**Saturation is Necessary to Prove a Pyramid Scheme**

 In its response brief, the Government argues that market saturation is not a necessary element of a “pyramid-scheme prosecution.” (Br.36.) To the court, the Government conceded that “saturation (and thus anti-saturation) is not at issue in this case.” (R.381,#2922). The Government claimed that “saturation is not the problem for the Emperor program” (*Id.* at #2923). However, saturation is what makes a pyramid scheme a pyramid scheme. “Pyramid schemes are said to be inherently fraudulent because they must eventually collapse.” *Webster v. Omnitrition Int’l*, 79 F.3d 776, 781 (9th Cir. 1996). , Thus, to be a pyramid scheme, “the Plan, as conceived by the parties and represented to the purchasers, could not possibly work.” *Blachly v. U.S.*, 380 F.2d 665, 671 (5th Cir. 1967); *see also Stull v. YTB Int’l, Inc.*, 2011 U.S. Dist. LEXIS 109376, at \*19 (S.D. Ill. Sep. 26, 2011)(“A legitimate multi-level marketing ("MLM") scheme does not have such a propensity for saturation.”); *FTC v. Skybiz.com*, 2001 U.S. Dist. LEXIS 26175, at \*28-29 (N.D. Okla. Aug. 31, 2001)(“[U]nlawful pyramid scheme will saturate the market of potential participants to the point where it is unrealistic to expect that such a large number of individuals will become involved and the pyramid must therefore eventually collapse.”)

“It is axiomatic, of course, that the government must prove all elements of a crime beyond a reasonable doubt… When “an affirmative defense bears a necessary relationship to an element of the charged offense, the burden of proof does not shift to the defendant.” *U.S. v. Brown*, 367 F.3d 549, 556 (6th Cir. 2004). Here, the Government was required to prove saturation and failed. Therefore, the sale of Emperor packages was not a pyramid scheme. Even if the burden was on the defendants, the evidence conclusively shows that the Government failed to prove saturation. Indeed, they conceded that saturation was not an issue.

The definition of pyramid scheme was incorrect, and the jury instructions were incomplete because they did not instruct on saturation. The Government conceded that the Gold definition of an illegal pyramid scheme from a forty-year-old FTC “should be updated.” (R.430,#3313.) This is in line with *Gold*: “In subsequent cases involving alleged pyramid schemes, prudent district courts might supplement the Koscot test to reflect the difference between legitimate multi-level marketing and illegal pyramids and Ponzi schemes.” *U.S.* *v. Gold Unlimited, Inc.*, 177 F.3d 472, 483 (6th Cir. 1999). Since *Gold*, the Fifth Circuit, in an *en banc* opinion, noted some potential updates:

By definition, a pyramid scheme operates by taking money from downline recruits . . . who will never recoup their payments, and funneling the money to those at the top of the pyramid. Such schemes depend on “there [being] Peters . . . to rob for the purpose of paying Paul.” Those who lose money in a pyramid scheme necessarily do so “by reason of” the fraud because the fraud is necessary to temporarily sustain the scheme, and ultimately causes the scheme's collapse. And, those who profit from a fraudulent pyramid scheme make money only by virtue of the participation of downline investors . . . who lose money.

*FTC v. Neora LLC*, 2023 U.S. Dist. LEXIS 217429, at \*29-30 (N.D. Tex. Sep. 28, 2023)(quoting *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 638 (5th Cir. 2016)). Thus, a necessary element of proving a pyramid scheme is that the scheme fails due to saturation. Not only did the district court refuse to include a saturation instruction, it permitted the Government to prove a pyramid scheme where there was no risk of saturation, which is another way of saying that the Government was allowed to prove a pyramid scheme without proving the part that makes it fraudulent. This was an error.

**Anti-Saturation Instruction**

 At a minimum, Hosseinipour was entitled to an anti-saturation instruction. The Government agrees that an anti-saturation instruction is a correct statement of law and may be given where the program has adequate anti-saturation policies. (Br.127.) The test is only whether the defense finds “some support in the evidence and in the law.” *U.S. v. Wiseman*, 932 F.3d 411, 418 (6th Cir. 2019). Having conceded that the law supports it, the only issue becomes whether there was any evidentiary support. Hosseinipour easily meets this standard.

