NO. 19-12951-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DONALD V. WATKINS, SR., Defendant-Appellant

On Appeal from the United States District Court, Northern District of Alabama

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CORRECTED REPLY BRIEF OF DEFENDANT-APPELLANT DONALD V. WATKINS, SR.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fed.R.App.P. 26.1, and 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, the undersigned counsel for defendant-appellant Donald V. Watkins, Sr., hereby certifies that the following persons and/or entities have an interest in the outcome of this appeal[1]:

1. Alamerica Bank
2. Alvis, Stewart James
3. Barkley, Charles
4. Billingsley, Michael B.
5. Bloomston, Brett M.
6. Bloomston Firm
7. Bowdre, Hon. Karon O.
8. Borton, Thomas E., IV
9. Brown, Jeffrey A.
10. Carter, Cris
11. Carter, Xavier O., Sr.

[1] The identities of victims, *see* 11th Cir. R. 26.1-2(a), are as determined by the United States Probation Office and the District Court over the objections of defendant-appellant Donald Watkins, Sr., which objections defendant-appellant does not waive and instead expressly preserves in this appeal.

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12. Emmons, Carlos A.

13. England, Hon. John H., III

14. Englehart, John Mark

15. Englehart Law Offices

16. Escalona, Prim F.

17. Hall, DeAngelo

18. Hankey, Kyle C.

19. Joseph, Anthony A.

20. Locke, Clint

21. Maynard, Cooper & Gale, P.C.

22. Meachum, Daniel R.

23. Ott, Hon. John E.

24. Parkman, James W., III

25. Parkman White LLP

26. Peeples, Lloyd C., III

27. Reed, Joe M. and Associates, LLC

28. Rossum, Allen

29. Spikes, Takeo G.

30. Taylor-Stoudamire, Natasha

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31. Thomas, Bryan

32. Thomas, Danielle

33. Town, Jay E.

34. Wasdin, Chelsea L.

35. Watkins, Donald V., Jr.

36. Watkins, Donald V., Sr.

37. Williams, Mario

38. Wilson, Gibril.

Respectfully submitted,

/s/ Mark Englehart
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ARGUMENT AND CITATIONS OF AUTHORITY

The Government's brief failed to defeat appellant Watkins, Sr.'s showing that a judgment of acquittal should be entered for him on all counts.

I. The evidence of intent to harm is legally insufficient to establish Watkins, Sr.'s intent to defraud as necessary to sustain the convictions for wire fraud (Counts 2 through 8)

Focusing on whether the evidence established his intent to ***harm***, defendant-appellant Donald Watkins, Sr. ("Watkins, Sr." or "Senior") demonstrated there is ***in***sufficient evidence for a reasonable jury to find beyond a reasonable doubt the intent to harm, intent to defraud, and the existence of a scheme to defraud, to find Watkins, Sr. guilty of any of the charges of wire fraud against him.[1] *See* Corrected Brief of Defendant-Appellant Donald Watkins, Sr. ("Watkins, Sr.'s Brief"), at 27-32 (relying on *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016)).

But, the Government's contrary arguments ***in***correctly rely on – and, mostly, erroneously conflate -- evidence that tends to show, or be relevant to, Senior's intent only to ***deceive*** the investor-victim into a transaction, as opposed to the intent to ***harm*** also required to convict Senior of wire fraud. And, relatedly, the evidence the Government cites as reflecting the nature of the bargain in each fraud count (Senior's intent to harm, by lying to the investor-victim about the nature of

[1] Record references to volumes of trial transcript, District Court pleadings, and trial exhibits are cited herein by their PACER docket number (and, if needed, pages number(s)), i.e., "Doc. __, at __."

the bargain), actually relates simply to Senior's alleged fraudulent inducement of the investor to enter into a transaction they would not otherwise (Senior's intent to merely deceive).

To convict Senior for wire fraud required the Government to prove beyond a reasonable doubt, *inter alia*, Senior's intentional participation in a "scheme to defraud," *e.g., United States v. Hasson*, 333 F.3d 1264, 1272 (11th Cir. 2003); and as part of the scheme to defraud, Senior's specific intent to defraud the victim. *E.g., United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

But, to prove defendant's intent to defraud as needed for conviction, the Government must prove ***not simply*** defendant's intent to ***deceive***, but ***also*** defendant's intent to ***harm***, "to intend to use deception to cause some injury." *Takhalov*, 827 F.3d at 1312-13; *United States v. Masino*, no. 18-15019, slip op. at 21 (11th Cir. July 30, 2021); *United States v. Waters*, 937 F.3d 1344, 1352 (11th Cir. 2019). To distinguish between schemes (a) to deceive and (b) to defraud, a court must look at the nature of the bargain itself, and whether the defendant lied about it. *Takhalov*, 827 F.3d at 1313, 1314 (scheme to defraud only those schemes in which defendant lies about nature of bargain itself); *Masino*, no. 18-15019, slip op. at 21-22; *Waters*, 937 F.3d at 1352. A defendant can lie about the nature of the bargain in two ways: by lying about either a) the good's price or b) its characteristics. *Takhalov*, 827 F.3d at 1313-14; *Masino*, no. 18-15019, slip op. at

22; *Waters*, 937 F.3d at 1352. In short, a scheme to defraud requires "a misrepresentation of an essential element of the bargain." *Takhalov*, 827 F.3d at 1314.

As to all the wire fraud counts, if Senior had made ***no*** alleged ***mis***representations and acted in accordance with ***all*** the representations he ***made***, e.g., used the money paid or loaned for the purposes he said, Charles Barkley and each other alleged investor-victim would have received ***exactly*** the same thing as each ***did*** receive in each transaction – whether a specified percentage economic interest, or a promissory note with a promise to pay.

A. Counts 2 through 4 (May 2013 loan transaction)

The nature of the bargain reached between Senior and alleged investor-victim Barkley, (Doc. 180-53 (GX 61[2]) (promissory note); *e.g.*, Doc. 180-44 (GX 52) (e-mails proposing terms), is straightforward: Barkley loaned Donald V. Watkins, P.C. $150,000.00, in return for a promissory note with a promise to repay approximately thirty days later. The alleged misrepresentations made by Senior in the May 24, 2013 e-mail solicitation do not misrepresent the price Barkley will pay ($150,000) or what he would and did receive (note payable in 30 days).

