UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff - Appellee v. FARADAY HOSSEINIPOUR, aka Faraday No. Hossienipour Defendant - Appellant	)	Case No. 23-5029 **DEFENDANT-APPELLANT'S MOTION FOR REVIEW OF THE DISTRICT COURT'S ORDER DENYING RELEASE PENDING APPEAL**

Defendant Faraday Hosseinipour ("Hosseinipour") respectfully moves this Court, pursuant to Fed. R. App. P. 9 and 6 Cir. R. 9, to review the district court's order denying release pending appeal under 18 U.S.C. § 3143(b) and grant Hosseinipour's release from imprisonment pending the disposition of her appeal. A memorandum in support of Hosseinipour's motion is included herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record via the CM/ECF system on this 4th day of May, 2023.

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA Plaintiff - Appellee v. FARADAY HOSSEINIPOUR, aka Faraday No. Hossienipour Defendant - Appellant	)	Case No. 23-5029 **APPELLANT HOSSEINIPOUR'S MOTION FOR REVIEW OF THE DISTRICT COURT'S ORDER DENYING RELEASE PENDING APPEAL**

Hosseinipour moves for review of the district court's denial of release pending appeal (DN 713, attached as Exhibit A) and for the Court to order her release (or home incarceration) during appeal because she meets the conditions for release under 18 U.S.C. § 3143(b). This motion is proper pursuant to FRAP 9(b) because Hosseinipour has already filed a notice of appeal (DN 644, attached as Exhibit B) from the judgment against her.

BACKGROUND

Hosseinipour was recruited to join Infinity 2 Global ("I2G") as an independent distributor in late 2013. (*See* DN 675, PageID #7856.) I2G was a multilevel marketing company ("MLM") started by Richard Maike. She had been assured a renowned MLM compliance attorney approved the business plan. (DN 504, PageID #4345.) Hosseinipour, like thousands of distributor "victims" the government chose not to prosecute, intended to grow a successful business by promoting an online casino and other digital products. As a distributor, Hosseinipour gave presentations

to promote her businesses. (DN 675, PageID #7826.) The district court described Hosseinipour as an animated cheerleader who exuded enthusiasm. (*Id.*) "Hosseinipour was not a leader. She was not an organizer or manager . . .[S]he certainly didn't set up this scheme. She got brought into it.... Hosseinipour was recruited because she's a great salesperson….[S]he wasn't supervising anybody. She wasn't managing anybody." (*Id.* at 7820, 7826.)

Despite her lack of authority, Hosseinipour was convicted of conspiracy to commit mail fraud and securities fraud. (DN 642, PageID 6392.) The government contended that Hosseinipour conspired to defraud people who purchased one aspect of the I2G business called the Emperor program. Richard Anzalone, an alleged sonspirator who pled guilty and testified for the government, testified that Hosseinipour is an honest, good, trustworthy loyal person who never intended to mislead anyone. (DN 511, PageID #4831.) The district court recognized that Hosseinipour "was very active in helping others" and "would help everybody" even if "she didn't benefit directly." (DN 675, PageID #7826–27.)

To be convicted, Hosseinipour had to at least know of a material misrepresentation to an Emperor. (DN 554, PageID #5259–60, 5265–66, 5267–68). Because there was no evidence Hosseinipour was ever aware of a false statement related to an Emperor sale, a substantial question exists as to whether there was sufficient evidence to convict. This case also involves additional novel legal

concepts. Some are summarized below.

The court viewed Hosseinipour as the least culpable of her co-defendants (and Anzalone) (DN 675, PageID #7830, 7857) but ultimately sentenced her to 30 months (DN 642, PageID #6393). Hosseinipour timely appealed to this Court from the Judgment and Commitment Order (DN 642) and the Memorandum Opinion and Order denying Hosseinipour's Motion for Judgment of Acquittal and Motion for a New Trial (DN 630, attached as Exhibit C).

Hosseinipour's lawyer, Wayne Manning, provided unconstitutionally ineffective assistance pretrial and during trial. (DN 578-1, attached Exhibit D; DN 578-2, attached as Exhibit E; DN 578-3, attached as Exhibit F.) For example, the United States presented Hosseinipour with the opportunity to plead guilty and accept a plea agreement with probation and no jail time in March 2022 ("March Meeting"). (Ex. D ¶ 12, 14; Ex. E ¶ 18; Ex. F ¶ 8.) But Manning told Hosseinipour she would commit perjury by pleading guilty. (Ex. D ¶ 15). Manning was totally inept at trial and had no knowledge of the criminal justice system or experience with federal sentencing guidelines. (*See* Ex. D; Ex. E.)

LEGAL STANDARD

18 U.S.C. § 3143 sets forth the conditions under which a defendant may be released pending appeal. The defendant must establish only the first two conditions, that he is not a flight risk and not a danger to another person or the community, by clear and convincing evidence. 18 U.S.C. § 3143(b)(1)(A).

"[A]n appeal raises a substantial question when the appeal presents a close question or one that could go either way and . . . is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *United States v. Robertson*, 2021 U.S. App. LEXIS 27054, at *1–2 (6th Cir. Sep. 8, 2021) (internal quotation markes omitted). This standard does not require the district court to find it committed reversible error. *Pollard*, 778 F.2d at 1181–82. The district court initially determines "whether the defendant raises a substantial question on appeal." *Id.* at 1182. When denying release, the district court must make more than a conclusory statement that a defendant has failed to raise a substantial question. *United States v. Moore*, 849 F.2d 1474 (6th Cir. 1988); Fed. R. App. P. 9. This Court reviews this determination "de novo." *Pollard*, 778 F.2d at 1182. This Court "may order the defendant's release pending the disposition of the appeal." Fed. R. App. P. 9.

ARGUMENT

The court ruled Hosseinipour met her burden under § 3143(b)(1)(A), establishing that she is not a danger or a flight risk. But the court held Hosseinipour did not meet her burden under § 3143(b)(1)(B) to show "a substantial question in the issues Hosseinipour intends to raise on appeal, and . . . that she is not seeking release for the purpose of delay." (DN 712, PageID #11293.) The court was incorrect.

I. Hosseinipour does not appeal for the purpose of delay.

Hosseinipour has a constitutional right to appeal and is not doing so to delay.

The court incorrectly found Hosseinipour had "not met her burden to show that she is not seeking release for the purpose of delay." (Ex. A, 3.) Notably, the court found Hosseinipour's co-defendant "met his burden as to delay" when Hosseinipour identified those same issues in her motion for release, plus one. (DN 712, PageID #11287; Ex. A, 3–4.) Identical issues, equally applicable to two co-defendants, cannot serve the sole purpose of delay as to only one.

The court relied on the United States's assertion that delay may be inferred by Hosseinipour's "atypical strategy of pursuing her ineffective assistance of counsel claim on direct appeal when the necessary record has not yet been developed." (Ex. A, 3.) This makes no sense. Hosseinipour presented three affidavits, including one from her former attorney, Wayne Manning ("Manning"), in her motion for a new trial based on ineffective assistance of counsel and requested an evidentiary hearing to further develop the record. (DN 578.) A decision to not delay in raising this issue cannot constitute evidence of delay.

II. The district misconstrued the standard under 18 U.S.C. § 3143(b).

The court held, "All of the issues…have been thoroughly argued to and considered by the Court through either pre-trial motions, objections during trial, or post-trial motions." (Ex. A, 4.) But the court misconstrued the standard, which does not require Hosseinipour to convince the court that it committed reversible error. *See United States v. Pollard*, 778 F.2d 1177, 1181–82 (6th Cir. 1985). Rather, the court may be confident in its rulings yet still recognize the existence of close questions

that may result in a reversal if this Court rules in Hosseinipour's favor. *See United States v. Brewer*, 2008 U.S. Dist. LEXIS 144471, at *7 (E.D. Ky. Nov. 6, 2008).

III. Hosseinipour's appeal raises substantial questions under § 3143(b)(1)(B).

A. The court erred in denying Hosseinipour's motion based on her counsel's constitutionally ineffective assistance.

Trial counsel, Wayne Manning, provided ineffective assistance of counsel requiring reversal. A defendant's representation is constitutionally ineffective when "counsel's representation falls below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 671 (1984). Defendants are entitled to effective representation of competent counsel at every stage of the proceedings, including plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To justify reversal, defendant must have suffered prejudice, shown by "a reasonable probability" "sufficient to undermine confidence in the outcome" of the proceeding "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 671.

The court improperly denied Hosseinipour a new trial and an evidentiary hearing on this issue, finding the record did not support her claim because

> On the first day of trial, the Court inquired as to pretrial plea negotiations between the United States and . . . Hosseinipour…in accordance with *Missouri v. Frye*, 566 U.S. 134 (2012). As with all Defendants, the Court confirmed that any plea offer had been communicated to Hosseinipour by her attorney. The Court also inquired whether she: (i) had sufficient time to discuss the plea offer with her attorney; (ii) understood the potential penalties if convicted; (iii) comprehended the terms of the plea offer; (iv) knew the differences in any potential penalties between the plea offer and a potential guilty

> verdict; and (v) had decided to proceed to trial. Because of her affirmative responses, the Court found that Hosseinipour had knowingly chosen to proceed to trial notwithstanding the…risks.

(Ex. C, 4.) But this exchange never happened. (*See* DN 678, PageID #8000.) Hosseinipour made no such statements to the court. The court abused its discretion by denying the motion based on this incorrect finding.

