No. 19-12951-FF

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
***Plaintiff-Appellee*,**

v.

DONALD V. WATKINS, SR. and DONALD V. WATKINS, JR.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION
No. 2:18-CR-00166-KOB-TMP

BRIEF OF APPELLEE

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19-12951-FF

United States v. Donald Watkins, Sr.
and Donald Watkins, Jr..

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The United States Attorney for the Northern District of Alabama, through undersigned counsel, certifies that, in addition to those persons and entities listed within Donald Watkins, Sr.'s brief, the following persons may have an interest in the outcome of this case:

1. Barkley, Charles, victim;
2. Emmons, Carlos, victim;
3. Escalona, Prim F., United States Attorney for the Northern District of Alabama;
4. Spikes, Takeo, victim;
5. Stoudamire, Natasha, victim;
6. Thomas, Bryan, victim;
7. Thomas, Danielle, victim; and
2. Town, Jay E., former United States Attorney for the Northern District of Alabama.

*/s/*Michael B. Billingsley
Assistant United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

The government agrees with Watkins Jr. that oral argument is unnecessary. Although the record is voluminous, the primary issue is whether the evidence was sufficient to support the jury's verdicts. As to the conspiracy and wire fraud counts, the evidence established that Watkins Sr. solicited "investments" from certain investor-victims, offering either to repay the investment as a loan or by granting the victim a percentage of Watkins Sr.'s "economic interest" in certain entities. The evidence conclusively established that, in soliciting the money, Watkins Sr. deceived the victims, using their money to pay personal expenses. The evidence also established the charged conspiracy. Among other things, the jury saw an email from Watkins Jr. to Watkins Sr., suggesting that Watkins Sr. solicit an additional $1 million by "piquing" victim's interest in business opportunities, while planning to use the funds to then pay other expenses. Watkins Sr. followed through and the scheme was successful. As for the bank-fraud counts, the evidence established that Watkins Sr., Chairman of the Board at Alamerica Bank, induced another individual to obtain loans from Alamerica Bank without disclosing that the proceeds were for Watkins Sr.'s benefit. Based on the evidence, the briefs and the record adequately present the facts and legal arguments necessary to resolve this appeal. *See* Fed. R. App. P. 34(a)(2)(C); 11th Cir. R. 34-3(b)(3).

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a final judgment in a criminal case. In November 2018, a ten-count superseding indictment was issued against Donald Watkins, Sr. and Donald Watkins, Jr. *Doc 4*. Both were charged with conspiracy, wire fraud, and bank fraud. *Id*. At the conclusion of a lengthy trial, the jury convicted Watkins Sr. of conspiracy (count one), wire fraud (counts two-eight), and bank fraud (counts nine and ten). *Doc 223*. He was sentenced to 60 months of imprisonment on all counts, to be served concurrently. *Id*. Watkins Jr. was convicted on counts one and two. *Doc 219*. He was sentenced to concurrent sentences of 27 months of imprisonment on each count. *Id*. The district court had jurisdiction under 18 U.S.C. § 3231. Judgment was entered against both defendants on August 5, 2019. *Docs 219, 223*. Watkins Sr. entered a timely notice of appeal on July 29, 2019, and Watkins Jr. entered one on July 30, 2019. *Docs 214, 215*. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Was the evidence sufficient to support Watkins Jr.'s conspiracy conviction where the evidence showed that Watkins Jr. was significantly involved in Watkins Sr.'s business dealings, including by: being regularly copied on emails to the investor/victims; suggesting solicitation of investments for the purpose of paying unrelated expenses; and directing the payments of investment funds to unrelated expenses?

2. Was the evidence sufficient to support Watkins Jr.'s count-two conviction for wire fraud where the evidence showed that the relevant loan proceeds were designated to be used for Masada expenses, but were instead used for other purposes, including personal expenses?

3. Was the evidence sufficient to support Watkins Sr.'s convictions for wire fraud where the evidence established that Watkins Sr. made material misrepresentations in soliciting the funds at issue?

4. Was the evidence sufficient to support Watkins Sr.'s convictions for bank fraud where the evidence established that Watkins Sr., Chairman of the Board at Alamerica Bank, induced another individual to obtain loans from Alamerica Bank without disclosing that the proceeds were for his benefit?

5. Did the district court abuse its discretion in refusing to give a requested jury charge where the instructions given were complete and a correct statement of

law?

6. Did the district court abuse its discretion by requiring Watkins Sr. to adhere to the rules of evidence in seeking to admit evidence relevant to his theory of defense?

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

In November 2018, a ten-count superseding indictment was issued against Donald Watkins, Sr. and Donald Watkins, Jr. *Doc 4*. Both were charged with: conspiracy to commit wire and bank fraud, a violation of 18 U.S.C. § 1349 (count one); wire fraud, a violation of 18 U.S.C. §§ 1343 and 2 (counts two-eight); and bank fraud, a violation of 18 U.S.C. §§ 1344 and 2. *Doc 4*. Both defendants pleaded not guilty.

The defendants were tried together and both elected to proceed *pro se*. The trial lasted two weeks, consisting of testimony from more than 30 witnesses, and the admission of more than 200 exhibits. *See minute entry, dated 3/8/2019*; *Doc 197*. At the conclusion of the government's case, and then again at the conclusion of all the evidence, both defendants made a Rule 29 motion for judgment of acquittal. *Doc 252, p. 140; Doc 255, pp. 168-68; Docs 144, 145, 151, 152*. The district court did not rule on the motions after the conclusion of the government's case but denied them at the close of all the evidence. *Doc 255, pp. 189-90*.

Watkins Sr. submitted proposed jury instructions. *Doc 97*. Regarding "proof of scheme to defraud," he requested the following instruction:

> To prove the required, alleged scheme to defraud, the Government must prove a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property. But, the scheme must be a scheme to defraud, and not a scheme to do

something other than defraud.

> That is, not only must there be proof that the Defendants schemed to deprive someone of something of value by trick, deceit, chicane, or overreaching, but also proof that each Defendant intended to harm the alleged "Investor Victim(s)." If a defendant does not intend to harm the victim - to obtain, by deceptive means, something to which the defendant is not entitled - then he has not intended to defraud the victim.
>
> Someone who tricks another to enter into a transaction has not "schemed to defraud" so long as he does not intend to harm the person he intends to trick. And this is true even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud.
>
> So, a "scheme to defraud," as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself. Even if a defendant lies, and even if the victim made a purchase because of that lie, you must find the defendant not guilty if you nevertheless believe that the alleged victims received what they paid for.

Doc 97, p .27.

The district court denied the request, stating "[i]nstead of going with your version of [*United States v.*] *Takhalov*, 827 F.3d 1307 (11th Cir. 2016)], I am relying on the instruction that was formulated by the Eleventh Circuit Pattern Jury Committee and approved . . . . as being a correct statement after . . . *Takhalov*[.]" *Doc 255, pp. 226-27*. As part of its instructions, the district court charged the jury:

> To act with intent to defraud means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury.
>
> Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

Doc 256, pp. 31-32. The court additionally instructed the jury on the defendants' theory of the case and good faith. *Doc 256, pp. 32-33*.

Following the instructions and the arguments of the parties, the jury convicted Watkins Sr. on all counts and Watkins Jr. on counts one and two. *Docs 219, 223*. Both defendants filed motions seeking a judgment of acquittal notwithstanding the verdict or, alternatively, a new trial. *Docs 163, 164*. The court denied those motions in a written order. *Doc 197*. The district court sentenced Watkins Sr. to serve 60 months of imprisonment on each count, with each sentence to run concurrently. *Doc 223*. On his two counts of conviction, the district court sentenced Watkins Jr. to serve concurrent sentences of 27 months in prison. *Doc 219*.

II. Statement of the Facts

A. Introduction

At all times relative to the indictment, Watkins Sr. was the manager of Masada Resource Group, L.L.C (MRG). Controlled Environmental Systems Corporation (CESC) owned of 95% of the stock in MRG. The two entities owned patents concerning technology to convert waste into ethanol. Watkins Sr. would refer to these entities collectively as "Masada" in emails and other correspondence. Watkins Sr. assumed operational control of Masada and its affiliates as the designated manager in late 2005. After one of the original two partners died, Watkins Sr.

negotiated purchase agreements with the owners that gave him the right to purchase ownership interests. At the time of trial, however, Watkins Sr. had not paid any funds to exercise the purchase options.

From 2007 to 2014, Watkins Sr. used his position and interest in these businesses to solicit "investments" from various people. In doing so, he often misled the victims into believing that he owned at least 50% of the interest in Masada. He also repeatedly misrepresented the purpose of the funds he solicited. *See, e.g., Doc 197, p. 6* ("The victims testified at trial that, if they had known the truth about how the Defendants would use their investment monies to pay expenses such as alimony, back-taxes, old debts, or advertising for Watkins, Jr.'s insurance agency, they would not have invested with the Defendants."). And he presented false information about the involvement of various prominent people with Masada. *Doc 244, pp. 69-80* (witness testifying about emails received from Watkins Sr. that, among other things, represented that Condoleezza Rice was "joining Masada" and that Martin Luther King III was "awaiting his appointment date with President Obama" to discuss Masada).

