they were unlawfully remunerating physicians to induce referrals for services that could be paid for by federal healthcare programs. *See, e.g.*, Trial Tr. 789–90, 794 (Marioni describing the MSO model to Madison), 795–804 (describing Madison's

knowledge of noncompliance of Marioni's MSO with the contract between the MSO and Little River), 851–57 (describing conversation between Marioni and Madison about payment of doctors), 881–82, 924–25, 4757–58 (O'Neal confirming that Madison was part of the conspiracy), 4866.

The evidence of Madison's reliance on counsel, moreover, was weak. The Government showed that Madison failed to disclose to Aseron all the relevant facts—such as Dr. DeMattia's financial interest and affiliation with an MSO. *See* GX-193A; GX-1058; GX-189; GX-743; *see also* Trial Tr. 4644. Aseron also qualified his legal advice and testified that his advice was not frequently followed. *See* Trial Tr. 4665, 4670, 4672–73, 4675, 4677–78, 4734–36; GX-743; GX-754; GX-758; GX-981; GX-750; *see Shah*, 95 F.4th at 378. And Aseron agreed that his opinion of the Little River MSO scheme would change if MSO revenue were generated by referrals to Little River. *See* Trial Tr. 4680. In fact, Aseron admitted he was unsure whether he received all the facts when analyzing whether the MSO model violated the AKS. *See id.* 4678. Indeed, Marioni and O'Neal characterized Aseron's legal advice and recommendation of attestations as "a paper exercise." *See* Trial Tr. 924–925, 5018. Based on this evidence, a reasonable juror could conclude that Madison retained Aseron "to [e]nsure the success of [the conspirators'] mendacious scheme, not to secure legal advice." *See United States v. Carr*, 740 F.2d 339, 347 (5th Cir. 1984).

Madison argues that the testimony of Marioni and O'Neal should not be credited. Docket No. 1049 at 15–16. And he cites Downton's testimony that he (Downton) believed that the marketing program was legally compliant.

Id. at 14. But "[i]t is well-settled that credibility determinations are the sole province of the jury." *See United States v. Davis*, 61 F.3d 291, 297 (5th Cir. 1995). The jury, moreover, was entitled to disregard the testimony of Downton, an interested attorney and alleged co-conspirator. *See United States v. Novis*, 2023 WL 4746541, at *14 (E.D.N.Y. July 24, 2023) (finding that jury could reasonably reject the testimony of an interested co-conspirator lawyer in upholding verdict).

c. Sufficiency of the Evidence

Finally, Madison argues that the Government failed to establish the elements of the crime charged against him. Docket No. 1049 at 15. But there was substantial evidence Madison voluntarily agreed to join the conspiracy—knowing it was unlawful—committed an illegal act to further the conspiracy. *See, e.g., supra* Section III.A.1.b; GX-568; GX-180. Madison again complains that the two key witnesses against him (Marioni and O'Neal) were not credible, but their testimony was detailed, specific, and supported by documentary evidence. And in any event, the jury—not the Court—makes credibility determinations.

Madison also references an argument he made orally at trial—that the utilized MSO model was not illegal because the conspirators did not explicitly pay for referrals of federally insured patients. Docket No. 1049 at 4; Trial Tr. 5199–5200. But an agreement to remunerate physicians can be unlawful even if it is made in part, rather than solely or primarily, to induce a referral of a federally insured patient. *See United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) ("[A]s long as 'the benefits extended to [the] defendant were, in part, an inducement for him to refer patients to the hospital . . . the Court must

. . . find that the Agreement violates [the predecessor to 42 U.S.C. § 1320a-7b(b)(2)(A)].'" (quoting *Polk Cnty v. Peters*, 800 F. Supp. 1451, 1456 (E.D. Tex. 1992))); *see also United States v. Mallory*, 988 F.3d 730, 741 (4th Cir. 2021); *United States v. Borrasi*, 639 F.3d 774, 781–82 (7th Cir. 2011); *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000); *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68, 69–72 (3rd Cir. 1985).

And here, the Government presented substantial evidence that the remuneration was made at least in part to induce the referrals of federally insured patients. Marioni, Dr. Salinas, and Gonzales testified, for example, that the kickback conspiracy involved paying physicians for both privately insured patients and federally insured patients. Trial Tr. 797–99, 838 (Marioni), 2164 (Salinas), 2293, 2356–57 (Gonzales). One witness explained that, although the payments were nominally to induce physicians to refer their privately insured patients for testing, the payments were in fact made to induce physicians to refer *all* their patients—including those for whom Medicare, Medicaid, or TRICARE would provide reimbursement. *Id.* 1117–18 (Marioni testifying that agreement was to motivate physicians to send all referrals). O'Neal and Marioni explained that physicians did not want to send samples from their federally insured patients to a different lab than their privately insured patients. *See id.* 1092–93, 4874–75. The Court highlighted this issue at trial: "if they are agreeing to pay for referrals from private patients and it necessarily includes Government patients, isn't that some evidence that there was an agreement to pay for federal patients?" *Id.* 5200.

Further, Marioni testified that the attestations signed by physicians, which stated that the payments were not intended to induce the referral of federally insured patients, were merely "a paper exercise" without significance. *See id.* 924–25; *see also id.* 5018 (O'Neal testimony) ("Q. So you're talking about a bigger MSO, Ascend Professional Consulting, and then a sub-MSO for doctors? A. MSOs are doctors, sir. It's just a tool, just like an attestation. Same thing. We all knew what we were doing."). The Government also presented evidence that physicians who had never referred any patients, let alone federal patients, started referring all their patients (both federal and private) to Little River only after receiving payments through the MSOs. *See* GX-180 at 3–4 (text messages between Hardaway and Madison about signing new physicians with MSO model).

In light of all this evidence, a reasonable juror could find that the remuneration was made at least in part to induce the referrals of federally insured patients. *See Davis*, 132 F.3d at 1094. Indeed, the Tenth Circuit recognized the difficulty in distinguishing whether a defendant (a) remunerated physicians for legitimate purposes while merely hoping or expecting that federal samples would be referred alongside commercial samples or (b) remunerated physicians at least in part for the referral of federal samples. *McClatchey*, 217 F.3d at 835 n.7. "Making such difficult factual determinations, however, is the very role which our system of justice assigns to the finder of fact." *Id.* (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716–17 (1983)).

* * *

Madison's challenge to the guilty verdict fails. A reasonable juror could have rejected his defenses and found

him guilty of conspiring to commit illegal remunerations in violation of 18 U.S.C. § 371.

2. Hertzberg

Former Boston Heart CEO Susan Hertzberg makes two arguments for acquittal. Docket No. 1050. First, she argues that the Government failed to prove she knew about or joined the kickback conspiracy. Alternatively, she argues that she withdrew from the conspiracy outside the limitations period. As explained below, these arguments are without merit.

a. Sufficiency of the Evidence

Hertzberg concedes that a kickback conspiracy existed—that Little River CEO Jeffrey Madison and Robert O'Neal conspired to "offer[ ] physicians the opportunity to invest [in MSOs] and receive 'distributions' based on the MSO's profits" and that "the distributions were actually shams intended to induce physician referrals." Docket No. 1050 at 3. Hertzberg also concedes that members of her own sales team—Jeff Parnell, Gray Hardaway, and Laura Howard—joined the conspiracy, "secretly . . . work[ing] with the MSOs in exchange for a share of the payments from Little River." *Id.* at 4. And she acknowledges knowing that Little River utilized MSOs to "recruit doctors into the hospital's network" and that these physicians referred patients to Little River for Boston Heart testing. *Id.* at 3–6. Hertzberg nonetheless argues that no reasonable juror could have found beyond a reasonable doubt that she knew about the conspiracy and joined it. *Id.* at 9–21. The Court disagrees.

It is well-settled that the Government can prove criminal conspiracies "on circumstantial evidence alone." *United States v. Sanders*, 952 F.3d 263, 273 (5th Cir.