A defendant is required to produce only a "modicum of evidence in support of a request for an evidentiary hearing on a motion for a new trial based on ineffective assistance of counsel." *United States v. Allen*, 254 F. App'x 475, 478 (6th Cir. 2007). The three affidavits attached to Hosseinipour's motion more than meet this hurdle. *See id.*; *see Arredondo v. United States*, 178 F.3d 778, 782, 789–90 (6th Cir. 1999); (*see* Ex. D); (*see* Ex. E); (*see* Ex. F.) Manning's representation was constitutionally deficient during plea bargaining when he

- told Hosseinipour the case against her would not go to trial (Ex. D ¶ 5, 8, 15);
- told Hosseinipour she would not be found guilty or go to jail (*id.* at ¶ 8);
- did not explain the elements of the charges against Hosseinipour (*id.* at ¶ 6);
- did not explain the sentencing guidelines and told Hosseinipour that jail was not a possible penalty (*id.* at ¶ 7–8, 15);
- failed to learn and understand the purpose of a proffer agreement so as to properly advise Hosseinipour when she received requests from the prosecution to meet (*id.* at ¶ 9–13);
- told Hosseinipour she would commit perjury by pleading guilty (*id.* at ¶ 15);
- consulted Hosseinipour's co-defendants' counsel about whether she should accept the government's plea offer, and followed their self-serving advice (*id.* at ¶ 18–19);
- failed to tell Hosseinipour the prosecutor asked if she was willing to accept a plea offer after the March Meeting (*id.* at ¶ 38); and
- ignored Hosseinipour's instructions to contact the prosecution regarding a

plea deal (*id.* at ¶ 39–40).

These were not tactical decisions by Manning but disregard for duties based on ignorance. *See Strickland v. Washington*, 466 U.S. 668, 688–89 (1984). Manning had no relevant experience (Ex. E ¶ 10–11, 13), and he failed to adequately counsel because he was naively confident the charges would be dropped and the case would never go to trial (Ex. D ¶ 3, 5, 8, 15). An attorney's decision to "avoid preparing a defense that might ultimately prove unnecessary" is not reasonably effective representation, serving only the attorney's interest to not work. *Pavel v. Hollins*, 261 F.3d 210, 216 (2d Cir. 2001).

The court incorrectly assumed that Hosseinipour's education compensated for Manning's deficient representation during plea bargaining. The court said Hosseinipour graduated "summa cum laude" from "a fine institution. She can read that—the plea agreement that was offered" (*see* DN 675, PageID #7833–34), and "even if Mr. Manning didn't understand the conversation, Ms. Hosseinipour did." (DN 675, PageID #7838). An education does not eliminate her Sixth Amendment right to counsel. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932) (But even educated and intelligent laypeople lack the skill and knowledge to adequately prepare a defense and are entitled to competent counsel "at every step in the proceedings").

Contrary to the court's analysis, the efforts of her co-defendants' counsel do not make up for the ineptitude of Hosseinipour's lawyer. (*see* Ex. C, 4–5); (*see* DN

675, PageID #7834.) Co-defendant counsel's skill did not diminish Hosseinipour's Sixth Amendment right to counsel.

Manning's performance at trial repeatedly demonstrated ineptitude and not conscious tactical decisions.[1] The court called Manning "redundant," "[u]npolished," and "disorganized." (DN 675, PageID #7834.) Manning's inexperience, ignorance of the law, and basic misunderstanding of trial and evidence principles fell well below an objective standard of reasonableness. *See Washington v. Hofbauer*, 228 F.3d 689, 704–05 (6th Cir. 2000).

The prejudice is apparent. A plea deal that would result in no prison sentence was rejected and the prosecutor's repeated inquiries about whether Hosseinipour

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[1] For example:

(a) Manning failed to question an expert witness because he was too timid to verbally advocate for Hosseinipour. (DN 691, PageID #9878.) The court admonished him for not speaking up, saying, "you have got to say something" and "you do irritate me when you're not ready when it's your turn." *Id.* The court had already told Manning to speak into the microphone on the first day of trial instead of raising his hand to get the court's attention. (DN 678, PageID #8016.)

(b) Manning admitted to the court that he did not read the government's 302 report summarizing Hosseinipour's March plea meeting, written by an agent who testified against Hosseinipour, until the close of trial. (DN 671, PageID #7418, 7424.) Co-defendant's counsel even called this ineffective assistance at trial. *Id.*

(c) The court told Manning he looked "incompetent" when struggling to use technology after the court had warned him to prepare. (DN 511, PageID #4896–97.)

(d) The court interrupted Manning's closing argument to explain to Manning that he is limited to evidence in the trial record. (DN 671, PageID #7677.)

(e) The court explained the evidentiary rule against hearsay to Manning, whose line of questioning invited repeated objections. (DN 688, PageID #9065.)

(f) Co-defendant's counsel instructed Manning *at trial* how to preserve issues regarding jury instructions for appeal. (DN 671, PageID #7482–83.)

would accept a plea offer were not communicated to her after the March Meeting; Manning also ignored her requests to contact the prosecution about a deal. (Ex. D ¶ 38–40.) Manning's failure to provide informed legal advice prevented Hosseinipour from accepting a deal without prison time. (Ex. E ¶ 18.) Manning also deprived Hosseinipour of a fair trial. *See Strickland*, 466 U.S. at 685–86. At the very least, Hosseinipour was entitled to an evidentiary hearing.

B. The Emperor program was not an illegal pyramid scheme.

The Government based both the mail fraud and securities fraud counts on its theory that the Emperor program was an illegal pyramid scheme and, therefore, a scheme to defraud. Illegal pyramid schemes are "inherently fraudulent" when "they must eventually collapse." *Webster v. Omnitrition Int'l*, 79 F.3d 776 (9th Cir. 1995). "Like chain letters, pyramid schemes may make money for those at the top of the chain or pyramid, but 'must end up disappointing those at the bottom who can find no recruits.'" *Id.* (quoting *In re Koscot Interplanetary, Inc.,* 86 F.T.C. 1106, 1181 (1976)). Thus, when a business plan is not doomed to failure and not dependent on endless recruits (as opposed to customers), the plan is not inherently fraudulent.

This Court has said, "No clear line separates illegal pyramid schemes from legitimate multilevel marketing programs." *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 475 (6th Cir. 1999). There is no Supreme Court Case defining an illegal pyramid scheme. In *Gold*, this Court defined an illegal pyramid scheme to require the right to receive rewards solely in return for recruiting other participants.

Gold also noted that a successfully implemented plan that prohibits market saturation is an affirmative defense. *See id.* at 482–83.

The structure of the Emperor program was not doomed to failure because of market saturation. The program was capped at 5,000 purchasers. (DN 500, PageID #4266–67; DN 505, PageID #4699, 4730; DN 512, PageID #4974.) Rather, the success of the program depended not on recruitment but on the benefits derived from the right to use (as ultimate users) I2G's products and services and the right to permanently share in any profits generated by I2G's online casino. (DN 465, PageID #3591; DN 504, PageID #4414; DN 505, PageID #4671, 4698–99). The success of the online casino was dependent on the success of the network marketing of the online casino; in other words, gathering customers.

Testimony supported that the focus of the Emperor program was not on recruiting. Many Emperors testified that they purchased Emperor packages because there was no recruitment requirement; they believed in the casino. (DN 500, PageID #4262–63; DN 512, PageID #4974–75, 4981–82; *see* DN 504, PageID #5513–14.) The Emperor program was not "destined to collapse" because even the five-thousandth purchaser could benefit from the Emperor program in the future through a successful casino. The undisputed proof was that the casino grew in revenue for the first few months of operation and resulted in profits owed to I2G for two consecutive months. At that time, banks in the United States began to create barriers

to I2G's ability to access accounts because of concern over its affiliation with online gaming. However, a business plan that does not enjoy the success that was hoped for does not transform into an illegal pyramid scheme.

C. Hosseinipour was entitled to an anti-saturation instruction.

There should be an instruction on anti-saturation as an affirmative defense when there is any evidence, even if weak or doubtful, to support it. *Gold Unlimited, Inc.*, 177 F.3d at 482; *United States v. Clark*, 485 F. App'x 816, 818 (6th Cir. 2012). An anti-saturation policy eliminates the risk of saturating the market by ensuring collapse due to saturation by new participants is not inevitable. *Gold Unlimited, Inc.*, 177 F.3d at 482–83. An anti-saturation policy does not prevent a business from failing but prevents the risk of inevitable failure due to the inability to endlessly recruit. *See id.*

The Emperor program was capped at 5,000. (DN 465, PageID #3591; DN 500, PageID #4262–63, 4266–67; DN 504, PageID #4414; DN 505, PageID #4698–99, 4730; DN 512, PageID #4974–75.) This prevented an endless chain of Emperors. *In re Koscot Interplanetary, Inc.*, 1975 FTC LEXIS 24, *62, 86 F.T.C. 1106 (Fed. Trade Comm'n 1975). The success of the Emperor program depended on successful marketing and use of the products, including the online casino, and simply could not fail because of market saturation. (DN 504, PageID #4414.)

At a minimum, the recruitment cap entitled Hosseinipour to an anti-saturation instruction, and the jury should have been allowed to weigh the evidence. The

omission of an instruction on Hosseinipour's affirmative defense was reversible error. *United States v. Wiseman*, 932 F.3d 411, 418 (6th Cir. 2019).

D. The district court erred by allowing inadmissible testimony from the Government's expert on pyramid schemes and by excluding Hosseinipour's expert on pyramid schemes.

The court erred when it failed to exclude the following inadmissible testimony from William Keep, a marketing professor, under FRE 702. First, Keep misstated the definition of an illegal pyramid scheme.[2] Keep's definition was incorrect as a matter of law because it is not illegal to pay for recruitment that is related to sales to ultimate users.[3] This was prejudicial in light of the business model of I2G, which simultaneously distributed its product while recruiting participants.