While Watkins Sr. was soliciting money from the victims and using the funds to pay for numerous personal and other expenses unrelated to the purported investment, he was in significant debt. The evidence showed that almost each time the defendants received a significant investment by one of the victims, Watkins Sr.'s account was significantly depleted before the funds were received. The money would

then be allocated to pay personal debts and other expenses not related to the purpose of investment. On many occasions, the money would be at least partially allocated even before it was received. Indeed, the evidence showed that a dwindling bank account was often the motivation behind a solicitation.

For example, in an email dated May 24, 2013, Watkins Jr. emailed Watkins Sr., stating, "We have no money left." *Doc 180-144* (Gov Exhibit 45). To try and survive another day, Watkins Sr. asked Charles Barkley, who had already invested a significant amount of money with Watkins Sr., to loan Masada $150,000. In doing so, he falsely represented the amount of recent business expenses he had incurred and stated, also falsely, that he would be able to pay the loan back shortly. Barkley agreed to provide Watkins Sr. with the requested money and Watkins Sr. immediately set out to paying personal expenses. At the time of trial, Watkins Sr. had not repaid the May 2013 loan or any of the money the Barkley and other victims had "invested" in Masada.

B. Charles Barkley

The victim who invested the most substantial amount of money with Watkins Sr. was Charles Barkley. He invested large sums on several occasions in the form of purchasing equity interest and loans. The following chart accurately reflects his outlays.

Date Received	Entity/Purpose	Payment Method	Amount
1/17/07	WP / Economic Interest	Wire	$1,000,000
3/18/08	WA(TW) / Economic Interest	Wire	$1,000,000
5/31/10	Masada / Loan	Wire	$1,000,000
5/19/11	Masada / Loan	Wire	$1,000,000
4/12/12	Nabirm / Economic Interest	Wire	$1,000,000
9/17/12	Nabirm / Economic Interest	Wire	$250,000
10/16/12	Nabirm / Economic Interest	Wire	$750,000
5/28/13	Nabirm / Loan	Wire	$150,000
		TOTAL	$6,150,000

Doc 180-45; *Doc 251, p. 10*. At the time of trial, Barkley had received none of his money back. *Doc 251, p. 15*.

1. January 2007

Barkley testified that, at the time he invested in Masada, he thought Watkins Sr. owned the company. *Doc 251, p. 7*. When Barkley decided to invest with Watkins Sr., he did not rely upon his financial advisor to make the decision because "Donald was a friend of mine, I trusted him." *Doc 251, p. 11*. On January 8, 2007, Barkley wired $1 million to Watkins Sr.'s bank account. *Doc 18-54 (Gov. Exhibit 62)*. Before receiving the wire, the account had an approximate balance of $6,344.09. *Id*. In exchange for the funds, Watkins Sr. executed a Purchase Agreement and Irrevocable Assignment of Economic Interests dated January 8, 2007. *Doc 180-47 (Gov. Exhibit 55)*.

Over the next several days, Watkins Sr. made several payments using the money Barkley provided to pay expenses unrelated to Barkley's investment, including:

a. $275,000 on January 8, 2007 to Marion Snell (Watkins Sr.'s girlfriend);

b. $100,000 on January 8, 2007 to Alamerica Bank for repayment of a personal loan to Watkins Sr.;

c. $56,600 on January 8, 2007 to First Highland Group for the loan payment on the Highland Avenue office building; and

d. $90,900 on January 7, 2007 to Watkins Sr.'s ex-wife (and Watkins Jr.'s mother), Deandra Watkins.

Doc 180-54 (Gov Exhibit 62).

2. March 2008

Approximately one year later, Watkins Sr. persuaded Barkley to invest another $1 million in another of Watkins Sr.'s companies, Watkins Aviation. Doc 180-45. In March 2008, Barkley wired the money to Watkins Aviation; the same day, $999,000 of those funds were transferred to Watkins Sr.'s bank account at Alamerica Bank. *Doc 180-55 (Gov. Exhibit 63)*. The funds were then used to repay loans from Marion Snell, Deandra Watkins, and to make payments to First Highland Group.

3. May 2010

On May 8, 2010, Watkins Sr. sent Barkley an email soliciting a $1 million loan to be paid back in one year with 10% interest for purported Masada "project development." *Doc 180-36 (Gov. Exhibit 42)*. Watkins Sr. copied Watkins Jr. on the

email and represented the following:

a. "the opportunities to deploy Masada's technology are simply coming faster than we can accommodate with existing resources;"

b. the "opportunity to move forward on these new markets arose this past week and I must notify the participating partners this week whether we are 'in or out;'" and

c. the $1 million must be "committed and received in our account by Friday, May 4."

Id.

On May 10, 2010, Watkins Sr. sent an email to Watkins Jr., copying Barkley and other investors stating that they would "split the first $1 million for Morocco and Mexico until the other funds come in." *Doc 180-36 (Gov. Exhibit 43)*. Four days later, Barkley wired $1 million to Watkins Sr.'s bank account. *Doc 180-56 (Gov Exhibit 64)*. Before receiving the wire, this account had an approximate balance of $4,623. *Id*. In exchange for the loan, Watkins Sr. executed a promissory note dated May 14, 2010. *Doc 180-49 (Gov. Exhibit 57)*. The note expressly provided that "the debt evidenced by this Note was made and transacted solely for business purposes related to Masada Resource Group, LLC." *Id*. Nevertheless, $750,000 was used to repay Daniel Meachum, an attorney in Atlanta, Georgia, who had invested $2,000,000 with Watkins in 2007. *Doc 180-265 (Gov. Exhibit 462)*. The $750,000 was a partial refund

of Meachum's investment and was made in response to his repeated demands for his money back.

4. May 2011

On May 13, 2011, Watkins Sr. sent Barkley an email soliciting another $1 million loan to be paid back in one year at 10% percent interest, plus an additional $100,000 "friendship kicker." *Doc 180-36 (Gov. Exhibit 45)*. Watkins Sr. copied Watkins Jr. on the email and represented that the money would be used for the "special purpose" of "expending significant sums of money on NY, San Francisco, and Atlanta investment bankers and lawyers" for the "Masada-Waste Management transaction." *Id*.

Both Watkins Sr. and Watkins Jr. knew these representations were false; just two days earlier, Watkins Sr. and Watkins Jr. exchanged emails in which they discussed the need to obtain money to pay various outstanding debts that were unrelated to Masada or any Masada-Waste Management transaction. *Doc 180-4 (Gov. Exhibit 4)*; *Doc 180-9 (Gov. Exhibit 9*). Specifically, Watkins Sr. and Watkins Jr. discussed the need to pay $22,000 on the loan they obtained to purchase their stock in Alamerica Bank; $26,000 related to a loan on the Highland Avenue South building owned by First Highland Group; and $45,000 to pay American Express expenses. *Ibid*.

On or about May 23, 2011, Barkley wired $1 million to Watkins Sr.'s bank

account. *Doc 180-57 (Gov Exhibit 65)*. Before receiving the wire, the account had a negative balance of $786.67. *Id*. In exchange for the loan, Watkins Sr. executed a promissory note to Barkley dated May 18, 2011. *Doc 180-50 (Gov. Exhibit 58)*. The promissory note provided for Barkley to be repaid in full with interest upon closing of a transaction with Waste Management or May 18, 2012, whichever came first. *Id*. The promissory note further provided that "the debt evidenced by this Note was made and transacted solely for business purposes related to Masada Resource Group, LLC and affiliated entities/persons." *Id*.

Despite his representation, Watkins Sr. did not use the funds for the "special purpose" identified in his email. Instead, he made payments that included the following:

a. $7,000 on May 23, 2011 to one of Watkins Sr.'s children (Watkins Jr.'s brother) with the word "Gift" written on the memo line;

b. $41,816 on May 23, 2011, to Marion Snell;

c. $50,000 on May 23, 2011, to Deandra Watkins for "partial alimony";

d. Two payments on May 23, 2011 for $10,008.63 and $11,904.80 for repayment on the loan for Watkins Sr.'s Alamerica Bank stock.

e. $50,000 on May 24, 2011 to the Varnum law firm for that

firm's work defending Watkins Sr. in non-Masada litigation; and

f. $255,703 on June 6, 20 for Watkins Sr.'s unpaid 2009 federal taxes;

Doc 180-265 (Gov. Exhibit 462).