2020). "Indeed, a jury can infer from the surrounding circumstances whether a defendant participated in and knew of the conspiracy." *Id.* at 273–74 (citing *United States v. Eghobor*, 812 F.3d 352, 362 (5th Cir. 2015)). Because criminal conspirators operate in secrecy, a jury can consider "[w]hat people do" to infer "what lies in their mind." *Id.* at 274 (quoting *United States v. Ganji*, 880 F.3d 760, 768 (5th Cir. 2018)). "Indeed, the voluntary participation may be inferred from a collection of circumstances, and knowledge may be inferred from surrounding circumstances." *United States v. Hesson*, 746 F. App'x 324, 334 (5th Cir. 2018) (quoting *United States v. Willett*, 751 F.3d 335, 339 (5th Cir. 2014)); *see also Sanders*, 952 F.3d at 274 (holding that an agreement can "be inferred from concert of action.") (quoting *United States v. Frydenlund*, 990 F.2d 822, 825 (5th Cir. 1993)). "Moreover, when an individual holds a position of authority within a company and remains within 'proximity to the fraudulent activities,' it is evidence that the defendant was aware of malfeasance within that company." *Hesson*, 746 F. App'x at 334 (quoting *Willett*, 751 F.3d at 340). "A similar inference is permissible when the individual fails to take remedial action in response to an employee's concerns about company practices." *Id.* (citing *Willett*, 751 F.3d at 342). "But the Government must still provide 'testimonial or documentary evidence' to support an inference of awareness." *Id.* (quoting *Ganji*, 880 F.3d at 777).

The evidence here is sufficient to infer that Hertzberg knew about and joined the conspiracy. In highlighting some of the evidence in the paragraphs that follow, the

Court does not intend to exclude other evidence also supporting the verdict.[3]

First, Hertzberg was no hands-off CEO. She was deeply involved in the day-to-day affairs of the sales representatives—especially with respect to the Little River relationship. *See, e.g.*, GX-261; GX-276; GX-278 at 10; GX-332; GX-387 (e-mail from Hertzberg referring to MSOs recruiting physicians); GX-595 (Hertzberg's negotiation of hospital contracts for sales representatives); GX-180 at 6; GX-205; GX-325 (Shore's notes of call including Hertzberg discussing MSOs); GX-334; GX-426; GX-838; GX-839; GX-286 (Hertzberg's involvement as to relationships with hospitals); GX-954–970 (Hertzberg's receipt of updates regarding clients, volume, and revenue associated with Little River); Kraus Ex. 44 (note regarding involvement of senior management team in developing relationships with Little River and Integrity Health). She was well aware that Little River used MSOs to recruit physicians, *see* Trial Tr. 3411; GX-427 at 4, and there was overwhelming evidence her subordinates knew that, to obtain referrals, Little River paid MSOs, which in turn allowed referring physicians to purchase ownership interests and disperse their profits to the physicians. *See* GX-287. Boston Heart Sales Representative Laura Howard testified, moreover, that Hertzberg was present on calls that discussed MSOs, the influence of MSOs, and Howard's collaboration with Robert O'Neal and his MSO.

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[3] The same is true about the discussion herein regarding the other Defendants who challenged the sufficiency of the evidence. The Court adopts the Government's recitation of the record in its opposition to the motions, Docket Nos. 1129–33, and highlights certain key evidence herein for illustrative purposes.

See Trial Tr. 2724–25, 2758–59. And the Government presented e-mails from Kraus to Hertzberg corroborating the relationship between Robert O'Neal and Howard, as well as contemporaneous e-mails and text messages written by Howard describing discussions with Hertzberg and other Boston Heart executives regarding competition in the MSO, laboratory, and hospital space. *See* GX-273; Trial Tr. 2846–49; GX-620 at 2–3; GX-194B at 120.

Hertzberg also took steps to conceal aspects of the conspiracy. *See, e.g.*, GX-220. The Government presented substantial evidence that the revenue from the Little River relationship was unusually high, Hertzberg was keenly aware of—and ecstatic about—the relationship's success, and Hertzberg and others were concerned about sharing this information "way too openly" within Boston Heart, "which is not good." *See* GX-489 at 7; GX-112 at 17; GX-271; GX-279; GX-386; GX-220. In one e-mail to Boston Heart Vice President of Payor Innovation and Strategy Jeff Craven, Hertzberg stated: "I don't want this [Little River volume and associated revenue] data shared. Period." GX-451; *see also* GX-537 (instructing general counsel not to share certain materials related to Little River with Boston Heart's parent company); Trial Tr. 5984. Hertzberg also abruptly ended Kraus's presentation to members of Boston Heart's leadership team about the relationship with Little River—a presentation that explicitly stated Little River used MSOs to recruit physicians to use its services. *See id.* 3411; GX-427 at 4. When Boston Heart sought to duplicate the Little River model with Stamford, moreover, Hertzberg knew that the agreement would require Boston Heart, not the hospital, to bill Medicare and Medicaid for patients referred by MSO-participating physicians. *See* GX-387; GX-392.

Further, when others warned Hertzberg about the possible illegality of the Little River arrangement, Hertzberg either took no action or attempted to silence them. For example, in November 2015, Boston Heart Vice President of Strategy Joanna Shore warned Hertzberg and Theiler that she did not fully understand the Little River model using MSOs because critical access hospitals like Little River typically do not have marketing arms. *See* GX-323. Shore also advised that Boston Heart should "reel this in and ask the field to stand down on any further client bill engagement with hospitals." *See id.* And in June 2016, Boston Heart Hospital Sales Director Michael Ivers e-mailed Hertzberg about the "Compliancy Disaster" in Texas with the Little River relationship. *See* GX-412.[4] Ivers told Hertzberg that Shore:

> has personally informed me of individuals associated with [Little River] and [Integrity Hospital] who have in her view broken the law as it relates to critical access hospitals, physician referral, billing through both [Little River] and [Integrity] and much more with the association of the MSO's [sic] who are working on behalf of all parties.

Id. Ivers explained that he heard physicians were being incentivized through MSO partnerships and that Little River and Integrity Health would "go up in smoke." *Id.* Ivers later testified that the information about the use of

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[4] The Court sustained Defendants' objection to this e-mail as hearsay and admitted the exhibit for its effect on the recipients. At Defendants' request, the Court provided the jury with the following instruction: "This exhibit was not admitted to prove the truth of any of the statements in the e-mail, but rather only to show notice of any of the recipients who received the e-mail." Trial Tr. 4501; *see also id.* 6258.

MSOs in Texas was widely known within the company. Trial Tr. 4497.

At trial, in discussing the e-mail to Hertzberg, Ivers testified that Hertzberg requested to meet with him personally, along with Boston Heart's Vice President of Human Resources. *See id.* 4504. According to Ivers, Hertzberg asked "why so many people were copied on the e-mail." *Id.* Ivers found her concern strange. *Id.* 4586. Hertzberg told Ivers that she "felt like she had been punched in the gut by Mike Tyson, and she was still catching her breath." *Id.* 4504. Hertzberg also reassigned Ivers from hospital sales, an area where he was "confident" and "knowledgeable," to a different position in physician sales, which required him to report to a former lateral. *Id.* 4505, 4555–56, 4585–86. Ivers felt that he was "absolutely" pushed to the side. *Id.* 4581. Other than meeting with Ivers—and arguably demoting him—Hertzberg took no further action with his information. Hertzberg's inaction stands in stark contrast to her reaction several years earlier upon hearing about a competing laboratory engaging in similar activity—she reported the lab to the DOJ. *See id.* 4471–72; *see also id.* 4480 (requesting DOJ investigator Alan Atchison to investigate potential violations of the AKS). Hertzberg argues that she was in the process of leaving the company when Ivers sent his e-mail, alleviating her of any responsibility, but that is not the only inference one could draw. *See Moreno-Gonzalez*, 662 F.3d at 372.