Keep compounded the error when he testified about several other characteristics that he looked at to determine whether a business is a pyramid scheme: "We look at how it's described. All of these schemes have a compensation plan with them; they have a set of policies and procedures with them; they have marketing material that are used to recruit people; and then there's also data that gets generated." (DN 486, PageID #3746–47.) The characteristics cited by Keep are

[2] "A pyramid scheme is an organization in which participants pay money for the right to obtain monetary rewards by enrolling new people into a program as opposed to selling products and services to the public. So the emphasis is on enrolling people in, not selling to the public." (DN 486, PageID #3742–43.)

[3] "A pyramid scheme is . . . characterized by . . . the right to receive in return for recruiting other participants into the program rewards which are **unrelated to** the sale of the product to ultimate users." *Gold Unlimited, Inc.*, 177 F.3d at 478.

present in legal multi-level marketing companies and not probative of whether an entity is an illegal pyramid scheme (e.g. all companies have a compensation plan).

Keep was also allowed to provide his opinion and testified that certain marketing statements in audio recordings were false or misleading (DN 486, PageID #3812–36)—a determination for the jury, not an expert. (*See* examples at DN 487, PageID #3878–84.) This testimony was highly improper and not probative of whether I2G was an illegal pyramid scheme.

Keep analyzed spreadsheets "distilled" from a third-party database that Hosseinipour could not examine to determine whether Keep reliably applied his principles and methods to the facts of her case. (DN 487, PageID #3862–63, 3874, 3876–77; DN 498, PageID #4124, 4217; DN 681, PageID #8317–32.) Keep's testimony did not satisfy FRE 702 because data essential to assessing the reliability of his analysis was not made available until after he testified. *See United States v. Sheppard*, No. 5:17-CR-00026-TBR-1, 2021 U.S. Dist. LEXIS 82221 at *11, 15 (W.D. Ky. Apr. 29, 2021). Reliable expert testimony requires "**verifiable** evidence that the testimony is based on 'scientifically valid principals.'" *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1318 (9th Cir. 1995). Without access to the database, those spreadsheets and Keep's testimony were not reliable. *See id.* at *15–16; *Am. & Foreign Ins. Co. v. GE*, 45 F.3d 135, 139 (6th Cir. 1995).

As Hosseinipour later discovered, Keep's testimony was based on false data.

Keep testified that ninety-six percent of I2G participants lost money based upon a "Participant Gain-Loss" spreadsheet, Exhibit 101(i). (DN 487, PageID #3876–78; *see* DN 498 PageID #4163.) At the sentencing hearing and the litigation over restitution, it has come to light that Exhibit 101(i) included data outside of the indictment timeline related to a different company (DN 663, PageID #6549–6552, 6572–6577) and excluded significant commissions that were earned by participants. This resulted in false data concerning the number of people who suffered losses. Keep's reported 96% loss rate was substantially inflated by his reliance on Exhibit 101(i).

The prejudice was compounded when the court precluded the defense expert to rebut Keep. The court excluded Manning Warren from rebutting Keep, ruling that he was unqualified. However, Warren, a distinguished law professor who has taught on the subject of pyramid schemed for decades and trained state regulators on the issue was qualified. Warren's qualifications, including his expertise in securities law, "provide[d] a foundation" for him to rebut Keep. *See Smelser*, 105 F.3d at 303.

"[I]t is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008). An expert may testify in a general area, and any lack of background with specific issues is

grounds for cross-examination, not exclusion. *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 516 (6th Cir. 1998). A professor who has general expertise but has not worked in the field is not a bar to testifying. *SEC v. Capwealth Advisors, LLC*, No. 3:20-cv-1064, 2022 U.S. Dist. LEXIS 167133, at *11 (M.D. Tenn. Aug. 3, 2022); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 919 (6th Cir. 1984).

The court abused its discretion when it determined that decades of teaching law, including the "application of illegal pyramid schemes," and his widely recognized expertise on the matter, evidenced by his appearance on a panel to educate securities regulators how to prove Ponzi schemes, were insufficient. (DN 454, PageID #3538.) The exclusion of Warren's testimony prejudiced Hosseinipour because it rendered her defenseless against Keep's inadmissible testimony.

E. The Emperor program was not a security as a matter of law.

The government had to prove the existence of a security. The government attempted to prove that one component of the Emperor Program—the right to share in any profits I2G received from the casino—was an "investment contract." To prove the existence of an "investment contract," the government had to prove four elements under the *Howey* test: (1) the presence of an investment (2) in a common venture (3) premised on a reasonable expectation of profits (4) to be derived from the efforts of others. *See, e.g. Union Planters National Bank v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174, 1181 (6th Cir. 1981). The government failed to meet any of these elements.

For example, when *Howey* held that "profits" must "come solely from the efforts of others," it referred to the "profits that investors seek on their investment, not the profits of the scheme in which they invest." *SEC v. Edwards*, 540 U.S. 389, 394 (2004). Thus, here, "profits" refers to the profits that Emperors hoped to receive from I2G's share of profits from the casino. Moreover, the Court must consider the economic realities of I2G's offer of the Emperor program from the perspective of an objectively reasonable purchaser. *Union Planters National Bank v. Commercial Credit Business Loans, Inc.,* 651 F.2d 1174, 1180 (6th Cir. 1981); *Piambino v. Bailey*, 610 F.2d 1306, 1320 (5th Cir. 1980).

Here, because I2G was a multi-level marketing company, the success of the casino depended on the "investors" using the online casino and driving international gambling to the casino. There was no other mechanism in place to drive traffic to the casino. When investors have the ability to control the profitability of their investment (individually or as a group), the "efforts of others" element is not satisfied. *See Gordon v. Terry*, 684 F.2d 736, 741 (11th Cir. 1982). In *Union Planters National Bank*, the Sixth Circuit made clear that the "efforts" that are relevant to the analysis are not the performance of administrative tasks. 651 F.2d at 1185. Rather, it is the effort that creates the "profits" at issue. "If the investor retains the ability to control the profitability of his investment, the agreement is no security." *Albanese v. Florida Nat'l Bank*, 823 F.2d 408, 410 (11th Cir. 1987). Here, the objectively

reasonable Emperor, when considering the economic realities of the offer, would understand that the generation of the profits from the casino not only permitted but required the effort of the investors.

Emperors also did not have a reasonable expectation of "profits." In *Union Planters National Bank*, 651 F.2d 1174, 1184 (6th Cir. 1981), the Court stated that "profits," as that term is used in the *Howey* test, means either capital appreciation resulting from the development of the initial investment or a participation in earnings resulting from the use of the investors' funds. Here, I2G established a contractual relationship with an online casino and committed to a minimum revenue payment each month. Revenue from the casino was applied to this amount, and I2G would owe the difference only if the revenue failed to cover the minimum payment. The "profits" were to arise solely from the use of the online casino. People had to gamble in the casino, and more money had to be lost than won. Those were the only "profits" Emperors were entitled to share. The $5,000 paid by Emperors was not used to generate and had no impact on whether there were "profits" from the casino. Rather, the $5,000 was revenue to I2G, which I2G was free to use at it saw fit. Thus, the "investors'" funds were not used to generate the "profits." This simply does not meet the requirement for the reasonable expectation of profits element.

In addition, the government failed to establish the "common enterprise" element. In the Sixth Circuit, to establish a "common enterprise," the government

must prove that investor funds were pooled for the purpose of generating the "profits" that investors would earn from their investment. In *Union Planters National Bank*, 651 F.2d at 1183, held, "[A] finding of horizontal commonality requires a sharing or pooling of funds." Other circuits that require horizontal commonality agree. *Steinhardt Group v. Citicorp*, 126 F.3d 144, 151 (3rd. Cir. 1997). *See also SEC v. Life Partners, Inc.*, 87 F.3d 536, 543 (D.C. Cir. 1996); *Goldberg v. 401 North Wabash Venture LLC*, 755 F.3d 456, 465 (7th Cir. 2014).

F. The district court erred in the manner it answered a jury question.

The jury asked the following question during deliberations: "Can we use the evidence from the whole case to determine if the positions sold are/were a security? Or just the purchase within the statute of limitations?" There was no proof of any purchase that occurred within the statute of limitations. Yet, the court indicated to the jury that it could consider the evidence of the purchase within the statute of limitations. This was error. "A question from a deliberating jury often represents a pivotal moment in a criminal trial." *United States v. Duncan*, 850 F.2d 1104, 1115 (6th Cir. 1988). "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Id.* (quoting *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946)). This is a substantial question.

G. The government presented false data at trial.

Recent restitution proceedings below have revealed serious flaws in data in spreadsheets presented at trial and on which the government's expert based his

testimony, including a participant gain-loss spreadsheet, Exhibit 101i. (DN 721, PageID #11396–97, 11400, 11409.) The prosecution knew or should have known that the data it introduced and testimony it elicited was false. *See Foley v. Parker*, 488 F.3d 377, 392 (6th Cir. 2007). The introduction of evidence that the prosecutor knew or should have known is false that would reasonably affect the jury is reversible error. *Id.*

Key testimony was based on the false data. Exhibit 101i included data from a different company and outside the indictment period. (DN 721, PageID #11397; DN 721-3; DN 663, PageID #6572; DN 497, PageID #4077; DN 498, PageID #4098–99). Exhibit 101i also failed to account for commissions that were earned by participants that were transferred to others or used to make purchases. The data in 101i was critical to Keep's pyramid scheme analysis, leading him to present the jury with a false 96% loss rate among I2G participants. (DN 487, PageID #3844, #3857, #3862–63, #3874–77). The United States elicited testimony based on false data to convince the jury that I2G was an illegal pyramid scheme.

