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 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. Hall, DeAngelo

17. Hankey, Kyle C.

18. Joseph, Anthony A.

19. Locke, Clint

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

21. Meachum, Daniel R.

22. Ott, Hon. John E.

23. Parkman, James W., III

24. Parkman White LLP

25. Peeples, Lloyd C., III

26. Reed, Joe M. and Associates, LLC

27. Rossum, Allen

28. Spikes, Takeo G.

29. Taylor-Stoudamire, Natasha

30. Thomas, Bryan

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31. Thomas, Danielle

32. Town, Jay E.

33. Wasdin, Chelsea L.

34. Watkins, Donald V., Jr.

35. Watkins, Donald V., Sr.

36. Williams, Mario

37. Wilson, Gibril.

Respectfully submitted,

/s/ Mark Englehart
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STATEMENT REGARDING ORAL ARGUMENT

Appellant Donald V. Watkins, Sr. requests oral argument. This appeal involves the proper application of *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), to a key defense of Watkins, Sr. to the wire and bank fraud charges at issue -- his lack of intent to defraud his investors (as shown by his lack of intent to harm them, and their receipt and continued possession of what each one bargained for, i.e., the benefit of their bargain).

In the novel factual situation here, each investor-"victim" entered into an arms-length contractual relationship involving a pre-revenue company with Watkins, Sr., under which the rights of each investor and the rights, responsibilities, and authority of Watkins, Sr. were established and governed by explicitly applicable contractual agreements. Watkins, Sr. placed the District Court on notice of his defense based on *Takhalov* / "they got what they paid for" / the investor-"victims" received the benefit of the bargain, well in advance of trial.[1]

Watkins, Sr. contends that, nonetheless, the District Court misapplied *Takhalov* and erred in multiple ways: by unduly and prejudicially restricting evidence relevant to his "*Takhalov* defense"; by refusing defendants' request to instruct the jury on the critical distinction between "intent to deceive" and "intent

[1] *See, e.g.,* Watkins, Sr.'s sealed response to the government's sealed (Doc. 80) "Motion in Limine to Exclude Irrelevant Evidence Regarding Meaning of Investment Agreements and Operating Agreements," filed Feb. 7, 2019, at 4-11, 17-20; Doc. 97 (defendants' proposed jury instructions, filed Feb. 9, 2019), at 27-28; Doc. 262 (hearing on motions *in limine*, held Feb. 11, 2019), at 40-44. (Counsel does not have access to the "Doc. #" for the sealed response.)

to defraud," and specifically to define "intent to defraud" under *Takhalov*; and by failing to grant a judgment of acquittal based on the lack of evidence from which a reasonable jury could find that Watkins, Sr. had the requisite intent to defraud or harm the alleged "victims," as required for conviction of either wire fraud or bank fraud.

Given the novel facts here and the somewhat shifting (and misunderstood) application of *Takhalov* since its rendition, the decisional process would be significantly aided by oral argument. Fed.R.App.P. 34(a)(2), 34(f); 11th Cir. R. 34-3(c).

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. §3231. This Court has jurisdiction under 28 U.S.C. §1291, because this is a timely appeal from a final judgment. The judgment, disposing of all claims, was entered on August 5, 2019. (Doc. 223). Sentence had been pronounced on July 16, 2019. Out of an abundance of caution defendant-appellant Watkins, Sr. filed notice of appeal within 14 days of that date, on July 29, 2019. (Doc. 214). That notice of appeal became effective upon the formal entry of the August 5, 2019 judgment. *See* Fed.R.App.P. 4(b)(2).

STATEMENT OF THE ISSUES

I. Whether the judgment of conviction on all counts of wire fraud should be reversed, and judgment of acquittal entered, because the evidence of intent to harm is legally insufficient to establish Watkins, Sr.'s intent to defraud as necessary to sustain conviction for ***wire*** fraud.

II. Whether the judgment of conviction on both counts of bank fraud should be reversed, and judgment of acquittal entered, because the evidence of intent to harm is legally insufficient to establish Watkins, Sr.'s intent to defraud as necessary to sustain conviction for ***bank*** fraud.

III. Whether the judgment of conviction on the conspiracy count should be reversed, and judgment of acquittal entered, because co-defendant Watkins, ***Jr***. lacked the specific intent necessary to be convicted of conspiracy; and without another co-conspirator to knowingly agree with to commit an illegal act, Watkins, ***Sr***. cannot be convicted of conspiracy either.

IV. Whether a new trial should be ordered on the wire and bank fraud charges, because 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.

V. Whether a new trial should be ordered because the District Court erroneously excluded and limited defense evidence that went to the heart of the case, i.e., evidence of the value of what the investor-"victims" acquired.

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

On April 26, 2018, a federal grand jury returned a sealed indictment against defendant-appellant Donald Watkins, Sr. ("Watkins, Sr." or "Senior") and his son and co-defendant-appellant Donald Watkins, Jr. ("Watkins, Jr." or "Junior"), alleging three counts of wire fraud, in violation of 18 U.S.C. §§1343 and 2. (Doc.1). On November 29, 2018, the government secured a superseding ten-count indictment against both defendants, alleging one count of conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. §1349 (count 1); seven counts of wire fraud, in violation of 18 U.S.C. §§1343 and 2 (counts 2 through 8); and two counts of bank fraud, in violation of 18 U.S.C. §§1344 and 2. (Doc. 4).

The charged conspiracy was alleged to run from about January 2007 and continue until about January 2016. (Doc. 4, at 3). The asserted purposes of the conspiracy were to enrich Watkins, Sr. and Jr. through investments in and loans for associated business entities; obtain funds from Alamerica Bank to pay personal and

business debts of Watkins, Sr. and Jr.; and conceal from investors and lenders how Senior and Junior used the proceeds of the "alleged business investments and business loans." (Doc. 4, at 4-5).

The case went to trial. After a thirteen-day trial, during which the government called thirty-two witnesses and the defense called four, the jury returned a guilty verdict against Watkins, Sr. on all ten counts (Doc. 157); and a guilty verdict against Watkins, Jr. on counts 1 (conspiracy) and 2 (wire fraud, concerning a May 28, 2013 transaction), and not guilty on the remainder. (Doc. 158).

Motions for acquittal filed by Watkins, Sr. at the close of the government's evidence (Doc. 144) and at the close of all evidence (Doc. 151) were denied by the Court. (Doc. 153 and 155, respectively). Watkins, Sr.'s motion for judgment of acquittal after the jury verdict, or alternatively for a new trial (Doc. 164), likewise was denied by the Court. (Doc. 198).

The Court sentenced Watkins, Sr. to 60 months imprisonment, which he is currently serving; and ordered forfeiture and restitution. (Doc. 223). Watkins, Sr. timely filed his notice of appeal. (Doc. 214).

Statement of Facts

1. Business and other background

Appellant Watkins, Sr. is a long-time practicing attorney (licensed over 40 years, during which he represented, among others, the City of Birmingham and other public entities); and businessman, including ventures into real estate development (an office building) and banking (with four or five others, founding Alamerica Bank in 1999). (Doc. 254, at 43-45). The charges against appellant Watkins, Sr. all arise out of his efforts to raise money in connection with the operation of two separate businesses in which he holds partial equity ownership interests: the Masada Resource Group (and various affiliated, special purpose entities) (collectively "Masada"), and Nabirm Global (and its Namibian affiliate, Nabirm Energy Services) (collectively "Nabirm").

During the time period of the indictment (January 2007 to January 2016), under Watkins, Sr. as its manager, Masada was (and continues) developing numerous individual international markets for its patented waste-to-ethanol technology, developing projects to (eventually) convert municipal solid waste into methanol and other commercial products. (*E.g.*, Doc. 253, at 30-31[1]). Nabirm is an oil and gas exploration company (Doc. 254, at 116), with confirmed oil

[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, page number(s)), i.e., "Doc. __, at __."

holdings on a lease off-shore Namibia in west Africa (Doc. 254, at, *e.g.*, 118-20); and likewise is an ongoing business. (Doc. 252, at 187).

The persons from whom he raised or sought to raise money, as identified in the indictment or at trial, were all investors in Watkins, Sr.'s interests in Masada. One of them (former professional basketball player and current TNT sports commentator Charles Barkley) also invested in Watkins, Sr.'s interests in Nabirm. (*See, e.g.*, Doc. 180-47 (GX 55[2]) (Masada); 180-51 (GX 59) (Nabirm)).

