No. 22-6114

United States Court of Appeals
for the
Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

RICHARD G. MAIKE,
Defendant – Appellant.

On Appeal from the United States District Court for the
Western District of Kentucky

No. 4:17-cr-00012-1, Hon. Gregory N. Stivers

BRIEF FOR APPELLANT RICHARD G. MAIKE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to FRAP 26.1 and Local Rule 26.1, Richard G. Maike, who is the Appellant in the above captioned case, makes the following disclosure:

1. Is any party a publicly held corporation or other publicly held entity? No.

2. Does any party have any parent corporations? No.

3. Is 10% or more of the stock of any party owned by a publicly held corporation or other publicly held entity? No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? No.

5. Is any party a trade association? No.

6. Does this case arise out of a bankruptcy proceeding? No.

Dated: October 7, 2024

/s/ Kyle Singhal
Kyle Singhal
Counsel for Richard Maike

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STATEMENT REGARDING ORAL ARGUMENT

Maike requests oral argument. This appeal arises from a 25-day, three-defendant trial and raises complex questions concerning the distinction between a legitimate multi-level marketing program and an unlawful pyramid scheme. Maike respectfully submits that, in light of the depth and complexity of the record below, oral argument will aid the Court.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in denying Maike's motion for acquittal where:

   A. the government failed to establish that I2G was an illegal pyramid scheme under *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999), or, alternatively, where

   B. the jury instructions constructively amended Maike's indictment, in violation of Maike's Fifth and Sixth Amendment rights to an indictment and apprisal of the offense, by permitting the jury to find Maike guilty without finding the existence of an illegal pyramid scheme?

II. Whether the district court erred in failing to give requested jury instructions on anti-saturation, scienter, and reliance on an accountant's advice?

III. Whether—

   A. the district court erred in permitting the government to use a co-defendant's guilty plea as substantive evidence of Maike's guilt without issuing a limiting instruction?

   B. the district court erred in admitting GX1, a two-page diagram of a pyramid that prejudicially misrepresented the structure of I2G?

   C. the district court abused its discretion in excluding the testimony of Maike's expert on pyramid schemes, Professor Manning Warren, as unqualified?

   D. the district court abused its discretion in permitting IRS employee Paula Basham to provide previously undisclosed expert testimony about the tax treatment of certain I2G loans?

   E. the government's failure to disclose *Brady* evidence (namely, exculpatory statements from Maike's accountant) requires reversal of Counts 11 and 12 (tax evasion)?

F. the district court erred in denying Maike's motion for acquittal as to Count 13 (securities fraud)?

G. the district court erred in insinuating to the jury that there was an overt act within the statute-of-limitations period for securities fraud?

H. the district court abused its discretion in allowing Special Agent McClelland to testify as a "course of investigation" and summary witness?

I. the district court abused its discretion in denying Maike's motion for new trial?

J. the errors that require reversal of Count 1 caused spillover prejudice that requires reversal of the remaining counts?

STATEMENT OF THE CASE

I. Introduction

This is a case about the line between lawful network marketing (frequently called multi-level marketing, or "MLM") and unlawful pyramid schemes. The government charged Appellant Rick Maike[1] ("Maike") with conspiring to run an unlawful pyramid scheme. But the trial evidence—and the testimony of *all ten* of the government's witnesses who bought into Maike's company—established that there was no unlawful pyramid scheme, because Maike's business was neither dependent on recruitment nor destined to collapse. The government, perhaps recognizing that truth, sought and received jury instructions that constructively amended the indictment, permitting the jury to convict Maike for conspiring to further *any kind of mail fraud at all*, even though Maike had marshaled all his defensive resources to combat the *charged* pyramid-scheme conspiracy.

What is more, the jury instructions garbled the elements of mail fraud, permitting the jury to find the "scheme to defraud" element without *any* scienter finding. Thus, the jury could have found Maike guilty even if the jury did not believe that Maike *knew* his business was a pyramid scheme, and even if the jury did not believe that Maike *intended* to use his business as a scheme to defraud others.

[1] Maike's surname is pronounced "Mikey" (*i.e.*, MY-key).

Multi-level marketing, though sometimes controversial and not always palatable to a general audience, is undisputedly *lawful*. The government blurred the line between lawful multi-level marketing and unlawful pyramid schemes, and it then invited the jury to ignore that line altogether. Under the decisions of the Supreme Court and this Circuit, Maike's mail-fraud conspiracy conviction (Count 1)—and by extension, his related convictions in Counts 2 through 13—cannot stand.

II. Relevant Factual Background

Maike is an entrepreneur with decades of experience in multi-level marketing. *See* GX107A at 3, App. A112. In March 2013, Maike and others acquired Finance Ventures, LLC (a Wyoming entity). Maike entered into an operating agreement with co-defendant Doyce Barnes ("Barnes") to run the entity together. GX170B, App. A127.

a. Maike and Barnes Launch I2G as a Multi-Level Marketing Company

Drawing upon their experience, Maike and Barnes used Finance Ventures to launch an MLM concept, "Infinity 2 Global" ("I2G"), that would sell licenses for people to use I2G's proprietary software applications. *See* GX106A, App. A92-99. (Those applications, discussed below at pages 13-18, included (1) an integrated online communication and social media platform called the I2G "Touch," (2) a karaoke app called "Songstagram," and (3) a fully licensed online casino accessible only to gamblers lawfully playing from outside the United States.) To that end,

Maike registered Finance Ventures to do business in Kentucky (where Maike resided) in June 2013, with I2G as its trade name. *See* GX171, App. A160.

As with other MLM concepts like Amway or Mary Kay, I2G made sales through a multi-level network of distributors called "independent business owners" ("IBOs"). An individual who wished to use I2G's products would sign up as a distributor and thereby gain the right to use I2G's products as well as the opportunity to earn commissions by recruiting others as distributors. *See* GX106A, App. A92-99; R.511, PageID#4836:24-25; R. 497, PageID#4014:4-9.

Ranks. I2G offered four "ranks" that a prospective distributor could choose from, each with its own features: Novice, Player, High Roller, and Emperor (in ascending order). To buy a package at any given rank, a prospective IBO paid $19.95 plus the rank's corresponding license fee: $100 for a Novice, $400 for a Player, $600 for a High Roller, and $5000 for an Emperor. *See* GX106A, App. A92-99. At each ascending rank, a distributor acquired greater access rights to I2G's products and could earn greater commissions. *See id.* I2G made clear that only 5000 Emperor packages would be sold. R.512, PageID#4974; R.667, PageID#6723.