Referring to the spreadsheet data, the prosecutor said, "It's no mystery that Jerry's information is gold in this trial." (DN 681, PageID #8324.) The prosecutor knew or should have known its "golden" spreadsheets included false data that skewed critical information on which its witnesses based their testimony. This prejudiced Hosseinipour and prevented her from receiving a fair trial.

Respectfully submitted,

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DEFENDANT-APPELLANT'S EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CRIMINAL ACTION NO. 4:17-CR-00012-GNS-CHL-5

UNITED STATES OF AMERICA PLAINTIFF

v.

FARADAY HOSSEINIPOUR DEFENDANT

ORDER

This matter is before the Court on Defendant's Motion for Release Pending Appeal (DN 655). The motion is ripe for adjudication.

DISCUSSION

Defendant Faraday Hosseinipour ("Hosseinipour") moves for release pending the resolution of her appeal. (Def.'s Mot Release, DN 655). The United States opposes the motion. (Pl.'s Resp. Def.'s Mot. Release, DN 696).

In relevant part, 18 U.S.C. § 3143 provides:

> Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—
>
> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except

> that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

18 U.S.C. § 3143(b)(1). As the Sixth Circuit has noted, this statute "creates a presumption against release pending appeal." *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002) (citation omitted). Hosseinipour has the burden to show that she satisfies the conditions in Section 3143(b)(1). *See United States v. Vance*, 851 F.2d 166, 168 (6th Cir. 1988) (citation omitted)

A. Section 3143(b)(1)(A)

Hosseinipour asserts that she is not a flight risk and would not pose a danger to the community if she remains released pending appeal. (Def.'s Mot. Release 3-4). In making that argument, she points to her bond status pending trial, during trial, and following her conviction. (Def.'s Mot. Release 4). Hosseinipour asserts that she has been cooperative with the U.S. Probation Office during the pre-sentencing period and has no prior criminal history. (Def.'s Mot. Release 4). In addition, she notes that she is a caretaker for his disabled mother and is devoted to her husband. (Def.'s Mot. Release 3). While her sister practices medicine in Africa, Hosseinipour states that she otherwise has no foreign ties. (Def.'s Mot. Release 4). She also relies upon recidivism statistics in asserting that she is unlikely to commit further crimes. (Def.'s Mot. Release 4).

In responding that Hosseinipour has failed to meet her burden, the United States focuses on the seriousness of her crimes and the fact that the crimes of which Hosseinipour has been convicted involve deceitfulness. (Pl.'s Resp. Def.'s Mot. Release 3). The United States contends that Hosseinipour poses a danger to the community and notes that "danger can

encompass pecuniary or economic harm." (Pl.'s Resp. Def.'s Mot. Release 3 (quoting *United States v. Olive*, No. 3:21-00048, 2013 WL 1666621, at *2 (M.D. Tenn. Apr. 17, 2013))).

The Court finds that Hosseinipour has met her burden under Section 3143(b)(1)(A). Based on her lack of a prior criminal history, her conduct while out on bond, and her ties to her family, Hosseinipour is not likely to flee and does not pose a danger to the safety of others or the community.

B. Section 3143(b)(1)(B)

In addition, Hosseinipour asserts that her motion is not for the purpose of delay and that she will raise substantial questions of law and fact on appeal. (Def.'s Mot. Release 5-25). The United States contends that she has failed to meet her burden. (Pl.'s Resp. Def.'s Mot. Release 4-6).

1. *Delay*

Hosseinipour argues that she is not appealing for the purpose of delaying her sentence because counsel for co-Defendants are raising some of the same issues on appeal and because she has previously raised some of these issues through the extensive motion practice in this case. (Def.'s Mot. Release 4-5). The United States notes that Hosseinipour has adopted the atypical strategy of pursuing her ineffective assistance of counsel claim on direct appeal when the necessary record has not yet been developed, which supports an inference that she is seeking to delay her sentence. (Pl.'s Resp. Def.'s Mot. Release 4-5).

As discussed below, the Court finds that there does not appear to be a substantial question in the issues Hosseinipour intends to raise on appeal, and she has not met her burden to show that she is not seeking release for the purpose of delay. Her motion will be denied on this basis.

2. *Issues on Appeal*

In term of issues on appeal, Hosseinipour identifies seven issues that she intends to raise: (i) ineffective assistance of trial counsel; (ii) the United States did not present sufficient proof of her intent to conspire; (iii) that i2G was not a pyramid scheme; (iv) the jury should have been instructed on the anti-saturation defense; (v) Manning Warren should have been permitted to proffer expert testimony as to pyramid schemes; (vi) William Keep's expert testimony should have been excluded; and (vii) evidence of other acts was improperly admitted. (Def.'s Mot. Release 5-23).

An appeal raises a substantial question of law or fact when it presents a "close question or one that could go either way." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985) (citing *United States v. Powell*, 761 F.2d 1227, 1233-34 (8th Cir. 1985)); *see also United States v. Sypher*, No. 3:09-CR-00085, 2011 WL 1314669, at *1 (W.D. Ky. Apr. 1, 2011) (quoting *Pollard*, 778 F.2d at 1182). "A substantial question is 'one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful.'" *United States v. Roth*, 642 F. Supp. 2d 796, 798 (E.D. Tenn. 2009) (quoting *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985)). The question must be "so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *Pollard*, 778 F.2d at 1182 (citing *Powell*, 761 F.2d at 1233-34).

All of the issues identified by Hosseinipour have been thoroughly argued to and considered by the Court through either pre-trial motions, objections during trial, or post-trial motions. Clearly, Hosseinipour disagrees with the Court's prior rulings. Based on the arguments of counsel relating to the present motion, however, the Court does not believe that Hosseinipour has met her burden to prove a substantial question of law or fact pursuant to

Section 3143(b)(1)(B) that would result in either a reversal or a new trial. Accordingly, her motion will be denied.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant's Motion for Release Pending Appeal (DN 655) is **DENIED**.

Greg N. Stivers, Chief Judge
United States District Court

February 28, 2023

cc: counsel of record

DEFENDANT-APPELLANT'S EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, v. FARADAY HOSSEINIPOUR, ET AL., DEFENDANTS.	CIVIL ACTION NO. 4:17-CR-00012-GNS-CHL

FARADAY HOSSEINIPOUR'S NOTICE OF APPEAL

Notice is hereby given that Faraday Hosseinipour, Defendant in the above named case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Judgment and Commitment Order entered in this action on January 6, 2023 (DN 642), in addition to the Memorandum Opinion and Order denying the Defendant's Motion for Judgment of Acquittal and Motion for New Trial entered December 29, 2022 (DN 630).

Dated: January 10, 2023

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Counsel for Defendant, Faraday Hosseinipour

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all parties of record.

/s/ Michael M. Denbow
Counsel for Defendant, Faraday Hosseinipour

DEFENDANT-APPELLANT'S EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CRIMINAL ACTION NO. 4:17-CR-00012-GNS-CHL-5

UNITED STATES OF AMERICA PLAINTIFF

v.

FARADAY HOSSEINIPOUR DEFENDANT

ORDER

This matter is before the Court on various post-trial motions (DN 578, 579) filed by Defendant Faraday Hosseinipour ("Hosseinipour"). The motions are ripe for adjudication.

A. Defendant's Motion for New Trial (DN 578)

Hosseinipour moves for a new trial pursuant to Fed. R. Crim. P. 33. (Def.'s Mot. New Trial 12-26, DN 578). She asserts that her trial counsel's performance was so deficient that her conviction should be vacated and she should be granted a new trial. (Def.'s Mot. New Trial 12-26).

Fed. R. Crim. P. 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Motions for a new trial are not favored and are granted only with great caution." *United States v. Garner*, 529 F.2d 962, 969 (6th Cir. 1976). "The defendant bears the burden of proving that a new trial should be granted." *United States v. Davis*, 15 F.3d 526, 531 (6th Cir. 1994). As the Sixth Circuit has explained:

> Such a motion calls on the trial judge to take on the role of a thirteenth juror, weighing evidence and making credibility determinations firsthand to ensure there

> is not a miscarriage of justice. . . . [W]hile Rule 29 requires the court to view the evidence in a light most favorable to the prosecution, Rule 33 does not.

United States v. Mallory, 902 F.3d 584, 596 (6th Cir. 2018) (internal citations omitted).

In her motion, Hosseinipour raises numerous issues relating to her trial counsel's performance prior to and during trial. (Def.'s Mot. New Trial 12-26). In particular, she contends that her counsel's performance constituted ineffective assistance of counsel ("IAC") in violation of her Sixth Amendment rights under *Strickland v. Washington*, 466 U.S. 668 (1984).[1] (Def.'s Mot. New Trial 12-26).

As the Supreme Court has explained:

> The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227-228 (1967)). Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.