The gateway for each of these investors (or business partners) into Masada was to enter into a Purchase Agreement and Irrevocable Assignment of Economic Interests with Watkins, Sr., (*see, e.g.,* Doc. 180-7 (GX 7) (Danielle and Bryan Thomas); 180-16 (GX 15) (Takeo Spikes), also referred to as an "economic participation" or "economic interest." (*E.g.*, Doc. 254, at 113-14). Under each such agreement, the investor bought, and Watkins, Sr. irrevocably assigned, for a specified price a specified percentage of the future total cash distributions that Watkins would receive from various sources ("the Masada entities") by reason of equity interests he owned in Pencor Orange Corporation ("Pencor") and Pencor's membership interests in two affiliated corporations.[3] (*E.g.*, Doc. 180-7 (GX 7) (Thomas), at 1; 180-47 (GX 55), at 1 (Barkley); *see, e.g.*, Doc. 245, at 130). Each

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

[3] Watkins, Sr. bought Pencor Orange Corporation under the name Watkins Pencor, which became the entity holding his Masada interest. (Doc. 254, at 86).

such purchase agreement incorporated provisions of various operating agreements of the Masada entities. (*E.g.*, Doc. 180-7 (GX 7); 180-47 (GX 55)).

These were not purchases of stock or equity interests (*e.g.*, Doc. 254, at 94-96); and specifically exclude from the defined future revenue stream legal fees paid to Watkins, Sr.; certain fees paid to Pencor/Watkins, Sr. as manager of the Masada entities, and expense reimbursements to Pencor. (*E.g.*, Doc. 180-7 (GX 7), at 1; 180-47 (GX 55), at 1; Doc. 254, at 106-07). Watkins, Sr. refers to this irrevocable assignment to a purchaser/investor of a percentage of this future revenue stream as a "dilution" of his own economic interest. (*E.g.*, Doc. 254, at 113-14). The government called seven of these economic interest purchasers to testify during trial to oral representations they recalled Watkins, Sr. having made several years before[4]; Watkins, Sr. called another, a Masada project manager (Ralph Malone), to testify during his defense.

The two-pages-long Masada economic interest purchase agreements expressly warned, and each purchaser acknowledged, that the "investment in the purchased economic interests involves a high degree of risk" and "is suitable only for persons or entities that have no need for liquidity in this investment and can

[4] Danielle Thomas and Bryan Thomas, Takeo Spikes, Natasha Stoudemire, Carlos Emmons, Gibril Wilson, and Charles Barkley. None of them testified as to any alleged misrepresentations (or representations) they claimed co-defendant Watkins, ***Jr.*** made to them (as relevant to the argument below regarding insufficiency of evidence of a conspiracy).

bear the loss of their entire investment." (Doc. 180-16 (GX 15) (Takeo Spikes), at 2; 180-47 (GX 55), at 2; Doc. 245, at 160-61 (Spikes)). The agreement itself states those risk factors are "described in detail" in a specified 1996 Confidential Memorandum (*e.g., id.*; *see* Doc. 181-1, at 9-16 (risk factors section of that Memorandum)), which was available to each purchaser. Each purchaser witness had personal financial advisor(s) and/or attorney(s) at the time of their purchase(s) (*e.g.*, Doc. 245, at 111-13 (Spikes)), although the witnesses varied on whether they asked their advisor(s) and/or attorneys to review the contract and any other documents (and request further information), and one or more bought the economic interest against the advice of their advisor(s). (*E.g.*, Doc. 244, at 207 (Bryan Thomas)).

Beginning in 1978, Masada started as a company in1978, owned 50-50 by Daryl Harms and Terry Johnson. It covered several businesses unrelated to waste-to-energy technology ("recycle garbage to create methanol") for about twenty years before Harms started pursuing a waste-to-energy venture in the late 1990s, which became Masada Resource Group. (*E.g.*, Doc. 249, at 157-59, 226-29).

Watkins, Sr., who had known Harms for a few years, learned about his garbage-to-ethanol technology, and found a way to invest in that venture in 1998. (Doc. 254, at 45-47). In 1998 Masada had one project it was developing, in Middletown, New York, under a venture Pencor Masada Oxynol. Pencor had that

one project it was developing. Watkins, Sr. bought Pencor from its owners, and with it 25 percent of Masada and a ten percent ownership interest, and right-to-first refusal if Masada wanted to sell the project, for the next eight projects Masada might develop in the U.S. (*Id*. at 46-47).

Daryl Harms was the manager for Masada Resource Group until his death, after a lingering illness, in 2005. As manager, he oversaw day-to-day operations and the development of the New York project, including moving from a concept to obtaining environmental permits; creating a "mountain" of engineering plans and specifications; and developing an engineering process and software package with the Tennessee Valley Authority – resulting in nine domestic patents -- to further develop technology started by Nazi Germany during World War II, to take "any pile of garbage" and generate a specification level of ethanol. (Doc. 254, at 47-50).

With its manager's illness from 2003 until his death in July 2005, Masada's progress slowed tremendously to being on the verge of bankruptcy. After Daryl Harms' death, Terry Johnson took over as a caretaker, to wind down the company. Watkins, Sr. exercised his right of first refusal under his ownership of Pencor; entered into an agreement in December 2005 with Harms' widow, Clarissa, to split the Harms' equity interest in Masada Resource Group 50-50 in exchange for Watkins, Sr. equally splitting capital contributions for operating expenses going

and Watkins, Sr. taking over as manager of Masada.[5] (Doc. 249, at 211; Doc. 254, at 51-53; Doc. 181-9 (DX 16), at 1; 180-177 (GX 337) (manager designation effective Dec. 29, 2005); *but see* Doc. 249, at 188-91, 193-96, 208-09).

And, as part of submitting an application to the Department of Energy for a loan guarantee, and with Terry Johnson having stepped away in 2005 from any involvement with Masada, Watkins, Sr. reached a purchase agreement to buy Johnson's 50 percent equity interest in Masada, which the parties signed in May 2007. The gist of the deal was Watkins, Sr. paid Johnson $100 for Johnson's stock, with the remaining amount Johnson loaned to Masada (approximately $3.2 million) to be paid upon a specified triggering capital event. The agreement was extended six times, with Watkins, Sr. paying Johnson an estimated $500,000-550,000 in extension fees, and remained continuously under contract until at least 2017. (Doc. 250, at 25-26, 29; Doc. 253, at 63-66; Doc. 254, at 53, 102-03; Doc. 180-32 (GX 34), at 1-4).

When Watkins, Sr. became manager of Masada in December 2005, its only project was the one in Middletown, New York. At around Harm's death in 2005, with a change in the "political structure" in Middletown and the exit of people there who supported the plants Masada was going to build, the county sought to

[5] Under the restated restructuring agreements, Watkins, Sr. paid $100 for the Harms' 50 percent Masada equity interests, with the Harms' remaining $6.9 million capital contribution to be paid upon a liquidation event, which has not occurred.

terminate the contracts. As a result, Masada filed an arbitration action in 2007, which was not decided until 2011. (Doc. 250, at 5; Doc. 253, at 58-60).

Mr. Harms had left Watkins, Sr. a detailed guide on how to grow the business and when to start seriously pursuing someone who would acquire or cash out Masada or generate another major liquidation event, with the threshold being development of forty markets. Although Harms' guide focused on developing U.S. markets, Watkins, Jr. focused instead on international markets.

For two reasons: fuel prices (during the entire 2007-2014 period) were much higher internationally, increasing the incentive to find alternative fuels; and Masada was able to negotiate much longer contracts for a garbage stream (from a minimum 20 to a maximum 50 years) than the much shorter (e.g., 3 to 5 year) contracts available in the U.S. Trying to align new markets with places in which Masada has its 60 international patents, Masada under Watkins, Sr.'s management had developed as many as 47 such markets, and still maintains about 40.[6] (Doc. 253, at 31; Doc. 254, at 173-74, 176-77).

[6] Developing an international market for Masada is complicated, time-intensive, and costly. It involves identifying the market, guided by where Masada has patents (60 in 60 countries); finding a suitable partner who can pass State and Treasury Department vetting and has access to garbage; developing a progression plan on how to proceed in that country; entering into a long-term contract to lock up the garbage for at least 20 years (up to 50 - "that's a great market"); and making sure the place is politically stable, to avoid investing much time and money in a place that experiences turmoil later. It requires significant expenditures on lawyers, vendors, and travel. Watkins, Sr. estimated that during the indictment period of

Masada was not a revenue-producing, company before Watkins, Sr. took over as manager in December 2005, and still isn't; instead, it is a project development company.[7] Accordingly, Watkins, Sr. has pursued a business plan to find partners or someone to finance or buy Masada in a liquidation event. (Doc. 249, at 217-18).

Beginning in around the latter part of 2007 and continuing forward, Masada experienced a cash crunch. This was, again, for two reasons: the Harms family stopped meeting its 50 percent capital contribution obligation; and the onset of the Great Recession. (Doc. 249, at 217; Doc. 254, at 111). Watkins already had not collected since 2003 the $17,000 monthly rent Masada owed for its office in his building, and has never drawn the monthly compensation he was due since

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January 2007 through January 2016, he spent between 12-14 million dollars, from sales proceeds from the economic interest purchasers or his personal money, not including "a lot of other things that were expense related." (Doc. 255, at 27-30). Even in a domestic market (Middletown, New York), per Masada's lawyer since the 1990s, it took 5 years to get to an agreement. (Doc. 253, at 126).