5. April 2012

On April 4, 2012, Watkins Sr. sent an email to Barkley, copying Watkins Jr. and representing the following:

a. before offering to sell ownership interests "to commercial uranium producers, [Watkins Sr.] wanted to give [Barkley] and another close personal friend of mine an opportunity to become part of this exclusive venture," referring to a transaction involving Nabirm;

b. Watkins Sr. was making this offer because Barkley had demonstrated "true friendship by not only investing significant money in Masada and TradeWinds airline, but also lending serious money to us for Masada's international expansion activities."

c. if Barkley invested $1 million in this venture, Watkins Sr. would give Barkley 5% of Watkins Sr.'s economic interest in Nabirm's uranium mining venture; and

d. if Barkley was interested in this opportunity, Barkley should contact Watkins Jr. to prepare the necessary paperwork.

Doc 180-40 (Gov Exhibit 47).

The day before Watkins Sr. sent the email, Watkins Jr. sent an email to Watkins Sr. with the subject line "Idea for money" and suggesting the following:

> You need to consider going back to Barkley for one last million loan/investment. I hate to go there but I don't think we have many more options. Perhaps the Nabirm and uranium development may be enough to pique his consideration. You need to call him as soon as you get back if not while you are over in Sierra Leone. I can't make that call.
>
> If we do go back to him, and he sees his way clear to help us, the following have to be the payment priorities:
>
> $40,000 - 2009 GA and Fed income taxes
> $190,000 - FHG replacement of AB prepaid rent (into our FHB account)
> $105,000 - AMEX
> $125,000 - Rich Hewlett (we pay the other $ 25,000 a month or two later)
> $45,000 Midland loan interest (2 quarters)
> $95,000 - past due bills, loan payments, fee payments and alimony
> $600,000 - TOTAL
>
> We hold the remaining $400,000, no exceptions. We use that for monthly payroll and expenses until we decide for sure what we are going to do with the bank and building.
>
> That's the only idea I have.

Doc 180-39 (Gov. Exhibit 46).

Shortly thereafter, Barkley wired $1 million to Watkins Sr.'s bank account. *Doc 180-59 (Gov Exhibit 67)*. Before receiving the wire, Watkins Sr.'s account had an approximate balance of $558.45. *Id*.

In exchange for this investment, Watkins Sr. executed the Purchase Agreement

and Irrevocable Assignment of Economic Interests dated April 10, 2012. *Doc 180-51 (Gov Exhibit 59)*. The agreement granted Barkley the right to receive 5% "of the total economic interests to which DVWPC is entitled by virtue of his ownership in Nabirm Energy Services (PTY) LTD in Namibia, Africa." *Id*.

Shortly after receiving the funds, Watkins Sr. made the following payments:

a. $190,000 on April 12, 2012 to First Highland Group;

b. $29,078.75 on April 12, 2012 to the United States Department of the Treasury for Watkins Sr.'s 2009 taxes;

c. $100,000 on April 18, 2012 to the Varnum law firm for that firm's work defending Watkins Sr. in the TradeWinds litigation; and

d. $7,250 on April 24, 2012 to the United States Department of the Treasury for Watkins Sr.'s 2011 taxes.

Doc 180-265 (Gov Exhibit 462).

6. September/October 2012

On September 11, 2012, Watkins Sr. sent an email to Barkley, copying Watkins Jr., and offering Barkley the opportunity to increase his 5% economic interest in Watkins Sr.'s equity in Nabirm from 5% to 20% in exchange for an additional $1 million. *Doc 180-41 (Gov. Exhibit 50)*. The email represents that (a) a recent lab report on Nabirm's uranium samples "indicates we have some of the highest quality uranium on record" and (b) if Mr. Barkley is interested, Barkley's financial advisor

"can arrange the $1 million payment with Donald Jr., as he has done in the past." *Id*.

On September 14, 2012, Watkins Sr. sent an email to Barkley and Glenn Guthrie (Barkley's financial advisor) stating:

a. he is "highly confident that Charles and the other investors in Nabirm and Masada will receive a cash return on their investments on or before December 31, 20-12."

b. Barkley's "Masada investment is covered by the Waste Management deal";

c. "we are negotiating an upfront payment that will be large enough to: (a) recoup our total investment in Masada, (b) repay Charles' two separate $1 million loans with interest, and (c) return Charles' original $2 million investment . . . together with a substantial premium on this investment amount"; and

d. this is a "rare opportunity for Charles, me and our other stakeholders in Nabirm."

Doc 180-41.

Barkley agreed to invest $1 million. In exchange, Watkins Sr. executed a Purchase Agreement and Irrevocable Assignment of Economic Interests dated September 4, 2012. *Doc 180-52 (Gov. Exhibit 60)*. The agreement superseded/replaced the April 2012 agreement. The September 2012 agreement was

for $2 million, which reflected the $1 million investment in April 2012 and the additional $1 million investment in the September/October 2012 agreement.

Barkley wired $1 million to Watkins Sr.'s bank account in two payments. One wire of $250,000 on September 17, 2012, and another wire of $750,000 on October 15, 2012. Before receiving the $750,000 wire on October 15, 2012, the account had an approximate balance of $25,320. *Doc 180-58 (Gov. Exhibit 66)*. On or about October 8, 2012, a $600,000 payment was made from the account to Richard Arrington, Jr. as repayment for a nominee loan Arrington took out at Watkins Sr.'s direction. *Id*. The evidence established that, when Arrington took out the loan (about a month earlier), Watkins Sr. already planned to use Barkley's money to pay it back. *Doc 180-133 (Gov Exhibit 196)*.

7. May 2013

On May 24, 2013, Watkins Sr. sent Barkley an email, copying Watkins Jr. and soliciting a $150,000 loan, to be paid back in 30 days. *Doc 180-44 (Gov Exhibit 52)*. The email represents the following:

a. Earlier in the week, Watkins Sr. "had to cover $600,000 in April and May expenditures related to these [Masada and Nabirm] projects."

b. Watkins Sr. had "paid all of these expenses, but these payments have left [his] office account far too thin for [his] personal

comfort";

c. The funds were needed to cover these expenditures until he received an "allotment of working capital" June 1.

d. that the $600,000 in expenditures included "some substantial legal fees" related to a "$10 million investment transaction" for Nabirm.

Id.

What Barkley did not know was that Watkins Sr. and Watkins Jr. were scrambling to raise funds to pay expenses unrelated to any expenses that Watkins Sr. had purportedly "covered" the previous week. Their dire financial status at the time is shown in an email from Watkins Jr. to Watkins Sr. dated Friday, May 24, 2013:

> The Malcolm Pirnie check for 5,333 came in today. I had to use it and Dr. Arrington's loan renewal money ($6,000, which I got from Southpace) to cover payroll today. We have no money left. I check your email and mine and no word from Barkley. And yes, Tina confirmed that the AMEX is on its way in, so it will be presented for payment Tuesday.

Doc 180-144 (Gov. Exhibit 208). Watkins Sr. replied, "I am surprised Charles did not say yes. I am going to send two more emails out today. The money has to be there on Tuesday." *Id*.

Barkley agreed to make the loan and, on or about May 28, 2013, wired $150,000 to the Watkins Sr.'s account. Before receiving the wire, the account had an approximate balance of $22,762. In exchange for the loan, Watkins Sr. executed a

promissory note to Barkley dated May 28, 2013. The Note provided that "the debt evidenced by this Note was made and transacted solely for business purposes related to Masada Resource Group, LLC." Nevertheless, the money was not used for such a purpose.

On May 24, 2013 (the same day as the solicitation email to Barkley), Watkins Sr. sent an email to Watkins Jr., stating: "If Charles comes through, please pay your AmEx ($79,000), Jessica's AmEx ($40,750.23) and my AmEx ($10,000). Pay $2,000 more on my Visa and pay a one-month $2,500 retainer for Jessica so that she can pay her personal bills." *Doc 180-252 (Gov. Exhibit 420)*. Several charges on the credit cards were for unrelated expenses, such as advertising for Watkins Jr.'s insurance business.

8. February 2014

On February 4, 2014, Watkins Sr. emailed Barkley representing that he was in discussions to sell Masada to a member of the royal family of Saudi Arabia. *Doc 180-45 (Gov. Exhibit 53)*. Watkins Sr. stated that he estimated that Masada's "total enterprise value" was more than one billion dollars, and that he expected the deal with the member of the royal family of Saudi Arabia to be structured with "an initial cash payout of $100 million." *Id*. According to Watkins Sr., Masada needed an "additional capital infusion of $1 million" and he asked Barkley for the money. *Id*. He also asked Barkley to convert $2 million of loans that Barkley had made to Masada into equity.

Id. In exchange, Watkins Sr. offered to upgrade Barkley's equity stake in Masada to "a 10% economic interest in all of Masada," which, according to Watkins Sr., would yield "upwards of $100 million." *Id*. On February 10, 2014, Watkins Sr. sent an email to Glen Guthrie, Barkley's financial advisor, reiterating the request for the $1 million investment. This time, Barkley declined.