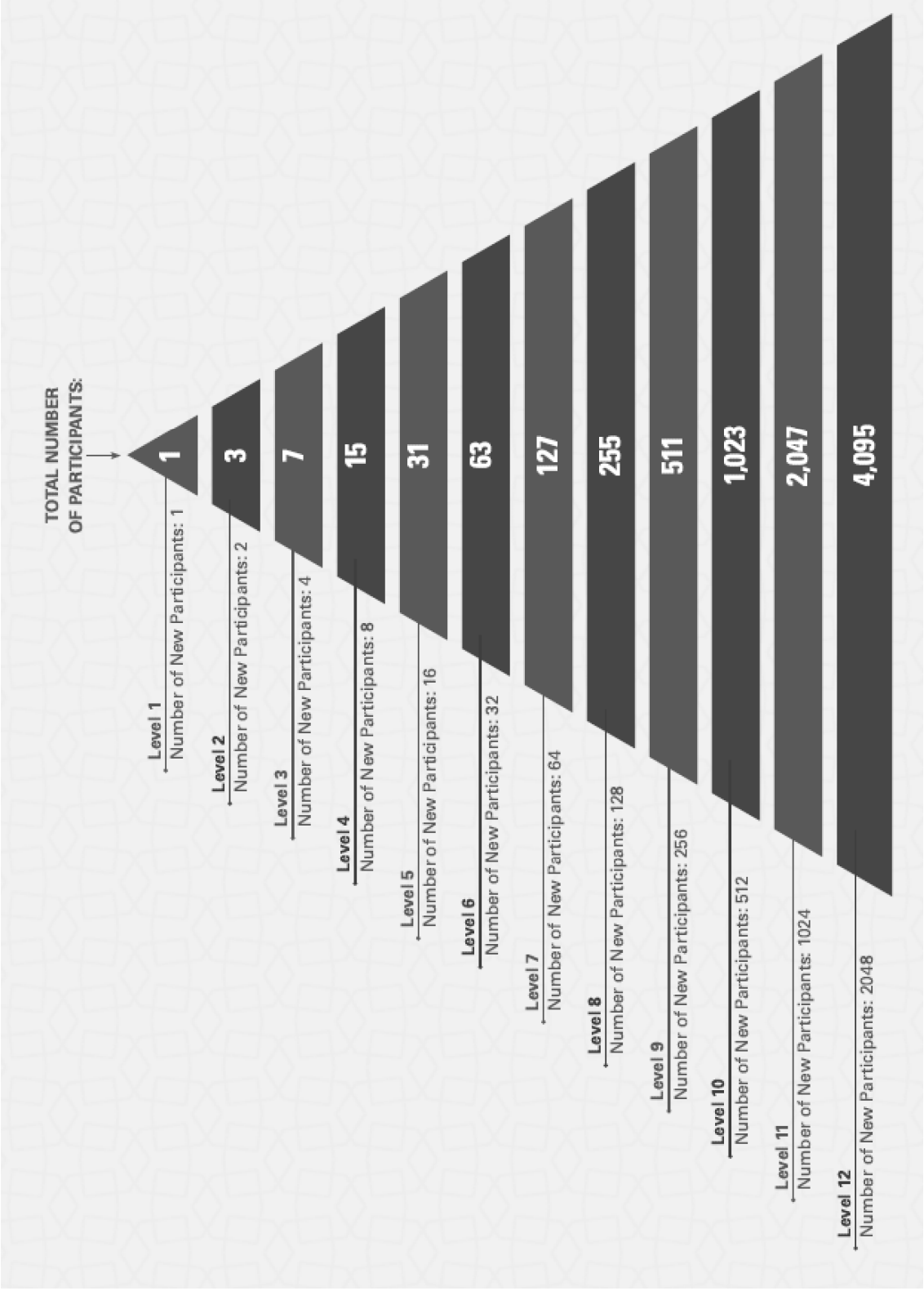
Commissions. I2G paid commissions according to a "binary compensation" plan: regardless of a distributor's rank, each distributor could have *at most* two other distributors directly underneath that person in the compensation structure (in MLM parlance, at most two "downlines"). *See id.*; *see also* R.497, PageID#4025.

So, if *A* joined as a distributor and subsequently recruited *B* and *C* as distributors, *A* would earn commissions based on *B* and *C*'s enrollment and spending. *B* and *C* could then recruit others into their *own* downlines: those others would then generate commissions not only to *B* and *C* but also back "upline" to *A*. But if *A* subsequently recruited another distributor (say, *D*), *D* could not be placed directly downline from *A*; rather, *D* would need to be downline from some other distributor. *B* and *C* could each have up to two direct downlines, each of which could have up to two direct downlines, and so on.