Frye, 566 U.S. at 140. "To prevail on a motion for new trial based upon ineffective assistance, the defendant must show that counsel's performance was deficient and that the deficiency

[1] Hosseinipour contends that the Court should hold an evidentiary hearing on her IAC claims. (Def.'s Mot. New Trial 25-26). The United States opposes the request. (Pl.'s Resp. Def.'s Mot. New Trial 24, DN 583). "Whether to hold an evidentiary hearing before deciding a motion for a new trial is within the discretion of the trial court." *Bass*, 460 F.3d at 838 (citing *United States v. Anderson*, 76 F.3d 685, 692 (6th Cir. 1996)). "An evidentiary hearing is required unless 'the record conclusively shows that the [movant] is entitled to no relief.' Thus, no hearing is required if the [movant's] allegations 'cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (internal citation omitted) (citation omitted). The Court may rely upon its recollection of trial and counsel's performance in ruling on the motion. *See id.* (citing *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996)). Based on the Court's recollection of the trial and the record, Hosseinipour is not entitled to an evidentiary hearing because she has not shown that she is entitled to a new trial on this basis. To the extent that she wishes to better develop the record in support of an IAC claim, it would be more appropriate to do so following her direct appeal through a motion pursuant to 28 U.S.C. § 2255. *See United States v. Seymour*, 38 F.3d 261, 263 (6th Cir. 1994) ("Ineffective assistance of counsel claims are best brought by a defendant in a post-conviction proceeding under 28 U.S.C. § 2255 so that the parties can develop an adequate record on the issue." (quoting *United States v. Daniel*, 956 F.2d 540, 543 (6th Cir. 1992)).

prejudiced the defense in a manner that deprived the defendant of a fair trial." *United States v. Bass*, 460 F.3d 830, 838 (6th Cir. 2006) (citing *Strickland*, 466 U.S. at 687).

i. Performance

Under *Strickland*, the performance prong requires a defendant to "show that counsel's representation fell below an objective standard of reasonableness," and in making this determination, the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 688, 690. The Supreme Court has cautioned that "[s]urmounting *Strickland*'s high bar is never an easy task." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356 (2010)). When a court assesses counsel's performance, it must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The salient question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id*. at 690.

In her motion,[2] Hosseinipour asserts that her attorney provided ineffective assistance relating to pretrial preparations and plea negotiations. (Def.'s Mot. New Trial 6-9). She notes disagreements with her counsel and issues with his trial preparation. It is unclear whether those issues satisfy this prong of *Strickland* based on the record.

[2] The motion is largely premised on affidavits from Hosseinipour; her trial counsel and brother-in-law, Wayne Manning; and her husband, David Manning. (Hosseinipour Aff., DN 578-1; W. Manning Aff., DN 578-2; D. Manning Aff., DN 578-3). "However, it is well established that a self-serving habeas affidavit is not sufficient to establish a constitutional violation." *Snyder v. Grayson*, 872 F. Supp. 416, 420 (E.D. Mich. 1994) (citing *Caudill v. Jago*, 747 F.2d 1046, 1051 (6th Cir. 1984)).

Four months prior to trial, Hosseinipour, her attorney, an Assistant United States Attorney, and Special Agent Matt Sauber ("Sauber") met for almost four hours to discuss the charges and evidence in this case and a potential guilty plea, which was memorialized by in a memorandum of information ("MOI") prepared by Sauber. (Pl.'s Resp. Defs.' Post-Trial Mots. Attach. 1-3, DN 583-1). The MOI notes that the plea agreement was discussed.

On the first day of trial, the Court inquired as to pretrial plea negotiations between the United States and Richard Maike ("Maike"), Doyce Barnes ("Barnes"), and Hosseinipour before the beginning of the trial in accordance with *Missouri v. Frye*, 566 U.S. 134 (2012). As with all Defendants, the Court confirmed that any plea offer had been communicated to Hosseinipour by her attorney. The Court also inquired whether she: (i) had sufficient time to discuss the plea offer with her attorney; (ii) understood the potential penalties if convicted; (iii) comprehended the terms of the plea offer; (iv) knew the differences in any potential penalties between the plea offer and a potential guilty verdict; and (v) had decided to proceed to trial. Because of her affirmative responses, the Court found that Hosseinipour had knowingly chosen to proceed to trial notwithstanding the potential risks. Thus, the record does not support Hosseinipour's assertion of a violation of her Sixth Amendment rights based on her counsel's pretrial conduct.

Hosseinipour also raises various claims regarding trial. (Def.'s Mot. New Trial 9-12). All three Defendants were named in the two conspiracy counts (Counts 1 and 13) of the Second Superseding Indictment. During trial, counsel for each Defendant took turns questioning witnesses. Hosseinipour's counsel always went last based on the order of Defendants in the Second Superseding Indictment. By the time Hosseinipour's counsel questioned a witness, counsel for co-Defendants had already capably exhausted possible subjects of cross-examination. In addition, the evidence reflected that Hosseinipour was less culpable than her co-Defendants,

and reasonable counsel may have made the tactical decision not to question witnesses more extensively to minimize the risk of drawing attention to her and her involvement in the scheme.

In pre-trial motions, trial motions, and objections, Hosseinipour's counsel either made a similar motion or objection as other defense counsel, or made a separate motion or objection. Thus, it is not clear what motion should have been made or what objection could have been raised on her behalf which was not.

As the Supreme Court cautioned in *Strickland*:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689-90 (internal citations omitted) (citation omitted); *see also Smith v. United States*, 542 F. Supp. 3d 755, 767 (M.D. Tenn. 2021) ("It is easy enough for post-conviction counsel to find fault with trial counsel's tactics and advice (or non-advice), but a court's role is not to act as a 'Monday morning quarterback.'" (citing *Fountain v. United States*, 211 F.3d 429, 434 (7th Cir. 2000); *Schumacher v. Hopkins*, 83 F.3d 1034, 1037 (8th Cir. 1996))).

When the alleged errors are viewed by the appropriate standard, Hosseinipour's arguments are not supported by the record, largely appear to be efforts to second-guess trial counsel, and potentially reflect her own remorse for choosing not to accept a plea offer. Thus,

Hosseinipour has not satisfied her burden of showing that her counsel's performance was deficient under *Strickland*.

ii. Prejudice

The prejudice prong is also a high bar. To satisfy this element, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

Hosseinipour contends that she was prejudiced by her trial counsel's performance. (Def.'s Mot. New Trial 24). To the extent that Hosseinipour's trial counsel was not as polished or thorough as co-Defendants' counsel, however, it is not clear that Manning's performance prejudiced her and resulted in her conviction. There was strong evidence presented of Hosseinipour's involvement in the scheme upon which the jury relied in finding her guilty. Accordingly, she has failed to satisfy the prejudice prong under *Strickland*.

For the reasons outlined above, Hosseinipour has failed to prove an IAC claim to warrant a new trial. This motion will be denied, and she may raise an IAC claim in a motion pursuant to 28 U.S.C. § 2255.

B. <u>Defendant's Motion for Judgment of Acquittal (DN 579)</u>

Hosseinipour also moves for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. (Def.'s Mot. J. Acquittal, DN 579). Fed. R. Crim. P. 29 provides that "[a] defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c)(1). When moving for a judgment of acquittal and a new trial, the defendant challenging the sufficiency of the evidence "bears a very heavy burden." *United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000). "[T]he

relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Garrido*, 467 F.3d 971, 984 (6th Cir. 2006). A motion for a judgment of acquittal "will be confined to cases where the prosecution's failure is clear." *United States v. Connery*, 867 F.2d 929, 930 (6th Cir. 1989) (internal quotation marks omitted) (citing *Burks v. United States*, 437 U.S. 1, 17 (1978)).

1. *Proof of Conspiracy to Commit Mail Fraud*

Hosseinipour raises various challenges to the sufficiency of the proof presented at trial to convict her of the crime of conspiracy to commit mail fraud. (Def.'s Mot. J. Acquittal 3-14).

a. Intent

Hosseinipour asserts that the evidence at trial was insufficient to prove that she intended to conspire. (Def.'s Mot. J. Acquittal 3-6). "Establishing a conspiracy requires only that the defendant 'knew the object of the conspiracy and voluntarily associated himself [or herself] with it to further its objectives.'" *United States v. Smith*, 749 F.3d 465, 477 (6th Cir. 2014) (quoting *United States v. Jamieson*, 427 F.3d 394, 402 (6th Cir. 2005)). "Further, 'circumstantial evidence alone can sustain a guilty verdict,' and [a court] will draw all reasonable inferences in favor of the prosecution." *United States v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997) (internal citation omitted) (citation omitted).

As to the element of intent, "a jury may consider circumstantial evidence of fraudulent intent and draw reasonable inferences therefrom. Intent can be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits." *United States v. Davis*, 490 F.3d 541, 549 (6th Cir. 2007) (internal quotation marks omitted)

(citation omitted). In addition, "[t]he existence of a conspiracy to violate federal law may be established by a tacit or mutual understanding among the parties." *United States v. Keene*, 959 F.2d 237, 1992 WL 68285 (6th Cir. 1992) (quoting *United States v. Blakeney*, 942 F.2d 1001, 1010 (6th Cir. 1991)).

There was evidence presented at trial from which the jury could find that Hosseinipour intended to conspire with others, and that she knowingly and voluntarily joined the conspiracy. Accordingly, her motion will be denied.

b. Mail Fraud

Hosseinipour also argues that there was insufficient evidence to prove that she committed mail fraud. (Def.'s Mot. J. Acquittal 6-9). "Mail fraud 'consists of (1) a scheme or artifice to defraud; (2) use of mails in furtherance of the scheme; and (3) intent to deprive a victim of money or property.'" *Smith*, 749 F.3d at 477 (quoting *United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006)).

While she challenges the sufficiency of the proof, there was proof at trial that supported the jury's verdict as to the elements required for Count 1. Her motion will be denied.

c. Pyramid Scheme

Like her co-Defendants, Hosseinipour challenges the jury instruction as a pyramid schemes and asserts that i2G was a legal multi-level marketing scheme. (Def.'s Mot. J. Acquittal 9-11). These issues were discussed extensively during trial.