A jury could infer from these circumstances that Hertzberg knew about and joined in the unlawful conspiracy. *See Sanders*, 952 F.3d at 273–74; *Hesson*, 746 F. App'x at 334. Evidence that a CEO is "an active leader in [the company's] operations," which put her "frequently

in concert with co-conspirators," and that she routinely discussed aspects of the conspiracy with others was "ample evidence indicating her awareness of, authority over, proximity to, and complicity with a fraudulent scheme, which she perpetrated in concert with co-conspirators." *Hesson*, 746 F. App'x at 335; *see also Ganji*, 880 F.3d at 767 (co-conspirator and employee testimony regarding defendant's concerted actions rebutted innocent explanations of circumstantial evidence). Efforts to conceal an illegal conspiracy, moreover, can indicate that the person knew the conspiracy was illegal. *See, e.g., United States v. Tooker*, 957 F.2d 1209, 1217 (5th Cir. 1992). And being put on notice that a scheme could violate the AKS, combined with a person's experience in healthcare and engaging in "suspicious activities," could "allow[ ] the jury to infer [the person] was aware of unlawfulness." *Marchetti*, 96 F.4th at 828; *see also United States v. Murthil*, 679 F. App'x 343, 349 (5th Cir. 2017) (twenty years of healthcare experience was probative of knowledge of conspiracy to violate the AKS); *United States v. Abovyan*, 988 F.3d 1288, 1304 (11th Cir. 2021) (evidence of role, conduct, and consistent participation in the conspiracy and significant financial gains from the conspiracy was sufficient to support verdict defendant knew the unlawful purpose of the conspiracy).

Hertzberg argues that the other conspirators concealed the scheme and prevented her from knowing its unlawful purpose. Docket No. 1050 at 10–11. But many of Hertzberg's arguments simply take issue with the Government's interpretation and characterization of the evidence presented at trial. *See, e.g., id.* at 11–14. That is not a proper basis for a judgment of acquittal because it asks

the Court to step in and weigh the evidence. *See Hernandez-Palacios*, 838 F.2d at 1348 (explaining that the court must "giv[e] the Government the benefit of all reasonable inferences and credibility choices"); *see also Moreno-Gonzalez*, 662 F.3d at 372 ("Our review of the sufficiency of the evidence is 'highly deferential to the verdict.'" (quoting *Harris*, 293 F.3d at 869)). Further, although some evidence may have supported a finding of concealment from Hertzberg, other evidence cut against it. As noted above, for example, Ivers—as well as former Boston Heart sales representative Jeff Parnell—testified that "everyone" in the company knew what was going on with the MSO kickback scheme. *See* Trial Tr. 1842–43, 1901 (Parnell), 4497–98 (Ivers).

As the Fifth Circuit recently cautioned, "[t]he jury's constitutional role in deciding criminal trials leaves little room for judicial second-guessing." *Crittenden*, 46 F.4th at 296.

For these reasons, Hertzberg's first argument for an acquittal fails. *See Sanders*, 952 F.3d at 273–74; *Hesson*, 746 F. App'x at 334–35; *Ganji*, 880 F.3d at 767; *Tooker*, 957 F.2d at 1217; *Marchetti*, 96 F.4th at 828.

b. Withdrawal

Hertzberg alternatively argues that she withdrew from any conspiracy outside the statute-of-limitations period. Docket No. 1050 at 21.

As discussed above, a "defendant is presumed to continue in a conspiracy unless he makes a substantial affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose." *Torres*, 114 F.3d at 525. And here, Hertzberg did not make that showing. *See Vargas*, 6 F.4th at 624. Hertzberg points to her disassociation

from Boston Heart in August 2016 and the unsigned agreement with Stamford Hospital as evidence of her alleged withdrawal. Docket No. 1050 at 21. But mere cessation of activity and disassociation are insufficient to establish withdrawal. *See Smith*, 568 U.S. at 114 ("[A] defendant's membership in the conspiracy, and his responsibility for its acts, endures even if he is entirely *inactive* after joining it.") (emphasis in original). And, as the Government points out, there is no evidence that Hertzberg affirmatively refused to sign the Stamford agreement. *See* Docket No. 1130 at 17–18. The jury was also free to interpret the evidence of Hertzberg's continuing financial interest in the financial success of Boston Heart—and hence the conspiracy—as evidence that she did not withdraw from the conspiracy. *See* GX-77; GX-89; GX-1075.

* * *

Hertzberg's motion for acquittal is denied.

3. Theiler

Matt Theiler was the Vice President of Sales and Marketing at Boston Heart. Like Hertzberg, Theiler argues there was no evidence he knew of an unlawful kickback conspiracy or joined it. Docket No. 1062 at 7. But Theiler's argument fails for many of the same reasons as Hertzberg's—there was enough circumstantial evidence that a reasonable juror could infer Theiler knew of and "perpetrated [the conspiracy] in concert with co-conspirators." *See Hesson*, 746 F. App'x at 335; *see also Sanders*, 952 F.3d at 273–74.

For example, the evidence showed that Theiler was deeply involved with and knowledgeable about the Little River relationship, including that it used MSOs to recruit physicians to use Boston Heart tests. *See, e.g.*, GX-289;

GX-278 at 10; Kraus Ex. 44 (highlighting the involvement of Boston Heart senior executives in the Little River relationship); GX-205; GX-325; GX-426; GX-286; GX-492; GX-978 at 7; GX-392 at 3; GX-366; Trial Tr. 2782–84 (coordinating and meeting with hospitals/MSOs and participating in sales meetings about Texas). Theiler was also told that the MSOs did not in fact "provid[e] any management/administrative services for the office." GX-277A. And Laura Howard testified that she was aware MSOs were paying physicians to refer their patients to Little River for Boston Heart testing and that she and Theiler had "in-depth conversations about the MSOs and the influence that they provided." Trial Tr. 2723–25, 2759; *see also* GX-273; Trial Tr. 2849; GX-620; GX-194B at 120 (e-mails corroborating Howard's testimony about discussions with Theiler). Finally, Theiler attended a Boston Heart sales conference where the use of MSOs at Little River was discussed with lower-level sales staff, including with Jeff Parnell and David Kraus. Trial Tr. 1842. Parnell testified that "everyone" at the conference "seemed to know the model and what was going on"—"that physicians had the opportunity to invest in [MSOs]," which was driving the overwhelming sales success in Texas. *Id.* 1842–43, 1902 ("I can't imagine that he would not know how that worked."). Parnell also testified that he learned from another Boston Heart sales representative that physicians were signing false attestations from Little River stating that they did not have any financial investment in or participation with the MSOs—the act that formed the factual basis for his plea of guilty to misprision of a felony. *Id.* 1787–88.

Theiler also took steps to conceal the conspiracy. Parnell testified that Theiler told him and Kraus not to send

him any e-mails about MSOs because Theiler did not want "a paper trail." *Id.* 1843. Theiler later repeated this instruction to Parnell individually. *Id.* 1853. In an e-mail to Hertzberg and Joanna Shore, moreover, Theiler warned that "information about this account [with Little River] is being shared way too openly within our company . . . [and] [n]ow it seems it's also being shared outside our company, which is not good." GX-386. Robert O'Neal, the mastermind of the MSO-kickback scheme, testified that he and Theiler met in person in Dallas to discuss expanding the Little River model to other hospitals, and that Theiler told O'Neal privately they would need to concoct a "storyline" to explain the unusual success in Texas. Trial Tr. 4931. And like Hertzberg, Theiler knew that when Boston Heart sought to duplicate the Little River model with Stamford Hospital, the agreement would require Boston Heart, not the hospital, to bill Medicare and Medicaid for patients referred by MSO-participating physicians. GX-387; GX-392. In fact, Theiler was personally involved in the expansion of the conspiracy to Stamford, with the help of Robert O'Neal and his MSO. *See* GX-840.

And finally, like Hertzberg, Theiler received some warning that the MSO model utilized by Little River was potentially illegal. Joanna Shore advised Theiler (and Hertzberg) by e-mail to "reel this in" until she could better understand the situation. *See* GX-323. Shore also made clear to Theiler that O'Neal "wasn't someone [she] thought we should work with." Trial Tr. 4396. And Theiler received the Michael Ivers "Compliancy Disaster" e-mail and took no discernible action. *See* GX-412.