Even so, the evidence showed that Watkins Sr. was prepared to spend any additional investment from Barkley on expenses unrelated to the subject of his solicitation email. The proposed expenditures included a $335,000 loan repayment to Dr. Arrington, $100,000 in past-due alimony to Deandra Watkins, $125,000 total to Watkins Jr.'s insurance agency, and many other expenses that were personal or otherwise unrelated to the transaction in the email soliciting funds. *Doc 180-148 (Gov. Exhibit 213)*.

C. Fraud Involving Other Investors

Barkley was hardly the only victim of the fraud. Numerous other victims suffered similar treatment. Watkins Sr. led others to believe that he owned a significant portion of Masada, even though he did not. *Doc 180-33 (Gov. Exhibit 34, purchase agreement)*; *Doc 180-140 (Gov. Exhibit 203, purchase agreement)*; *Doc 249, pp. 194-96* (Clarissa Harms testifying that she entered into an agreement for Watkins Sr. to purchase her family's interest in CESC, but that there was never a sale of the interest because Watkins Sr. never paid what was owed); *Doc 250, pp. 12-23* (Terry

Johnson testifying that he entered into an agreement for Watkins Sr. to purchase his 50% of MRG and CESC, but that the sale never went through because Watkins Sr. never paid what was owed).

In addition to Barkley, several other witnesses testified that they invested money based on Watkins Sr.'s misrepresentations. *See, e.g., Doc 244, pp. 76-102* (Danielle Thomas testifying that she and her husband invested $1 million after being told, among other things, that Watkins Sr. owned 50% of the company, that prominent people like Condoleezza Rice were involved; she was not told that the money would pay Watkins Sr.'s old unrelated debts, his alimony payments, and his personal credit card bills); *Doc 244, pp. 180* (Bryan Thomas testifying that Watkins Sr. lied to the SEC in testifying in the SEC proceedings that Thomas knew he was investing in Watkins Sr. and not directly in Masada); *Doc 244, pp. 247-63*; *Doc 245, pp. 88-90, 96* (Takeo Spikes testifying he invested money after being told: his money was going to be used for Masada purposes; Condoleezza Rice and Martin Luther King, III were involved; Masada was worth a billion dollars or more; and Watkins Sr. owned 50% of the company"); *see also id*. (Spikes testifying that, if he had known his money would be used to pay Watkins Sr.'s girlfriend, Watkins Sr.'s personal credit card bills, and Watkins Sr.'s back taxes, he "never would have invested").

D. Bank Fraud

On two separate occasions, Watkins Sr. asked Dr. Richard Arrington to take out a loan for Watkins Sr.'s benefit at Alamerica Bank where Watkins Sr. was Chairman of the Board. *Doc 248, pp. 118-19*. On the first occasion, Watkins Sr. asked Arrington to take out a loan for $750,000. *Doc 248, pp. 128-29*. Watkins Sr. told Arrington that he expected to get some money from Charles Barkley and that Watkins Sr. would use Barkley's money to pay Arrington back. *Doc 248, p. 121*. Watkins Sr. directed Arrington to go see Larry Tate, the president of Alamerica Bank, to get the loan. *Id*.

Arrington received the loan, informing the bank that the proceeds were to provide capital for Arrington's own business, even while always intending to provide the funds to Watkins Sr. and Watkins Jr. *Doc 248, pp. 128-29*. Arrington subsequently received a substantial portion of the money back when Watkins Sr. was able to convince Barkley to invest more money. *Doc 248, pp. 146-47*.

Later the same year, Watkins Sr. asked Arrington to take out another loan, this time for $150,000. *Doc 248, pp. 153-54*. Arrington went to Alamerica Bank and took out the loan. *Doc 248, pp. 154-55*. Once again, the purported borrower was Jennro, LLC, an LLC owned and controlled by Arrington and the purported purpose was to provide working capital for Jennro. *Doc 248, p. 156*. But that information was false. *Id*. After Arrington received the money, he gave Watkins Jr. a check for $150,000 the same day. *Doc 248, p. 158*.

III. Standards of Review

1-4. This Court "review[s] a verdict challenged for sufficiency of the evidence *de novo*, resolving all reasonable inferences in favor of the verdict," and the verdict will not be disturbed "unless no trier of fact could have found guilt beyond a reasonable doubt." *United States v. Yost*, 479 F.3d 815, 818-19 (11th Cir. 2007) (per curiam) (quotations and citation omitted).

5. This Court reviews a district court's refusal to give a requested jury instruction for an abuse of discretion. *United States v. Maxwell*, 579 F.3d 1282, 1303 (11th Cir. 2009).

6. This Court reviews a district court's evidentiary rulings for an abuse of discretion. *United States v. Todd*, 108 F.3d 1329, 1331 (11th Cir. 1997).

SUMMARY OF ARGUMENT

1. Both Watkins Sr. and Watkins Jr. argue the evidence was insufficient to support the jury's verdict as to count one, conspiracy. They argue there was no evidence of Watkins Jr.'s involvement in a scheme to defraud. The claims should be denied. Among other things, the evidence showed that Watkins Jr. was routinely copied on emails containing misrepresentations that were sent to investors. Moreover, the evidence established that Watkins Jr. was significantly involved in Watkins Sr.'s business dealings, including directing and receiving the wire transfers from the "investors." Most significantly, Watkins Jr. sent Watkins Sr. an email suggesting that

Charles Barkley be solicited for an additional investment in particular business opportunities so that debts unrelated to the solicitation could be paid using Barkley's money.

2. Watkins Jr. argues the evidence was insufficient to support his count-two conviction for wire fraud. He is wrong. As the district court found, the evidence permitted a reasonable inference (at least) that Watkins Jr. knew that misrepresentations were made to obtain the $150,000 loan at issue. In addition, the jury could infer (at least) that Watkins Jr. knew the loan proceeds were supposed to be used for Masada, but used them instead to pay unrelated expenses.

3. Watkins Sr. argues that the evidence was insufficient to support his wire-fraud convictions (counts two through eight). The claim should be rejected. Contrary to Watkins Sr.'s argument on appeal, Barkley did not loan Watkins Sr. $150,000 in exchange for a worthless promissory note. Rather, he extended the loan based on Watkins Sr.'s representation that greater than expected business expenses had depleted Watkins Sr.'s "office account," and that a forthcoming injection of "working capital" would permit him to pay the money back within 30 days. Neither of those representations were true. In short, because of Watkins Sr.'s misrepresentations, none of the "investors" got what they bargained for. The jury was, moreover, permitted to disbelieve Watkins Sr.'s testimony and instead conclude the opposite was true. For these reasons, the evidence was sufficient.

4. Watkins Sr. argues the evidence was insufficient to support his convictions for bank fraud (counts nine and ten). Again, he is wrong. As the district court found, the evidence conclusively established that Watkins, Sr. committed bank fraud by seeking loans in the name of Dr. Arrington, but for his own benefit because, as a "bank insider," Watkins Sr. "had borrowed the maximum amount on his line of credit at Alamerica Bank." This evidence, combined with Watkins Sr.'s testimony, supports the jury's verdict.

5. Watkins Sr. complains that the district court erred in failing to give his proposed jury instruction related to his "*Takholov*" defense. The claim should be denied. The district court's instructions followed the pattern jury instructions, correctly stated the law, and were complete.

6. Watkins Sr. argues that the district court's evidentiary rulings denied him his constitutional right to present a defense. The record does not support the claim. Instead, it shows that the district court encouraged Watkins Sr. to present his defense, and only restricted him to evidence that was admissible under the rules and relevant to the charges. There was no abuse of discretion.

ARGUMENT

I. The Evidence Was Sufficient To Support the Conspiracy Convictions.

Both Watkins Sr. and Watkins Jr. argue that the evidence was insufficient to support their convictions for conspiracy. *Watkins Sr.'s brief, p. 34*; *Watkins Jr.'s brief, p. 11*. Watkins Jr. argues that he was entitled to a judgment of acquittal because "the government did not produce any recording, dialog, communication, or writing between [him] and [Watkins] Sr. articulating or establishing or affirming a plan or agreement to defraud any investor by obtaining money under false pretenses." *Watkins Jr.'s brief, p. 11*. Watkins Sr. makes a similar argument; he too argues that the evidence was insufficient to support a finding that Watkins Jr. was part of a conspiracy, and thus without a co-conspirator, he should have been acquitted as well. *Watkins Sr.'s brief, p. 36* (arguing that "there is no evidence from which a reasonable jury could conclude that Watkins, **Jr**. had the required specific intent to commit an illegal act and join a criminal conspiracy . . . and given the lack of any other person with whom the Government contends Watkins, **Sr**. has conspired, the conspiracy charge would fail") (emphasis in original). Contrary to both claims, the evidence was sufficient to support the existence of a conspiracy.