[7] As Terry Johnson agreed, a business being pre-revenue does not necessarily mean it lacks value; and there were accepted methods for valuing pre-revenue companies in both August 2001 (when an outside valuation of Watkins, Sr.'s assets in Masada was done in connection with Senior's effort to bid for ownership of a major league baseball team) and December 2005 (when Watkins, Sr. became manager). (Doc. 250, at 34). Indeed, per his widow, Daryl Harms saw a lot of potential in Masada and had internally valued it at about $40 million (when Masada had only one project). (Doc. 249, at 161).

becoming Masada's manager in December 2005.[8] (Doc. 254, at 110; Doc. 255, at 111). One step he took to address cash flow was to sell economic participations from 2007 to 2010 and dilute his own economic interest in the revenue stream he might receive from the identified Masada entities. He also generated operating revenues through fees for his legal services and other things he could do to produce money (about $7.4 million over the January 2007 to January 2016 indictment period). (Doc. 254, at 114).

In addition, during the cash crunch period, especially when his own credit was exhausted or unavailable[9], Watkins, Sr. called upon all credit available, including "friends and family credit," with those persons loaning him and Masada use of their own credit. (Doc. 254, at 199). This took various forms, including a) his ex-wife (DeAndra Watkins), who was entitled under their divorce decree to 25 percent of the proceeds of Masada economic interest purchases, delaying or forgoing and effectively loaning those proceeds to Masada (Doc. 254, at 27-30; Doc. 180-283 (GX 500), at 5); b) his son Donald Jr. and Junior's wife (Chay)

[8] As Watkins, Sr. understood them, under the operating agreements that governed his authorities and duties as manager, as executed by Masada's members in 1998 (before his involvement), the manager was due compensation starting at $7500 per month per place in which Masada had a contract to receive garbage. (Doc. 254, at 90; Doc. 181-7 (DX 5), at 1, 44-45).

[9] There was evidence that Watkins, Sr.'s American Express card went into collections, was suspended, and then went into litigation before the suspension was lifted under a settlement agreement. (*E.g.*, Doc. 244, at 106-09; Doc. 249, at 74-75, 86-88; Doc. 180-161(GX 279); Doc. 180-206 (GX 390), at 95-97).

allowing their American Express credit to be used to charge Masada expenses (Doc. 254, at 199); and c) Masada project director Ralph Malone , instead of receiving salary, crediting that amount as payments toward his economic interest purchase (or "sweat equity"). (Doc. 252, at 179; Doc. 254, at 199). Acknowledging that Masada paid some personal expenses when paying off or down family members' American Express bills (and considering that a cost to Masada of borrowing their personal credit when other credit was not available), Watkins, Sr. testified all such expenditures were recorded in QuickBooks to be reconciled upon a liquidation event. (Doc. 254, at 199-200).

2. The Indictment, Defenses, and Evidence

Count 1 of the indictment alleges a conspiracy by Senior and Junior from 2007 to 2016 to commit wire fraud and bank fraud, the purposes of which were to enrich them through purported investments in and loans for associated business entities; obtain funds from Alamerica Bank to pay their heavy personal and business debts; and conceal from the investors and lender how they used the proceeds of the investments and loans. (Doc. 4, at 4-5).

As to the wire fraud, as characterized by the government (and alleged in the indictment), Senior and Junior did so by a) Senior, with Junior's encouragement, lying to the investors about how their funds would be spent, and concealing the true reason defendants wanted that money, i.e., for their personal benefit; b) Senior

telling the investors lies about significant events supposedly happening at Masada, to convince them Masada was moving toward a liquidation event that would give the investors a nice payday; and c) Senior lying about being sole owner, or joint owner with Mrs. Harms, of Masada Resource Group. (Doc. 256, at 45-46; *see* Doc. 4, at 5-6).

As to the conspiracy to commit bank fraud, the government charged that Senior and Junior created a plan to get money under false pretenses from Alamerica Bank, where Senior was an executive officer and "insider" for purposes of regulatory restrictions that impose a maximum amount on extensions of credit to "insiders"; persuade Senior's mentor and former Birmingham mayor Dr. Richard Arrington to take out a loan for them under his own name, to circumvent the regulatory limits on loans to "insiders"; and conceal from the bank that the loan proceeds would go to Senior and Junior and be used to pay their outstanding debts. (Doc. 256, at 46; Doc. 4, at 6-7, 13-16).

For the period from June 6, 2007 through May 28, 2013, the indictment identifies all the purchases made of economic interests from Watkins, Sr., and also three loans Senior obtained from economic interest holders (Charles Barkley, or "Investor Victim A"; and Dr. Arrington, or "Investor Victim J") -- a total of 16 acts -- as being in furtherance of the conspiracy. (Doc. 4, at 13-28).

For each of the economic interest purchases, the government followed the same basic script: a) the economic interest buyer testified about any representations Senior made to them to induce them to invest, including any (whether specific, or general such as "to grow the business") about how the money to be invested would be used (or how they understood it would be used); b) the government introduced any e-mails or other written evidence of representations Senior made; c) the government offered evidence (through a forensic accountant, Bernard Woolfley) summarizing financial records and tracing the short-term outflows immediately following 13 specific deposits (of the proceeds of such purchases) received by Senior (Doc. 251, at 129-78); d) the government identified specific expenditures made shortly after Senior deposited the money that ostensibly were different from any specific representations as to use, or appeared to be personal and non-business related (if no specific representations allegedly had been made regarding their use, as the purchase agreements were silent as to use of the funds); and e) the investor would be shown several such expenditures, and then asked whether they knew their investment would be spent on such things (invariably no), whether it would have been important to have known that in advance (invariably yes), and/or whether they would have invested if they'd known that's what Senior would spend their money on (invariably some version of no).

As to the specific wire fraud counts, counts 2 through 4 involved three e-mails or wire communications (Doc. 180-174 (GX 313); 180-143 (GX 207); and 180-44 (GX 52), respectively) leading to a single transaction in which Charles Barkley made a $150,000 loan to Watkins, Sr. by wire transfer on May 28, 2013. Watkins had e-mailed Barkley on May 24, 2013, requesting a $150,000 loan to cover his short-term financial exposure, stating "earlier this week, I had to cover $600,000 in April and May expenditures related to" specified Masada and Nabirm projects, "including some substantial legal fees for Nabirm relating to the $10 million investment transaction currently being handled by Daniel Stewart & Company in London." (Doc. 180-44 (GX 52), at 1.) The $150,000 loan was memorialized in a promissory note from Senior to Barkley, also dated May 28, 2013. This note represents that the debt evidenced by the note "was made and transacted solely for business purposes related to Masada Resource Group, LLC." (Doc. 180-53 (GX 61), at 2).

As to this transaction the government offered evidence that a) Senior's representations regarding the need for the funds were not true, e.g., there were not "substantial legal fees for Nabirm relating to a ten million dollar investment; and b) various expenses paid in the immediate aftermath were not Masada business-related. (E.g., Doc. 180-265 (GX 462), at 12). Watkins, Sr. in turn explained his

calculation of the $600,000 in expenses and how they accrued. (Doc. 254, at 141-43).

Watkins, Sr. also offered business-related reasons for many of the expenses and categories of expenses that the government argued were not business-related, both in this instance and as identified in relation to other receipts of investor funds; explained the payment of some personal expenses as being the temporary cost of obtaining the credit of his family members' personal credit (and more cheaply than commercial lenders) when he could not obtain other credit; and detailed the recordkeeping from which such expenses will be reconciled in a final accounting upon a Masada liquidation event. (Doc. 254, at 191-202).

As a general matter, Watkins, Sr. mounted several defenses. As to both the wire and mail fraud charges, he relied on the defense from *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), that he lacked any intent to harm any of the alleged "victims," and even if any alleged "victim" was deceived into buying an economic interest or making a loan, they got what they bargained for, *id.* at 1313-14, e.g., the percentage economic interest, a promissory note, a "good loan" the bank wanted to make and made money from. (Doc. 249, at 41 (referring to September 2012 $750,000 loan to Dr. Arrington)). In that regard, there was no evidence that any of the investors lost what they received. On the other hand, the trial court precluded Watkins, Sr. from offering evidence of the value of Masada

(Doc. 253, at 12, 26), notwithstanding its relevance to whether the investors got what they bargained for, *see* Doc. 148, at 5-6; and severely limited as to value his cross-examination of, and ability to respond to, government witnesses who offered evidence on direct examination denigrating Masada's value.[10]

As to the representations, Watkins, Sr. offered testimony and documents (e.g., e-mails) tending to show, even if disputed, that the alleged misrepresentations were true when made, future-looking opinions regarding events to come, or in good faith he believed them to be true when made. As to the bank fraud charges, Watkins testified as to his good faith reliance on the tangible benefit exception to Regulation O; if that exception is satisfied, those loans to Dr. Arrington are not deemed an extension of credit to the bank executive officer or "insider," and would not cause Watkins, Sr. to exceed the maximum amount of credit that can be extended to such a bank "insider." Watkins also offered evidence to show his compliance (or attempt to comply) with the regulatory exception.