Viewing the evidence in the light most favorable to the Government, the Court finds that a rational juror could

infer that Theiler knew about and participated in the unlawful conspiracy. *See Sanders*, 952 F.3d at 273–74; *Hesson*, 746 F. App'x at 334–35; *Ganji*, 880 F.3d at 767; *Tooker*, 957 F.2d at 1217; *Marchetti*, 96 F.4th at 828. Theiler's motion for acquittal is denied.

4. Kraus

There was also sufficient evidence to convict former Boston Heart Regional Sales Director David Kraus.

Kraus directly managed Parnell and Howard—the sales representatives who admitted knowing the unlawful purpose of the conspiracy and participating in it—as well as co-Defendant Gray Hardaway. *See* Trial Tr. 2721–26. Howard testified that Kraus would lead periodic sales calls with her and other Boston Heart sales representatives in Texas. *Id.* 2723. During these calls, MSOs in Texas were "a constant topic of conversation," Howard made no secret she was working alongside Robert O'Neal and his MSO, and they would "common[ly]" "discuss doctors' thought processes." *See id.* 2723–25, 2759, 2782–84, 2735; GX-366. Howard explained that "part of the MSO pitch" to physicians was that they would receive "financial compensation from the MSOs." Trial Tr. 2737. Howard also testified that Kraus was "aware of Robert O'Neal and aware of Robert O'Neal's ability to help Boston." *Id.* 2728. E-mails from Kraus to Hertzberg and Theiler referring to O'Neal as Howard's reliable source corroborate Howard's testimony. GX-273; Trial Tr. 2849.

Jeff Parnell also testified that he and Kraus discussed MSOs and that Kraus knew about the involvement of MSOs in the Texas market, including with Little River. Trial Tr. 1791, 1868. And like Theiler, Kraus attended the Boston Heart sales conference where "everyone" at the

conference knew about the MSO model that was driving sales in Texas. *Id.* 1842. This MSO model included physicians investing in and being paid by MSOs. *Id.* 1842–43. Indeed, Kraus informed Theiler that MSOs working with Little River were not actually providing any management or administrative services for the physicians' offices and they existed only to provide access to Boston Heart's testing. GX-273; GX-277A; Trial Tr. 2849.

Kraus plainly demonstrated his own knowledge and understanding of the conspiracy in an executive summary he prepared for Boston Heart's parent company Eurofins. GX-287. Kraus sent a draft of the summary to Parnell and Hardaway, which included the following language: "practitioners become investors by purchasing shares in the MSO. *Little River will remunerate the Marketers/MSO, which in turn disperse their profits among the investors.*" *Id.* at 3 (emphasis added). In fact, physicians would receive more shares from the MSO if they referred more patients to Little River for Boston Heart tests. Trial Tr. 4071. O'Neal confirmed that physicians were remunerated through the MSO for their patient referrals, with the number of shares held by each physician directly related to the number of referrals. *Id.* 4958–59, 5122. Ruben Marioni also confirmed that the investments were not real but meant to compensate physicians based on referrals. *Id.* 758–59. Kraus later deleted the remuneration language from the executive summary before it was finalized. *Id.* 1895–1901; GX-320.

Kraus also coordinated meetings with Texas hospitals and MSOs. GX-286; GX-366; GX-389; Kraus Ex. 44. Along with Howard, Kraus helped set Theiler's agenda for his Dallas trip to meet with potential referral sources and "marketers" employed by Little River. Trial Tr. 2782–84;

GX-366. In an e-mail to Parnell and Hardaway, Kraus reported on a dinner meeting in which Little River's MSO model was discussed with physicians, some of whom were persuaded to refer patients for Boston Heart testing after understanding the MSO model. GX-262. After the dinner, several physicians in fact joined an MSO and directed their referrals to Little River with the ultimate goal of subsequent referrals to Boston Heart for further testing. *Id.*

Based on this evidence, along with other evidence presented at trial, the Court finds that a rational juror could conclude that Kraus conspired to commit illegal remunerations in violation of 18 U.S.C. § 371. *See Sanders*, 952 F.3d at 273–74; *Hesson*, 746 F. App'x at 334–35; *Ganji*, 880 F.3d at 767; *Tooker*, 957 F.2d at 1217; *Marchetti*, 96 F.4th at 828. Kraus's motion for a judgment of acquittal is denied.

5. Hardaway

Former Boston Heart Sales Representative Gray Hardaway challenges the sufficiency of the evidence to convict him. Docket No. 1051 at 3, 21. Alternatively, Hardaway argues that he withdrew from the conspiracy outside the limitations period. *Id.* at 27. Both arguments fail.

a. Sufficiency of the Evidence

The Government presented legally sufficient evidence that Hardaway knew about and joined the unlawful conspiracy. Hardaway was on the ground in Texas and was deeply involved in building Boston Heart's relationship with Little River and the MSOs. Marioni testified that Hardaway knew about Marioni's MSO—including that it paid physicians for patient referrals. *See* Trial Tr. 861–62.

Hardaway also frequently communicated with Madison about MSOs working with hospitals to send referrals to Boston Heart. *See, e.g.*, GX-568. And Hardaway received e-mails from Little River CFO Todd Cook (a co-conspirator who pleaded guilty in this case) coordinating an agreement between Little River, Boston Heart, and the MSOs. *See, e.g.*, GX-469. Because of Hardaway's knowledge, others at Boston Heart asked Hardaway to explain the Little River relationship, including how it worked with Medicare. *See* GX-262.

Hardaway also received the Kraus summary discussed above, which explained that Little River remunerated physicians who referred their patients to the hospital for testing services. GX-287. Hardaway, moreover, received the e-mail from Parnell telling Kraus to delete the statements relating to remuneration. *See* GX-320. Hardaway also knew that the MSOs did not actually provide any management or administrative services for the physicians who joined them. GX-289; GX-277; GX-492; GX-978 at 7. And based on other evidence, the jury could infer that Hardaway provided that information to Kraus, along with information that the MSOs existed only to provide access to Boston Heart's testing and were recruiting doctors into the MSOs. GX-277; GX-277A; GX-289 at 4. And, finally, Hardaway often forwarded e-mails such as GX-830 and GX-568 to his personal e-mail account, which a reasonable juror could conclude was evidence of his knowledge and willfulness. *See Marchetti*, 96 F.4th at 828 (discussing compensation-related issues with personal e-mail addresses could support an inference of knowledge and willfulness).

In sum, in light of this evidence, as well as other evidence at trial, the Court finds that a rational juror could

conclude that Hardaway knew about and participated in the unlawful conspiracy. *See Sanders*, 952 F.3d at 273–74; *Hesson*, 746 F. App'x at 334–35; *Ganji*, 880 F.3d at 767; *Tooker*, 957 F.2d at 1217; *Marchetti*, 96 F.4th at 828.

b. Withdrawal

Hardaway alternatively argues that he withdrew from any conspiracy outside the statute of limitations period. Docket No. 1051 at 27.

Hardaway failed to show withdrawal. *See Vargas*, 6 F.4th at 624. He claims that his resignation from Boston Heart in July 2016 is sufficient. Docket No. 1051 at 28. But mere cessation of activity and disassociation are not enough. *See Smith*, 568 U.S. at 114 ("[A] defendant's membership in the conspiracy, and his responsibility for its acts, endures even if he is entirely *inactive* after joining it.") (emphasis in original). In any event, Hardaway continued to associate with Boston Heart through his own MSO following his departure from the company. Trial Tr. 2844; *see also* GX-193A, Rows 2188, 3777–81 (text messages regarding Hardaway's continued activities in his own MSO).

* * *

Hardaway's challenge to the guilty verdict fails. His motion for acquittal is denied.

B. Motions for New Trial

Defendants also move for a new trial. As explained below, Defendants' arguments are without merit.

1. Juror Communications

Several Defendants complain about the Court's communications with the jury. But they misunderstand—or

misrepresent—the material facts. There was no error, and any error would have been harmless.

a. Factual Overview

The case was submitted to the jury on Tuesday, November 28, at 9:49 a.m. Following its typical practice, the Court provided the jury with blank Jury Note forms, numbered in sequential order, to ensure that any communications between the jury and the Court were properly documented.