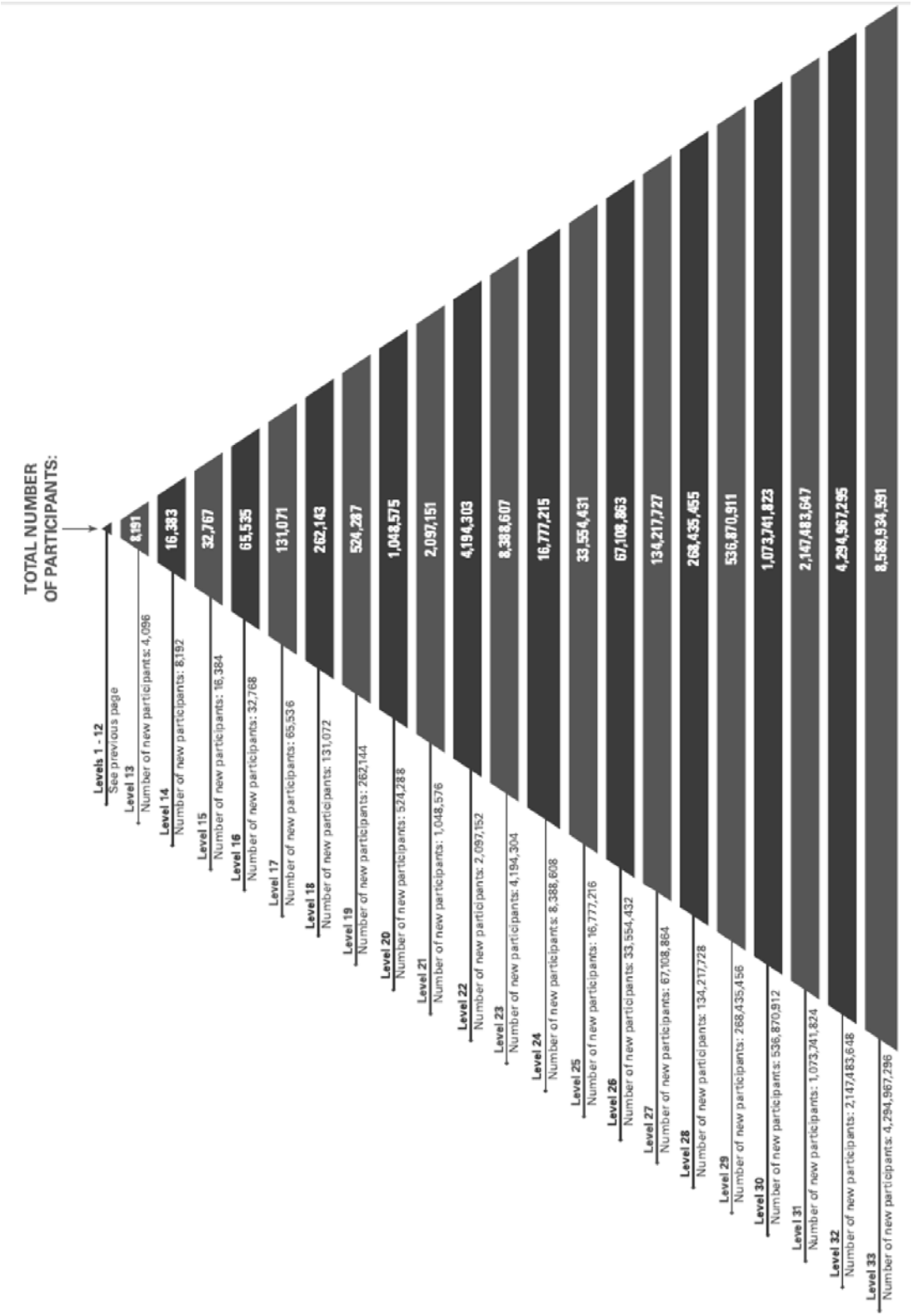
If *every* distributor in a binary-compensation network has exactly two direct downlines, then the resulting structure will naturally resemble a pyramid: a five-level network with all spots filled, for instance, will have a total of 31 participants (1 on the top level, 2 on the second level, 4 on the third level, 8 on the fourth level, and 16 on the fifth level). The math required to calculate the total number of positions under a binary compensation plan is simple: given n levels in the network, there are 2^n minus 1 spots. Thus, for a 33-level network, the number of theoretically available spots is $2^{33} - 1 = 8{,}589{,}934{,}591$. That number is theoretical, of course, because it is greater than the population of the Earth.

At trial, the government relied repeatedly on a diagram that depicts such a 33-level pyramid with the total number of participants if each level were fully occupied.

Here is page one, which shows the top twelve levels:



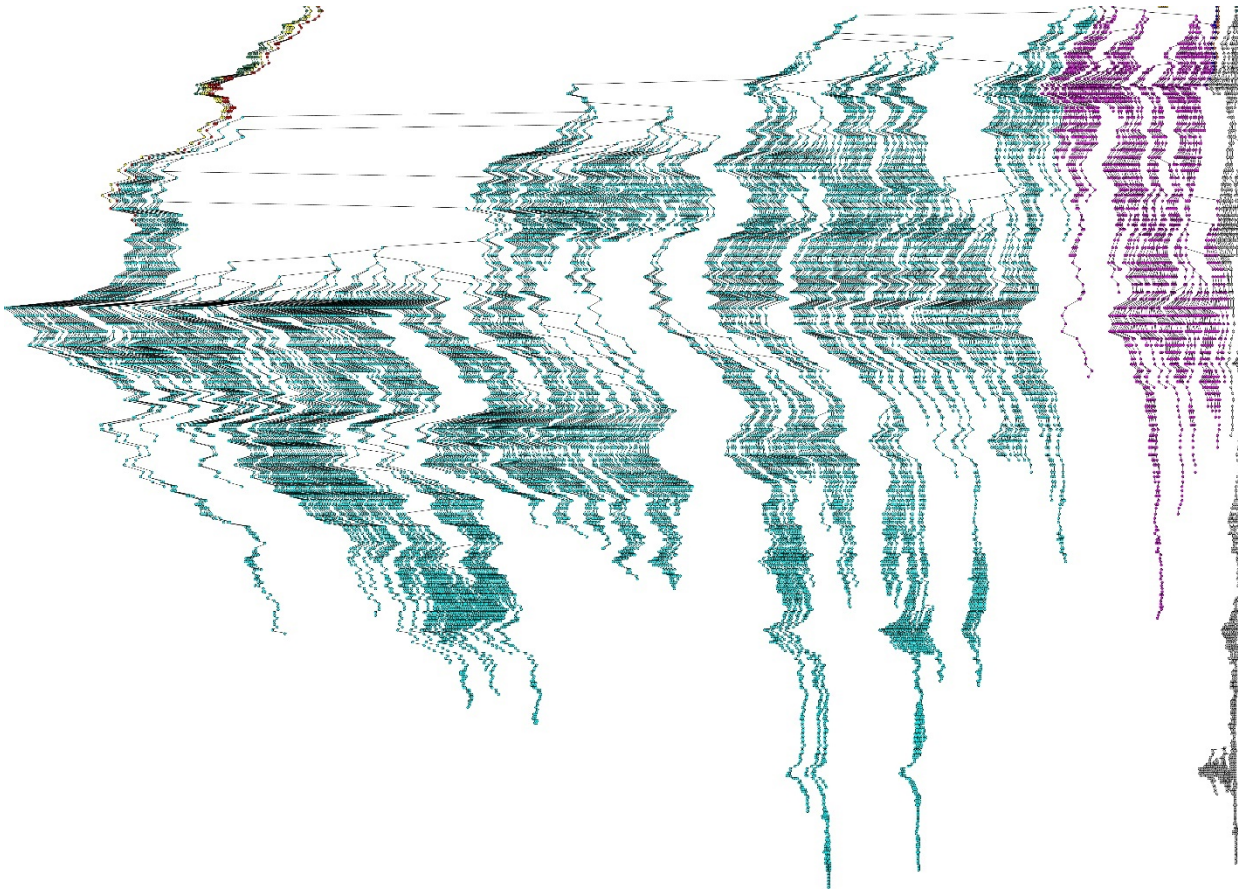
And here is page two, which shows the remaining levels:



GX1, App. A90-91.