In reviewing a claim of insufficient evidence, this Court reviews the matter "*de novo*, viewing the evidence and all reasonable inferences and credibility choices in the light most favorable to the government." *United States v. Anderson*, 289 F.3d 1321,

1325 (11th Cir. 2002) (citing *United States v. De La Mata*, 266 F.3d 1275, 1301 (11th Cir. 2001)). A jury's verdict must stand "if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Herrera*, 931 F.2d 761, 762 (11th Cir. 1991) (citing *United States v. Bonavia*, 927 F.2d 565 (11th Cir. 1991)).

To prove a conspiracy to commit wire fraud under 18 U.S.C. § 1349, the evidence must establish "(1) that a conspiracy [to commit wire fraud] existed; (2) that the defendant knew of it; and (3) that the defendant, with knowledge, voluntarily joined it." *United States v. Vernon*, 723 F.3d 1234, 1273 (11th Cir. 2013) (quotation marks and citation omitted). And, "[b]ecause the crime of conspiracy is predominantly mental in composition, it is frequently necessary to resort to circumstantial evidence to prove its elements." *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998) (internal quotation marks and citation omitted). Thus, Watkins Jr.'s contention that there was no "recording, dialog, communication, or writing . . . establishing or affirming a plan or agreement to defraud" matters very little.

Moreover, the "government need not prove that the defendant knew all of the details or participated in every aspect of the conspiracy." *United States v. Miranda*, 425 F.3d 953, 959 (11th Cir. 2005) (internal quotation marks and alterations omitted). Instead, the government's burden is only to prove "that the defendant knew the essential nature of the conspiracy." *Id*. (internal quotation marks and alteration omitted). A "defendant can be convicted [of conspiracy] even if his or her participation

in the scheme is 'slight' by comparison to the actions of other co-conspirators." *Id*. at 1428.

Here, the district court correctly found that that the evidence was sufficient to support a finding that Watkins Jr. knew that Watkins Sr. was misrepresenting material facts to obtain funds from investors and that he willfully participated in that conduct. That finding was supported by, among other things: evidence that Watkins Jr. offered ideas for misrepresentations; that he directed and received the transfer of funds from alleged investors; and that he used the funds to pay the personal expenses of himself and Watkins Sr., all while knowing that the funds were obtained based on Watkins Sr.'s false information and representations to those individuals.

Without question, Watkins Jr. was directly involved in Watkins Sr.'s business activities. *Doc 255, p. 6*. Watkins Sr. testified that Watkins Jr. oversaw "all of . . . the administrative day-to-day stuff that any business has." *Id*. In addition, Watkins Jr. was included on numerous emails Watkins Sr. sent to the victims, many of which contain false statements, such as representations that Condoleezza Rice, and Martin Luther King, III, had both agreed to work with Masada. *Doc 245, pp. 38-45, 65-66, 195-209*. In fact, the emails were most often sent to Watkins Jr. with the victims copied.

As the district court found, perhaps the most significant evidence of Watkins Jr.'s involvement was his role in the solicitation of investment funds from Charles Barkley for the very purpose of using those funds to pay personal expenses. That role

was reflected in Government's Exhibit 46, an email from Watkins Jr. to Watkins Sr. *Doc 197, pp. 9-10*.

The email contains the subject line "Idea for money" and reads: "You need to consider going back to Barkley for one last million loan/investment. I hate to go there but I don't think we have many more options. Perhaps the Nabirim and uranium developments may be enough to pique his consideration. You need to call him as soon as you get back if not while you over in Sierra Leone. I can't make that call." *Doc 180-39 (Gov Exhibit 46)*. The email then listed a number of expenses to be paid from Barkley's "investment/loan," including $40,000 for personal back taxes; $105,000 for an American Express bill; $45,000 for loan interest payments; and $95,000 for past due bills, loan payments, fee payments and alimony." *Id*. As the district court concluded, a "jury could reasonably infer from this email Defendant Watkins, Jr.'s involvement in a conspiracy with Watkins, Sr. to try to solicit funds from Barkley using false statements about business needs but using the proceeds for personal expenses and gain." *Doc 197, pp. 9-10*.

This evidence of Watkins Jr.'s involvement in this transaction alone was enough to support the jury's verdict convicting him of the conspiracy count. Watkins Jr. knew of a plan to defraud Barkley – in fact, he instigated it – and he participated in executing the plan. His knowledge as the recipient of numerous emails containing multiple misrepresentations that were sent for the purpose of providing the information to investors supports a reasonable inference of his involvement as well. He was aware

of the representations in those emails and that the funds were not utilized in a manner consist with the representations.

Thus, the evidence was sufficient. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States v. Young*, 906 F.2d 615, 618 (11th Cir. 1990). "A jury is free to choose among reasonable constructions of the evidence." *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983). A verdict should be sustained where "there is a reasonable basis in the record for it." *United States v. Farley*, 607 F.3d 1294, 1333 (11th Cir. 2010). Here, as the district court found, there is a reasonable basis in the record for Watkins Jr.'s conspiracy conviction. Thus, both his and Watkins Sr.'s claim of insufficient evidence as to count one should be denied.

II. The Evidence Was Sufficient To Support Watkins Jr.'s Count-Two Conviction for Wire Fraud.

Watkins Jr. argues that the evidence was insufficient to support his conviction on count two of the indictment – wire fraud, resulting in a $150,000 transfer from Charles Barkley. *Watkins Jr.'s brief, p. 19-24*. He says that "the record is entirely devoid of any false, fraudulent, or misleading statements by Watkins, Jr. to Charles Barkley in any shape way or form that influenced Barkley to execute the loan agreement." *Watkins Jr.'s brief, p. 17*. Again, Watkins Jr. misses the point. Applying

the appropriate standard of review demonstrates that the evidence was sufficient to support Watkins Jr.'s conviction on count two.

The evidence established that Watkins Sr. sent Barkley an email on May 24, 2013, soliciting a $150,000 loan. *Doc 180-44 (Gov Exhibit 52)*. Watkins Jr. was copied on the email. *Id*. Watkins Sr. stated that he needed the loan because he "had to cover $600,000 in April and May expenditures related to these projects, including some substantial legal fees for Nabirm relating to the $10 million investment transaction currently being handled by Daniel Stewart & Company in London." *Id*. Watkins Sr. further stated that paying "all these expenses," "left his office account far too thin for my personal comfort," and that "our June allotment of working capital will not hit my office account until June 1." *Id*.

As the district court recognized, however, the evidence "showed that Watkins, Sr. had not paid $600,000 worth of business expenses in the week prior" and "he did not receive any working capital on June 1." *Doc 197, p. 10*. Thus, the "jury could reasonably conclude that Defendant Watkins, Jr., as the office manager and keeper of the books for Watkins, Sr., knew that the representations in this email regarding the alleged payment of $600,000 in business expenses were false." *Id*.

In addition, "[b]ased on these false representations, Barkley agreed to the loan, and the loan document expressly states that 'the debt evidenced by this Note was made and transacted solely for business purposes related to Masada Resource Group, LLC." *Doc 197, pp. 10-11 (citing Doc. 180-53, p. 2)*. Nevertheless, "the record reflects

emails between Watkins, Sr. and Watkins, Jr. specifically detailing personal expenses for both Watkins, Sr. and Watkins, Jr. to be paid from the loan proceeds, including a $79,000 American Express bill for Watkins, Jr." *Doc 197, p. 11 (citing Doc 180-252)*.

As the district court found, this evidence was sufficient to support Watkins Jr.'s count-two conviction: "As the preparer of business documents for Watkins, Sr., the jury could reasonably infer that Defendant Watkins, Jr. knew that these funds from the loan could be used for business purposes only, and not to pay his personal expenses." *Doc 197, p. 11*.

Again, a verdict should be sustained where "there is a reasonable basis in the record for it." *Farley*, 607 F.3d at 1333. Here, there is a reasonable basis in the record for Watkins Jr.'s conviction on count two.

III. The Evidence Was Sufficient To Support Watkins Sr.'s Wire-Fraud Convictions.

Watkins Sr. argues that the evidence is insufficient to support his convictions for wire fraud. *Watkins Sr.'s brief, p. 31*. His argument is limited to whether the evidence establish his intent to defraud. *Id*. More specifically, he asserts there can be no fraud because there was no evidence of an intent to harm the victim and that "as scheme to defraud 'refers only to those scheme in which a defendant lies about the nature of the bargain itself[.]'" *Watkins Sr.'s brief, p. 32* (quoting *United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016)). Even assuming (without conceding)

Watkins Sr. is right about his interpretation of *Takhalov*,[1] he is wrong about the sufficiency question. The evidence was sufficient to support each of his wire-fraud convictions.