Juror Note 1. Shortly after deliberations began, as instructed by the Court, the jury sent its first note identifying the foreperson. Trial Tr. 6259. The Court did not respond to this note.

Juror Note 2. Later that same day, at 2:26 p.m., the jury sent Note 2 stating that "Juror #1 would like to talk with Judge Kernodle Wednesday morning." Docket No. 1019 at 1. The following morning, Wednesday, November 29, the Court made itself available in the courtroom with the court reporter present to hear from Juror No. 1. The Court Security Officer then relayed to the Court that Juror No. 1 no longer needed to speak to the Judge. The Court therefore did not speak with any juror or send any other communication to the jury regarding Juror Note 2.

Juror Note 3. At 10:55 a.m. on Wednesday, November 29, the jury sent Note 3 stating that "Juror # 12 is unwilling to change his mind based on the evidence provided and the instructions you provided." Docket No. 1019 at 2. The Court assembled the parties in the courtroom to prepare a response to Note 3. The Court read the note aloud and then proposed the following response: "I refer you to the instructions already provided. I further instruct you

to continue deliberating until you have reached a unanimous decision. You may be as leisurely in your deliberations as the occasion may require, and you should take all the time which you feel is necessary." Trial Tr. 6265; *see also* Docket No. 1019 at 3. All parties agreed to this response.

Juror Note 4. Before the Court responded to Note 3, the jury sent a fourth note that repeated the message of Note 3. This note stated: "Juror #12 informed the jurors that his 'moral compass' would not allow him to be open minded. He also stated he would 'hang this jury.'" Docket No. 1019 at 4. Because the fourth note was "very similar to the first note regarding Juror No. 12" and the Court was in the process of responding to Note 3, the Court "did not respond to [Note 4]." Trial Tr. 6271.

Verdict. The jury continued deliberating the remainder of the day on November 29 and the morning of Thursday, November 30. At 11:00 a.m. on Thursday, the jury informed the Court that it had reached a unanimous verdict. Docket No. 1029 at 5. The Court convened the parties, at which point the Court informed them of the fourth note. Trial Tr. 6271. Neither side objected at that time. *Id.* The Court then brought in the jury, which delivered the unanimous guilty verdicts. Thereafter, the Court polled each juror individually, with each person confirming the guilty verdicts. *Id.* 6272–73.

b. First and Second Notes

Some Defendants complain that the Court did not immediately inform them about the first and second jury notes or allow them to propose responses. Kraus and his counsel also claim that the Court had "unrecorded communications with the jury," despite the Court's repeated

statements that no communication occurred. Docket No. 1064 at 17.

Rule 43 entitles a defendant to "be present at . . . every trial stage, including jury impanelment and the return of the verdict." Fed. R. Crim. P. 43(a)(2). The Fifth Circuit has interpreted this Rule to require that when a court receives communications from the jury, "counsel [for a defendant] should be informed of its substance and afforded an opportunity to be heard before a supplemental charge is given." *United States v. Bieganowski*, 313 F.3d 264, 293 (5th Cir. 2002) (quoting *United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir. 1976)). But there is no right to be informed of a jury note that requires no response, as here. In fact, it is the routine practice of the judges of this Court not to immediately inform the parties about a note identifying the foreperson, which is nearly always the first jury note received, and never to "respond" to it. In any event, the Court informed the parties about the first note. Trial Tr. 6265. And the Court would have informed the parties about the second note if the juror had actually spoken with the Court.

As for Kraus's claim about imagined, unrecorded conversations with the jury, it is categorically false. Following the trial, Kraus's counsel inquired about such communications, and the Courtroom Deputy responded on behalf of the Court to all counsel by e-mail plainly and clearly: "The Court had no interaction with the jury or any individual jurors during deliberations outside of the notes provided." (Notably, Kraus's counsel did not include the Courtroom Deputy's e-mail when attaching other related e-mails to his motion. *See* Docket No. 1064, Ex. 1.) Despite the Court's representation, Kraus's coun-

sel submitted affidavits testifying that a Courtroom Security Officer had locked the courtroom doors and told them the Judge was speaking with the jurors *ex parte*. *Id.*, Exs. 2, 3. This is false. Contrary to counsel's claims, there were no "unrecorded and *ex parte* communications with the jury during its deliberations," no "locking the courtroom doors," and no "oral instruction to the jury once deliberations began." *See* Docket No. 1064 at 6. Kraus's continued pressing of this imaginary scenario is both unfounded and bizarre.

c. Third and Fourth Notes

Defendants also argue that the Court erred by not immediately notifying them about Note 4 or responding to it.

But defendants do not have an absolute right to be immediately notified of every juror note or to propose a response. Rather, a defendant has a right to be heard before a court gives a supplemental charge, which did not happen here. *See Bieganowski*, 313 F.3d at 293; *United States v. Bascaro*, 742 F.2d 1335, 1355 (11th Cir. 1984); *United States v. Ronder*, 639 F.2d 931, 934 (2d Cir. 1981). "Whether or not to use a written charge and whether or not to reply to a jury's request for additional instructions are both matters properly determined by the sound discretion of the trial judge." *United States v. Acosta*, 763 F.2d 671, 677 (5th Cir. 1985). Because the trial judge is in the best position to evaluate the jury, the "trial judge [has] the flexibility, within broadly defined parameters, to handle such situations in the least disruptive manner possible." *United States v. Ramos*, 71 F.3d 1150, 1153 (5th Cir. 1995). Here, Note 4 did not ask any questions or express confusion, but merely restated Note 3. The Court concluded that separately responding to the fourth note

could potentially confuse and disrupt the jury. *See Acosta*, 763 F.2d at 677. Any response, moreover, would have repeated the response to Note 3. And the Court informed the parties about the note the next time they assembled in the courtroom. *See* Trial Tr. 6271.

United States v. Mejia is distinguishable. 356 F.3d 470 (2d Cir. 2004). In that case, the jury had been deadlocked for several days, and the court responded to a jury note identifying a single holdout "without consulting the parties" by sending the jury a copy of its instructions with highlighted sentences. *Id.* at 473. Less than an hour later, the jury returned a guilty verdict. *Id.* The Second Circuit held that under these circumstances the court's *ex parte* communication with the jury "may have induced unanimity." *Id.* at 476 (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975)). Here, in contrast, the jury had been deliberating only a few hours when it sent Note 4. And, with the consent of counsel, the Court had just responded to the very-similar Note 3 by referring them "to the instructions already provided" and directing them to "continue deliberating." Docket No. 1019 at 3. There was no indication the jury was deadlocked. *See, e.g., United States v. Glover*, 681 F.3d 411, 423 (D.C. Cir. 2012) (A district court has "considerable discretion in determining how to respond, if at all, to a jury's request for clarification of a jury instruction."). Further, unlike in *Mejia*, the Court did not communicate *ex parte* with the jury regarding Note 4.

Hertzberg argues that the response to Note 3 became a coercive *Allen* charge response to Note 4. An *Allen* charge is a set of "supplemental instructions urging jurors to forego their differences and reach a unanimous verdict." *United States v. Heath*, 970 F.2d 1397, 1406 n.2 (5th Cir. 1992). The response to Note 3 was no *Allen*

charge. Because the note came so soon after the jury began deliberations (following a multi-week trial with five defendants), the Court's response merely reminded them of the Court's prior instructions—to deliberate in good faith and not to "give up your honest beliefs . . . because of the opinion of your fellow jurors." Docket No. 1017 at 24. The jury here, moreover, continued to deliberate for an additional seven hours, returning the verdict the following morning—twenty-four hours after receiving the Court's response to Note 3. This length of delay between the Court's response and the verdict demonstrates a lack of coercion. *See, e.g., United States v. Andaverde-Tinoco*, 741 F.3d 509, 517–18 (5th Cir. 2013) (evaluating Fifth Circuit cases holding shorter periods between charge and verdict as not being coercive). Indeed, following the verdict, the Court polled each juror, who stood and affirmed the verdict in open court, further indicating a lack of coercion, Trial Tr. 6272–73; *see United States v. Barragan-Devis*, 133 F.3d 1287, 1289–90 (9th Cir. 1998).