While the parties agreed that *United States v. Gold Unlimited*, 177 F.3d 472 (6th Cir. 1999), provided the rule of law, the language added to the jury instruction was consistent with the Sixth Circuit's statement in *Gold Unlimited* as to the wisdom of clarifying the difference between legitimate business ventures and illegal schemes. *See id*. at 483. The Court also added

language from *Federal Trade Commission v. BurnLounge, Inc.*, 753 F.3d 878 (9th Cir. 2014), to clarify that a pyramid scheme involves the promotion of the program itself rather than the sales of products. *See also Kerrigan v. ViSalus, Inc.*, 112 F. Supp. 3d 580, 593 (E.D. Mich. 2015) (noting that "the key inquiry [of the second element of the *Koscot* test] is whether the alleged scheme pays rewards 'primarily for recruitment rather than for sales of merchandise.'" (quoting *BurnLounge, Inc.*, 753 at 884)). Notwithstanding Hosseinipour's argument, there was overwhelming evidence presented at trial to support the jury's determination that i2G was an illegal pyramid scheme.

For these reasons, Hosseinipour's motion will be denied.

d. Expert Testimony

Hosseinipour also raises several issues relating to the inclusion and exclusion of expert testimony at trial. (Def.'s Mot. J. Acquittal 11-14). She asserts that Professor Manning Warren's testimony was improperly limited and that Professor William Keep was permitted to give improper opinions. (Def.'s Mot. J. Acquittal 11-14).

These issues were thoroughly addressed in pre-trial motions and during objections raised at trial. Consistent with those prior rulings, Hosseinipour's arguments do not provides a basis for relief. Her motion will be denied as to the expert testimony.

2. *Proof of Conspiracy to Commit Securities Fraud*

Similar to her challenges to Count 1, Hosseinipour asserts various issues relating to her conviction of conspiracy to commit securities fraud in Count 13. (Def.'s Mot. J. Acquittal 14-21). To obtain a conviction on this conspiracy, "the government must 'prove an agreement between two or more persons to act together in committing an offense, and an overt act in

furtherance of the conspiracy.'" *United States v. Ayers*, 386 F. App'x 558, 564 (6th Cir. 2010) (quoting *United States v. Hunt*, 521 F.3d 636, 647 (6th Cir. 2008)).

a. Intent & Overt Acts

Hosseinipour avers that the United States failed to present proof that she intended to defraud others and of the existence of an overt act. (Def.'s Mot. J. Acquittal 14-15). Despite her characterization of the evidence, there was ample evidence presented at trial upon which the jury could rely in finding all of the elements of this crime. The motion will be denied as to this issue.

b. Security

In addition, Hosseinipour raises several issues relating to definition of an investment contract and whether the Emperor positions constituted a security. (Def.'s Mot. J. Acquittal 15-21). These issues similarly were thoroughly debated and discussed throughout the trial and during the discussions relating to the jury instructions. These issues do not warrant relief under Fed. R. Crim. P. 29.

3. *Statute of Limitations*

Hosseinipour asserts that the Court erred in the instruction addressing overt acts (Instruction No. 7) charged in Count 13 of the Second Superseding Indictment. (Def.'s Mot. J. Acquittal 21-22). In particular, Count 13 outlined 20 overt acts or transactions—with the latest occurring in November 2014. (Second Superseding Indictment ¶ 40, DN 230).

This issue was raised before and during trial, and the Court rejected this contention. As the United States notes, there was evidence to show that an unindicted co-conspirator sold Emperor shares even after the summer of 2014, and Maike directed the co-conspirator to deposit those funds into an account in the name of Tech Entertainment d/b/a Global 1 Entertainment. (Pl.'s Resp. Defs.' Post-Trial Mots. 20). Thus, there was evidence that the jury could rely upon

in finding that an overt act occurred within the statutory limitations period. The motion will be denied as to this issue.

4. *Anti-Saturation*

Hosseinipour also contends that the Court erred in failing to give an anti-saturation instruction. (Def.'s Mot. J. Acquittal 22). Her argument appears to be largely reiteration of prior contentions by Defendants regarding this instruction. As the Court noted during one of the discussions with counsel regarding the proposed instructions, there was an absence of proof to support giving an anti-saturation instruction, which is consistent with the holding in *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999). Further, the defendants had the burden of establishing that an effective anti-saturation program was implemented. *See Gold*, 177 F.3d at 482. No such evidence was presented.

As recognized by the Sixth Circuit in *Gold*, "[t]he key to any anti-pyramiding rule . . . is that the rule must serve to tie recruitment bonuses to actual retail sales in some way." *Id.* (quoting *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 783 (9th Cir. 1996)). At trial, the only anti-saturation policy urged by defendants was the numerical cap of 5000 placed on the sale of "Emperor positions", which were promised to receive a portion of profits from an on-line casino in Asia.[3] The program bonuses, however, were based solely upon recruitment of new members. No significant profits were ever realized by the casino and the only revenue to the venture was derived almost exclusively from the sale of the Emperor and other positions.[4] Far from preventing the program from failure, the numerical cap ensured that the last members recruited

[3] To avoid online gambling restrictions in the United States, participation in the casino could only occur outside the U.S.

[4] Evidence at trial reflected that Emperors received payments in the range of $15 per month, or $60,000 monthly assuming 4000 Emperors, but the casino generated losses except for two months when a negligible profit was earned.

would certainly lose their money because they would be unable to qualify for bonuses for the recruitment of new members. Therefore, no instruction for anti-saturation was warranted. *See Gold*, 177 F.3d at 482 (Defendant "did not prove at trial that it appropriately tied recruitment bonuses to actual retail sales" or that it "de-linked recruitment and commissions."); *cf. In re Amway Corp.*, 93 F.T.C. 618, 716 (1979) ("It is only when the newly recruited distributor begins to make wholesale purchases from his sponsor and sales to consumers, that the sponsor begins to earn money from his recruit's efforts.").

Accordingly, in the absence of sufficient proof, Hosseinipour was not entitled to an anti-saturation instruction and is entitled to relief from the jury verdict under Fed. R. Crim. P. 29 or 33.

5. Brady *Violation*

Hosseinipour alleges that the United States failed to produce timely MOI prepared by Sauber relating to her, which violated her rights under *Brady v. Maryland*, 373 U.S. 83 (1963). (Def.'s Mot. J. Acquittal 23).

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The subject MOI was prepared by Sauber based on a meeting he attended with Hosseinipour, her trial counsel, and an Assistant United States Attorney. (Pl.'s Resp. Defs.' Post-Trial Mots. Attach. 1-3).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that

evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

In its response, the United States asserts that the MOI does not contain any *Brady* material and the MOI had been disclosed to Hosseinipour's counsel. (Pl.'s Resp. Defs.' Post-Trial Mots. 21-22). In particular, Hosseinipour has stated that "Manning did not find or review my 302 interview with Sewell and Matt Sauber in the government's produced documents until after Matt Sauber testified . . . ." (Hosseinipour Aff. ¶ 44). Because the MOI was not suppressed from her, Hosseinipour's motion will be denied.

6. *Due Process/Void-For-Vagueness Doctrine*

Finally, Hosseinipour asserts that the Court's instruction on a pyramid scheme violated the Fourteenth Amendment's Due Process Clause under the void-for-vagueness doctrine. (Def.'s Mot. J. Acquittal 23-24). The crux of her argument is that she disagrees with the instruction defining a pyramid scheme because the instruction was not identical to the instruction in *United States v. Gold Unlimited*, 177 F.3d 472 (6th Cir. 1999). (Def.'s Mot. J. Acquittal 24).

The language of this challenged instruction was discussed extensively during trial—including more recent decisions like *Federal Trade Commission v. BurnLounge, Inc.*, 753 F.3d 878 (9th Cir. 2014). In drafting the jury instructions, the Court added language from *BurnLounge* to specify that a pyramid scheme involves the promotion of the program itself rather than the sales of products. *See also Kerrigan v. ViSalus, Inc.*, 112 F. Supp. 3d 580, 593 (E.D. Mich. 2015) (noting that "the key inquiry [of the second element of the *Koscot* test] is whether the alleged scheme pays rewards 'primarily for recruitment rather than for sales of merchandise.'" (quoting *BurnLounge, Inc.*, 753 at 884)).

While Hosseinipour disagrees with the instruction, the inclusion of the challenged language was consistent with the Sixth Circuit's statement in *Gold Unlimited* that it may be prudent to clarify the difference between legitimate business ventures and illegal schemes. *See Gold Unlimited, Inc.*, 177 F.3d at 483. Thus, her motion will be denied on this basis.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant's Motion for New Trial (DN 578) and Defendant's Motion for Acquittal (DN 579) are **DENIED**.

Greg N. Stivers, Chief Judge
United States District Court
December 29, 2022

cc: counsel of record

DEFENDANT-APPELLANT'S EXHIBIT D

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY- OWENSBORO DIVISION
CASE NO. 4:17CR-00012-GNS

UNITED STATES OF AMERICA PLAINTIFF

v. **DEFENDANT FARADAY HOSSEINIPOUR'S AFFIDAVIT**

RICHARD MAIKE, et al. DEFENDANTS

Affiant, Faraday Hosseinipour, being duly sworn, states:

1. In 2017, I was indicted on federal charges. The second superseding indictment against me listed my charges as violations of 18 U.S.C. § 371, 18 U.S.C. § 1349, and 15 U.S.C. § 78j(b). These charges were based on my role in a multi-level marketing company, I2G.