As to all charges, he asserted his reliance on his good faith understanding of the operating agreements – adopted in 1998, years before he became manager

[10] Especially the government's introduction through Terry Johnson (Doc. 249, at 232-39) of Government Exhibit 206 (Doc. 180-142), an outside valuation of Watkins, Sr.'s Masada assets performed as part of Senior's effort to buy the Tampa Bay Devil Rays baseball team. The exhibit included Daryl Harms' handwritten notes on the document, including one labeling the estimated Watkins Pencor valuation of approximately $10 billion "Total Bullshit!" (*Id.*, at 3).

(Doc. 254, at 79) -- that spell out his authority and responsibilities as manager. (*Id.* at 80-81; *see* Doc. 181-6 (DX 3), at 12; 181-7 (DX 5), at 40-43). In this regard, as to payment of allegedly personal or non-business expenses, it was Watkins' good faith understanding that the operating agreements authorized him to determine what constituted valid business purposes (Doc. 254, at 204-05); and as noted above, he explained the valid business purpose for many of the expenses questioned by the government. To his understanding, Watkins, Sr. could hold or deal in real or personal property of any interest; enter into partnerships in and outside the U.S.; incur liabilities; borrow money; hire and appoint employees and agents, define their duties, and fix their compensation; participate in partnerships and other business relationships with others; reimburse himself for all reasonable expenses; bind the corporation; and do anything necessary and proper to carry out his other powers, among others. (Doc. 254, at 81-89) (citing various provisions of agreements).

Returning to the specific wire fraud charges, counts 5 and 6 relate to unsuccessful efforts by Watkins, Sr.in February 2014 to raise an additional $1 million from Barkley in exchange for upgrading his equity stake to a 10% economic interest in all of Masada (not just Senior's portion), to enable Masada to undertake and complete a deal with a Saudi prince, Masada's local partner in Saudi Arabia, to acquire Masada's global assets, at an estimated enterprise value. (Doc.

180-162 (GX 285); 180-163 (GX 286)). Although the government offered a list of Senior's intended payments from the hoped-for $1 million (Doc. 180-148 (GX 213), at 3), they did not offer evidence that the intended payments were not for legitimate Masada-related business purposes.

Counts 7 and 8, the final two wire fraud charges, involve upbeat Masada Stakeholder Reports that Watkins, Sr. sent to Junior and copied to many individual economic interest holders, dated June 22, 2014 (Doc. 180-181 (GX 353)) and January 30, 2016 (Doc. 180-179 (GX 343)), respectively. The government alleges defendants sent these, and the e-mails identified in Counts 5 and 6, to conceal their fraud and to avoid detection by their "Investor Victims" of their fraudulent conduct. (Doc. 4, at 6, 20-22). Evidence offered to show alleged misrepresentations in those Stakeholder Reports, and evidence tending to rebut such claims of misrepresentations can be found in the testimony of the government's summary witness, Thomas Mayhall. (Doc. 252, at 4-135).

Finally, the last charges, Counts 9 and 10 alleging bank fraud, relate to two loans of about $750,000 and $150,000 that Richard Arrington obtained from Alamerica Bank on September 21, 2012 (Doc. 180-113 (GX 171)) and November 20, 2012 (180-119 (GX 178)), respectively, as an alleged "straw borrower" for Watkins, Sr. and Jr., who received the benefits of those loans, and used them for

business and allegedly personal purposes; but Senior, as an executive officer of the bank, did not disclose his receipt of benefits to the bank. (Doc. 4, at 22-25).

Regulation O, 12 C.F.R. Part 25, generally imposes a $100,000 maximum on the amount of credit a bank can extend to an "insider." (Doc. 248, at 238; Doc. 180-138 (GX 201), at 7-8). Senior, who was an "insider" at Alamerica for purposes of Regulation O (Doc. 180-130 (GX 192), at 1; Doc 180-131 (GX 193), at 1), had reached his Regulation O credit limit at the bank. Arrington held a 10 percent economic interest in Senior's Masada interests (and an interest in Nabirm), which Senior believed was a controlling interest and made Arrington subject to capital call obligations under the operating agreements. (Indeed, Arrington confirmed Watkins, Sr. told Arrington he needed to get the $750,000 and it would be used in connection with their Watkins Pencor business relationship.) (Doc. 248, at 190). In both instances Watkins, Sr. asked Arrington to obtain loans in those amounts as capital call contributions because Arrington had gotten a free ride for so long. Senior testified that in neither instance (nor in two earlier loans to Masada that Arrington obtained from Alamerica Bank) did Senior direct or ask Arrington, who had at least two other banking relationships, to go to Alamerica for the loan, although Arrington told Senior in seeking the larger loan that he was going to Alamerica. (Doc. 248, at 189-90; Doc. 254, at 178-79, 183-84).

Watkins, Sr. knew he would receive economic benefits from the loans because Arrington was fulfilling his capital call obligation, and has never denied that he received such benefits. (Doc. 254, at 185-86). Regulation O considers an extension of credit as one made to the insider (which would have put Senior above the regulatory credit limit) if either the proceeds are transferred to the insider or the insider receives tangible economic benefit from the proceeds. 12 C.F.R. §215.3(f)(1); Doc. 254, at 179.

But, from continuing education training, Senior knew of an exception to that tangible benefit rule, i.e., that it is not considered a loan to the insider if the loan involves a bona fide transaction for acquiring property, goods, or services from the insider. 12 C.F.R. §215.3(f)(2); Doc. 249, at 62-63; Doc. 254, at 179. Watkins, Sr. understood that exception as applying to the Arrington loans, and has consistently invoked consistently his rights and protections under the Regulation O tangible benefits exception. (Doc. 254, at 183, 186).

Although Watkins, Sr. knew he would receive benefits from those loans, he did not disclose that to the bank, because he did not see any disclosure requirement under the tangible benefits rule exception. (Doc. 254, at 183; *see* Doc. 249, at 63). Although the evidence is conflicting whether Arrington disclosed that to the bank, Arrington testified he told the loan officer (Matt Rockett) he was in a business relationship with Senior and needs the loan, and thought he told the bank president

(Larry Tate) that too. (Doc. 248, at 191-92). Also, Tate confirmed that Senior had disclosed his Masada and Watkins Pencor business interests on annual regulatory filings. (Doc. 249, at 35-36). Although according to Tate the bank board did not receive information about Senior's economic benefit when it voted, Rockett (or anyone) who received that information would have had a duty to report it to the board. (Doc. 249, at 64).

In processing the large, September 2012 loan, loan officer Rockett asked for a source of repayment letter regarding Nabirm, for confirmation of Arrington's right to receive investment proceeds from the $750,000 Barkley investment promised in Nabirm at that time. That September 18, 2012 letter, drafted by Senior and signed by his young general counsel (Kimberly Perkins), confirmed the right of JennRo (Arrington's business entity) to receive that $750,000 by December 31, 2012. (Doc. 180-133 (GX 196)) According to Rockett, Rockett showed the letter to bank president Tate, who directed him to remove it from the loan file. (Doc. 248, at 243, 257-59). Tate denies ever seeing or directing Rockett to remove it from the file. (Doc. 249, at 31-32, 34). Regardless, that right of repayment letter was not in the loan file reviewed by the bank board in approving the application for the $750,000 September 21, 2012 loan. (*See* Doc. 248, at 235; Doc. 249, at 30-32, 131-37).

In any event, the bank made each loan based on the creditworthiness of Arrington. (Doc. 249, at 64). Watkins was not a guarantor of the loans. (*Id*. at 32). Arrington was responsible for repayment of the loans, with his assets (including his house) as collateral (*id*. at 38), and when Arrington told loan officer Rockett that he (Arrington) had this business relationship with Watkins, Sr. and needed the $750,000 loan, Rockett made sure Arrington understood it was Arrington and not Watkins 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."[11] (Doc. 249, at 41).

Standards of Review

As to Watkins, Sr.'s motions for acquittal, questions of sufficiency of the evidence, such as failure to establish a scheme to defraud or conspiracy, likewise are reviewed *de novo*, viewing the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the Government's favor. *United States v. Kelly*, 888 F.2d 732, 740 (11th Cir. 1989).