Indeed, this framing of this bargain is consistent with this Court's framing of the bargain in *Masino.* There, this Court affirmed the District Court's ***acquittal*** of

[2] "GX" herein refers to Government Exhibit; "DX" to Defendants' Exhibit.

defendants of wire fraud conspiracy, given the ***absence*** of evidence that defendant bingo hall operators intended to deceive charities about what profits the charities would receive in the bargain, set out in lease agreements under which defendants operated bingo games for the charities. *Masino*, no. 18-15019, slip op. at 24-25.

The Government's claim that Barkley did not get what he bargained for, i.e., receiving an allegedly "worthless promissory note," and would not have loaned the money but for Senior's alleged misrepresentations, Appellee's Brief, at 33-34, is flawed in several ways. Even if Senior ***had*** represented in his solicitation e-mail how the requested $150,000 would be spent (which he did ***not***), *see* Doc. 180-44 (GX 52), at 1, any misrepresentations that he would use the money for other than paying his and his son and co-defendant-appellant Donald Watkins, Jr.'s ("Watkins, Jr." or "Junior") credit card bills, *see* Appellee's Brief, at 34, would relate ***only*** to inducing Barkley to enter into a loan he otherwise would not have given -- ***not*** the nature of the bargain or Senior's intent to ***harm***, as opposed to deceive. *E.g., Takhalov*, 827 F.3d at 1310, 1313-14. Likewise with Senior's alleged misrepresentations that "greater than expected expenses had depleted his 'office account,' not his personal finances."[3] Appellee's Brief, at 34.

[3] More specifically, a misrepresentation that Senior had greater than expected expenses would be relevant ***only*** to Senior's inducement of Barkley to enter into the loan, ***not*** whether Senior deceived ***with the intent to cause injury***. As to the depletion of his office account, Senior specifically represented, payments of the expenses "left my office account far too thin for my personal comfort." Doc. 180-

The Government otherwise cites only one alleged ***mis***representation as evidence that Senior lied about the nature of the bargain (implicitly, evidence of intent to harm) – that Senior "would pay the money back within 30 days because he would soon get an allotment of 'working capital,'" *id*., or "in about a week, he would receive a 'June allotment of working capital.'"[4] *Id*. at 33. Its argument on that basis likewise fails. First, ***Senior*** proposed the thirty-day repayment period, ***not*** Barkley or Barkley's representative as a requirement for the loan. There is no evidence that Senior's ability to pay within 30 days was "an essential element of the bargain," *Takhalov*, 827 F.3d at 1314; or that Barkley even was bargaining for payment within 30 days.[5] *See, e.g., id.*, at 1313-14.

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44 (GX 52), at 1. GX 462 confirmed this, showing a beginning balance of just over $3900 in the Donald V. Watkins, PC bank account on May 28, 2013, before the $150,000 in loan proceeds were received. (Doc. 180-265, at 11). Contrary to the Government's contention, Appellee's Brief, at 34, Senior did ***not*** "misrepresent[] his financial condition to" Barkley. As to whether making a statement about his "office account" (not his "personal finances") was a misrepresentation, *see* Appellee's Brief, at 34, other evidence showed that such account was indeed Senior's "office account."

[4] Senior's specific representation: "our June allotment of working capital will not hit my office account until June 1." (Doc. 180-44 (GX 52), at 1).

[5] Senior does ***not*** contend there can never be fraud based on a borrower's misrepresentation of his financial condition, provided the lender receives "a legal debt owed" even if unlikely to be repaid. *See* Appellee's Brief, at 34. But, a lie regarding one's financial condition can show intent to defraud ***only when*** it constitutes deception about or affects the nature of the bargain itself or the characteristics of the good being exchanged *See, e.g., Masino*, no. 18-15019, slip op. at 22, 24; *Takhalov*, 827 F.3d at 1313-14.

Moreover, there is ***no*** evidence that the representation was false, i.e., that Senior, when he made the representation or signed the note, did ***not intend*** to repay within 30 days. *E.g., United States v. McCarrick*, 294 F.3d 1286, 1291, 1293 (11th Cir. 2002) (intent to defraud, i.e., intent ***not*** to carry out promise, at the time of transaction required for conviction) (bank fraud). First, Junior's statement to Senior that "[w]e have no money left," (Doc. 180-144 (GX 208)), came ***after*** Senior represented that Junior would send a "short term 30-day promissory note" to Barkley's representative, (Doc. 180-44 (GX 52), at 1); at most, it ***supports*** Senior's representation in the loan solicitation e-mail about his office account being left "far too thin for my personal comfort. *Id*. Further, Junior's statement of present financial condition does ***not*** support an inference that there would be ***no*** allotment of "working capital" received "until June 1"; or more importantly, that Senior would be unable or intended not to repay Barkley in 30 days.

And, in two separate e-mails the same date, after Senior had represented to Barkley regarding the "June allotment of working capital," (Doc. 180-44 (GX 52), at 1), Senior advises Junior first that Senior is working an unnamed source (inferably not Barkley) for the mortgage arrearage money and other bills, (Doc. 180-252 (GX 420), at 1); and later that Senior has ***two*** (unnamed) potential sources for that money, and to tell "the mortgage guy we will be current by the end of the week." (Doc. 180-145 (GX 209), at 2) The latter e-mail identifies another funding

possibility -- telling Junior to contact two persons to reimburse Senior their proportionate shares of legal bills from FDIC litigation, and pledging "cutting [them] off if they don't reimburse us by May 31." (*Id*. at 1). These internal Masada e-mails support the inference that Senior expected to receive additional monies ("working capital") from specific sources by May 31 or soon[6], which inferably could cover repayment of bills (such as Barkley's $150,000 loan), such that Senior's representations about receiving the "June allotment of working capital" on about June 1 (or within the Barkley loan repayment period) were true or Senior believed them to be.

And, that Senior did not repay the loan within 30 days or even as of trial is ***in***sufficient, without more, to show that Senior ***intended*** when he proposed or signed the short-term note ***not*** to repay it on those terms (or at all). *See, e.g., McCarrick*, 294 F.3d at 1291-93.

In short, ***even if*** Senior's representations that he could repay the loan "shortly after I return to the U.S." and would give Barkley a 30-day promissory note (Doc. 180-144 (GX 52), at 1) were deemed to affect the nature of the bargain or the characteristics of the good exchanged, *e.g., Masino*, no. 18-15019, at 22, 24;

[6] *See also* excerpts of Masada's QuickBooks transactions (the "Type" column marked as "Deposit") for the months surrounding the Barkley loan. (*See* Doc. 180-238; Doc. 180-239 (excerpts from GX 400)). These periodic deposits of various types (e.g., fees, retainers, and loans) reflect additional Masada funds sources that Senior might have predicted could be available "working capital" at relevant times (e.g., June 2013).