Finally, any error in not immediately disclosing Note 4 would have been harmless. *See United States v. Sylvester*, 143 F.3d 923, 928 (5th Cir. 1998). Defendants claim they would have moved for a mistrial or requested an *Allen* charge. But Note 4 was remarkably similar to and closely followed Note 3, and no one moved for a mistrial or requested an *Allen* charge in responding to Note 3. In any event, the Court would have denied the requests. "District courts have broad discretion to give *Allen* charges when the jury indicates deadlock." *United States v. Hitt*, 473 F.3d 146, 153 (5th Cir. 2006) (citing *United States v. Rivas*, 99 F.3d 170, 175 (5th Cir. 1996)). And here, the jury had been deliberating for less than a day following a long, complex trial with multiple defendants.

It would have been inappropriate to issue an *Allen* charge, or any other response, at that early point in the deliberative process. *See United States v. Bayer*, 331 U.S. 532, 536 (1947) ("The trial judge in the light of the whole trial and with the jury before him may feel that to repeat the same words would make them no more clear, and to indulge in variations of statement might well confuse."). Any *Allen* charge, moreover, would not have changed the outcome given the early stage of deliberations and the length of time between Note 4 and the verdict. *See Andaverde-Tinoco*, 741 F.3d at 517.

Defendants' motion for a new trial on this ground is denied.

2. Discovery Issues

Several Defendants argue that the Government committed *Brady* and *Giglio* violations by delaying transmission of or withholding certain exculpatory or impeachment material.

Some Defendants argue that the Government violated *Brady* by failing to disclose before trial tens of thousands of documents (e-mails and attachments) obtained by a 2019 search of Robert O'Neal's e-mail account. Docket No. 1050 at 37. Hertzberg claims her counsel learned of the warrant for the first time during the cross-examination of Agent Geren on November 7, 2023. The next morning, the Government acknowledged the "oversight" and produced a thumb drive containing the e-mails, but the vast majority were apparently "not readable," according to Hertzberg. *Id.* Hertzberg resolved the technical issues a week later, but given the obligations of trial, could not perform a thorough review until after the verdict. Docket No. 1052, Declaration of Keisha N. Stanford ¶¶ 12, 16.

Brady v. Maryland prohibits the Government "from suppressing evidence favorable to the defendant 'where the evidence is material either to guilt or to punishment.'" *United States v. Dvorin*, 817 F.3d 438, 450 (5th Cir. 2016) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). To demonstrate a *Brady* violation, "a defendant must show: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the prosecution; and (3) the evidence was material." *United States v. Swenson*, 894 F.3d 677, 683 (5th Cir. 2018) (quoting *Dvorin*, 817 F.3d at 450). "[E]vidence that is turned over to the defense during trial . . . has never been considered suppressed." *Id.* (emphasis in original) (citing *Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008)). Moreover, courts have held that a defendant is not prejudiced by the late disclosure of evidence if the evidence is received in time for its effective use at trial. *Powell*, 536 F.3d at 335 (citing *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003)); *see also United States v. Chesser*, 795 F. App'x 242, 244–45 (5th Cir. 2019) (disclosure of report containing allegedly exculpatory information after the Government rested its case-in-chief but before defendant's case was not a *Brady* violation because defendant was able to use evidence in her case and in closing argument).

Here, by Defendants' own admission, the Government disclosed the O'Neal e-mails during trial. *See* Docket No. 1052, Declaration of Keisha N. Stanford ¶ 12. And the disclosure came almost a week before O'Neal testified. Defendants could have and did use the e-mails during cross-examination of Government witnesses. *See* GX-421; GX-609; GX-688; Trial Tr. 4396–97. In any event,

Hertzberg has not identified any e-mail that was material—that could have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). "Mere speculation that a trial might have gone differently is insufficient to show the requisite prejudice from a tardy disclosure." *Swenson*, 894 F.3d at 683.

Defendants cannot reasonably claim prejudice even if the e-mails were suppressed and material. *See Powell*, 536 F.3d at 335 ("In this Circuit, when the claim is untimely disclosure of *Brady* material, we have looked 'to whether [the defendant] was prejudiced by the tardy disclosure.'" (citing *United States v. Williams*, 132 F.3d 1055, 1060 (5th Cir. 1998))). As the Government points out, Hertzberg's legal team consisted of several attorneys and staff who had ample time to access and review the materials before O'Neal's testimony. *See* Docket No. 1130 at 41. Moreover, Defendants wasted days of trial time by their routine failure to have witnesses ready and their decisions to cancel prospective witnesses as noted in the Court's Order to Show Cause. *See* Docket No. 967. Defendants initially requested ninety-three hours combined for their case-in-chief but used only approximately ten hours. *See id.* Defendants' failure to use their time and resources effectively to review the O'Neal e-mails does not warrant a new trial. *See Williams*, 132 F.3d at 1060–61 (finding waiver of prejudice when the defendant rejected the court's offer of a continuance to "review [his] strategy and examine additional witnesses in connection with the newly disclosed evidence").

A few Defendants re-raise other discovery arguments made and rejected by the Court at trial. In doing so, they cite no new authority or facts that would change the

Court's decision. Accordingly, the Court stands by its earlier rulings on these matters.

The motion for new trial on this ground is denied.

3. Rule 801(d)(2)(E) Co-conspirator Statements and Findings

Defendants challenge the admission of certain hearsay statements pursuant to Federal Rule of Evidence 801(d)(2)(E), arguing that the Government did not prove the existence of a conspiracy and that the Court should have made a detailed factual finding when admitting the statements.

The Government, through witness testimony and exhibits, offered co-conspirator statements pursuant to Rule 801(d)(2)(E), which provides that a statement is not hearsay if it is "offered against an opposing party" and "was made by the party's coconspirator during and in furtherance of the conspiracy." For a statement to be admissible under this provision, "'[t]he proponent of admittance . . . must prove by a preponderance of the evidence (1) the existence of a conspiracy, (2) the statement was made by a co-conspirator of the party, (3) the statement was made during the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy.'" *United States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011) (quoting *United States v. Solis*, 299 F.3d 420, 443 (5th Cir. 2002)); *see also United States v. Fragoso*, 978 F.2d 896, 899 (5th Cir. 1992) (quoting *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)). "The content of the statement may be considered as part of the analysis, but there must also be independent evidence establishing the factual predicates for Rule 801(d)(2)(E)." *El-Mezain*, 664 F.3d at 502.

Throughout the trial, the Court evaluated numerous statements and conditionally admitted certain ones subject to the Government's proof of the required predicate facts. The Court also analyzed challenged statements before trial began each day—and during trial—as well as sustained the objections to certain statements as falling outside Rule 801(d)(2)(E). *See, e.g.*, Trial Tr. 650–51, 1505–12. Following the close of the Government's case-in-chief, the Court reviewed the evidence and ruled on the conditional admission of the Rule 801(d)(2)(E) statements:

> I will note for the record that I conditionally admitted several exhibits with out-of-court statements under Rule of Evidence 801(d)(2)(E), and I carried the Defendants' motion challenging the admission of those statements. After considering the record, the Court finds that the Government has shown by a preponderance of the evidence that the requirements of Rule 801(d)(2)(E) are met here, and I, therefore, finally admit the exhibits under that provision.

Trial Tr. 5209. No Defendant objected that this finding was insufficient or asked the Court to issue further findings. *Id.*

Some Defendants complain about the Court's procedure of conditionally admitting certain statements under Rule 801(d)(2)(E). But that's a permissible—and common—practice. *See, e.g., Fragoso*, 978 F.2d at 900 (noting that it is "sometimes not reasonably practicable 'to require the showing to be made before admitting the evidence'" and thus a district court may "carry[ ] a *James* motion through trial"). And the Court's chosen procedure of admitting the statements without detailed factual findings comports with Fifth Circuit precedent. *See United*

States v. Osgood, 794 F.2d 1087, 1093 (5th Cir. 1986) (finding no error when the trial court admitted co-conspirator statements without delineating findings and when the defendants did not object at trial).