[11] According to bank board member Mike Weaver, although banking regulators later found "apparent" violations of Regulation O in the September 2012 and November 2012 loans to Arrington, the bank accepted the findings on behalf of the bank and president Tate. Watkins, Sr. contested the "apparent violation" finding on his own behalf, and to Weaver's knowledge, no violation has been found on Watkins' part to date. (Doc. 249, at 149-50).

"If there is a lack of substantial evidence, viewed in the Government's favor, from which a reasonable factfinder could find guilt beyond a reasonable doubt, the conviction must be reversed." *Id.* "While the government need not exclude every conceivable hypothesis of innocence, … evidence is insufficient to establish a conspiracy where such evidence is wholly consistent with an obvious and reasonable innocent interpretation, and where little more than conjecture supports the hypothesis of guilt." *Kelly*, 888 F.2d at 740.

A district court's refusal to give a requested jury instruction is reviewed for abuse of discretion. *United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016). The district court commits reversible error "if (1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by other instructions, and (3) its subject matter dealt with an issue in the trial court that was so important that failure to give it seriously impaired the defendant's ability to defend himself." *United States v. Paradies*, 98 F.3d 1266, 1286 (11th Cir. 1996).

A district court's rulings to exclude or limit evidence or limit evidence are likewise reviewed for abuse of discretion, *United States v. Ethridge*, 948 F.2d 1215, 1218 (11th Cir. 1991), but "the trial court's discretion does not extend to exclusion of crucial relevant evidence." *Id.* (quotation omitted).

SUMMARY OF THE ARGUMENT

Appellant Watkins, Sr.'s defense against the five wire fraud charges was marred in at least three ways. The district court erred in not finding the government failed to prove Senior had the necessary intent to defraud, in the absence of evidence that he intended to harm his "victims" as required under *Takhalov*.

Further, the *Takhalov* defense that even if deceived to enter into any of the transactions, the "victims" received what they bargained for, was at the core of his case. But, the meaning of "intent to harm" as defined by *Takhalov* is not self-evident or common-sense. The district court's single sentence from this Court's pattern jury instruction to the effect that proving both intent to deceive and intent to cause loss or injury are required to prove intent to defraud, failed to define a key element of Watkins, Sr.'s defense. The district court accordingly erred in failing to give the jury Watkins, Sr.'s proposed instruction that fleshed out the meaning of "intent to harm" as *Takhalov* does. And, by excluding and narrowly limiting evidence relevant to whether Senior's alleged victims got what they paid for, i.e., the benefit of the bargain, the court below denied Watkins, Sr. his right to present a complete defense.

The convictions for on the two counts of bank fraud likewise should have been vacated, and Watkins acquitted, for a similar lack of evidence to establish the

required intent to harm.

Finally, the district court erred in not granting Watkins, Sr. an acquittal on the conspiracy charge. The evidence was insufficient to prove that co-defendant Watkins, ***Jr***. had the specific intent necessary to be found guilty. But, in conspiracies it takes two to tango. And, without a co-conspirator with whom to knowingly agree to commit an unlawful act, there can be no conspiracy; and Senior's conspiracy conviction must be reversed.

ARGUMENT AND CITATIONS OF AUTHORITY

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

In her opinion explaining her denial of Watkins, Sr.'s motion for judgment of acquittal after jury verdict (Doc. 197), the district court did not directly address Watkins, Sr.'s objections to the insufficiency of evidence to support any intent to harm any alleged victim. (Doc. 164, at 7-8). In fact, there is insufficient 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.

To convict Watkins, Sr. for wire fraud, the Government must prove beyond a reasonable doubt (1) Watkins, Sr. intentionally participated in a "scheme to defraud," and (2) use of the mails or wires in furtherance of the scheme. *E.g.,*

United States v. Hassan, 333 F.3d 1264, 1270 (11th Cir. 2003). The specific intent the Government must prove for wire fraud is that Watkins, Sr. intended to defraud the victim, here, Mr. Barkley. *E.g., United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

As to counts 2 through 4, that alleged victim is Mr. Barkley, whom the government contends Watkins, Sr. fraudulently induced to enter into a $150,000 loan. In return, he received a promissory note, with a promise to repay the debt owed.

The wire fraud statute prohibits only schemes to defraud, not mere schemes to lie, trick of otherwise deceive. *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016). Proof of a scheme to defraud requires proof that Watkins, Jr. intended to cause harm to his "victim," here, Barkley. *Id.* at 1310, 1312. Proof that a defendant merely induced the victim to enter into a transaction he otherwise would not have, is not sufficient to prove a scheme to defraud. *Id.* at 1310. Instead, a scheme to defraud "refers only to those schemes in which a defendant lies about the nature of the bargain itself," either about the price of the bargain or the nature of what is being received, *id.* at 1313-14, or, stated differently, "about the quality or price of the goods sold to the victims." *Id.* at 1316. "'[E]ven if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in acquittal if the jury nevertheless believes that the alleged

victims "'received exactly what they paid for'"" *Id.* at 1314 (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2nd Cir. 2007)).

The alleged misrepresentations made by Watkins, Sr. in the May 24, 2013 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).

Even under the Government's theory, Watkins, Sr. misrepresented only the expenses previously incurred that created the need for more funds, that he had already paid those expenses, and the anticipated arrival of more working capital. Barkley did receive what he was promised (the promissory note with the promise to repay), which is what he would have received if he had made the same $150,000 loan in response to a solicitation that the Government would regard as true. At most, the alleged misrepresentations induced Barkley to enter into a loan that he otherwise would not have entered, i.e., he was deceived, but the alleged misrepresentations did not address or affect what Barkley paid and received, i.e., he was not defrauded. A jury could find at most that Barkley was merely induced to enter into a transaction he otherwise would not have entered, which is insufficient to prove the required scheme to defraud. *Takhalov*, 827 F.3d at 1310. A jury could ***not*** find beyond a reasonable doubt that Watkins, Sr. intended to harm Barkley, i.e., that he lied about the nature of the bargain itself – the other

requirement for proof of a scheme to defraud Barkley in the May 2013 loan transaction as alleged in Count Two.

Watkins, Sr.'s conviction on Counts 5 through 8, all of which involve wire communications alleged to have been intended to conceal and avoid the detection of both defendants' conduct, Doc. 4, at 6, 20-22, likewise must fall under *Takhalov* for legally insufficient evidence of Senior's intent to harm, and thus of the existence of a scheme to defraud. Counts 5 and 6 involve an unsuccessful attempt to induce Barkley to buy an additional specific economic interest, but in all of Masada (not just Watkins, Sr.'s portion) for a price of $1 million. Although the relevant e-mails state an estimated or hoped-for value of a future liquidation transaction, if completed, the government did not offer the underlying valuation (which the initial e-mail indicated was attached); any of the underlying assumptions; and evidence that any such valuation was false, much less that Watkins, Sr. knew it was false when made, as to even indicate that he intended to deceive Barkley. Beyond that, there is no evidence that Senior lied about the offer price of $1 million; or what Barkley would have received if he paid the $1 million, a 10 percent economic participation in all of Masada. This too is legally insufficient to establish an intent to harm Barkley, as required to support the required intent to defraud.

And, counts 7 and 8 do not identify any alleged victims, except to the extent incorporated from the list of economic interest holders identified as "Victim __." All such alleged victims, including Barkley, came through the gateway of purchase of a specified percentage economic participation interest for a fixed price. Other than Barkley (who also entered into loan transactions), no one received anything different from that economic interest they purchased. There is no evidence that any economic interest holder no longer has the percentage interest they bought, or that any alleged identified misrepresentation in the Stakeholder Reports sought to take away anyone's interest. This too shows a lack of evidence of intent to harm.

Conviction on a lulling theory requires proof that the wire communications designed to conceal a fraud, by lulling a victim into inaction, must be in furtherance of a scheme to defraud. *See, e.g., U.S v. Evans*, 473 F.3d 1115, 1120 (11th Cir. 2006); *United States v. Georgalis*, 631 F.2d 1199, 1204 (11th Cir. 1981). If there is insufficient evidence of Senior's intent to harm (as shown above), there is no scheme to defraud. *E.g., Takhalov*, 827 F.3d at 1310. In the absence of a scheme to defraud, there is no scheme to further by lulling a victim into inaction. Even if there were sufficient evidence that the alleged lulling communications were deceptive and Senior intended them to be so, the Government's failure to establish Senior's intent to harm is fatal to these lulling counts too.

Each investor/creditor/alleged victim, even if deceived to enter their respective transaction, has obtained and still has what he or she bargained for (Doc. 255, at 9)(no purchaser terminated economic interest purchase agreement), which bars proof of the scheme to defraud that's required for conviction for wire fraud. *E.g., Takhalov*, 827 F.3d at 1312-14. Because proof beyond a reasonable doubt of the scheme to defraud is required for conviction on each of the wire fraud counts, and is absent here, this Court must reverse the judgment of conviction against Watkins, Sr. on all the wire fraud counts and enter a judgment of acquittal.