Takhalov, 827 F.3d at 1313-14, they still would ***not*** evidence Senior's intent to harm Barkley or to cause him injury because of the ***lack*** of evidence that when he made the promise, Senior intended ***not*** to repay Barkley in 30 days.

Finally, as to these counts, that Senior chose to testify, *see* Appellee's Brief, at 35, does ***not*** supply evidence of intent to harm Barkley in the May 2013 loan transaction as required to sustain those convictions. Senior did ***not*** testify regarding the only alleged misrepresentations the Government cited as affecting the nature of the bargain or the characteristics of the good – ***no testimony***, e.g., that Senior 1) expected (and why) he would receive "working capital" by about June 1, or 2) intended to repay Barkley the loan amount within 30 days (and then why he couldn't). So, there was ***no*** "statement" relating to Senior's intent to harm Barkley in that transaction for the jury to disbelieve, *McCarrick*, 294 F.3d at 1293, and treat as contrary substantive evidence for "proving a fact in issue." *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995) (quotations omitted).

And, given the "government's fundamental obligation to establish guilt in its case-in-chief, *McCarrick*, 294 F.3d at 1293, even if Senior ***had*** made such a "statement" regarding his intent that the jury could treat (in its disbelief) as substantive evidence, there was ***no corroborating*** evidence from which the jury could permissibly infer that Senior intended to defraud Barkley when the transaction was made, as required to show wire fraud. *E.g., id.* Senior's

convictions on counts 2 through 4 accordingly must be reversed for insufficiency of evidence of intent to defraud.

B. Counts 5 and 6 (proposed February 2014 investment)

As with the May 2013 loan transaction, the nature of the proposed bargain here is straightforward: if Barkley agreed to contribute new investment of $1 million and convert his pre-existing $2 million in loans to equity (i.e., the price of the good), Senior would upgrade Barkley's economic participation interest from 6% in Senior's part of Masada to 10% in all of Masada (the good to be exchanged). (Doc. 180-45 (GX 53), at 2 (Count 5); *see* Doc. 180-46 (GX 54), at 1 (Count 6)).

The Government does ***not*** argue that Senior lied regarding the good's price or its characteristics. *E.g., Takhalov*, 827 F.3d at 1313-14; *Masino*, no. 18-15019, slip op. at 22, 24. Instead, the Government contends that if Barkley had accepted the offer and made the new investment, he would not have gotten what he bargained for, because Senior planned to spend the new money on ostensibly personal or otherwise unrelated expenses, Appellee's Brief, at 34-35; *see* Doc. 180-148 (GX 213), rather than use it solely to grow Masada, as Barkley ***believed*** it would be.[7] Appellee's Brief, at 35; *see* Doc. 252, at 62.

[7] The Government did not address, and implicitly accepted, Senior's argument regarding the lack of evidence that certain critical representations by Senior were false, much less that Senior knew they were false when made – i.e., insufficient evidence to indicate ***even*** that Senior intended to ***deceive*** Barkley, ***much less harm*** him. *See* Senior's Brief, at 30.

But, (a) Senior's ***written*** proposal to Barkley contained ***no*** representations how the new $1 million investment would be spent (*see generally* Doc. 180-45 (GX 53); Doc. 180-46 (GX 54) at 1); (b) neither Barkley or anyone else testified that Senior represented anything ***orally*** how the new money would be spent (*see, e.g.*, Doc. 180-46 (GX 54), at 1); (c) the new investment would have been another economic interest purchase (*see, e.g., id.*); and (d) each economic interest purchase ***agreement*** – at least three of which Barkley had entered previously (*see* Doc. 180-47 (GX 55) (Masada); Doc. 180-51 (GX 59) (Nabirm); Doc. 180-52 (GX 60) (Nabirm)) – contained ***no*** (i) representations regarding the use of the sales proceeds ***or*** (ii) restrictions on their use.[8] (*See, e.g., id.*) Without (a) representations regarding the intended use of purchase funds received or (b) stated restrictions on the use of purchase funds, it's difficult to see how the nature of the bargain ***could*** restrict use of such funds to Masada-related purposes only.[9]

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[8] Some economic interest purchasers ***believed*** that their purchase monies would / could be used for Masada business purposes only -- some even ***without*** Senior representing ***anything*** about how the money would be spent. But, at least one other purchaser (Ralph Malone, later a Masada executive) believed he "bought an asset, … got an asset, and … gave (Senior) money," which belonged to Senior, who could spend it however he wanted to. (Doc. 252, at 201-02; *see* Doc. 253, at 35-36).

[9] Senior likely could not appropriately intentionally misrepresent to the economic interest purchasers before purchase how their funds would be used (subject to contractual authority, change of circumstances, etc.). But, assuming he made ***no*** representations, absent any positive law requirement or a special, e.g., fiduciary, relationship between Senior and the economic interest purchasers (i.e., every investor-victim witness at trial), Senior had ***no*** duty to disclose how or for what

Accordingly, the straightforward view of the bargain, as explicitly proposed by Senior, properly applies, *see, e.g., Masino*, no. 18-15019, slip op. at 24; and there is (a) no lie as to the price or characteristics of the good exchanged, (b) no intent on Senior's part to harm or cause injury to Barkley, and thus (c) no intent to defraud and no wire fraud as to counts 5 and 6.

Even ***if*** Barkley's understanding of how his new money would be used ***did*** reflect ***mis***representations (or ***any*** representations) by Senior regarding use of those funds (which there ***weren't***, and it ***didn't***), the Government's argument here again conflates (a) the inducement (or attempted inducement) by deception into a transaction with (b) the consideration and/or the characteristics of the good exchanged (as proposed, an upgrade to a 10% economic interest in all of Masada). Had Senior misrepresented how the new funds would be used (e.g., for Masada business purposes only, as opposed to ostensibly purely personal, non-business uses), any such lie would relate ***only*** to Senior's intent to ***deceive*** Barkley into the transaction, but ***not*** reflect any intent to ***harm*** Barkley if he did invest the new $1 million.[10] Such evidence would ***not*** satisfy the intent to harm element necessary to

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purposes funds received would be spent. *E.g., Langford v. Rite-Aid of Alabama*, 231 F.3d 1308, 1312, 1314 (11th Cir. 2000); *see also, e.g., United States v. Feldman*, 931 F.3d 1245, 1267 (11th Cir. 2019) (W. Pryor, J., concurring).