I2G's network, however, had distributors spanning ***273*** levels. R.487, PageID#3848; R.498, PageID#4139. That was so even though I2G had, at most, approximately 22,000 distributors—a number that would easily fit within a ***fifteen***-level network ***if*** the network in fact resembled a pyramid. In reality, I2G's structure looked like this:

Level 1 (top; this side is "up")



Level 273 (bottom)

GX101G-1, App. Flash Drive.[2]

[2] This is a visual depiction of the spreadsheet admitted as GX101G-1. (The jury received a computer to analyze the data. R.672, PageID#7732:11-13.) Both the spreadsheet (GX101G-1) and a full-resolution image of this depiction are on the

Accordingly, the government's witnesses testified that I2G's structure was "leggy" and resembled not a pyramid but "roots" of a tree. R.487, PageID#3974:4; R.498, PageID#4139:7.

Unlike in a true pyramid structure, the overwhelming majority of spots in each of the overwhelming majority of levels in I2G's network were vacant. That was true even at the smaller, higher-ranked (*i.e.*, lower-numbered) levels towards the top of the network. *See* GX101G-1, App. Flash Drive, sorted by Column C (showing only 20 distributors at Level 10, 18 distributors at Level 11, and 19 at Level 12, for instance, compared to the 512, 1024, and 2048 participants that would be at each of those levels, respectively, if I2G's structure resembled a pyramid).

I2G's binary structure may seem unusual to a reader uninitiated into the world of lawful multi-level marketing programs. But within that world, it is the norm. *See, e.g.*, *FTC v. Neora LLC*, No. 3:20-cv-01979-M, 2023 WL 8446166 (N.D. Tex. Sep. 28, 2023) (discussing the distinction between lawful MLM and illegal pyramid schemes, and upholding Neora (a seller of purportedly anti-aging skincare products) as lawful MLM where (1) Neora offered multiple "product tiers" beyond an initial $20 enrollment fee, ranging from $199 to $1000; (2) 96% of the approximately

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Appendix Flash Drive. To review the data underlying this visual depiction, open the spreadsheet (filename "101g.1.xlsx") and sort by Column C, the "level" field. Column A (the "SortField" field) assigns a unique identifier (from 1 to 22447) to each position in the network.

400,000 distributors *lost* money; and (3) most of the commission rewards required attaining a rank that required recruiting at least three other distributors); *see also In re Amway Corp.*, 93 F.T.C. 618, 709-17 (1979) (affirming the legality of Amway against the FTC's pyramid-scheme complaint); *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 490 n.1 (6th Cir. 1999) (Moore, J., dissenting) (explaining that "the Amway program is essentially a pyramid" but not "an *illegal* pyramid").

Maike hired Robb Flener, a Kentucky accountant, to handle the books. Flener, who testified for the government, believed that there was nothing wrong with I2G and confirmed that if he thought any deception was afoot, he would never have agreed to be the signer on I2G's bank accounts. R.670, PageID#7257. Maike later hired another accountant, Mike Pierce, who told the government in an interview that Maike "never refused to give me anything, and whenever I asked for a backup document, he gave it to me." R.699, PageID#10125.

Maike also hired Jerry Reynolds, the owner of a software company that specialized in developing MLM commission-tracking programs, to create a program to manage I2G's commissions. R.498, PageID#4179-4184. Reynolds, another government witness, testified that he had worked with over a thousand multi-level marketing companies, many of which used binary compensation systems like I2G's, and that he would never work with any company "that was a pyramid scheme." *Id.* at PageID#4183. But Reynolds worked with Maike for decades, including for the

duration of I2G's existence. *Id.* And the district court remarked of Reynolds: "This guy, if he's not an expert, I don't know who is." R.498, PageID#4205:10-11.

b. I2G's Core Products: Touch, Songstagram, and the Online Casino

I2G began selling packages in summer 2013. R.465, PageID#3580. Over the course of its operation, I2G marketed three products: (1) the I2G "Touch," an integrated online communication and social media application; (2) Songstagram, a karaoke app; and (3) an online casino that, in full compliance with United States gambling laws, permitted access only to individuals located outside the United States. R.689, PageID#9272; R.504, PageID#4512; R.505, PageID#4699; R.669, PageID#6862:10.

I2G Touch. All I2G distributors received a license to use the I2G Touch, which was a white-label (that is, custom-branded) version of a software product previously developed as "Qubeey," into the development of which outside investors had invested at least $10 million. R.689, PageID#9272. The Touch, which launched in August 2013 after some preliminary pre-launch sales, was intended to be a revolutionary application that enabled users to cross-post content across social media platforms, among other things. R.465, PageID#3580. At the time, which was "before Facebook had bought Instagram," "there was nothing on the market able to do" what the Touch could do. R.689, PageID#9289.

The Touch also facilitated video conferencing (Zoom also launched its Version 1.0 in 2013), and it allowed users to collaborate on a whiteboard. R.504, PageID#4526; *see* GX107B at 8, App. A134. Another feature was the "walk-out": when a user finished reading a document on the Touch, an animated image of the document's author "would walk out on the screen" and personally greet the user. R.689, PageID#9200; *see also* PageID#9236 (investor's testimony that the walk-out feature alone was worth upwards of $3,000,000); PageID#9201 ("I never heard of anything like it."), GX107B at 9, App. A135.

Ultimately, approximately 22,000 people purchased licenses to use the I2G Touch through one of I2G's packages. R.498, PageID#4139. Approximately 4,700 of those purchasers bought Emperor packages, R.699, PageID#10334:2-11, meaning approximately 79% of I2G's distributors were *not* Emperors.

Songstagram. I2G distributors also received a license to use Songstagram (also spelled Songstergram in the record below), an app that launched in early 2014 and enabled users to create and share karaoke videos set to popular songs. R.504, PageID#4512, 4519 (Richard Anzalone, a cooperating government witness, testified: "Most of it was like a background music, and we would sing our own song, and it would stitch it together and do a nice little vignette[.]").

There were various complaints about the functionality of the Touch, and Songstagram never gained popularity. But a computer programmer (Jason Reeves,

a government witness) who worked for the apps' developer, Rocky Wright, testified that both Songstagram and the Touch worked well. R.684, PageID#8869 (Qubeey/Touch), 8900 (Songstagram). And evidence showed that Maike personally took steps to insist on Reeves's continued troubleshooting to address concerns, such as the need to have the Touch work in various languages when accessed by users in different countries. *See, e.g.*, *id.* at PageID#8835-8836 (discussing "localization"); *see also* GX539 and GX543, App. A177-180 (emails addressing difficulties with Reeves). All told, I2G paid Wright over $800,000 for product development and licensing for the Touch and Songstagram. R.670, PageID#7232.