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

Virtually identical analysis applies to the legally insufficient lack of evidence of intent to defraud to support Watkins, Sr.'s convictions for bank fraud. Intent to defraud the financial institution, i.e., Alamerica Bank, is required to support conviction under the bank fraud statute, 18 U.S.C. §1344. *E.g., Loughrin v. United States*, 134 S.Ct. 2384, 2389-90 (2014).

The district court's charge to the jury regarding the required scheme to defraud for bank fraud was similar to that for the scheme to defraud under wire fraud, substituting "a financial institution" as the necessary target of the scheme. And, the district court expressly directed the jury to apply the wire fraud instructions regarding "intent to defraud" to the bank fraud charges as well. (Doc.

183-1, at 19, 23). According to the annotations to the Eleventh Circuit criminal pattern jury instruction O52, bank fraud, from which the district court's charge on "intent to defraud" was taken, the instruction regarding "intent to defraud" incorporates the principle that "deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss." (citing *Takhalov*, 827 F.3d at 1315). Accordingly, the *Takhalov* principles set out above apply equally here regarding bank fraud.

The government's theory of bank fraud was that Watkins, Sr. and Jr. caused materially false representations to be made regarding who would receive the proceeds of two separate loans for which Dr. Arrington applied and was approved. (Doc. 4, at 23-25). There was no evidence of any misrepresentation of the amount of either loan (the price) or regarding the terms of either loan (the repayment terms Alamerica Bank bargained for in exchange). As would have happened if Dr. Arrington had applied for the same amount of proceeds but for his own use (i.e., absent any misrepresentation), the bank evaluated the application based on the creditworthiness of Dr. Arrington; repayment was secured by Dr. Arrington's collateral; Senior was not a guarantor of the loan; and Dr. Arrington was responsible for repayment – all as it was here. The evidence also showed that the bank wanted to make the large, $750,000 loan (and by inference, the $150,000 loan as well); considered it "a good loan"; and believed it did "not jeopardize in any

way the security and safety of the bank." (Doc. 249, at 41). Nothing in the evidence indicates that Senior intended in any way to jeopardize the bank's route to repayment (with profit) on the loan, and in the absence of any proof that the bank did not receive what it bargained for in making the loans, there is no evidence that Senior intended to harm the bank (as opposed to deceiving the bank to enter into the loan transactions), and thus insufficient evidence for a reasonable jury to find the intent to defraud required for conviction of bank fraud. This requires reversal of the bank fraud convictions and entry of a judgment of acquittal.

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.

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). In denying Senior's motion for acquittal on the conspiracy charge, in part for lack of a guilty coconspirator, the district court ruled the jury "reasonably could have found Watkins, Sr. conspired with Watkins, Jr. 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, contrary to that finding, the Government failed to prove beyond a reasonable doubt that a) Donald Watkins, ***Jr***. knowingly agreed to commit an unlawful act or b) he had the specific intent required for conspiracy, and thus c)

two persons (Senior and Junior) agreed to pursue a specific illegal object, and ultimately that an actionable conspiracy existed.

To sustain a conviction for conspiracy, the Government "must prove an agreement between at least two conspirators to pursue jointly an illegal objective." *United States v. Adkinson*, 158 F.3d 1147, 1153 (11th Cir. 1998). The Government "must allege and prove that the defendants ***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). The Government also must prove that each defendant – and specifically, Watkins, ***Jr***. here – had a "deliberate, knowing, specific intent to join the conspiracy." *E.g., Adkinson*, 158 F.3d at 1153. And, even though a conspiracy conviction may be based 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)(conviction reversed); *Chandler*, 388 F.3d at 806 (conviction reversed); *Parker*, 839 F.2d at 1478 (11th Cir. 1988)(conviction reversed). Each defendant convicted must know there is a

conspiracy and demonstrate the specific intent to join it.[12] *E.g., Adkinson*, 158 F.3d at 1155.

Here there is not 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, or that Watkins, Sr. and Watkins, Jr. entered into any agreement to commit an illegal act. And, absent such evidence of specific intent on Watkins, ***Jr***.'s part, and given the lack of any other person with whom the Government contends Watkins, ***Sr***. has conspired, the conspiracy charge would fail against both Watkins, Jr. and Watkins, Sr. *E.g., Parker*, 839 F.2d at 1478.

The district court focused on two e-mails, GX 46 (Doc. 180-39) and GX 52 (Doc. 180-4), as circumstantial evidence of a conspiracy by Junior with Senior "to try to solicit funds from Barkley using false statements about business needs, but using the proceeds for personal expenses and gains." (Doc. 197, at 9). But, even assuming Junior's knowledge that Senior made false statements about the particular purposes or need for the investment he solicited, that is insufficient to conclude Junior knew in advance that Senior would lie, agreed that Senior should lie, or intended for Senior to lie to obtain the requested funds. Given the evidence that a) Senior believed the operating agreements gave him managerial authority to

[12] "Since no one can be said to have agreed to a conspiracy that they do not know exists, proof of *knowledge* of the overall scheme is critical to a finding of conspiratorial intent." *Chandler*, 388 F.3d at 806.

determine what constituted legitimate business expense, b) during the cash crunch, Masada operated by "friends and family" credit, with friends or family loaning their personal credit (e.g., American Express) for business use (Doc. 254, at 199), and c) whether particular expenses were business-related depended on the specific reason they were incurred, the listing of expenses to be paid from new business investment funds does not equate to an agreement to pay "personal" expenses from funds obtained by deceit.

To the extent that a jury could have found an agreement from the evidence, at most it could have found an agreement between Senior and Junior to try to keep the Masada entities in business, preserve the assets, and continue trying to grow the business; or more narrowly, an agreement between Watkins, Sr. and Watkins, Jr. to identify and prioritize debts to be paid, try to obtain funds, and determine which creditors to pay and how much – both of which agreements, on their face, seek lawful objectives.

But, there is ***not*** evidence to permit a jury to have found beyond a reasonable doubt an agreement between Watkins, Sr. and Watkins, Jr. to identify and prioritize debts to be paid, ***and*** to try to obtain funds by defrauding investors to induce them to invest, i.e., a ***knowing agreement*** between the two of them to commit an ***unlawful*** act. *E.g., Chandler*, 388 F.3d at 800. Even assuming evidence that Watkins, ***Sr***. intended to obtain funds for those purposes by

fraudulently soliciting investors, any finding that Watkins, ***Jr***. shared that intent to solicit investors by fraud, so as to create a "meeting of the minds" to try to commit the charged unlawful act, *e.g., Arbane*, 446 F.3d at 1229-30; *Parker*, 839 F.2d 1478, would be merely speculative, not a reasonable inference. *E.g., Adkinson*, 158 F.3d at 1159 ("[w]here the government's case is predicated largely, if not solely, on circumstantial evidence" – as here – "reasonable inferences and not mere speculation must support the jury's verdict")(quotation omitted).

Evidence is ***in***sufficient to establish a conspiracy where such evidence is wholly consistent with an obvious and reasonable innocent interpretation, e.g., a common, lawful goal of identifying creditors, obtaining funds, determining payment of creditors, and keeping the Masada and Nabirm businesses afloat; and where little more than conjecture (here, especially as to Junior) supports the hypothesis of guilt. *E.g., Kelly*, 888 F.2d at 740. And, it is not enough to support a conspiracy conviction for the Government to show, and the Government may not rest on proof, that Watkins. Jr. "acted in a way that would have furthered the goals of a conspiracy ***if there had been one.***" *Adkinson*, 158 F.3d at 1155 (emphasis added); *United States v. Brown*, 954 F.2d 1563, 1571 (11th Cir. 1992).

Contrary to the general conclusion of the court below, a reasonable jury could not find Mr. Watkins, Jr. had the required specific criminal intent, or participated or joined in an unlawful agreement; and also that there existed any

agreement between Watkins, Jr. and Watkins, Sr. (or anyone else) to commit an unlawful act – essential elements of a conspiracy offense involving either or both of these defendants.