[10] Generally, uncontradicted evidence from not only Senior, but also other Masada (e.g., Ralph Malone) and Government (Terry Johnson and Clarissa Harms) witnesses, showed that Masada was and is a project development company; was and always has been pre-revenue; and has not operated or had any commercial

show the required scheme to defraud, requiring acquittal of Senior on counts 5 and 6 as well.

C. Counts 7 and 8

As to the two upbeat Masada Stakeholder Reports that Senior sent to Junior and many individual economic interest holders (Doc. 180-181 (GX 353) (Count 7); Doc. 180-179 (GX 343) (Count 8)), Senior argued initially that communications

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processing plants to demonstrate its waste-to-ethanol technology (the plant to be built for which Masada was under contract with the City of Middletown, New York was never built, *see, e.g.*, Doc 181-12 (DX 27), at 3). Instead, per uncontradicted evidence from Senior and others, Masada's primary assets included its patents and other intellectual property, its permits, and the long-term waste stream contracts it obtained and projects it developed in over 40 international markets.

Senior testified without contradiction, as corroborated by evidence of the various investors' percentage interests (and testimony from Masada executive/investor Malone), that he did not dilute his economic interest below around 50% of the revenue stream that his equity interests in Masada and Nabirm might produce. Senior's percentage was far greater than any investor's (Barkley, with economic participation interests of 20% in Senior's Nabirm interest and 6% in Masada, *see* Doc. 180-45 (GX 53), at 1, holds the largest percentage of that revenue stream after Senior).

Accordingly, anything tending to hurt any investor's much smaller, fractional economic percentage interest (e.g., by arguably lowering its value by spending some purchase monies for ostensibly personal, non-business expenses) would hurt Senior's economic interest disproportionately ***more***. That is unless, ***perhaps***, the Government showed evidence that Senior disproportionately diverted monies received from ***any*** source (including Senior's earned attorney's fees and other own contributions) to personal, non-business-related uses, rather than using much of them to pursue the business plan and otherwise develop the business.

The Government did not offer any such evidence, and has not argued on appeal (or below) how Senior's use of ***some*** monies for ostensibly personal, non-business purposes ***harmed*** – or specifically showed Senior ***intended to harm*** – the much smaller, derivative economic interests of the investor-victims.

designed to conceal a fraud, by lulling victims into inaction, must further a scheme to defraud; given the ***in***sufficient evidence of Senior's intent to harm (*see* the preceding wire fraud counts), there was no scheme to defraud, and thus no wire fraud. Senior's Brief, at 31.

The Government mainly asserts that this claim "piggybacks … on arguments already made."[11] Appellee's Brief, at 36. The Government did not identify in its brief any misrepresentations in either Report, nor any specific evidence purporting to show Senior's intent to ***harm*** any alleged investor-victim – as to either Report, or any preceding transaction with any such person (whether the preceding Barkley-only wire fraud counts, or any separate transaction involving Barkley or another purported victim) – as needed to further a scheme to defraud. *See id.*

The Government's assertion that Senior's claim of insufficient evidence of a scheme to defraud is meritless "[f]or the reasons already set out," *id*., is unclear what "reasons" it refers to – e.g., whether the "reasons" argued as to the individual counts, or all facts discussed. Because the Government failed to specify (apart from its discussion of the substantive wire fraud counts) what evidence it believes

[11] The Government's brief does ***not*** address Senior's arguments about the ***lack*** of evidence that a) any of the unidentified alleged victims received anything different from the economic interest they purchased, b) any such person no longer has the percentage interest they bought, or c) any alleged misrepresentation in either report sought to take away anyone's interest – all showing a ***lack*** of Senior's intent to ***harm*** as needed to complete a wire fraud offense for either report. Senior's Brief, at 31; *see* Appellee's Brief, at 36.

tends to show Senior's required intent to ***harm***, Senior is unable to respond to this further (and the Government has waived any argument about evidence not specifically discussed).

The Government's failure to show intent to harm as to the other counts likewise shows the lack of a scheme to defraud necessary to support Senior's convictions on these counts too.

II. The evidence of intent to harm is legally insufficient to establish Watkins, Sr.'s intent to defraud as necessary to sustain the convictions for bank fraud (Counts 9 and 10)

Virtually identical analysis applies to the legally insufficient evidence of intent to defraud required to support Watkins, Sr.'s convictions for bank fraud, *e.g., Loughrin v. United States*, 134 S.Ct. 2384, 2389-90 (2014), on two loans Richard Arrington obtained from Alamerica Bank. (Doc. 180-113 (GX 171) ($750,000 loan) (Count 9); Doc. 180-119 (GX 178) ($150,000) (Count 10)).

In response to Senior's focus on the insufficient evidence of his intent to cause harm to the bank to support either conviction, the Government again relies on evidence that addresses ***only*** defendant Watkins, Sr.'s intent to ***deceive*** Alamerica***, not*** his intent to ***harm*** it. The Government cites evidence:

1) of alleged misrepresentations by alleged "straw borrower" Arrington in each loan application, in identifying the borrower as Jennro, LLC (Arrington's

d/b/a name) and stating that the loan was for Jennro's business purposes ($750,000 loan) or for working capital for Jennro ($150,000 loan);

2) regarding the sending of a "source of repayment" letter to then-Alamerica executive vice-president Matt Rockett, drafted by Senior but signed by a lawyer identified as "general counsel for Nabirm Global, LLC"; showing that borrower Arrington, as an investor in a Nabirm-associated company, had the "exclusive right to receive $750,000 in cash from Mr. Barkley's investment proceeds" on or before December 31, 2012 (Doc. 180-133 (GX 196)); and with the lawyer misrepresenting that she had verified the financial information when she had not; and

3) tending to show that the benefits of both loans went to Watkins, Sr., who (per the District Court) "had borrowed the maximum amount on his line of credit at Alamerica Bank," and/or Watkins, Jr. *See* Appellee's Brief, at 37-39.

But the Government offers ***no*** argument how any of this evidence shows an intent on ***Senior's*** part not only to ***deceive*** Alamerica Bank to enter into the loans, ***but also*** to ***harm*** Alamerica in their making. First, even as to deception, Senior had ***no*** part in borrower Arrington's misrepresentations to Alamerica: Dr. Arrington himself stated Senior never asked him to falsify or conceal any information concerning their business relationship or the information on the loan applications, nor did Arrington show Senior any application to review or approve.

Doc. 248, at 188-89, 193. As to the source of repayment letter (apparently requested by Matt Rockett, *see* Doc. 248, at 194, 234; Doc. 180-114 (GX 172)), there was ***no*** evidence that Senior's key representation regarding borrower Arrington's right to receive $750,000 cash from Barkley (as a potential source of loan repayment) was false.