2. My brother-in-law, Wayne Manning ("Manning"), had recently graduated from Thomas M. Cooley Law School and was barred in Texas.

3. My husband, Dave, contacted Manning, his brother, about the charges against me. We thought his knowledge as a lawyer and also as a past patron of other multi-level marketing companies would be helpful in deciding what to do. Manning told my husband that the charges were ridiculous and I would never go to trial.

4. We knew that Manning had little experience practicing law, but hired him to save money under the assumption that this indictment was a misunderstanding that would quickly be resolved.

5. Manning was unfamiliar with the law and trial procedure from the outset. For example, he had no subscription to any legal research service. When my name was incorrect on the indictment, he did not know how to fix it. But, because Manning repeatedly told Dave and I that this would not go to trial, I continued with him as my lawyer.

6. Manning never told me what the elements of the charges against me were.

7. Manning did not review the sentencing guidelines for the charges with me.

8. The only information I received from Manning about my case was that I would never see trial, I would not be found guilty, and I would not go to jail. Because of this, I not only thought that the charges would be dropped, but also did not realize jail was a possible penalty if they were not.

9. The prosecution first asked to meet with me in September of 2021 and sent me a proffer agreement. Manning told me to cancel this meeting because he was not comfortable with and

did not understand the proffer agreement. I researched what a proffer agreement was and sent him the information that I found.

10. Manning emailed Prosecutor Marisa Ford explaining that he was not comfortable with the agreement and did not understand why the charges could not be dropped without me signing the agreement. Ford responded that the proffer agreement was a standard agreement and would allow me to speak with the prosecution without fear of my statements being used against me in the future. Ford also told Manning that the prosecution was not willing to drop any charges against me without speaking with me first.

11. Manning told me we made the right decision in rejecting the proffer agreement and canceling the meeting.

12. When I was offered a second meeting with the prosecution in March 2022, Manning told me and Dave that he thought the prosecution planned to drop the charges against me at the meeting. This belief was based on Prosecutor Madison Sewell's statement that he did not see the distributors, which included me, going to trial.

13. Manning again instructed me not to sign the proffer agreement offered by Sewell because Manning trusted him.

14. Manning was unwilling to have the meeting anywhere but Texas, his home state at the time. He insisted I fly there for the meeting, so I did. To my surprise, the prosecution did not drop the charges but instead wanted to discuss another plea offer. The potential offer was that they would argue for no jail time in return for my pleading guilty to conspiracy to commit mail fraud.

15. In shock and still under the assumption that the prosecution did not have a strong case against me, I explained to Manning that I did not want to plead guilty to a felony I did not believe I had committed. He told me it would be perjury to plead guilty without believing I was. He offered me no further advice and repeated that I would not go to trial, I would not be found guilty, and jail was not a possibility.

16. I did not speak much with the prosecution about the potential offer, since I did not sign the proffer agreement.

17. Manning and Dave discussed the potential offer and Sewell's statements and decided that I should not plead guilty because I was innocent.

18. Manning then exceeded the scope of the joint defense agreement and violated my attorney-client privilege by discussing the details of my plea negotiations with my co-defendants' counsel.

19. Manning told me about his discussions with Dave and the other defense attorneys, and said that he believed everyone agreed I should reject the plea offer unless I thought that I was guilty.

20. I rejected the plea offer based on this advice, but felt pressured to by Manning.

21. Manning also knew that I was discussing my plea negotiations with Anzalone, my co-defendant and former business partner, because he was cc'd on our emails. He encouraged me to talk to Anzalone about my plea negotiations. This was to my detriment, because it encouraged Anzalone to seek and enter into a plea deal under which he agreed to testify against me in return for a probated sentence.

22. Manning further prejudiced me by sharing our confidential discussions with the prosecution on multiple occasions before trial. For example, he disclosed that I told him Chuck King, a key witness for the prosecution, had a history of conning people. This undermined my ability to impeach a witness against me because the government was prepared to address that issue. Manning also told the prosecution about my theory of the case, what I believed had happened, and the evidence I was aware of that might be presented at trial.

23. Manning told the prosecution of the joint defense agreement, which violated the very terms of that agreement.

24. When I learned of these disclosures and confronted Manning about them, he told me it was part of his "strategy" to make me seem useful to the prosecution.

25. Manning also often shared details of my case and our conversations with Dave and multiple other members of his family without my permission.

26. During discovery, Manning did not interview or even contact witnesses that I suggested might have helpful information.

27. Manning did not review all of the discovery he received about Maike.

28. Manning missed discovery deadlines despite that I provided him the necessary documents far in advance. When Manning told me that he had missed the deadline, he did not try to fix the situation but instead said he did not think he would be able to present evidence on my behalf anymore.

29. When the deadline was extended due to COVID-19, Manning had me resend all of the evidence I had already sent him multiple times, and then told me he intended to erase the dates on those items because he thought he was supposed to have already turned that information over to the government.

30. When I told Manning that I could not view parts of the discovery he received from the government or the emails sent to Maike, he made no efforts to make the discovery accessible to me. This suggested to me that he never viewed the discovery himself, since he likely received it in the same format.

31. I saw my co-defendants file motions objecting to government exhibits, so I asked Manning to file a motion objecting to the government's exhibits of business transfer requests based on their irrelevance, prejudice, hearsay, and potential to confuse the jury. Manning refused to do so, stating that the judge did not know the facts of the case and would take objections as they came.

32. When I realized Manning was filing practically no motions on my behalf, I had to explain to him that he needed to object to things like this to preserve the issue for appeal.

33. An example of a motion Manning did file on my behalf was a motion to dismiss for selective prosecution. He claimed that the government should have charged other Caucasian I2G members with these crimes instead of me, but I am Caucasian.

34. When Devorin and Syn were severed from the main trial, I asked Manning to file a motion to sever my case from Maike, since I would be left as the only non-owner tried with the owners of the company.

35. I told Manning that I felt being tried with the owners would greatly prejudice me, as there would be evidence presented against them that was not related to me but would be attributed to me, and being tried with Devorin and Syn would allow my actions and statements to be viewed in relation to people who held similar roles in I2G as I did.

36. Manning refused to file the motion to sever, claiming it was a terrible idea. When I insisted he file the motion to sever, Manning claimed it was his strategy to have me tried with Maike and Barnes, and that if I made him file the motion he would quit and I would go to jail.

37. Because I did not have time to find a new lawyer before trial, I gave up on filing the motion and continued to trial with Manning as my lawyer.

38. Manning eventually told me and Dave that Sewell had continued asking him since our March meeting whether I was willing to accept a plea offer in which the prosecution argued for no jail time.

39. I was beginning to realize Manning may have been wrong about whether I was facing imprisonment. I did not feel confident going to trial with him as my attorney because I felt he had not done anything correctly leading up to trial. I thought it would be a good idea to talk with the prosecution about a plea deal, so I emailed Manning instructing him to reach out to Sewell. I also suggested that he propose different options I had read about online, like diversion. Manning would not respond.

40. Eventually, after repeatedly asking him to contact Sewell, Manning told me it was a "waste of time" since Sewell would not offer me anything less than a felony, and I had previously expressed that I did not want to plead guilty to a felony.

41. Trial began, and Manning displayed a complete lack of understanding of trial procedure. His objections were not based on law or rules, but instead were his attempt to impeach witnesses or undermine the sufficiency of evidence. The Court not only had to tell him to wait until his chance to examine the witness, but also had to tell Manning that the proper word to object was "objection."

42. Manning never objected to anything warranting an objection, like the emails that I had previously I asked him to object to through a written motion.

43. Manning would raise his hand to cross-examine witnesses. In one instance, the judge did not see him raise his hand and dismissed an expert witness, Manning Warren, without giving Manning the opportunity to cross-examine him. Manning did not bring up his inability to cross-examine the expert until after lunch, when the witness had left trial and could not be called back.

44. Manning did not find or review my 302 interview with Sewell and Matt Sauber in the government's produced documents until after Matt Sauber testified, so nothing from that was used in Manning's examination of Sauber.

45. Manning would not bring up issues in his cross-examinations that were important, like that Anzalone, through whom the government presented almost all of its evidence against me, had accepted a plea deal that required him to testify against me.

46. Manning also made no attempt to challenge or even clarify the evidence introduced through Anzalone. I wrote 150 questions for Manning to use in his examination of Anzalone, and he did not use them.

47. The questions Manning did ask did not go to the issues being tried and were frequently objected to, often on hearsay grounds, and even by my co-defendants' counsel. When Manning's questions were objected to, he could not rephrase them, so he did not ask them.

48. Manning did not reference or introduce exculpatory evidence at trial or prepare any exhibits, even though I provided him with dozens of videos showcasing my focus on customers, product training, and product testimonials that would have supported my good faith and the fact that I2G was a legitimate business.

49. Part of the discovery received from Maike that Manning refused to review included emails sent to Maike from other independent business owners that held the same position as I did in I2G. These emails could have provided the jury with helpful insight into network marketing and its operation and further demonstrated that I did not play the role in I2G's alleged fraud that the government claimed I did, but they were not introduced because Manning was not aware of them.

50. It was not until Manning saw my co-defendant's counsel introducing exhibits that he attempted to put exhibits together at the last minute to present on my behalf.

51. Manning constantly apologized to the prosecution and the judge when his objections were overruled or the objections made against him were sustained.

52. He was not aware of how to use technology in the courtroom, and was so deficient with the technology that the judge admonished him for his inability to use it.

53. Manning also accidentally forwarded a group email between defense counsel discussing their preparation and plan for one of the government's upcoming witnesses, Peter Herr. Sewell deleted the email, but announced to the Court the next day that they would not be calling Peter Herr as a witness. This was one less opportunity to exculpate myself through impeaching a government witness.