A. Counts one through four

Watkins Sr. first brings into question counts one through four, which charge wire transmissions related to Watkins Sr.'s successful solicitation of a $150,000 loan from Barkley. *Watkins Sr.'s brief, p. 32*. He says that there was no fraud because Barkley got exactly what he paid for. *Id., p. 33*. This is so, Watkins Sr. says, because "the alleged misrepresentations made by Watkins, Sr. in the . . . e-mail soliciting Barkley for the loan transaction do not misrepresent the price Barkley will pay (the $150,000 loan) or what he will and did receive (a short-term promissory note payable in 30 days)." *Id*. Watkins Sr. ignores, however, his misrepresentation that he would soon have an ability to pay the loan back. He directly represented that, in about a week, he would receive a "June allotment of working capital." *Doc 197, p. 10*. This was not true. And, as of the time of trial, the note had not been repaid. *Doc 251, p. 42*.

Despite Watkins Sr.'s contention on appeal, Barkley did not bargain for a worthless promissory note. Rather, he extended the loan based on Watkins Sr.'s

[1] *See United States v. Feldman*, 931 F.3d 1245, 1272 (11th Cir. 2019) (W. Pryor, J., concurring) ("Nothing about the common-law test limits materiality to misrepresentations about 'the price,' 'the characteristics of the good,' or even 'the nature of the bargain itself.'") (quoting *Takhalov*, 827 F.3d at 1314).

representation that greater than expected expenses had depleted his "office account," not his personal finances, and Watkins Sr.'s representation that he would pay the money back within 30 days because he would soon get an allotment of "working capital." *Doc 180-44*. Again, this was not true. The truth was, as Watkins Jr. wrote to Watkins Sr. in an email dated May 24, 2013, "We have no money left." *Doc 180-144 (Gov Exhibit 45)*.

Watkins Sr.'s position is effectively that there can be no fraud when a borrower misrepresents his financial condition to a lender because, despite the misrepresentation, the lender got what he bargained for – a legal debt owed, no matter how unlikely it may be that the borrower will pay the loan back. This is not the law as it relates to fraud. Rather, again, even accepting that the fraud must relate to the nature of the bargain itself, that standard is met on this record. Barkley did not get what he bargained for and would not have loaned the money, but for the misrepresentations. *Doc 251, pp. 43-45*. He loaned the money to cover business expenses in a venture in which he already had a substantial investment; he did not loan the money to pay Watkins Sr.'s and Watkins Jr's credit-card bills. *Ibid*.

Finally, "when a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true." *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995) (quotation marks omitted). When corroborated by the government's case, the defendant's testimony on his own behalf may be treated as "substantive evidence of the defendant's guilt." *Brown*, 53 F.3d at 314-315. This

principle has "special force" with respect to "highly subjective elements" such as a defendant's intent. *Brown*, 53 F.3d at 315. *Accord United States v. Croteau*, 819 F.3d 1293, 1305 (11th Cir. 2016). Thus here, the principle has "special force." Watkins Sr. testified in his own defense. *Doc 254, p. 26*. It was thus permissible for the jury to reject Watkins Sr.'s testimony regarding his intent and instead conclude the opposite was true. *Brown*, 53 F.3d at 314. On that basis as well, the evidence was sufficient.

B. Counts five through eight

As it relates to counts five through eight, Watkins Sr.'s claim is the same as above – he says that all of these convictions "must fall under *Takhalov* for legally insufficient evidence of Senior's intent to harm, and thus of the existence of a scheme to defaud." *Watkins Sr.'s brief, p. 34*. Watkins Sr. is wrong again.

On February 4, 2014, Watkins Sr. sent Barkley another email requesting yet more money (count five). *Doc 180-45 (Gov Exhibit 53)*. In the email, he requests that Barkley convert his $2 million in loans to equity in addition to investing another $1 million. *Id*. Watkins Sr. states that, in exchange, he will convert Barkley's equity interest from 6% to 10%. *Id*. Watkins Sr. also sent an email to Barkley's financial advisor, reiterating the offer (count six). *Doc 180-46 (Gov Exhibit 54)*.

This time, Barkley declined to invest. *Doc 251, pp. 60-63*. Nevertheless, an email dated February 10, 2014, from Watkins Sr. shows that, once again, he was already planning to spend Barkley's money on unrelated expenses. *Doc 180-148 (Gov Exhibit 213)*. Included in the list of payments was Dr. Richard Arrington for

repayment of nominee loans he obtained at Watkins Sr.'s request, alimony payments, and an American Express card payment. *Doc 251, p. 62*.

Contrary to Watkins Sr.'s contention, had Barkley invested, he would not have received what he bargained for. Barkley invested "because he thought [Watkins Sr.] was going to grow Masada with [the] money." *Doc 251, p. 63*. That is not what happened. Rather, Watkins Sr. repeatedly used Barkley's money to pay other unrelated expenses. The evidence was sufficient as to counts five and six.

Counts seven and eight relate to emails sent out by Watkins Sr. to several victims who had already invested. The first is titled "Masada stakeholder report" and was sent out on June 22, 2014 (count seven). *Doc 180-81 (Gov. Exhibit 353)*. A similar email titled "Masada 2015 year-end stakeholder report" was sent out on January 30, 2016 (count eight). *Doc 180-179 (Gov. Exhibit 343)*.

In his brief, Watkins contends that the email is insufficient under a "lulling theory" because "the wire communications designed to conceal a fraud, by lulling a victim into inaction, must be in furtherance of a scheme to defraud." *Watkins Sr.'s brief, p. 35*. And here he says, there was no scheme to defraud here because there was "insufficient evidence of Senior's intent to harm." *Id*. In other words, he just piggybacks this claim on arguments already made, and presents no additional support for his contention. For the reasons already set out, Watkins Sr.'s claim of insufficient evidence of a scheme to defraud is without merit. Thus, his claims related to counts seven and eight are without merit as well.

IV. The Evidence Was Sufficient To Support Watkins Sr.'s Bank-Fraud Convictions.

Watkins Sr. argues that the evidence was insufficient to establish his "intent to defraud as necessary to sustain the convictions for bank fraud." *Watkins Sr.'s brief, p. 36*. This claim too should be denied.

Under 18 U.S.C. § 1344, one commits bank fraud by knowingly executing "a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, . . . or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." To sustain a conviction under § 1344(1), the government must prove that "the defendant intentionally participated" in the scheme or artifice, and that the intended victim "was a federally-insured financial institution." *United States v. McCarrick*, 294 F.3d 1286, 1290 (11th Cir. 2002). Subsection 1344(1) requires proof of the defendant's intent to defraud the financial institution while subsection 1344(2) does not. *See Loughrin v. United States*, 573 U.S. 351 (2014). Here, as Watkins Sr. notes, the jury was instructed on the requirements of § 1344(1). *Watkins Sr.'s brief, p. 36*. The evidence was sufficient to support the verdicts.

Regarding count nine, the evidence showed that, on or about September 18, 2012, Watkins Sr. asked Dr. Richard Arrington to make a $750,000 loan to Masada to further Masada's business. *Doc 248, pp. 118-19*. Watkins Sr. told Arrington that he expected to get some money from Charles Barkley and that Watkins Sr. would use

Barkley's money to pay off Arrington's $750,000. *Doc 248, p. 121*. Watkins Sr. directed Arrington to go see Larry Tate, the president of Alamerica Bank, to get the loan. *Id*. Watkins Sr. was Chairman of the Board at Alamerica Bank.

Around the same time, Watkins Sr. arranged for Kimberly Perkins, an attorney who had worked for Watkins Sr. in the past, to send a letter to Matt Rockett. *Doc 249, p. 83*; *Doc 180-133 (Gov. Exhibit 196)*. At the time, Rockett was an Executive vice-president at Alamerica Bank, and was primarily in charge of the loan department. *Doc 248, p. 255*. In the letter, which was drafted by Watkins Sr., Perkins identified herself as "general counsel for Nabirm Global, LLC," identified Barkley Enterprises as a stakeholder in Nabirm, and identified Barkley himself as a "high net worth individual and accredited investor in Nabirm and associated energy companies." *Doc 180-133*.

The letter identified Arrington as an "investor in one of the associated Nabirm companies" and represented that he had "an exclusive right to receive $750,000 in cash from Mr. Barkley's investment proceeds, the receipt of which will occur on or before December 31, 2012." *Id*. In signing the letter, Perkins represented that "[t]he $750,000 amount, the commitment to pay it, and the date of payment were made by Raymond James on behalf of Barkley Enterprises. I have verified this financial information in my capacity as general counsel of Nabirm." *Id*. Perkins testified that all the information in the letter came from Watkins Sr. *Doc 249, p. 87*. Despite the representation in the letter, Perkins had done no independent verification. *Doc 249, p. 88*.