As to whether Senior made any false representations showing his intent to harm the bank[12], even if the right of repayment letter ***had*** reflected any material misrepresentation by Senior, that letter was not in the loan file the Alamerica board reviewed in approving Arrington's application for the $750,000 loan. (*See* Doc. 248, at 235; Doc. 240, at 30-32, 131-37). The bank made each loan based on ***Arrington's*** creditworthiness. (Doc. 249, at 63). Watkins was ***not*** a guarantor of the loans (*id*. at 32), and had previously disclosed to the bank (annually, from its formation) his Masada and other related business interests. (*Id*. at 34-36). ***Arrington*** was responsible to repay the loans, ***his*** assets (including his house) serving as collateral (*id*. at 38); and when Arrington told loan officer Rockett that

[12] Senior did not personally disclose to Alamerica that he would receive benefits from the loans. That receipt would have caused him to exceed the maximum loan amount available to a bank insider, ***unless*** an exception to the Regulation O "tangible economic benefits" rule – an exception that Senior consistently invoked – applied, so as to render his receipt of benefits ***not*** an extension of credit to an insider. (Doc. 249, at 64). Government witnesses gave conflicting testimony whether Arrington disclosed Senior's receipt of benefits to Alamerica. Senior's Brief, at 22-23. Regardless, the tangible economic benefit exception has ***no*** provision requiring the ***insider*** (Senior) give notice of his receipt of benefits. (Doc. 249, at 63).

Arrington had this business relationship with Senior and needed the $750,000 loan, Rockett made sure Arrington understood it was Arrington, not Senior, on the loan. (Doc. 248, at 192). In short, per bank president Tate, the bank wanted to make the $750,000 loan to Arrington. The loan was "a good loan"; the bank made money from the loan; and in Tate's opinion, did "not jeopardize in any way the security and safety of the bank." (Doc. 249, at 1359).

The Government identified no evidence supporting an inference that Senior ***intended*** at all to jeopardize Alamerica's route to repayment (with profit) on either loan, or subject Alamerica to regulatory hazard. And, absent any proof that Alamerica did not receive what it bargained for in making the loans, there is no evidence that Senior intended to ***harm*** Alamerica (as opposed to deceiving it to make the loans). Thus the evidence is ***in***sufficient for a reasonable jury to find the intent to defraud required for conviction of bank fraud on either Count 9 or Count 10.

III. Co-defendant Watkins, *Jr.* lacked the specific intent necessary to be convicted of conspiracy. Without another co-conspirator to knowingly agree with to commit an illegal act, Watkins, *Sr.* cannot be convicted of conspiracy either. (Count 1)

The "existence of a coconspirator is not only an element of the crime of conspiracy, but the very essence of the crime." *United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir. 1998). Because the Government offered no evidence to show, and did not argue, that anyone other than Senior's son and codefendant-

appellant Donald Watkins, ***Jr***. ("Junior") conspired with ***Senior*** to commit wire or bank fraud, ***Senior's*** argument for acquittal of conspiracy (Count 1) hinges on the sufficiency or insufficiency of the evidence that ***Junior*** was guilty of conspiracy.

The District Court found the evidence sufficient for the jury to find Junior conspired with Senior to commit wire fraud "by agreeing to solicit investments from victims based on misrepresentations about how their investment money would be used." (Doc. 197, at 6). But, to the contrary, the Government ***failed*** to prove beyond a reasonable doubt that (a) ***Junior*** "***knowingly*** entered into an ***agreement*** to commit an ***unlawful*** act." *United States v. Chandler,* 388 F.3d 796, 800 (11th Cir. 2004) (emphasis in original); or (b) ***Junior*** had the required "deliberate, knowing, specific intent to join the conspiracy." *E.g., United States v. Adkinson*, 158 F.3d 1147, 1153 (11th Cir. 1998); and thus (c) two persons (Senior and Junior) agreed to pursue a specific illegal object, and ultimately that an actionable conspiracy existed.

Even relying on circumstantial evidence, the Government must show circumstances from which the jury may infer beyond a reasonable doubt that there "was a meeting of the minds to commit an ***unlawful*** act." *Id.* at 1154 (emphasis added) (convictions reversed); *accord, e.g., United States v. Arbane*, 446 F.3d 1223, 1229 (11th Cir. 2006) (same); *Chandler*, 388 F.3d at 806 (same); *Parker*, 839 F.2d at 1478 (11th Cir. 1988) (same).

Senior's initial brief showed not even circumstantial evidence allows a reasonable jury to conclude beyond a reasonable doubt that ***Junior*** had the required ***specific intent*** to commit an ***illegal*** act (wire fraud) and join a criminal conspiracy, or that Senior and Junior ***agreed*** to commit an ***illegal*** act (wire fraud). And, given the lack of anyone else with whom the Government contends Senior has conspired, the conspiracy charge must fail against both Junior ***and*** Senior. *E.g., Parker*, 839 F.2d at 1478.

In response the Government mischaracterizes categories of evidence that purport to show Junior knew that Senior "was misrepresenting facts to obtain funds from investors and [Junior] willfully participated in that conduct."[13] Appellee's Brief, at 28. The evidence showed ***not*** that Junior offered ideas for misrepresentations; instead Junior identified debts that needed to be paid. Junior's receipt of the transfer of funds from investors was a purely ministerial or administrative function, and Junior did ***not direct*** the transfer of funds[14] (except by providing administrative, e.g., wiring, instructions).

As to Junior's payment of his and Senior's alleged personal expenses from investors' funds, there is no evidence that he and Senior did not incur legitimate

[13] Although presumably from the district court's order denying defendants' post-judgment motions for acquittal, *see* Doc. 197, counsel hasn't found such a finding.
[14] If "directing transfer of funds" refers to the authority to decide how funds received would be spent, undisputed evidence showed such authority rested with Senior, not Junior. Doc. 254, at 115; *see, e.g.,* Doc. 180-252 (GX 420); Doc. 180-145 (GX 209) (Senior directing Junior which debts to pay/not pay).

expenses; and the evidence was disputed whether numerous expenses the Government facially identified as personal or at least non-Masada expenses, were in fact reasonably regarded as Masada or Nabirm business-related, within Senior's discretion as Masada manager under the operating agreement to treat as legitimate business expenses.