Several Defendants seem to object that statements by unindicted co-conspirators fell within the Rule. But an individual may be considered a co-conspirator even if "he only participated at one level" or "only played a minor role in the conspiracy." *United States v. Posada-Rios*, 158 F.3d 832, 858 (5th Cir. 1998). Further, "[a]lthough the rule speaks of statements made in furtherance of a 'conspiracy,'" the Fifth Circuit "[has] recognized that admissibility under Rule 801(d)(2)(E) does not turn on the criminal nature of the endeavor." *El-Mezain*, 664 F.3d at 502 (citing cases). "Instead, a statement may be admissible under Rule 801(d)(2)(E) if it is made in furtherance of a lawful joint undertaking." *Id.* "'One can qualify as a 'joint venturer' for the purposes of Rule 801(d)(2)(E) merely by engaging in a joint plan—distinct from the criminal conspiracy charged—that was non-criminal in nature.'" *Id.* (quoting *United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 694 (5th Cir. 2010)). In admitting statements by unindicted co-conspirators, the Court ensured that the statements were made during the course and in furtherance of a common plan or endeavor with a Defendant. *Id.*; *see also United States v. Postal*, 589 F.2d 862, 886 (5th Cir. 1979) (holding that a ship's logbook was admissible under Rule 801(d)(2)(E) as a co-conspirator statement in a drug conspiracy case because the ship's crew were engaged in the voyage of the ship, which was a "'joint venture' in and of itself").

Other Defendants object to the number of statements admitted under Rule 801(d)(2)(E). But this was an extensive, multi-year conspiracy involving numerous individuals at several companies. And the Court did not simply admit all such statements requested by the Government, but carefully considered each one individually and examined the evidence before finally admitting certain statements under the Rule. On many occasions, the Court sustained the defense objection and ruled that the statement was inadmissible hearsay.

The Court stands by these decisions.

4. Admission of Certain Evidence

Defendants argue that the Court improperly admitted certain evidence that prejudiced their substantial rights and warrant a new trial. The Court disagrees.

a. GX-1059

On the eighteenth day of trial, November 20, 2023, the Government moved to admit GX-1059 during the cross-examination of Ryan Downton, a defense witness called by Jeffrey Madison. Trial Tr. 5776, 5782. The exhibit is a May 18, 2017 e-mail from a Little River executive, copying Downton and Madison. GX-1059 included the following passage at issue:

> Lab here is like cocaine. The first time you use it is great. Makes you feel above the world and powerful. Before addiction occurs, every time you do it your [sic] on top of the world. Once addiction occurs you have to have it or you will go through withdrawals. You don't try to turn to other things because this drug is what you want and know. Then your (sic) so addicted, you

> need it to survive. You have been caught and threatened by police that if caught again your (sic) going to jail. They suggest you get help and look for sources to replace this drug. You see no way out and continue to a point where it leads to your death. Just substitute labs for cocaine . . .

Defendants objected to the e-mail for multiple reasons, including hearsay and undue prejudice under Rule 403. Trial Tr. 5776–84. The Court overruled the objections and admitted the e-mail not for the truth of the matter asserted but to demonstrate Downton's notice of concerns raised about the lab program by another Little River owner. *Id.* 5779.

Defendants Kraus and Hardaway now re-raise their Rule 403 objection to GX-1059. They claim that the exhibit "offered minimal, if any probative value" and "was merely meant to inflame the jury." Docket No. 1064 at 30. The Court is unpersuaded. The exhibit was admitted for the limited purpose of showing Downton's state of mind following his testimony regarding the legitimacy of Little River's lab program—i.e., that others had raised concerns with Downton about the program. *See* Trial Tr. 5790. And the Court expressly instructed the jury to consider the exhibit for this limited purpose only. *See id.* Given the circumstances, the Court concluded that the relevance of the exhibit substantially outweighed any potential prejudicial effect arising from the colorful language used by the sender. *See United States v. Sims*, 11 F.4th 315, 323 (5th Cir. 2021) ("Rule 403's major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." (quoting *Baker v. Canadian Nat'l/Ill. Cent. R.R.*, 536 F.3d 357, 369 (5th Cir. 2008))). The Court

stands by its decision and further finds that any error in admitting this exhibit, one of nearly 500 exhibits admitted at trial, would have been harmless in light of the substantial evidence against Defendants. See *El-Mezain*, 664 F.3d at 526. ("Under this standard, we ask 'whether the error itself had substantial influence' on the jury in light of all that happened at trial; if we are 'left in grave doubt, the conviction cannot stand.'" (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))).

b. GX-412

Government Exhibit 412 is the June 3, 2016 e-mail about the "Compliance Disaster" in Texas from Boston Heart employee Mike Ivers to Susan Hertzberg, Matt Theiler, and others, which is discussed above. The Government did not seek to admit the exhibit for the truth of the matter asserted, but to show notice to and effect on the recipients. Trial Tr. 6223–24; *see also* Fed. R. Evid. 801(c); *United States v. Ballis*, 28 F.3d 1399, 1405 (5th Cir. 1994) (finding statements admitted "to show the effect of those statements" is not hearsay). The Court admitted the e-mail for this limited purpose and gave the following limiting instruction to the jury on three separate occasions: "This exhibit was not admitted to prove the truth of any of the statements in the e-mail, but rather only to show notice [to] any of the recipients who received the e-mail." Trial Tr. 4501; 6258; Docket No. 1017 at 13–14. Ivers, moreover, testified about the e-mail and was subject to cross-examination regarding the e-mail and his direct testimony. Trial Tr. 4490–4594.

Defendant Theiler complains that the testimony about the e-mail "far exceeded the limited purpose of whether Theiler and others received notice of Ivers' con-

cerns." Docket No. 1062 at 32. But much of the complained-about testimony was Ivers reviewing the e-mail and explaining to the jury why he sent it. Trial Tr. 4490–4501. Theiler also contends that the Government invited the jury to consider the e-mail for its truth during the Government's closing argument. The Court disagrees, but in any event gave the jury the limiting instruction Theiler requested at the time, telling them after closings that "certain exhibits were admitted not to prove the truth of what is in the exhibit but for the effect on the listener or the receiver . . . Exhibit 412 is one such exhibit." *See id.* 6258. And jurors are presumed to follow instructions. *See, e.g., United States v. Mejia*, 792 F. App'x 318, 319 (5th Cir. 2020) Finally, any error regarding GX-412—again, one of nearly 500 exhibits admitted at trial—was harmless in light of the substantial other evidence against Theiler and the other Defendants. *See, e.g., El-Mezain*, 664 F.3d at 526.

c. Geren's Testimony

In testifying about his investigation, Agent Jack Geren was asked "whether or not a person is an experienced healthcare professional . . . affect[s] your evaluation as an agent." Trial Tr. 3565. He said yes and explained that "in this particular case, with respect to allegations of illegal kickbacks, the fact that an individual has years of experience in the healthcare arena suggests to me that these individuals should know what an unlawful arrangement is." *Id.*

Hertzberg and Theiler argue this was improper opinion evidence under Rule 701(b) and an improper legal conclusion under Rule 704(a). The Court did not—and does not now upon further review—interpret Geren's testimony to violate the Rules. Rather, Geren was explaining

generically why a person's experience in healthcare matters in a kickback conspiracy case, which the Fifth Circuit has repeatedly held is valid circumstantial evidence of willfulness under the AKS. *See, e.g., Marchetti*, 96 F.4th at 828. The Court in fact instructed the Government to "stay away from any questions [of Geren] about intent," instructing that the Government could ask only "the generic question about what would people in the [healthcare] field understand." Trial Tr. 3724–25. And Geren's testimony complied with that instruction. Geren never opined that any specific Defendant in this case had the requisite scienter. *See United States v. Anderskow*, 88 F.3d 245, 249 (3d Cir. 1996) (finding no plain error when "[t]he witness never explicitly opined on direct examination that [the defendant] possessed guilty knowledge."). Any error, moreover, was harmless in light of the substantial other evidence against Hertzberg, Theiler, and the other Defendants. *See, e.g., El-Mezain*, 664 F.3d at 526.

5. Closing Arguments

Several Defendants argue that the Government made improper statements during its closing argument.