54. Eventually, I fired Manning and asked him to let the judge know, because I assumed I was not allowed to speak to the judge.

55. Manning told my co-defendants' counsel that he was fired, but continued representing me and never alerted the judge.

56. When I told Manning that I wanted to represent myself, he told me that the judge would not allow me to fire him, my firing him would cause the other defendants to seek a mistrial, and that I would go to prison without his representation.

57. Manning also told me that he was withdrawing at least three times during the trial and would be returning to Texas. When I asked him to let the judge know, he would not.

58. When Manning learned that I was considering writing to the Court to ask to represent myself, he replied that that was the last thing I should do.

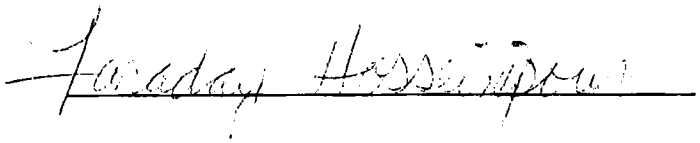
59. I tried to alert anyone I could think of that I wanted new representation. I could not find someone who was able to offer me advice on what to do other than going through Manning. For example, when I called the judge's case manager and asked her how I could address Manning's incompetency with the judge, she said I needed to go through Manning, too.

60. I continued to ask Manning to alert the judge that I wanted to represent myself, but Manning told me it was the worst thing I could do and refused to address it with the judge.

61. Manning filed a Rule 29 motion for judgment as a matter of law at the end of trial. When I read it, I realized he had borrowed largely from defendant Doyce Barnes's motion and only added arguments discussing various affirmative defenses that were irrelevant to whether the government had met its burden. I re-wrote the motion for him. Manning said he would not include my arguments because he could argue them in court. The Court would not hear these further arguments because they were not included in the motion. This further proves Manning's lack of understanding of the need to preserve issues for appeal and for argument.

62. I did not testify at trial due to Manning's advice that it would not be in my best interest. Because I realize his advice was faulty in many other respects, I am regretful that I relied on him in waiving my constitutional right to testify on my behalf.

FURTHER THE AFFIANT SAYETH NOT.



STATE OF FL)
)
COUNTY OF Duval)

The foregoing instrument was acknowledged before me this 19 day of October, 2022, by Faraday Hosseinipour.

My commission expires: 07/22/23

NOTARY PUBLIC

[SEAL]

Monica Smolder
State of Florida
My Commission Expires 07/22/2023
Commission No. GG 345289

DEFENDANT-APPELLANT'S EXHIBIT E

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY- OWENSBORO DIVISION
CASE NO. 4:17-CR-00012-GN

UNITED STATES OF AMERICA — PLAINTIFF

v. **WAYNE MANNING'S AFFIDAVIT**

RICHARD MAIKE, et al. — DEFENDANTS

Affiant, Wayne Manning, being duly sworn, states:

1. I am Defendant Faraday Hosseinipour's brother-in-law.
2. I graduated from Thomas M. Cooley Law School in August 2012.
3. I was licensed to practice law in the state of Texas as of May 3, 2013.
4. I am not licensed to practice law in any other state.
5. Since graduating law school, I have practiced as a solo practitioner.
6. My practice areas include business litigation, personal injury, and wills and trusts.
7. I have represented only a few clients in a criminal matter other than Hosseinipour.
8. I had limited experience trying a criminal case at the time I agreed to represent Hosseinipour.
9. I had very limited jury trial experience at the time I agreed to represent Hosseinipour.
10. I had no experience with federal criminal law at the time I agreed to represent Hosseinipour.
11. I had no experience with the federal sentencing guidelines at the time I agreed to represent Hosseinipour.
12. I had no experience in dealing with Assistant United States Attorneys at the time I agreed to represent Hosseinipour.
13. I had no experience with federal, criminal proffer agreements at the time I agreed to represent Hosseinipour.
14. I had limited experience with plea negotiations at the time I agreed to represent Hosseinipour.

15. I had no experience engaging in complex e-discovery at the time I agreed to represent Hosseinipour.

16. I had no experience with government investigation devices, such as 302 interviews, at the time I agreed to represent Hosseinipour.

17. I had no paid subscription to a legal research service at the time I represented Hosseinipour.

18. Prosecutor Madison Sewell discussed the concepts of a potential plea offer to Hosseinipour in their March 2022 meeting. In discussing this potential offer, Sewell mentioned allowing Hosseinipour to plead guilty to conspiring to commit mail fraud in return for the prosecution dismissing the securities fraud charges and arguing to the court that Hosseinipour not serve jail time for the mail fraud conspiracy charge.

FURTHER THE AFFIANT SAYETH NOT.

Wayne Manning

STATE OF NEVADA)
)
County OF NYE)

The foregoing instrument was acknowledged before me this 18 day of October, 2022, by Wayne Manning.

My commission expires: 08.02.2023

NOTARY PUBLIC

[SEAL]

EMILY DUNIPHIN
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO: 20-2785-14
MY APPT. EXPIRES: 08/02/2023

DEFENDANT-APPELLANT'S EXHIBIT F

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY- OWENSBORO DIVISION
CASE NO. 4:17CR-00012-GNS

UNITED STATES OF AMERICA PLAINTIFF

v. **DAVID ROBERT MANNING JR. AFFIDAVIT**

RICHARD MAIKE, et al. DEFENDANTS

Affiant, David "Dave" Manning, being duly sworn, states:

1. I am married to Faraday Hosseinipour, and Wayne Manning ("Manning") is my brother.

2. I did not take my wife's charges seriously because I thought the charges had no factual basis and would be dropped once the government further investigated.

3. I asked Manning to represent my wife when we found out she was indicted in 2017 because he had recently graduated law school and I did not want to spend a lot of money on an attorney for charges I thought would be dropped.

4. When I hired Manning to represent Hosseinipour, he told me that the charges were ridiculous, the case would never go to trial, and that Hosseinipour would never be convicted or incarcerated.

5. Even when the trial kept being continued, Manning continued to tell us that the case would not go to trial and that Hosseinipour would not be found guilty or sentenced to prison.

6. In March of 2022, Manning told me he spoke with Madison Sewell. He said he thought Sewell was going to drop the charges, so he wanted my wife to fly to Dallas to meet with them.

7. After the March meeting between my wife, Manning, and Sewell, Manning called me to tell me that Sewell thought my wife was innocent. Manning told me he thought this because he found out the prosecution only expected Richard Maike and Doyce Barnes to go to trial, not the distributors, which included Hosseinipour.

8. Manning told me that Hosseinipour was offered a potential plea deal where the prosecution would argue to the court for her not to serve jail time if she pled guilty to a felony. He and I agreed that she was not a criminal and should not accept a guilty plea when she was innocent.

9. Manning told me that he spoke with the other defense attorneys about the plea offer as well, and had the impression they also thought that my wife should not take a plea deal if she was innocent.

10. Hosseinipour would call and talk to Richard Anzalone and the other defendants constantly to update them on the case and her dealings with the prosecution. She talked with Anzalone every day.

11. Eventually, Hosseinipour became interested in a plea deal that allowed her to plead guilty to a misdemeanor. When discussing that idea, Manning told me that Sewell was not going to offer a misdemeanor and that my wife should not accept a felony because she was not guilty. At this point, I still thought the charges would be dropped.

12. At the pre-trial meeting, Manning told me Sewell was still reaching out about a plea deal, but he said it would still be a waste of time to talk with him because he did not think Sewell was going to offer Hosseinipour anything less than a felony.

13. Manning also told me that severing Hosseinipour from the main case was a bad idea. I believed him because I thought he would know better than Hosseinipour.

14. One night Manning and Hosseinipour were fighting about the motion to sever. Manning told her that if she made him file the motion to sever he would quit and she would be convicted without him. There was no time to find a new lawyer, so I told Hosseinipour that Manning knew what he was doing.

15. Hosseinipour and I started to wonder whether she could represent herself. Manning told us that was a bad idea and that the judge would never allow that. Manning also told me that the other attorneys would ask for a mistrial if Hosseinipour asked to represent herself, so I told her it was a bad idea, too.

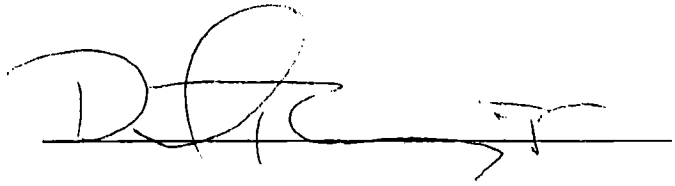
16. Hosseinipour and Manning fought every night. He would call her choice words and would storm off.

17. Manning told Hosseinipour at least three times that he was quitting and going back to Texas. Manning refused to tell the judge, though.

18. When Hosseinipour fired Manning, Manning emailed the other attorneys that Hosseinipour no longer wanted him to represent her, but he never notified the court.

19. I told Manning that Hosseinipour wanted to write to the court asking to represent herself. He said that is the last thing Hosseinipour should do, so I then fought with Hosseinipour as well because I believed Manning's statement that it was a terrible thing to do.

FURTHER THE AFFIANT SAYETH NOT.



STATE OF FL)
)
COUNTY OF Duval)

The foregoing instrument was acknowledged before me this 19 day of October, 2022, by David Robert Manning, Jr.

My commission expires: 07 22 2023

NOTARY PUBLIC

[SEAL]

Monica Smolder
State of Florida
My Commission Expires 07/22/2023
Commission No. GG 345289