As to the assertion that Junior paid such alleged personal expenses, "all while knowing that the funds were obtained based on [Senior's] false information and representations to those individuals": even if some of the investor funds were arguably obtained by ***Senior's*** intentional misrepresentations, there was ***no*** evidence that ***Junior*** participated in making misrepresentations or knew in advance that Senior would lie – ***much less*** that ***Junior agreed*** that Senior should lie, or ***intended*** for Senior to lie to obtain the requested funds (all of which misrepresentations relate to the inducement only, regardless).

And, in using the funds to pay identified expenses, Junior was paying the ***same*** expenses – at Senior's direction, *see* Doc. 254, at 115 – that he would have paid if Senior had specifically told the potential investors the solicited funds would pay those expenses, or if Senior had represented ***nothing*** regarding the use of solicited funds.

The evidence that Junior was directly involved in day-to-day activities in Senior's legitimate businesses shows only a close association between them that's

insufficient, without more, to establish knowing and willful[15] participation in a conspiracy. *E.g., United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir. 1986); *see also, e.g., United States v. Kelly*, 888 F.2d 732, 740 (11th Cir. 1989). For there to be a ***knowing*** agreement by Junior to commit the ***unlawful*** act of wire fraud, *Chandler*, 388 F.3d at 800, or "a meeting of the minds to commit [the] unlawful act" of wire fraud, *Adkinson*, 158 F.3d at 1554, there must be evidence that ***Junior*** acted (or agreed to act) with the intent to ***harm***, not merely deceive, one or more investor-victims. Acting (or agreeing to act) with the intent merely to ***deceive*** investors into a transaction (e.g., economic interest purchase, a loan) they would not otherwise have entered, ***without*** intending to ***harm*** them or cause some injury, is ***not*** wire fraud and ***not*** an ***unlawful*** act. *E.g., Masino*, no. 18-15019, slip op. at 21-22; *Waters*, 937 F.3d at 1352; *Takhalov*, 827 F.3d at 1312-13.

To try to show Junior's involvement in a wire fraud conspiracy, the Government focuses (as did the District Court) almost exclusively on Junior's role in soliciting investment funds from Barkley "for the very purpose of using those funds to pay personal expenses," – specifically an April 3, 2012 e-mail Junior sent Senior, subject line "Idea for money." Appellee's Brief, at 28-29 (citing Doc. 180-39 (GX 46)).

[15] As the District Court instructed, "'willfully'" required acting "with the intent to do what the law forbids." Doc. 183-1, at 29.

Soliciting investment funds to pay personal expenses is ***not*** per se illegal as wire fraud; the Government does not argue otherwise. And, ***Senior*** had ***no duty*** to disclose how investment funds would or might be spent, *see supra*, at 10-11 n. 9; *see also, e.g., Langford*, 231 F.3d at 1312, 1314; and here represented ***nothing*** to Barkley how his specific Nabirm investment would be spent.

Junior's "Idea for money" e-mail urges Senior to "consider going back to Barkley for one last million loan/investment," suggesting "the Nabirm and uranium developments may be enough to pique his consideration." (Doc. 180-39 (GX 46)). The e-mail also lists several "payment priorities" in the event Barkley makes the investment, including back state and federal taxes ($40,000); American Express ($105,000); and "past due bills, loan payments, fee payments and alimony"($95,000), some of which inferably may cover personal expenses. (*Id*.)

Contrary to the Government's argument (and the District Court's finding), the "Idea for money" e-mail, especially read with Senior's follow-up April 5, 2012 e-mail to Barkley (Doc. 180-40 (GX 47)), does ***not*** allow a jury to infer ***Junior's*** involvement in a conspiracy with Senior "to solicit funds from Barkley ***using false statements about business needs*** but using the proceeds for personal expenses and gains." Doc. 197, at 9-10 (emphasis added); Appellee's Brief, at 29.

Junior's "Idea for money" e-mail does ***not*** ask or suggest that Senior lie about or misrepresent the anticipated possible uses for the funds (especially

regarding business needs), or represent ***anything*** to Barkley regarding possible uses for the money in soliciting an investment. In turn, Senior's e-mail to Barkley two days later pitched a straight purchase exchange of a one-time $1 million payment by Barkley for a 5% economic interest in Senior's portion of certain Nabirm uranium and oil interests. Senior did ***not*** mention any business needs for the funds, ***or*** the internally-proposed uses for the funds; and indeed made ***no*** representations – and thus ***no false*** or ***misleading*** representations -- about the use of the funds whatsoever. (Doc. 180-40 (GX 47)).

Contrary to the Government's assertions, the e-mails reflecting this transaction does ***not*** show of any ***joint*** "plan to defraud Barkley," much less that Junior knew of such a putative plan. Rather than instigating such a purported plan, Junior proposed ***only*** the idea for Senior to ask Barkley for another investment, ***not*** to lie about the need or anticipated uses for the money. These e-mails – and specifically the "Idea for money" e-mail, the ***only*** evidence the Government cites as showing a plan to defraud – do ***not*** permit an inference of any ***agreement even*** to ***deceive*** Barkley (or any other investor), ***much less intend to harm*** them (by lying about the price or the characteristics of the good(s) to be exchanged, *e.g., Takhalov*, 827 F.3d at 1313-14) as necessary to find an agreement to commit the illegal act of wire fraud. ***Nor*** do they allow an inference of ***Junior's*** willful

participation in such a scheme, or a "deliberate, knowing, specific intent to join" the putative conspiracy. *E.g., Adkinson*, 158 F.3d at 1153.

Similarly, Junior's mere receipt of numerous e-mails containing ***Senior's*** alleged multiple misrepresentations (including that Condoleezza Rice and Martin Luther King, III were joining or involved with Masada) that were sent to provide such information to investors, Appellee' Brief, at 28, 29, likewise does ***not*** support any inference that Junior knowingly joined any putative conspiracy to commit wire fraud. There's ***no*** evidence that Junior made or participated in any such misrepresentations, and the Government identifies ***no*** evidence indicating ***Junior knew*** that ***Senior's*** representations were false. Indeed, rather than ostensibly showing knowledge of and involvement in a plan to defraud, Junior being copied on many e-mails (some containing misrepresentations) is entirely consistent with his ***legitimate*** role overseeing all day-to-day administrative operations of Masada and affiliated entities. (*See* Doc. 255, at 6.)