Prosecutors are "confined in closing argument to discussing properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence." *United States v. Vargas*, 580 F.3d 274, 278 (5th Cir. 2009). Allegations of prosecutorial misconduct are reviewed under a two-step analysis: (1) was a remark improper; and (2) did it affect the defendant's substantial rights. *Shah*, 95 F.4th at 379. "The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *Id. (*quoting *United States v. Aguilar*, 645 F.3d 319, 323 (5th Cir.

2011)) (considering the threshold for improper closing argument a "high bar").

Defendants largely complain about the Government's interpretation of the evidence. The Court has reviewed the statements carefully and finds that the Government was for the most part drawing reasonable inferences and conclusions from the evidence. For example, Hertzberg and Theiler point to the Government's statements that Hertzberg directed Theiler to work with O'Neal and that Shore warned Theiler and Hertzberg to cease illegal activity. *See* Docket No. 1050 at 29, 31; Docket No. 1062 at 26–27. These are reasonable interpretations of the evidence. To be sure, Defendants were entitled to argue to the jury about competing inferences and conclusions, which they did. And the Government acknowledged that it misstated a fact in closing. But viewed in context, the Government's statements about the evidence were not mischaracterizations that rise to prosecutorial misconduct. *See, e.g.*, *United States v. Lara*, 23 F.4th 459, 481–82 (5th Cir. 2022) (finding no misconduct when the prosecutor argued reasonable inferences and conclusions to the jury and responded to theories of the evidence offered by defense counsel). Also, the Court instructed the jury that the "arguments made by the lawyers are not evidence," that the lawyers will "point out those things that are most significant or most helpful to their side of the case" and may "call your attention to certain facts or inferences that might otherwise escape your notice," but that "[i]n the final analysis," it is "your own recollection and interpretation of the evidence that controls the case." Docket No. 1017 at 3.

Even if the Government's argument fell on the wrong side of the line in certain instances, moreover, Defendants "have not carried their burden of showing substantial prejudice." *Shah*, 95 F.4th at 381. As in *Shah*, the evidence against these Defendants was substantial, and in light of the numerous limiting instructions given to the jury throughout the trial, Defendants have not shown that, "taken together, the 'remarks cast serious doubt on the correctness of the jury's verdict.'" *Id.* (quoting *Aguilar*, 645 F.3d at 325). *See also, e.g., United States v. Rodonaia*, 2022 WL 4364735, at *1 (5th Cir. Sept. 21, 2022) ("[Defendant] fails to show that it resulted in prejudice to his substantial rights, as other evidence supported an inference of a connection, the jury was cautioned not to treat the lawyers' arguments as evidence, and the strength of the evidence supporting the convictions was otherwise strong.").

Theiler also complains about the Court telling the lawyers during closings that "[t]here will be no more speaking objections." Docket No. 1062 at 27–28 (citing Trial Tr. 6255). The Court's instruction followed two instances of counsel objecting to the Government's closing and making improper argument in the presence of the jury. *See* Trial Tr. 6254–55. The Court stands by that instruction; it certainly does not entitle Theiler to a new trial.

6. Variance from the Indictment

Theiler argues that "the evidence at trial created a prejudicial variance" because the Government "fail[ed] to prove any of the specific factual allegations in the indictment as to Theiler." Docket No. 1062 at 3.

"A variance occurs 'when the proof at trial depicts a scenario that differs materially from the scenario charged

in the indictment but does not modify an essential element of the charged offense.'" *United States v. Girod*, 646 F.3d 304, 316 (5th Cir. 2011) (quoting *United States v. Delgado*, 401 F.3d 290, 295 (5th Cir. 2005)). To determine whether a variance occurred, the Court must "compar[e] the evidence presented at trial with the language of the indictment." *Id.* (citing *United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 1998)). "If a variance did occur, [the Court] reverse[s] only if the variance prejudiced the defendant's substantial rights" by "failing to sufficiently notify him so that he can prepare his defense and [ ] not be surprised at trial." *Id.* at 316 (citing *Delgado*, 401 F.3d at 295). "In determining whether a variance resulted in prejudice, [the Court] employ[s] a harmless-error analysis." *Id.* (citing *United States v. Ramirez*, 145 F.3d 345, 351 (5th Cir. 1998)). "[T]he Government need not prove all facts charged in the indictment as long as it proves other facts charged in the indictment which do satisfy the essential elements of the crime." *United States v. England*, 480 F.2d 1266, 1269 (5th Cir. 1973) (citing *United States v. Trexler*, 474 F.2d 369 (5th Cir. 1973)).

Theiler's argument fails because the Government proved facts charged in the indictment that satisfy the essential elements of the crime. The Government provided substantial evidence of a conspiracy to illegally remunerate physicians through MSOs in exchange for referrals to rural Texas hospitals for Boston Heart laboratory tests, some of which were later reimbursed by federal payors, and that Theiler knew the unlawful purpose of the conspiracy and willfully joined it. *See supra* Section III.A.3. Theiler cites statements in the indictment that he claims were either not proven by the Government, proven to be false, or proven to be legal. *See, e.g.*, Docket No. 1062 at 3

(citing Docket No. 1 ¶¶ 43, 55, 57, 70–71). But these statements are either immaterial or are the Government's characterizations of facts proven at trial. Neither justifies a new trial. *See United States v. Robinson*, 974 F.2d 575, 578 (5th Cir. 1992) ("[W]hen an indictment alleges nonessential facts, the government need not prove them in order to sustain a conviction.").

Nor has Theiler shown how any variance affected his substantial rights. *See United States v. Meza*, 701 F.3d 411, 424–25 (5th Cir. 2012). Theiler does not explain how any variance "surpris[ed] [him] at trial" or "plac[ed] [him] at risk of double jeopardy." *United States v. Valencia*, 600 F.3d 389, 432 (5th Cir. 2010) (quoting *Robinson*, 974 F.2d at 578). Theiler's variance argument appears to be a second challenge to the sufficiency of the evidence, which the Court rejected above.

Accordingly, the Court denies Theiler's motion on this ground.

7. Remaining Arguments

The Court has reviewed Defendants' remaining arguments for new trial, most of which were considered and rejected at trial. *See, e.g.*, Docket No. 1055 at 10 (arguing that the Court "erroneously failed to provide Mr. Hardaway's good faith instruction"). The parties raise nothing new, and thus the Court again rejects them and finds that they do not entitle Defendants to a new trial. Nor does the "cumulative error" doctrine apply here. *E.g.*, Docket No. 1050 at 44. The bar for cumulative error is exceedingly high:

> [C]umulative error justifies reversal only when errors so fatally infect the trial that they violated the trial's

> fundamental fairness. We have repeatedly emphasized that the cumulative error doctrine necessitates reversal only in rare instances and have previously stated en banc that the possibility of cumulative error is often acknowledged but practically never found persuasive.

Marchetti, 96 F.4th at 833 (quoting *Delgado*, 672 F.3d at 344). Defendants have not demonstrated that non-reversible errors fatally infected the trial such that "they violated the trial's fundamental fairness." *See id.*

And finally, the Court rejects the argument that the evidence weighed heavily against the verdict. As the Court explained in Section III.A., the evidence as a whole demonstrated that Defendants conspired to commit illegal remunerations in violation of 18 U.S.C. § 371.

IV. CONCLUSION

For the reasons stated above, Defendants' motions are **DENIED**.

So **ORDERED** and **SIGNED** this **8th** day of **August, 2024**.

/s/ *Jeremy D. Kernodle*
JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40779

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW JOHN THEILER; SUSAN L. HERTZBERG; DAVID WELDON KRAUS; THOMAS GRAY HARDAWAY,
Defendants-Appellants.

Filed: August 18, 2026

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:22-CR-3-2
USDC No. 6:22-CR-3-5

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, SMITH, and OLDHAM, Circuit Judges.

PER CURIAM:

Treating the petitions for rehearing en banc as petitions for panel rehearing (5TH CIR. R. 40 I.O.P.), the petitions for panel rehearing are DENIED. Because no

member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petitions for rehearing en banc are DENIED.