On or about September 21, 2012, Watkins Sr. caused Arrington, who was doing business as Jennro, LLC, to originate an Alamerica Bank loan in the amount of $750,000. *Doc 248, pp. 128-29*. In obtaining this loan, Arrington represented to Alamerica Bank that the loan was for Jennro's business purposes. *Doc 248, p. 129*. This was not true. *Id*. The money was instead dispersed at the direction of Watkins Sr. and Watkins Jr. *Doc 248, pp. 133-46*. This evidence, along with Watkins Sr.'s testimony, was sufficient to support the jury's conviction on count nine. As the district court found, the evidence supports "a jury finding that Watkins, Sr. committed bank fraud involving the loans sought in the name of Dr. Arrington, but for the benefit of bank insider Watkins, Sr., who had borrowed the maximum amount on his line of credit at Alamerica Bank." *Doc 197, p. 7*.

For the same reason, the evidence was sufficient to support the jury's conviction on count ten. In relation to that count, the evidence showed that in November 2012, Watkins Sr. asked Arrington to take out a loan for $150,000. *Doc 248, pp. 153-54*. Arrington went to Alamerica Bank and took out the loan. *Doc 248, pp. 154-55*. Once again, the purported borrower was Jennro and the purported purpose was to provide working capital for Jennro. *Doc 248, p. 156*. Both of those representations were false. *Id*. After Arrington received the money, he gave Watkins Jr. a check for $150,000 the same day. *Doc 248, p. 158*.

V. The District Court Did Not Abuse Its Discretion By Denying Watkins Sr.'s Proposed Instruction on "Proof of Scheme to Defraud."

Watkins Sr. argues that the "district court abused its discretion in refusing to define the element of 'intent to harm' when it instructed the jury as to the 'intent to defraud' required for conviction of both wire fraud and bank fraud." *Watkins Sr.'s brief, p. 39*. He says that, even though the district gave this Court's pattern instruction on the subject, it was insufficient and prejudicial. *Id*. He is wrong. The instruction given was correct and complete.

Watkins Sr. requested the following instruction on "proof of scheme to defraud:"

> To prove the required, alleged scheme to defraud, the Government must prove a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property. But, the scheme must be a scheme to defraud, and not a scheme to do something other than defraud.
>
> That is, not only must there be proof that the Defendants schemed to deprive someone of something of value by trick, deceit, chicane, or overreaching, but also proof that each Defendant intended to harm the alleged "investor Victim(s)." If a defendant does not intend to harm the victim - to obtain, by deceptive means, something to which the defendant is not entitled - then he has not intended to defraud the victim.
>
> Someone who tricks another to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick. And this is true even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud.
>
> So, a 'scheme to defraud,' as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself. Even if a defendant lies, and even if the victim

> made a purchase because of that lie, you must find the defendant not guilty if you nevertheless believe that the alleged victims received what they paid for.

Doc 97, p .27.

The district court denied the request, stating "[i]nstead of going with your version of [*United States .v*] *Takhalov*[, 827 F.3d 1307 (11th Cir. 2016)], I am relying on the instruction that was formulated by the Eleventh Circuit Pattern Jury Committee and approved . . . . as being a correct statement after . . . *Takhalov*[.]" *Doc 255, pp. 226-27*. In relevant part, the district court instructed the jury:

> To act with intent to defraud means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury.
>
> Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

Doc 256, pp. 31-32.

A district court's refusal to give a requested instruction is an abuse of discretion if: "(1) the instruction is correct; (2) the court did not address the substance of the instruction in its charge; and (3) the failure to give the instruction seriously impaired the defendant's ability to present an effective defense." *United States v. Maxwell*, 579 F.3d 1282, 1303 (11th Cir. 2009) (internal quotation marks omitted). "[D]istrict courts have broad discretion in formulating jury instructions provided that the charge as a whole accurately reflects the law and the facts." *United States v. Williams*, 526 F.3d 1312, 1320 (11th Cir. 2008) (quotation omitted). This Court "will not reverse a

conviction on the basis of a jury charge unless the issues of law were presented inaccurately, or the charge improperly guided the jury in such a substantial way as to violate due process." *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) (citation and quotation marks omitted). "If the instructions accurately reflect the law, [this Court allows] wide discretion in determining the style and wording of the instructions." *Williams*, 526 F.3d at 1321. Here, the instructions given accurately reflect the law and there was no abuse of discretion.

First, Watkins Sr.'s proposed instruction was arguably not a correct statement of the law. *See United States v. Feldman*, 931 F.3d 1245, 1272 (11th Cir. 2019) (W. Pryor, J., concurring) ("Nothing about the common-law test limits materiality to misrepresentations about 'the price,' 'the characteristics of the good,' or even 'the nature of the bargain itself.'") (quoting *Takhalov*, 827 F.3d at 1314). Second, the district court's instruction, which followed this Court's pattern instruction, was an accurate statement of the law and otherwise sufficient. It informed the jury that "[p]roving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud." *Doc 256, pp. 31-32*.

In addition, the district court instructed the jury on good faith and Watkins Sr.'s theory of defense:

> Mr. Watkins, Sr. contends that as to the purchase agreement, the purchase money he received belonged to him. As to the loans, Mr. Watkins, Sr. contends that he had the right under the applicable agreements to determine what constituted valid business purposes for expending the funds.

> Both defendants contend that Mr. Watkins, Jr. did not have and did not exercise any authority of how any funds would be spent.
>
> As to the acts the governmental alleges to be wire fraud or part of a scheme to defraud, the defendants contend that in each instance they relied in good faith on the authority granted by the various applicable contractual agreements to engage in each such act; that they acted for a valid business purpose under those agreements; and that they complied and acted in accordance with all contractual provisions.
>
> Ladies and gentlemen, good faith is a complete defense to a charge that requires proof of intent to defraud. But a defendant is not required to prove good faith. Instead, the government must prove intent to defraud beyond a reasonable doubt.
>
> An honestly held opinion or an honestly formed belief cannot be fraudulent intent, even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness cannot establish fraudulent intent.

Doc 256, pp. 32-33.

To determine whether the charge given substantially covers the requested instruction, this Court "need only ascertain whether the charge, when viewed as a whole, fairly and correctly states the issues and the law." *United States v. King*, 751 F.3d 1268, 1275 (11th Cir. 2014) (internal quotation marks omitted). Here, under the instructions given, the jury could not have convicted Watkins Sr. without finding that his misrepresentations were made with the intent to cause loss or injury to his victims, *i.e.*, that the victims did not get what they bargained for.

The evidence of fraudulent intent was, moreover, overwhelming; there were numerous misrepresentations, including many about "the nature of the bargain itself."

For example, Watkins Sr. repeatedly misrepresented the purpose of the funds he solicited and the nature of his ownership interest in Masada. *See, e.g., Doc 197, p. 6* ("The victims testified at trial that, if they had known the truth about how the Defendants would use their investment monies to pay expenses such as alimony, back-taxes, old debts, or advertising for Watkins, Jr.'s insurance agency, they would not have invested with the Defendants."); *Doc 180-33 (Gov. Exhibit 34, purchase agreement)*; *Doc 180-140 (Gov. Exhibit 203, purchase agreement)*; *Doc 249, pp. 194-96* (Clarissa Harms testifying that she entered into an agreement for Watkins Sr. to purchase her family's interest in CESC, but that there was never a sale of the interest because Watkins Sr. never paid what was owed); *Doc 250, pp. 12-23* (Terry Johnson testifying that he entered into an agreement for Watkins Sr. to purchase his 50% of MRG and CESC, but that the sale never went through because Watkins Sr. never paid what was owed); *Doc 244, pp. 69-80* (witness testifying about emails received from Watkins Sr. that, among other things, represented that Condoleezza Rice was "joining Masada" and that Martin Luther King III was "awaiting his appointment date with President Obama" to discuss Masada).

Witness after witness testified that they invested or loaned money because of these misrepresentations. *See, e.g., Doc 244, pp. 76-102* (Danielle Thomas testifying that she and her husband invested $1 million after being told, among other things, that Watkins Sr. owned 50% of the company, that prominent people like Condoleezza Rice were involved, and that she was never told that the money to pay Watkins Sr.'s old

unrelated debts, his alimony payments, and his personal credit card bills); *Doc 244, pp. 180* (Bryan Thomas testifying that Watkins Sr. lied to the SEC in testifying in the SEC proceedings that Thomas knew he was investing in Watkins Sr. and not directly in Masada); *Doc 244, pp. 247-63*; *Doc 245, pp. 88-90, 96* (Takeo Spikes testifying he invested money after being told that his money was going to be used for Masada purposes, that Condoleezza Rice and Martin Luther King, III were involved, that Masada was worth a billion dollars or more, and that Watkins Sr. owned 50% of the company; if he had known his money would be used to pay Watkins Sr.'s girlfriend, Watkins Sr.'s personal credit card bills, and Watkins Sr.'s back taxes, he "never would have invested").