The jury properly could find Senior and Junior agreed to identify and prioritize debts to be paid, seek funds, determine which creditors to pay, and try to keep the Masada and Nabirm businesses afloat -- all lawful objectives. But, any finding that ***Junior*** shared any intent to solicit ***and harm*** investors by ***fraud*** (as needed to show a knowing agreement to commit an unlawful act), *e.g., Arbane*, 446 F.3d at 1229-30; *Parker*, 839 F.2d at 1478, is merely speculative. *E.g.,*

Adkinson, 158 F.3d at 1159. The evidence here as to ***Junior***, acting in his administrative capacity, is totally consistent with the above obvious and reasonable innocent interpretation, i.e., an agreement to identify creditors (including himself), obtain funds, determine payment of creditors, and keep the businesses alive and moving forward. And, in paying those creditors, Junior acted consistently with those ***lawful*** objectives.

Even if a jury may choose among "reasonable constructions of the evidence," Appellee's Brief, at 30, only mere conjecture -- especially as to Junior's alleged unlawful intent -- supports the hypothesis of guilt here regarding Junior. Given the obvious and reasonable alternative innocent interpretation, the evidence is ***in***sufficient to establish any fraud conspiracy involving ***Junior***. *E.g., Kelly*, 888 F.3d at 740; *Jenkins*, 779 F.2d at 616 (defendant Jenkins). And, the absence of any other guilty conspirator for the conspiracy charged bars any conspiracy conviction against ***Senior*** too. *E.g., Arbane*, 446 F.3d at 1229; *United States v. Johnson*, 440 F.3d 1286, 1296 (11th Cir. 2006); *Parker*, 839 F.2d at 1478.

IV. 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.

In refusing defendants' proposed original ***and*** alternative abbreviated instructions regarding "proof of scheme to defraud," the district court omitted from both the wire and bank fraud instructions *Takhalov's* critical requirement – on

which Senior's defense largely rested -- regarding the intent to harm needed to complete the scheme to defraud: even if the jury found defendant deceived the purchasers to enter into the economic interest purchase or loan transactions, there was no intent to harm – and thus no fraud – where defendant did not lie about the nature of the bargain itself, and/or the investors received (and here, still own) what they bargained for. *Compare* Doc. 97 (defendants' proposed instructions), at 27 and Doc. 255, at 226 (alternative request[16]) *with* Doc. 183-1 (Court's instructions), at 20-21.

In defending the court's abuse of discretion in refusing either proposed *Takhalov* charge, *e.g., Takhalov*, 827 F.3d at 1311, the Government addresses mainly whether the charge given substantially covered the proposed instruction.[17]

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[16] Defendants' abbreviated, alternative request when the Court rejected their proposed "proof of scheme to defraud" instruction: "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. 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. 255, at 226 (emphasis added); Doc. 97, at 27.

[17] The Government's single sentence that defendants' proposed instruction(s) were "arguably not a correct statement of the law," Appellee's Brief, at 42; *see Takhalov*, 827 F.3d at 1311 (legal correctness of proposed instruction), cites only a *dubitante* single-judge concurrence in *United States v. Feldman*, 931 F.3d 1245 (11th Cir. 2019)((W. Pryor, J., concurring). As to the correctness of defendants' instructions, *see Takhalov* itself (which supplies the proposed language verbatim or nearly so) and this Court's post-*Feldman* decisions in *Waters* and *Masino*, discussed *supra,* at, *e.g.*, 3.

Initially, the Government's reliance on the court's giving of the Eleventh Circuit pattern instruction, Appellee's Brief, at 42 – which addresses *Takhalov's* teaching regarding the required intent to defraud in the single sentence, "[p]roving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud," Doc. 183-1, at 20-21; Eleventh Cir. Criminal Pattern Jury Instructions O51, O52 (2019) – is legally flawed.

Taking the court's charge as a whole, neither the "***scheme*** to defraud"[18] nor the "***intent*** to defraud"[19] instruction defines the "intent to deceive" or the "intent to harm" *e.g., Waters*, 937 F.3d at 1353, that *Takhalov* distinguishes between as the "fine line" between non-criminal conduct and criminal fraud. *E.g., id.* at 1352; *Takhalov*, 827 F.3d at, *e.g.*, 1314. Equally crucial, neither did the court's instructions "tell the jurors how to tell the difference between them." *Waters*, 937 F.3d at 1353.

The Government notably did ***not*** contest (or address) Senior's showings that defendants' proposed instruction(s) (a) were supported by evidence and (b) dealt with an issue sufficiently important that failure to give it seriously impaired Senior's defense – indeed, was critical to Senior's case theory. *See* Senior's Brief, at 41-44; *see also, e.g., Waters*, 937 F.3d at 1353 (standard); *Takhalov*, 827 F.3d at 1316, 1318 (abuse of discretion in refusing instruction).

[18] "Any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact." Doc. 183-1, at 19.

[19] "[T]o act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury," followed by the sentence quoted in the text. *Id*. at 20-21.

In contrast, defendants' "proof of scheme to defraud" instruction (both versions) (a) identified a "scheme to defraud" as "refer[ring] only to those schemes in which a defendant lies about the nature of the bargain itself," Doc. 97, at 27 (original); Doc. 255, at 226 (alternative); *see Waters*, 937 F.3d at 1353-54 (quoting *Takhalov*, 827 F.3d at 1313) (government's identical language as "supplying the missing link" for the scheme to defraud in Waters' proposed instruction); and (b) provided, as to a scheme to deceive, that even if a "victim made a purchase because of [defendant's] lie," the jury "must find the defendant not guilty if you nevertheless believe that the alleged victims received what they paid for." Doc. 97, at 27; Doc. 255, at 226; *Takhalov*, 827 F.3d at 1314; *see Waters*, 937 F.3d at 1354 (in scheme to deceive, victim not harmed "because he still received what he paid for").

These failures to (a) define intent to deceive and intent to harm[20], and (b) tell the jury how to distinguish between them – as with the district court's instructions here -- led this Court in *Waters* to find defendant's proposed instruction an "incomplete and misleading jury instruction" under *Takhalov*.[21] 937 F.3d at 1353-

[20] The "intent to cause loss or injury" is indistinguishable from "intent to harm"; and certainly does ***not*** meaningfully define it.

[21] Moreover, in *Takhalov* this Court found it too great a logical leap from a virtually identical "scheme to defraud" instruction (allowing conviction only if a defendant intended to "deceive or cheat someone out of money or property") to the inference that one is "not deceived or cheated out of money or property if he gets

54. In contrast, (1) the identical "scheme to defraud" definition defendants proposed here ("lies about the nature of the bargain itself"), and (2) language similar to their proposal -- in a scheme to deceive the victim is not harmed "because he still received what he paid for" --, would have correctly defined scheme to defraud, scheme to deceive, and the difference between them in *Waters*. *Id*.