The online casino. Maike and Barnes envisioned a product that would harness the marketing power of MLM to realize the profitability of online gambling. The result was an online casino, launched at i2gcasino.com, where users located in countries that permitted online gambling could gamble online. *See, e.g.*, GX501, App. A165-166 (email from prior to their acquisition of Finance Ventures in which Maike and Barnes discuss parameters of an online casino); GX503B, App. A167-176 (early draft of a business plan for an online casino marketed by MLM distributors who could "make money by simply spreading the word" about the casino, with one outcome being the casino's sale to an industry leader), GX503C (App. Flash Drive) at sheet 2 ("p&Lcash flow") (early draft of projections using the casino's then-working name "Diamond Royale" that showed both "USA Revenue"

(*i.e.*, revenue from distributors' contributions) and "International Revenue," which would include both distributors' contributions and gambling revenue from players outside the United States).

Emperors—those who bought in at the $5000 level—uniquely received a right to share (equally with other Emperors) in 50% of I2G's share of the profits earned from lawful online gambling at the casino. Crucially, the number of Emperors was capped at 5000: distributors knew and expected that I2G would sell only 5000 Emperor packages and that the casino profit-sharing program would include only those Emperors. R.505, PageID#4699; R.669, PageID#6862:10. With the cap of 5000 Emperors, there was no risk of dilution (as there would be if, for instance, unlimited Emperors could continue to enroll). And because distributors knew of the cap, there was no risk of surprise (as there might be if, for instance, someone signed up as the 5000th Emperor *expecting* to be able to continue to recruit other Emperors, only to realize that the level was "full").

The sale of 5000 Emperor packages would thus provide approximately $25,000,000 in operating capital and, if all went well, I2G would continue its growth, using that capital to innovate and to market the casino and its other products. *See* R.465, PageID#3602:3-4. Moreover, there would then be as many as 5000 Emperors with strong incentive to persuade gamblers worldwide (in countries that permit online gambling) to play at the I2G casino. *See id.*; *see also* R.683, PageID#8747:20-

25. Trial testimony from all ten government witnesses who had bought in as Emperors established that the opportunity to earn a share of the online casino's profits—a benefit that was entirely unrelated to recruiting other distributors to I2G—was a primary motivator in their decisions to buy an Emperor package; they did not care about *recruitment* rewards whatsoever. *See* R.500, PageID#4263:13-15 (Jordan Adams); R.515, PageID#5017:4-7 (Justin Moyer); R.667, PageID#6724:8-11 (Dino Aiello); R.512, PageID#4982:3-9 (Jeff Bennett); R.669, PageID#6862:1-13 (Shawn Vougeot); R.669, PageID#6957:5-15 (Mark Logue); R.683, PageID#8683:13-21 (Erik Wiksten); R.683, PageID#8719:5-8 (Victoria Sieb); R.683, PageID#8744:12-17 (Bruce Fredericks); R.699, PageID#10253:23-10254:1 (Margaret Alderdice).

To make the online casino a reality, Maike established a Hong Kong-based entity (Infinity 2 Global HK Limited) ("I2G HK") that contracted with Plus-Five Gaming (a Malta-based company that already operated online casinos). I2G HK acquired a license to operate a white-label version of Plus-Five's casino so that customers would see the I2G branding on the website when they gambled there. Plus-Five kept thirty percent of the I2G casino's profits; the remaining seventy percent accrued to I2G's benefit (50% of which, in turn, would be shared with the Emperors). R.486, PageID#3773.

The casino launched in August 2013, and by April 2014 it realized its first profitable month, based on over $1.2 million in chip revenue that month. R.487,

PageID#3870. I2G distributors who themselves resided outside the United States were some of the online casino's customers. R.504:#4299-4301; *see* R.487:#3873-3874; R.465, PageID#3603:5-16. Other individuals who were not I2G distributors set up "casino player" accounts that enabled them to gamble. R.497, PageID#4045.

c. I2G's Rebranding and Decline

Unfortunately, three series of events contributed to I2G's demise over the course of the year that followed the casino's launch. *First*, Qubeey (developer of the Touch) abruptly filed for bankruptcy, causing Maike to scramble to maintain the rights to license the Touch. *See In re Qubeey, Inc.*, Ch. 11 Petition, Doc. 1 in No. 1:13-bk-15805-MT (Bankr. C.D. Cal. Sep. 5, 2013). *Second*, banks began closing I2G's accounts over fears of government regulation related to online gambling activity, even though there was no allegation that I2G was facilitating *any* gambling within the United States or any unlawful gambling. *See, e.g.*, R.699, PageID#10227.

Third, a disgruntled I2G distributor, Chuck King, generated substantial bad publicity about I2G online and launched an intense effort to recruit distributors away from I2G, turn against I2G, demand refunds, and submit letters to government agencies requesting intervention. *See* R.511, PageID#4886 (Anzalone's testimony that King "made it a vendetta to, you know, do something about this company and take it down"). King personally drafted pro forma letters and directed I2G distributors to submit them to state attorneys general. *See* R.669, PageID#6891. King

even acted as a pseudo-lawyer and took money from I2G distributors under the guise of promising to take I2G to arbitration to get refunds that were not owed, none of which happened. *See* R.505, PageID#4808.

In response to the issues Maike faced with maintaining bank accounts and staving off the Chuck King mutiny, Maike consulted with counsel and decided in July 2014 to rebrand I2G as G1E (short for "Global One Entertainment"), to rebrand the casino as Velocity Casino, and to introduce new and different products related to travel and fantasy sports. R.511, PageID#4915; R.505, PageID#4583. Sales of Emperor packages were discontinued, and G1E's top package sold for $1499.95 rather than $5000. R.511, PageID#4940; GX106C, App. A100-109.

Unsurprisingly, the rebrand and the other ongoing circumstances inhibited G1E's growth, and, although the fantasy sports product was popular, aggregate sales declined. *See* R.505, PageID#4589; R.541, PageID#5156; R.701, PageID#10918. In January 2015, acting on information received from Chuck King together with tips forwarded from state government offices (such as tips prompted by Chuck King's campaign efforts), federal officers executed a search warrant on Maike's house, setting this prosecution in motion.