Without question, the victims did not get what they bargained for – the use of their money to grow a business they were told had potential for favorable returns. Instead, Watkins Sr. and Watkins Jr. used the victim's "investments" for their own personal benefit, repeatedly (and many times immediately) using the funds to pay, among other things, unrelated debts, back taxes, personal credit card bills, alimony, and advertising for Watkins Jr.'s insurance business. The intent to harm is further demonstrated by the fact that Watkins Sr. and Watkins Jr. often solicited "investments" precisely because they needed money to cover other expenses. And they continued to solicit investments from Barkley even though, because of their financial condition, they were unable to even pay back any of his loans as promised.

In sum, based on this record, there can be no conclusion that "the charge

improperly guided the jury in such a substantial way as to violate due process." *United States v. Abovyan*, 988 F.3d 1288, 1308 (11th Cir. 2021) (internal quotation marks omitted). Thus, Watkins Sr.'s claim that the jury instructions warrant reversal should be denied.

VI. The District Court Did Not Abuse Its Discretion In Excluding Evidence That Was Not Relevant to the Charges.

Watkins Sr. argues that "the district court erroneously excluded and limited defense evidence that went to the heart of the case." *Watkins Sr.'s brief, p. 43*. He says that the court violated his constitutional right to defend himself. *Id. at 44*. The claim should be denied.

This Court reviews only for abuse of discretion a district court's evidentiary rulings. *United States v. Todd*, 108 F.3d 1329, 1331 (11th Cir. 1997). But that discretion does not "extend to the exclusion of crucial relevant evidence necessary to establish a valid defense." *Id*. at 1332 (quotation marks omitted). In response to a claim that the exclusion of evidence violated the Constitution, this Court considers whether a constitutional right was violated and, if so, whether the error was harmless beyond a reasonable doubt. *United States v. Hur*n, 368 F.3d 1359, 1362–63 (11th Cir. 2004). There was no constitutional violation here. The district court rulings identified by Watkins Sr. were merely evidentiary in nature, and they were correct.

In his brief, Watkins Sr. states broadly that he was "routinely" rebuffed in his attempts to present evidence relevant to what he characterizes as a "*Takhalov*" defense.

Watkins Sr.'s brief, p. 45 (complaining that he was denied the opportunity to present evidence that the victims "received exactly what they paid for"). But, despite the sweeping nature of Watkins Sr.'s contention, he only identifies three places in the record where, he says, the district court prohibited him from presenting evidence that was, according to him, probative as to the key parts of his defense. *Watkins Sr.'s brief, pp. 52-53 (citing Doc 252, pp. 52-59, 202-223 and Doc 254, pp. 121-29*). His record citations do not support his claim. Instead, each shows the district court appropriately exercising its discretion to limit Watkins Sr.'s proffered evidence to that which was relevant to the charges and admissible under the rules of evidence.

The court largely agreed with the government that evidence regarding whether Watkins Sr. subsequently grew the business was not relevant to the charges in the indictment – whether Watkins Sr. made misrepresentations to the victims about his ownership interest in the company and how the funds would be used. *Doc 4, pp. 5-12*; *Doc 252, pp. 152-68*. Nevertheless, the district court agreed to grant Watkins Sr. some leeway on the subject:

> You can ask him if he saw the patents. I will even let you ask, and the government will probably object, whether he knows if anything was ever done with those patents. I would like to know that. And I'll give you a little leeway on growing the business.
>
> But, if you get too far afield, I will tell the jury that that is not relevant to the questions that are at issue in this case.

Doc 252, p. 168.

In another portion of the record identified by Watkins Sr., the district court

expressed skepticism in response to Watkins Sr.'s offer of proof regarding a witness's testimony because the testimony was to be based on something Watkins Sr. had told him. *Doc 252, p. 206-08*. Such testimony lacks a proper foundation and is not admissible under the rules. There was no error in excluding such testimony. Moreover, the district court made clear that it was not excluding evidence that was admissible and relevant; instead, the court merely admonished Watkins Sr. to lay a proper foundation and ensure that the evidence is relevant to the actual charges:

> Mr. Watkins, if you will try to play within the boundaries that I'm trying to set for you, and I'm trying to set them wider than the government is wanting me to, but I'm not going to give you boundaries that extend all around the world. But if you will try to play within those boundaries and ask questions that are based on someone's personal knowledge, I think you're going to – you would find that you would be able to get in a lot of the things that you're wanting to get in but you have got to be smart about it and tailor it to the things that are material to the defenses you want to make as to these particular allegations.
>
> . . .
>
> Because I really want you to be able to present these defenses that I think you have a valid right to present, but you have got to lay some foundation with your witnesses for it, it's got to be based on personal knowledge, and there needs to be some tie and relevant to these representations that the government has been throwing at you.

Doc 252, pp. 222-23. Thus, contrary to Watkins Sr.'s contention, the district court did not prohibit him from presenting a defense.

Finally, Watkins Sr. cites to a portion of the record where the district court considered whether Watkins Sr. could testify – during his direct examination of himself – that, regarding Charles Barkley's 2012 investment in Nabirm, "we

discovered five hundred and twenty-two million barrels of oil and five hundred and eighty-three billion cubic feet of methane gas" in 2015. *Doc 254, p. 127*. The court ruled that Watkins Sr. "can testify about what was being done in 2012 and 2013, but that is it." *Id*. Watkins Sr.'s resulting direct examination of himself on the point reads as follows:

> Q (by Mr. Watkins, Sr.) With respect to Nabirm, in 2012, following the Barkley transactions, did Nabirm Energy Services develop oil block 2113-A in 2012?
>
> A Yes.
>
> Q With respect to that same block, in 2013, did Nabirm continue the development of block 2113-A?
>
> A Yes.

Doc 254, p. 129.

The district court did not abuse its discretion in limiting Watkins Sr.'s testimony on this subject to the years 2012 and 2013. The evidence established that, on April 3, 2012, Watkins Jr. emailed Watkins Sr., stating in part: "You need to consider going back to Barkley for one last million loan investment. I hate to go there, but I didn't think there's many more options. Perhaps the Nabirm and the uranium developments may be enough to pique his consideration." *Doc 251, p. 27*; *Doc 180-39 (Gov. Exhibit 46)*. He then proceeded to set out a list of payment "priorities," including: $40,000 for personal back taxes; $105,000 to American Express; and $95,000 for past due bills, loan payments, fee payments and alimony. *Ibid*.

Two days later, Watkins Sr. sent Barkley an email soliciting a $1 million dollar investment in Nabirm. *Doc 251, p. 29-30*; *Doc 180-40 (Gov. Exhibit 47)*. The email said nothing about Watkins Sr.'s and Watkins Jr.'s plans to use much of the money to pay personal expenses. *Id*. Barkley testified that he thought he was investing in a business and that he would not have provided the money if he had known how Watkins Sr. was planning to use it. *Doc 251, pp. 26, 33*.

On September 14, 2012, Watkins Sr. sent an email to Glenn Guthrie, Barkley's financial advisor, and Barkley. *Doc 251, pp. 34-35*; *Doc 180-41 (Gov. Exhibit 50)*. The email begins by stating it is a "follow up" to a conversation Watkins Jr. had with Guthrie that morning. *Ibid*. The email further stated: "I'm highly confident that Charles and other investors in Nabirm and Masada will receive a cash return on their investment on or before December 31st, 2012." *Ibid*. Not surprisingly, no such return ever came. *Doc 251, p. 35*.

The email additionally solicited another $1 million investment from Barkley in exchange for bumping his interest in Nabirm from 5% to 20%. *Doc 180-41*. Again, Barkley invested the requested amount. And again, the money was used to pay non-business-related expenses, including: $10,000 to Watkins Jr.; $10,000 to Watkins Sr.'s girlfriend; Watkins Sr.'s girlfriend's car payment; $98,000 to American Express; $80,000 to American Express; and mortgage payments for September and October. *Doc 251, p. 36*. Barkley testified he did not know that his $1 million would be used to pay the personal expenses of Watkins Sr., Watkins Jr., and others. *Doc 251, p. 37*.

For this reason, the district court did not abuse its discretion in limiting Watkins Sr. to testifying about Nabirm beyond 2012 and 2013. What may have happened in 2015 was not relevant to whether the representations Watkins Sr. made to Barkley in 2012 were fraudulent. Watkins Sr. solicited $2 million from Barkley as an investment in Nabirm and then used those funds to pay personal expenses.

In sum, the evidentiary rulings Watkins Sr. identifies in his brief were based on relevancy and the rules of evidence. The district court did not prohibit Watkins Sr. from presenting a legitimate defense.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(l). The brief contains 12,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief was prepared in WordPerfect 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of September the foregoing brief was filed electronically using the Court's CM/ECF system, which will provide notice of the filing to all counsel of record.

On this same date, the original and additional copies of the Brief of Appellee were filed by Federal Express overnight delivery, addressed as follows:

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