Indeed, *Waters* demonstrates plainly that not only is ***defendants'*** proposed charge a correct statement of the law; but also the ***court's*** charge was ***in***complete and ***failed*** to cover substantially the critical parts of defendants' "proof of scheme to defraud" instruction.[22] Given the evidence supporting a finding of Senior's intent to ***deceive*** in some instances, the Court's refusal to define intent to ***defraud*** / ***harm*** and to instruct the jury how to tell the difference deprived Senior of a critical defense theory, and was an abuse of discretion.[23] *Takhalov*, 827 F.3d at 1318.

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exactly what he paid for," even though deceived into it; and thus the "scheme to defraud" instruction did ***not*** substantially cover the latter. 827 F.3d at 1317-18.

[22] Neither the court instructing on "good faith" nor its charging a modified version of Senior's theory of defense saves its refusal to give defendants' "proof of scheme to defraud" instruction. *See* Appellee's Brief, at 42-43. The theory of defense instructions given, Doc. 183-1, at 17, 21 (wire fraud), and 25-26 (bank fraud), do ***not address*** intent to deceive or defraud or the distinction between them; same with the "good faith" instructions. *See id*. at 21, 26; *see also, e.g., Takhalov*, 827 F.3d at 1317 (virtually identical, but longer, "good faith" instruction "said nothing about what kind of deception could constitute wire fraud"; ***not*** substantially cover a correct charge).

[23] The Government ironically argues that the jury could not have convicted Senior under the court's instructions without finding he made misrepresentations "with

Regarding whether the court's error in refusing defendants' proposed "proof of scheme to defraud" charge was harmless, *id.* at 1320-21, the Government's claim of "overwhelming" evidence purportedly of defendants' fraudulent intent -- much of which relates to intent to ***deceive***, ***not*** intent to ***harm*** -- addresses the wrong issue. "The question is not whether the jury could still have convicted the defendants if the [refused] instruction had been given [but]… whether the jury could have acquitted them." *Id*. at 1322. The Government failed to address whether "'the record contain[s] evidence that could rationally lead' a jury to find that [Senior] lacked the intent to defraud," which would entitle him to a new trial. *Id*. at 1321.

For every type of evidence the Government cites as showing fraudulent intent, there was contrary evidence in the record. For example, regarding the use of funds he solicited, Senior generally had no duty to disclose how money was/ would be spent. Concerning the economic interest purchases (the gateway into

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the intent to cause loss or injury to his victims, ***i.e., that the victims did not get what they bargained for.***" Appellee's Brief, at 43 (emphasis added).

The problem: "intent to cause loss or injury," which the court's charge did include, does ***not*** define the "intent to harm" required to find a scheme to defraud. *Waters*, 937 F.3d at 1353. And, the part defining loss or injury as the victims "not get[ting] what they bargained for," was ***omitted*** from the court's charge -- the court ***refused defendants'*** request for a ***comparable*** instruction, i.e., that even if defendant deceived the victim into a purchase, defendant is not guilty if the jury believes that the victims "received what they paid for." Doc. 255, at 226-27; *see, e.g., Waters*, 937 F.3d at 1354. Moreover, the claim that "intended to cause loss or injury to the victims" substantially covers the omitted part is foreclosed by *Takhalov* as too great an inferential leap. *See supra*, at 29 n. 21.

Masada for each investor), the purchase agreements imposed ***no*** restrictions on the use of the sale proceeds. For some investor witnesses or certain transactions, there was ***no*** evidence that Senior represented ***anything*** regarding funds' expected use. There was conflicting evidence regarding a) Senior's authority as manager under the relevant operating agreements to determine what constituted legitimate business expenses (and whether various expenditures the Government identified as personal actually had a legitimate business purpose), b) whether Senior ever represented that all funds would be used ***solely*** for Masada purposes, c) what representations Senior did make, d) whether investors' expectations for use of funds were based on actual representations made, and e) sometimes whether such representations were true when made.

Regarding the extent of Senior's ownership interest in Masada[24], evidence showed that Senior made the contract payments to buy both the Johnson and Harms parties' respective interests when due; both purchase agreements remained continuously under contract; Terry Johnson relinquished control over his shares to Senior when they signed the initial agreement; Clarissa Harms stopped paying her 50% share of Masada expenses, leaving Senior responsible for 100% of the expenses, within a couple years after Senior became manager of Masada; Senior paid Johnson over $500,000 in continuation fees to extend their agreement; and

[24] Senior's ownership interest under the Johnson and Harms contracts likely is a legal question the court should have decided.

Senior's repayment of Johnson's and Harms' pre-existing loans to Masada was ***not*** due under the agreements until a liquidation event, which has ***not*** occurred. And, concerning the involvement/ potential involvement of Condoleezza Rice and Martin Luther King, III with Masada, there was evidence that Senior's representations either were true or he had reason to believe them to be true when made.

At minimum, as to all counts and other transactions in the indictment, the evidence conflicted whether Senior misrepresented anything about the nature of the bargain, i.e., the price or the characteristics of the investment; and whether each investor in each transaction received (and still has) what they paid for. The instructions given allowed the jury to convict Senior on multiple counts based on misrepresentations but without intent to harm the investor-victim or misrepresenting an essential element of the bargain. *Takhalov*, 827 F.3d at 1314, 1321. And, there is sufficient evidence that, had defendants' requested instruction been given, a rational jury could find that Senior lacked the intent to harm on all (or nearly all) counts. *Id*. at 1321. Because the ***Government*** failed to carry ***its*** burden, *id*. at 1320-21, 1324, of showing beyond a reasonable doubt that the faulty jury instruction did ***not*** contribute to Senior's wire fraud and bank fraud convictions, Senior is entitled to a new trial on all those counts. *Id*. at 1321.

CONCLUSION

The Court should reverse the judgment of conviction, and either order a judgment of acquittal on all counts, or remand for a new trial on any count not due an acquittal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the body of this corrected reply brief does not comply with the type-volume limit of Fed.R.App.P. 32(a)(7)(B)(ii), in that it contains more than 6,500 words, i.e., 8,588 words, as calculated by the word-processing system used to prepare this brief.[25] I certify that this brief complies with the typeface and type style requirements of Fed.R.App.P. 32(a)(5) and (6), in that it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman type style, font size 14-point.

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[25] Per the Clerk's deficiency notice, counsel is submitting this proposed corrected reply brief with a motion to file out of time and exceed the word limit.

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of December, 2021, I have filed the above and foregoing, using the Court's electronic filing system, which will electronically serve a copy of the same on all counsel of record.

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