III. Procedural History

a. The Government Charges Maike with Conspiring to Run a Pyramid Scheme

In 2017, a federal grand jury returned an indictment charging Maike and others with conspiring to run I2G as a "fraudulent pyramid scheme." R.1, Indictment, at ¶¶ 1-2. The operative charging document for this appeal is the Second Superseding Indictment, returned in 2019, but from *day one* of this criminal proceeding, the government alleged that Maike engaged in a *pyramid* scheme, not in some other kind of scheme. *Id.*

The Second Superseding Indictment, R.230, PageID#1452, charged Maike with thirteen counts as follows:

Count One (Pyramid Scheme). The grand jury charged Maike and others with one count of conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1341 and 1349, alleging that Maike and others "engaged in a $25 million dollar [*sic*] fraudulent ***pyramid scheme***, operating under the name Infinity 2 Global," R.230, Second Superseding Indictment, at ¶ 1 (emphasis added); *see also id.* at ¶ 2 ("12G was operating as a fraudulent ***pyramid scheme***") (emphasis added). This count was the crux of the government's case against Maike and his co-defendants.[3]

[3] Originally, there were seven individual defendants. The government dismissed the charges against two. *See* R.378, PageID#2910 (Angela Leonard); R.596, PageID#5634 (Richard Anzalone). Two otherd, Dennis Dvorin and Jason Syn, pleaded guilty and did not appeal (Dvorin received a 12-month sentence for a single count of securities fraud, and Syn received probation). R.789, R.802. That left Maike

Counts Two Through Ten (Money Laundering). These counts alleged that Maike laundered money by transferring funds derived from the alleged mail-fraud conspiracy in Count One, in violation of 18 U.S.C. § 1957. Thus, if Maike's conviction on Count One is reversed, these money-laundering counts follow with it.

Counts Eleven and Twelve (Tax Evasion). These counts charged that Maike evaded individual federal income-tax liability in 2013 (Count Eleven) and 2014 (Count Twelve), in violation of 26 U.S.C. § 7201. The indictment charged Maike with making low-interest loans on favorable terms, totaling approximately $3.3 million, from I2G HK to an entity called RAW Ventures, LLC, of which Maike was a 50% owner, with the ultimate purpose of enabling RAW Ventures, LLC, to purchase real estate in Kansas. *See* GX300 and GX301, App. A163-164 (promissory notes). The indictment alleged that these were not genuine business-to-business loans but were instead draws that should have been taxable to Maike personally as income.

Count Thirteen (Securities Fraud). Finally, the indictment charged Maike and others with one count of conspiracy to commit securities fraud in violation of 15 U.S.C. § 78j(b) and 18 U.S.C. § 371. This count alleged that Maike and others

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and two co-defendants who were tried and convicted alongside him: Doyce Barnes and Faraday Hosseinipour. Barnes collaborated with Maike from the outset of I2G as discussed above. Hosseinipour joined I2G in summer 2013. R.504, PageID#4343-4347. Barnes and Hosseinipour have also appealed their convictions and sentences. *See* 6th Cir. Nos. 22-6121/23-5029/23-5560/23-5561.

made material misrepresentations or omissions "in connection with the sale of securities" on the basis that the Emperor packages were "investment contracts" governed by securities laws. R.230, PageID#1467 ¶40.

Over five years elapsed between the return of the opening indictment and the commencement of jury trial. For the first three-and-a-half years, Judge McKinley oversaw the case. In December 2020 it was transferred to Chief Judge Stivers, who ultimately presided over the 25-day trial that spanned two months in summer 2022. R.363.

b. The Government Asks for Jury Instructions That Allow Proof of a Pyramid Scheme to Conclusively Establish a Scheme or Artifice to Defraud

In the government's first pretrial memorandum, the government sought a jury instruction based on *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999), which, the government argued, held "that if the government could prove to a jury that a company was a pyramid scheme, the jury would ***necessarily*** have to find that the defendants had devised a scheme to defraud, because pyramid schemes inherently defraud their participants." R.185, PageID#1097 (emphasis added). The government knew from the outset that by charging Maike with a pyramid scheme, it played a powerful card: all it had to do was prove that I2G was a pyramid scheme, and it would avoid having to persuade the jury that I2G satisfied the murky definition of a "scheme to defraud." *See id.* The government, of course, took a risk that it might not be able to prove a pyramid. But the government sought and received an enormous

benefit by pursuing a pyramid-scheme theory, and, in doing so (and in articulating no alternative theories of mail fraud, whether in the disjunctive or otherwise), the government put Maike on notice to defend against the pyramid-scheme allegation.

c. On the Eve of Trial, the District Court Excludes Maike's Expert on Pyramid Schemes

In 2018, the government disclosed the report of one of its expert witnesses, William Keep, who it claimed was "an expert on retail and multi-level marketing, as well as pyramid schemes." R.92, PageID#560. The district court denied a defense motion to exclude portions of Keep's testimony. R.238, PageID#1641.

Also in 2018—more than *four years* before trial—Maike disclosed the report of his own expert on securities and pyramid schemes, Professor Manning Warren. R.95, PageID#566; R.381-1, PageID#2925-2931. Professor Warren held "40 years of experience as a law professor publishing and instructing law students on business organizations and securities law," R.390, PageID#3013, and he taught the *Koscot* case (*i.e.*, the seminal FTC case on pyramid schemes) in all his securities-law courses. *Id.*

Nevertheless, in April 2022, more than four years after this disclosure, the government moved to exclude Professor Warren as unqualified to give expert testimony on pyramid schemes. R.381, PageID#2920. On the night before trial began, the district court granted the government's motion, acknowledging Professor Warren's experience but ruling that it "is simply not sufficient." *Id.*

d. The Government's Opening Statement Includes Precisely One Theory of Mail Fraud: Pyramid Scheme

Trial began on July 12, 2022. Maike, Barnes, and Hosseinipour were tried together. *See* p. 20 n.3, *supra*; *see also* R.219, PageID#1420 (denying motion to sever).

In its opening statement, the government made its pyramid-scheme theory crystal clear:

"So if I2G wasn't really selling an online casino, a social media app, or a karaoke app, what exactly were they selling? The evidence will show that they were selling spots in a pyramid scheme." R.485, PageID#3730:13-16; *see also id.* at PageID#3730-3735 (referring to pyramid schemes *seventeen* additional times in approximately ten minutes).

The government's case-in-chief spanned the first eighteen trial days. The government called as witnesses:

- Its experts on pyramid schemes (William Keep: R.486, R.487) and securities (Chad Harlan: R.682, PageID#8492-8542);
- Jerry Reynolds, who ran the commission-tracking software company (R.497, R.498);
- Jason Reeves, the coder who worked for the developer of the Touch (R.684);

- Cooperating witness Richard Anzalone (R.465, R.504, R.505, R.511);
- Maike's accountants, Robb Flener (R.669, PageID#7062-7120; R.670, PageID#7171-7293) and Mike Pierce (R.670, PageID#7294-7388; R.682, PageID#8367-8388);
- Ten I2G distributors who bought Emperor packages: Jordan Adams (R.500), Justin Moyer (R.515), Dino Aiello (R.667, PageID#6719-6795), Jeff Bennett (R.512, R.513), Shawn Vougeot (R.669, PageID#6858-6941), Mark Logue (R.669, PageID#6946-6971), Erik Wiksten (R.683, PageID#8667-8699), Victoria Sieb (R.683, PageID#8703-8741), Bruce Fredricks (R.683, PageID#8741-8793), and Margaret Alderdice (R.699, PageID#10246-10266);
- IRS agent Paula Basham (R.699, PageID#10273); and
- IRS case agents Dave McClelland (R.700, PageID#10412; R.688; R.689) and Matt Sauber (R.699, PageID#10317) (Sauber took over as lead case agent after McClelland retired, *see* PageID#10320).