The lack of evidence for a jury to find an agreement between Watkins, Sr. and Watkins, Jr. to commit an unlawful act, and specifically the crime charged; and the absence of any other guilty conspirator, bar any conviction for conspiracy against either Junior or Senior. *E.g., 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 instructing the jury concerning the wire fraud charges, and expressly applying the same instruction for "intent to defraud" to the bank fraud charges, Doc. 183-1, at 18-21, 23, the Court gave prejudicially insufficient instructions to the jury regarding, among other things, what the Government must show to prove the "intent to defraud" required to convict under *Takhalov*, 827 F.3d at 1312-14, specifically by omitting any definition of the required "intent to harm." In this regard, the Court gave only the Eleventh Circuit pattern instruction regarding wire fraud, Doc. 183-1 at, *e.g.*, 20-21; *see* 11th Cir. Criminal Pattern Jury Instruction O51 (wire fraud), which addresses the effect of *Takhalov* on the definition of

"intent to defraud" in a conclusory single sentence.[13] The Court refused, over defendants' objections, to give defendants' proposed charge (or any version thereof) regarding "proof of scheme to defraud" (Doc. 255, at 225-27, 230 (refusing proposed instruction and alternative request for two sentences excerpted from proposed instruction)), which focused (through verbatim or nearly-verbatim quotes) on what *Takhalov* requires for proof of intent to cause injury, loss, or harm. (*See* Doc. 97, at 27-28 (Defendant Watkins, Sr.'s Proposed Jury Instructions, Proposed Instruction no. 9)).[14]

In addition to contesting any intent to defraud, defendants also steadfastly and vigorously contested that they acted with any intent to cause injury, loss, or harm to any of the investor-"victims." Watkins, Sr. alluded to his *Takhalov*/"still have what they paid for" defense in his opening statement (Doc. 244, at 39),

[13] Specifically, "[t]o 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. 183-1 at, e.g., 20-21; 11th Cir. Criminal Pattern Jury Instruction O51, at 2. The annotation to that pattern instruction provides in relevant part: "The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted))."

[14] In submitting their proposed jury instructions, defendants inadvertently labeled two instructions as "Proposed Jury Instruction No. 9." (*See* Doc. 97, at 26-28). This argument refers to the proposed instruction regarding "proof of scheme to defraud," not the one regarding "good faith."

developed trial proof to accord with its definitions of intent to harm, and argued its evidence (if not the insufficient instruction itself) during closing. (Doc. 256, at 98, 117). Given the sufficiency of evidence from which a reasonable jury could find Watkins, Sr. acted with intent to deceive in various instances, the importance of lack of intent to harm/"got and still have what they paid for" as a defense – and a clear statement to the jury of what does and doesn't satisfy that defense – increased dramatically to Watkins, Sr. By refusing defendants' proposed instruction regarding "proof of scheme to defraud," the district court omitted *Takhalov's* critical principle that even if the jury found the purchasers had been induced by fraud to enter into the economic interest purchase or loan transactions, there was no intent to harm – and thus no fraud – where the investors received and still own what they bargained for. (*Compare* Doc. 97 (defendants' proposed instructions), at 27 and Doc. 255, at 226 (alternative request) *with* Doc. 183-1 (Court's instructions), at 20-21).

Defendants' proposed instruction regarding "proof of scheme to defraud" is a correct statement of the law, consisting (other than the first sentence) of a compilation of principles taken verbatim or nearly verbatim from *Takhalov*. It distinguishes between intent to deceive and intent to harm; directs the legal effect of a successful deceit that lacks intent to harm ("you must find the defendant not guilty"); and defines the situations to which a scheme to defraud, with the requisite

intent to harm, is limited, i.e., where the defendant lies about the nature of the bargain or the alleged victim does not get what they paid for. (Doc. 97, at 27-28 (proposed instruction regarding "proof of scheme to defraud")).

Defendants offered evidence that the challenged representations made (all by Mr. Watkins, Sr.) were true, believed to be true when made, or otherwise were not fraudulent. But, defendants also offered evidence that each investor received and still owned the asset that he or she bargained for in each alleged fraudulent transaction at issue. Accordingly, defendants' proposed instruction regarding "proof of scheme to defraud," in addition to being legally correct, was supported by evidence.

Further, contrary to the Court's finding in refusing to give the proposed instruction, the instruction actually given did not substantially cover the requested instruction. Indeed, other than the conclusory single sentence inserted to add a single point announced or clarified in *Takhalov* (*see* Doc. 183-1, at 21 (1st full sentence); Doc. 255, at 226-27 (Court to give 11th Circuit pattern charge that generally takes into account *Takhalov*, refusing to give defendants' proposed charge)), nowhere else in the charge is any of the substance of the proposed instruction addressed. Specifically, the instruction given did not define or identify what is meant by "intent to cause loss or injury"; and specifically did not convey *Takhalov*'s key holding that there is no fraud, even if the transaction is induced by

material misrepresentations, if the "victim" receives what they paid for, i.e., the benefit of their bargain. (*See generally* Doc. 183-1, at 20-21 ("intent to defraud" definition as given to the jury)).

Stated differently, with the instruction as given, and without defendants' proposed instruction, the jury could not have known that each investor's receipt of what he or she bargained for – even if the transaction was fraudulently induced -- was a complete defense to a fraud charge. The meaning of "intent to harm" is neither uniform, obvious, nor universally understood. Without elaboration, the jury is set adrift applying a term that "is not defined with sufficient definiteness that ordinary people can understand what conduct is prohibited," raising due process concerns. *United States v. Mayweather*, no. 17-13547, slip op. at 37 (11th Cir. March 17, 2021) (quotations omitted). Defendants' proposed instruction was critical to their defense theory; and the Court's refusal to give that proposed instruction seriously impaired both defendants' ability to present an effective defense. In contrast, "the district court refused to give a jury instruction that was a correct statement of the law, was critical to the defense's case theory, and was not substantially covered by other instructions. Thus, as a matter of law, the district court abused its discretion by refusing to give that instruction." *Takhalov*, 827 F.3d at 1318.

Here, there is sufficient evidence for a rational jury to find Watkins, Sr. lacked the required intent to defraud. Further, a properly instructed jury could have reasonably found Watkins, Sr. not guilty. *Id.* at 1320-21. Because the error in failing to give the requested instruction is not harmless, reversal and remand for a new trial as to both the wire and bank fraud claims is required.

V. The District Court erroneously excluded and limited defense evidence that went to the heart of the case.

a. Evidence of the value of what the investor-"victims" acquired

This particular error in instructing the jury regarding the Takhalov/"got what they paid for" / lack- of- intent- to harm defense, was compounded by the district court's erroneous exclusion of relevant, potentially exculpatory evidence (and of Mr. Watkins' use of such evidence on direct examination or cross-examination) that would have tended to show the value of the economic participation interests that each one purchased, whether in Mr. Watkins' Masada holdings (all investors) or his Nabirm holdings (among the "victims," Charles Barkley only); or even that the economic participation interests had and still have some value (as opposed to being worthless, as the Government argued in its final closing). (Doc. 256, at 154-56 (government argument)).[15] This exclusion of evidence significantly

[15] *Compare id.* and Doc. 255, at 149-53, 156-64 (extended government cross-examination of Watkins, Sr. on his listing of the value of various Masada-related assets as zero on personal financial statements submitted to lenders) *with*, *e.g.*, Doc. 244, at 26 (government not going to argue Masada not a real company), Doc.

undermined Mr. Watkins' ability to show that the various transactions with the investor-"victims" were legitimate, potentially viable and lucrative investments – and not shams, as the Government argued (*id.*) and the Court has intimated (*see* Doc. 252, at 154, lines 17-20)[16] -- for purposes of showing each investor-"victim" did receive what he or she paid for, i.e., the benefit of their contractual bargain – again, a complete defense to a fraud charge.

The right to present such evidence is at the heart of the constitutional guarantee of the right to defend oneself in a criminal case. "A criminal defendant's right to present witnesses in his own defense during a criminal trial lies at the core of the fifth and fourteenth amendment guarantees of due process." *United States v. Ramos*, 933 F.2d 968, 974 (11th Cir. 1991).

The right of defendants to introduce evidence to effectively present their defense is broad: the district court's discretion to exclude testimony or evidence "does not extend to exclusion of crucial relevant evidence." *E.g., United States v. Todd*, 108 F.3d 1329, 1332 (11th Cir. 1997); *United States v. Ethridge*, 948 F.2d 1215, 1218 (11th Cir. 1991); *see also, e.g., United States v. Cavin*, 39 F.3d 1299,

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252, at 182-84 (government arguing and Court agreeing valuation evidence of Masada assets not relevant), Doc. 254, at 122-27 (government arguing valuation of what the investors received not relevant, and government "never put on a valuation case"); *see* Doc. 254, at 123 (Court agreeing value of what investors received "has never been the theory of the government [as] .. discussed … many times"), 124-27 (Court limiting evidence Sr. could offer regarding Nabirm-related development activities).

[16] *Compare id. with* Watkins, Sr.'s arguments at Doc. 252, at 152-61.

1308-09 (5th Cir. 1994) (improper exclusion of certain opinion testimony relevant to defense of lack of fraudulent intent). And, if the government is allowed to offer evidence tending to show an element of an offense, defendants must be allowed to offer evidence tending to ***disprove*** or show the ***absence*** of the element. *E.g., Todd*, 108 F.3d at 1332-34 (improper exclusion of evidence to rebut evidence of specific criminal intent); *Ethridge*, 948 F.2d at 1217-18 (mail fraud and conspiracy; improper exclusion of evidence that the victim insurer did not suffer a loss, as relevant to defendants' lack of criminal intent).