The standard for an affirmative-defense instruction is not a heavy one. Weak evidence suffices. *U.S. v. Clark*, 485 F. App’x 816, 818 (6th Cir. 2012). Here, the evidence was robust. Despite the strong evidence that saturation was not an issue (indeed, the Government conceded it was not), the court still did not give Hosseinipour the requested instruction.

At the end of the day, pyramid schemes are fraudulent because they are doomed to fail. Typically, they spend money to pay the people who joined before the new people, but the plans and actual practices of I2G differ significantly. The 5,000-person cap alone warranted an anti-saturation instruction. Significantly, the scheme charged and identified in the jury instructions was the sale of Emperor packages, not all product packages. The 5,000-person cap prevented the geometric progression that causes pyramid schemes to fail.

However, the cap, combined with the fact that Emperors received casino profits and could earn BV by driving traffic to the casino, showed other measures to prevent saturation. Indeed, I2G structured its compensation plan by building customer transactions into how participants earned money. (R.497,#4048-49; R.505,#4551-52; *see also* App’x047; *see also* App’x48,59,84, US-126801-02,468.) The innovative structure of receiving binary income based on the traffic IBOs drove to the casino was unheard of in the MLM industry, and even putting aside the various product packages offered by I2G, it ensured that a significant percentage of binary income would come directly from retail sales (casino chip transactions). *Gold*, 177 F.3d at 482 (anti-saturation instruction proper where compensation is tied to retail sales). Further, individuals could and did make money with fantasy sports. (R.690,#9467, 9500.)

I2G depended, in part, on the casino’s success, but that dependence is simply part of operating a business. The business failure was due to a decline in sales related to this prosecution, not because of saturation. Pampered Chef depends on sales of cookware; a decline in sales could cause the business to fail, but it does not mean that Warren Buffett is operating a pyramid scheme. Combined with these measures, various technological products, and the expansion of offerings, including travel and fantasy sports, I2G has numerous safeguards against saturation.

In its brief, the Government takes on the role of the jury and finds $1.2 million of chip transactions and $360,000 of fantasy sports transactions as cosmetic. (Br.129.) However, the evidence presented a jury question, but without the proper instruction, the issue of saturation was never presented to the jury.

 Reversal is then required “if it impairs the defendant's theory of the case and is not covered adequately by the instructions given.” *U.S. v. Wiseman*, 932 F.3d 411, 418 (6th Cir. 2019). The failure to give the affirmative defense instruction crippled her defense. Because Warren was prevented from testifying regarding the anti-saturation measures, the jury did not hear from either Warren about how anti-saturation measures are a defense, and the instructions failed to inform the jury that proper anti-saturation measures are a complete defense. *In re Amway Corp.*, 93 F.T.C. 618 (1979); *Gold*, 177 F.3d 472, 482 (6th Cir. 1999) (“a defendant carr[ies] the burden of establishing that it has effective anti-saturation programs”). Hosseinipour was left unable to argue that the hallmarks of the I2G plan that enabled compensation from retail sales provided a full defense.

None of the other instructions presented the defense to the jury. The Government correctly does not argue to the contrary. Indeed, the Government told the court that a related pyramid scheme definition did not require proof of saturation:

Instead, the United States plans to show that I2G is a pyramid scheme—not because of any saturation problem, but rather because I2G’s scheme meets the definition approved in *BurnLounge*:

“[A] pyramid scheme is an organization in which the participants obtain their money rewards primarily through enrolling new people into the program rather than selling goods and services to the public.”

(R.381,#2923 quoting *BurnLounge*, 753 F.3d at 889.) The Government also told this Court that saturation is not an element of a pyramid-scheme prosecution. (Br.36.) The evidence and law support the anti-saturation defense. Additionally, Hosseinipour’s defense was impaired and was not covered by the instructions given, so reversal is required.