The government also called various other individuals, such as bank employees and real estate brokers, who testified as to background facts. After the defense case, the government called Scott Magers (an I2G distributor) as a rebuttal witness regarding the securities fraud count. R.671, PageID#7444-63.

e. The District Court Overtly Favors the Government's Lawyers

From the outset, the district court held defense counsel to a different standard than the government. The court stated, for instance, that it would *presume* that any points of law offered by the government were correct and that the government would not make points unsupported by caselaw—but it held no such presumption towards defense counsel:

- "I have worked with these [AUSAs], and, you know, I do—I do trust when they—you know, when Mr. Sewell says, 'No. This is the rule,' I'm assuming in short order he can produce me a case that says something like that." R.678, PageID#8021:10-14.

- "So it's not that I don't trust you-all, but I will likely trust Mr. Sewell and Ms. Ford just because I know them very well." R.678, PageID#8021:16-18.

- "I am going to presume, partially based upon my history with these two [AUSAs], that they concede points they should concede." R.678, PageID#8021:19-24.

- Regarding alleged *Brady* violations: "I am relying upon the United States and their good faith. I do deal with these attorneys on a regular basis, and they have always—you know, they've exemplified—they have complied with their duty of candor with the Court, they have maintained excellent credibility, and I am counting on them to make sure that their disclosures are compliant with the law. [. . .] I absolutely trust you on that, that you and [AUSA Ford] are both well experienced in determining what needs to be produced." R.683, PageID#8635:9-14, PageID#8641:23-25.

The court extended this presumption even though Chief Judge Stivers conceded he was "not well steeped in criminal law" (R.678, PageID#8009:22-23), had "never tried any criminal cases" as a lawyer (R.683, PageID#8621:6-7), had

never "tried a case with more than one defendant" as a judge (R.678, PageID#8022:8-9), and was "really a blank slate" as to foundational concepts in this case (R.678, PageID#8022:9-13).

The court continued to express these sentiments throughout trial. *See, e.g.*, R.670, PageID#7393:13-15 ("frankly I'm just not familiar with an FBI agent's—all of the 302s they do when they testify"); R.699, PageID#10140:18-23 ("As I've indicated before, I do know [AUSA] Ford, I've dealt with her for a long time, and she's got a great track record. Quite frankly, I do trust her judgment, her experience, and I appreciate the defendants raising these points. The mechanics of it I frankly—like I've told you-all before, I don't have a lot of experience in criminal cases.").

f. Trial Testimony Establishes There Was No Pyramid Scheme

The crux of the government's case-in-chief was that I2G operated as a pyramid scheme. To that end, the government called as witnesses ten I2G distributors who had bought Emperor packages. All ten testified that they did not seek an Emperor package in order to be rewarded for recruitment (an essential element of a pyramid scheme, *see* Section I.A, *infra*) but simply to make money, chiefly to share in the profits of the online casino. R.500, PageID#4263:13-15 (Jordan Adams); R.515, PageID#5017:4-7 (Justin Moyer); R.667, PageID#6724:8-11 (Dino Aiello); R.512, PageID#4982:3-9 (Jeff Bennett); R.669, PageID#6862:1-13 (Shawn Vougeot); R.669, PageID#6957:5-15 (Mark Logue); R.683,

PageID#8683:13-21 (Erik Wiksten); R.683, PageID#8719:5-8 (Victoria Sieb); R.683, PageID#8744:12-17 (Bruce Fredericks); R.699, PageID#10253:23-10254:1 (Margaret Alderdice).

Anzalone's Plea. Some of the other trial evidence bears mention as well. Cooperating witness Richard Anzalone, for instance, testified for four days. He testified that he was charged as a co-defendant and had pleaded guilty:

> Q: What were you charged with?
> A: Conspiracy to commit mail fraud and conspiracy to commit security fraud.
> Q: And did you plead guilty?
> A: Yes, I did.
> Q: What did you plead guilty to?
> A: Conspiracy for security fraud.
> Q: And only that charge?
> A: Yes, sir.
> Q: Why just that charge?
> A: It's the lesser of the two charges and the one I feel for sure we did.
> Q: Did you also commit the crime in Count 1, the conspiracy to commit mail fraud?
> A: I believe so, now that I understand it.

R.465, PageID#3576.

Over objection,[4] the court permitted the government not only to elicit testimony about Anzalone's guilty plea, but also to rely on the guilty plea in the government's opening statement to show the guilt of Maike, Barnes, and

[4] The district court ruled that unless a defendant specifically declined to join an objection, an objection from one defendant would count for all three. R.679, PageID#8253; R.681, PageID#8307.

Hosseinipour, tainting the jury from the beginning. R.485, PageID#3736; R.678, PageID#8030-8032. The district court, also over objection, declined to give any limiting instruction on either of these uses of Anzalone's plea.[5]

Government Exhibit 1. Over Maike's objection, the district court admitted a two-page diagram of a simple pyramid, reproduced on pages 8-9, *supra*. R.486, PageID#3743. *See* GX1, App. A90-91. The government showcased this diagram throughout Keep's and Reynolds's testimony, despite its inapplicability to I2G's 273-level binary-tree structure. *See, e.g.*, R.486, PageID#3746 (Keep); R.498, PageID#4140-41 (Reynolds).

Agent Basham. Paula Basham testified regarding the loans made from I2G HK to RAW Ventures, LLC, which pertain to Counts 11 and 12 (tax evasion).