Moreover, the relevance of evidence offered in support of their defense is viewed broadly. *E.g., Ethridge*, 948 F.2d at 1217 ("liberal policy" in Eleventh Circuit "as to the admission of evidence tending to prove intent in mail fraud cases"); *United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979) (en banc). "When proffered evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility." *E.g., Todd*, 108 F.3d at 1332 (quotations omitted).

During trial, the government routinely objected to and tried to bar evidence tending to support defendants' argument under *Takhalov* that there is no scheme to defraud where there is no intent to harm; and that a "wire-fraud case must end in an acquittal if the jury nevertheless believes the alleged victims 'received exactly

what they paid for." 827 F.3d at 1314 (quoting *United States v. Shellef,* 507 F.3d 82, 108 (2nd Cir. 2007)). They largely succeeded.

But, evidence that the alleged victims got what they paid for – whether through the economic interest purchase agreements or the promissory notes that contractually define the bargain (and evidence that the persons still held the property interest they received), or through evidence showing the value (e.g., valuation models actually run) and how the value was built up (e.g., evidence of markets developed, contracts for waste streams obtained, assets held or acquired, discovery of oil and other natural resources (relating to Nabirm), potential transactions in progress[17], and generally the building of the value through execution of the business plan) – is relevant, and indeed critical, to defendants' ability to assert a *Takhalov* / "they got what they paid for" defense.

The government by its questioning of certain witnesses on direct examination opened up certain evidentiary doors, which should have required that defendants be permitted to mount a vigorous defense at least in those areas.[18]

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[17] *See, e.g.*, Doc. 254, at 25 (objection sustained to Senior's question to Masada counsel whether counsel was currently working on a particular transaction).

[18] In *United States v. Hurn*, 368 F.3d 1359 (11th Cir. 2004), this Court stated a defendant generally must be permitted to introduce the following kinds of evidence, among others: (1) "evidence directly pertaining to any of the actual elements of the charged offense or an affirmative defense"; (2) "evidence pertaining to collateral matters that, through a reasonable chain of inferences, could make the existence of one or more of the elements of the charged offense or an affirmative defense more or less certain"; and (3) evidence that, while not directly

For example, at least four government witnesses (Takeo Spikes, Terry Johnson, Carlos Emmons, and Charles Barkley) on direct were asked questions relating to the valuation of Masada as represented by Watkins, Sr. The government led Johnson through a 2001 outside valuation of Senior's net worth done in his Devil Rays ownership pursuit (Masada assets: $10.1 billion) (Doc. 249, at 232-39), along with the highlights of Johnson's long dead partner's notes trashing the valuation ("Total Bullshit!"; "you cannot anticipate any value of any Masada interests of greater than 0").[19] *Supra*, at 18 n. 10 (Doc. 180-142 (GX 206), at 1, 3). As for Emmons, based on Watkins, Sr. representing that Masada would sell for billions, Emmons thought $500,000 for a half-percent economic participation interest was a good deal.[20] (Doc. 250, at 48) Given the inference that

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or indirectly relevant to any of the elements of the charged events, nevertheless tends to place the story presented by the prosecution in a significantly different light, such that a reasonable jury might receive it differently." *Id.* at 1363. Exclusion of a defendant's evidence violates the Compulsory Process and Due Process guarantees in each of these circumstances. *Id.*

[19] This valuation was over 5 years before the conspiracy period, not tied to any particular allegation in the indictment, with no obvious purpose or apparent foundation established for its admission (unobjected to) …

[20] Spikes said Senior represented Masada was worth a couple billion "numerous times. Every time we met." (Doc. 245, at 109). Emmons said when Senior first told him about Masada, Senior said he had a great opportunity, was letting in only a few people, and it was "going to sell one day for 40 billion." (Doc. 250, at 45) Emmons said Senior told him "more than 20" times that the company/ Masada was worth, at a minimum, a couple billion. (*Id.* at 59). Barkley too said that as Masada

such representations by Senior regarding Masada's value were false when made, and part of what those buyers relied on or deemed important, defendants had a right to offer contrary evidence, e.g., evidence of valuations actually done, to support their defense.[21] *E.g., Todd*, 108 F.3d at 1332-34; *Ethridge*, 948 F.2d at 1217-18.

But, on this and several other subjects on which government witnesses opened the door, the district court disallowed or very narrowly circumscribed the scope of relevant evidence of his defense that Watkins, Sr. sought to adduce. This included repeatedly limiting its scope to responding only to matters specifically alleged in the indictment, or particular evidence introduced by the government[22]; or

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went along over several years, Watkins, Sr. represented the value as "in the billions." (Doc. 251, at 8).

[21] Similarly, Natasha Taylor-Stoudamire testified on direct about Watkins, Sr.'s representation to her pre-purchase about the "exit plan" for Masada (growing the business, liquidating the assets). (Doc. 248, at 64-65). This directly implicates the business plan Watkins, Sr. had in place, and has continued to try to execute since, of expanding internationally, developing partnerships and contracts in various countries, and building a market presence in 40 countries outside the U.S. This evidence too is relevant to show how value is developed in Masada, and to whether the purchasers have / still have what they paid for. *See, e.g., Takhalov*, 827 F.3d at 1313. But, the government objected and the court sustained it when Senior asked if she knew whether the Masada business plan that was described to her in June of 2007 was implemented. (Doc. 248, at 71).

[22] *Compare, e.g.,* Doc. 244, at, *e.g.*, 74-75, 181-82 (significance of Senior's bid for ownership of St. Louis Rams in 2009 in investor's decision to buy economic participation interest from Senior) *with, e.g.*, Doc. 252, at 180-84, Doc. 254, at 206 (Court sustaining objections to questions and evidence relating to Senior's bid and Goldman Sachs' valuation of Masada assets in connection with bid qualification).

tying the timeframe tightly to a specific alleged fraud; or mirroring the prosecution theory (e.g., only evidence directly responding to claims of misuse of investor money, such as spending it for purposes different than those represented when Senior induced the "victims" to invest), as opposed to broadly supporting Senior's defenses.

For example, the government viewed Senior's alleged misrepresentations of Masada's worth at or before the time of sale as going to the value of what that investor received, i.e., lying about the nature of the bargain and thus constituting a scheme to defraud. *E.g., Takhalov*, 827 F.3d at 1313-14; Doc. 253, at, *e.g.*, 12. The government repeatedly argued, and the district court consistently agreed, that any defense evidence of value of either the Masada (waste-to-ethanol technology) or Nabirm (oil and gas exploration) entities had to address and be limited to the truth or falsity of Senior's representations of value at the time he made them, as opposed to relating to the value or worth of the economic interest at some time after the investor had bought it (as relevant to whether the investor received the benefit of the bargain). (*E.g.*, Doc. 252, at 221-23; *see generally id.* at 202-23). The court similarly required all evidence regarding subsequent work (e.g., market development) done by Masada after Senior's alleged fraudulent representations, growing the business, and defendants' good faith, also be limited to the time and scope of representations alleged as fraudulent. (*E.g., id.*; Doc. 252, at 152-59).

Regarding the fraud charge arising out of his 2012 sale to Barkley of an economic interest in Nabirm, Watkins, Sr. sought to show Barkley had received the benefit of the bargain of his 2012 purchase, by offering evidence Nabirm did all of the oil block development activities through 2015 as required under protocols in their petroleum agreement with the Namibian government; and had discovered 522 million barrels of oil and 583 billion cubic feet of methane gas in 2015. But, the district court limited testimony to 2012 and 2013, and excluded the evidence of the oil and gas discovery, as offered as relevant to the value of the economic interest after additional years of development (as Senior had promised). (Doc. 254, at 121-29).

Indeed, contrary to the broad range of types of evidence a defendant generally must be permitted to introduce in his defense, *Hurn*, 368 F.3d at 1363, the district court repeatedly restricted Watkins, Sr.'s evidence as set out above. Exclusion of evidence so probative as to key parts of defendant's defense is reversible error. *See, e.g., Todd*, 108 F.3d at 1333-34; *Cavin*, 39 F.3d at 1308-12; *Ethridge*, 948 F.2d at 1217-18; *Garber*, 607 F.2d at 97-100; *see also, e.g., United States v. Foshee*, 569 F.2d 401, 403-05 (5th Cir. 1978).

CONCLUSION

The Court should reverse the judgment of conviction, and either order a judgment of acquittal on all counts or alternatively remand for a new trial on any

counts not due an acquittal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the body of this initial brief complies with the type-volume limit of Fed.R.App.P. 32(a)(7)(B)(i), in that it contains fewer than 13,000 words, i.e., 12,767 words as calculated by the word-processing system used to prepare this brief. I certify that this motion 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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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of April, 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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