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[5] Maike and Barnes differed slightly in how they objected to the use of Anzalone's plea. Maike, on the first day of trial, sought to preclude any use of Anzalone's plea in opening arguments. R.678, PageID#8028:6-16, PageID#8029:16-23. The district court stated that there was "no question that" there would be a limiting instruction that "the fact that [. . .] one person pled guilty can't be held against the other defendants." R.678, PageID#8029:20-25. But the district court also stopped the conversation on that issue, PageID#8020:15-16, and the district court cautioned Maike ***not*** to object to that during the government's opening. PageID#8030:23-25 ("with regard to what the United States can say during their opening statement about Mr. Anzalone – I really don't want to hear an objection to that, and then, frankly, if I'm wrong, I'll declare a mistrial"). Maike subsequently "preserve[d] the record" on the issue, explaining that Maike objected both to the government's use of Anzalone's plea in opening arguments *and* to any decision not to give a limiting instruction to the jury. R.678, PageID#8163:16-23. Later, on the fourth day of trial, Barnes made an *additional* objection to the government's use of Anzalone's plea on direct examination. R.681, PageID#8304:4-14. Maike declined to join in that additional objection, but that decision did not impact Maike's already-preserved objections.

R.699, PageID#10281. Defense counsel did not object to proposed testimony concerning the tax consequences of including income on a tax return, but Basham, over objection, ultimately testified in her capacity as an IRS agent about "what is and isn't income." R.699, PageID#10280-10281. The district court initially sustained this objection. R.699, PageID#10281:15. Later, the government tried again, and the district court changed its mind. R.699, PageID#10304:12 ("All right. I'll give you some latitude."). Basham then gave extremely damning testimony that the circumstances surrounding the loans at issue meant the loans "should be treated as income." R.699, PageID#10310:22.

Evidence of Misrepresentations. To be sure, there was evidence that Maike and others used language reflective of multi-level marketing salesmanship, like "Join I2G and get your share of the [$]150 billion gambling pie." R.683, PageID#8742-43. I2G distributors flashed "big checks" at gatherings and shared presentations that contemplated the possibility of big earnings. R.504, PageID#4445. Maike made some exaggerated claims of the online casino's profits. R.504, PageID#4505-07. And Maike made some lofty projections for how quickly I2G would grow. R.504, PageID#4305:21-22. But even Anzalone (the government's star witness) testified that he thought that when Maike made these kinds of pronouncements, he was simply "being excited and overexaggerating"—*i.e.*, speaking ordinary puffery. R.504, PageID#4306:5, PageID#4425:17. And the

evidence established that, puffery aside, I2G always made clear that distributors had to work hard to generate revenue in order to earn commissions and increase their take of the casino profit-sharing. R.683, PageID#8747:20-25.

g. The Government Changes Its Mind, Deciding That It No Longer Needs to Prove a Pyramid Scheme

Maike sought a jury instruction that, in line with the indictment, articulated elements of mail fraud as follows:

> (1) First, a defendant knowingly participates in, devises, or intends to devise a scheme to defraud in order to obtain money or property, ***through an illegal pyramid scheme***, ***knowing*** that he is participating in such a scheme.
>
> (2) Second, that the scheme included a material misrepresentation or concealment of a material fact.
>
> (3) Third, that the defendant had an intent to defraud.
>
> (4) Fourth, that the defendant used the mail or caused another to use the mail in furtherance of the scheme.

R.290, PageID#2013-14 (emphasis added), R.702, PageID#11105. Looking at the first element, Maike's proposed instruction would have required the jury to find that the scheme to defraud employed an "illegal pyramid scheme." And it would have required the jury to find that Maike *knew* it was a pyramid, as opposed to finding only that Maike knew that he was participating in I2G.

The government, however, changed course from the pyramid-scheme theory that it had advanced in the indictment, in its opening statement, and throughout trial. Instead, while still acknowledging the benefit that the government received from presenting the jury with the *option* of finding a pyramid scheme, the government

sought instructions that would permit the jury to convict *without* finding a pyramid scheme:

> So there's two ways to prove the fraud, right? One way to prove the fraud is [. . .] that there's a specific lie outside of – irrespective of it being a pyramid scheme. Another way to prove the fraud is to say that this is a pyramid scheme that they designed and people bought into it.
>
> If it is a pyramid scheme and people bought into it, then all of them by definition were defrauded whether or not there was a lie involved or not. To win on the pyramid scheme, you don't have to show any particular lie. You just have to show that they designed this pyramid scheme and sold positions.

R.692, PageID#10009:11-24.

The court, over objection, ultimately issued the government's proposed instruction: "First, that the defendant knowingly participated in or devised a scheme to defraud in order to deprive another of money or property, that is through the sale of Emperor positions in Infinity 2 Global or i2g[.]" R.554, PageID#5265, *see also* R.429, PageID#3290. The instruction required the scheme to involve the sale of Emperor positions, but it did not require the jury to find a pyramid scheme. Instead, over objection, the court separately instructed, "A pyramid scheme constitutes a scheme or artifice to defraud for purposes of this instruction." R.554, PageID#5266; R.702, PageID#11109:6-21.

The court also declined, over objection, to give a requested instruction on anti-saturation that would have permitted the jury to find, as an affirmative defense to the pyramid-scheme charge, that I2G had measures in place (*e.g.*, the cap of 5000

Emperor packages) that meant I2G was not destined to collapse due to distributors' inability to find new recruits (*i.e.*, due to saturation of the market for new recruits). R.533, PageID#5090; R.569, PageID#5359.

And the court, over objection, instructed: "Advice of an accountant is not a defense to the crimes charged under the indictment." R.554, PageID#5279.

h. The Jury Convicts

The defense case and the charge conferences spanned Trial Days 18 through 23. On Day 24, the government called Scott Magers as a rebuttal witness, the court instructed the jury, and the parties gave their closing statements. On Day 25, the jury deliberated and returned its verdict, finding Maike and his co-defendants guilty on all counts. R.672, PageID#7742. The verdict form did not require the jury to specify whether it found a pyramid scheme. R.553, PageID#5238.

On December 12, 2022, the district court sentenced Maike to ten years in prison on the mail-fraud conspiracy and money-laundering counts (Counts 1-10) and a concurrent five years in prison on the tax-evasion and securities-fraud counts (Counts 11-13). R.617, PageID#6077.

This appeal follows.[6]

[6] The district court separately ordered restitution as part of Maike's sentence. R.744, PageID#11543-44. Maike has appealed that order in 6th Cir. No. 23-5563.

IV. Rulings Under Review

Maike challenges the following rulings on appeal:

1. Pretrial order on anti-saturation. R.347, PageID#2809.

2. Order excluding Professor Warren as Maike's pyramid-scheme expert. R.454, PageID#3538.

3. Admission of GX1. R.486, PageID#3743.

4. Rulings permitting the government to use co-defendant Anzalone's guilty plea. R.678, PageID#8020:15-16, PageID#8030:23-25.

5. Ruling permitting Paula Basham to give undisclosed expert testimony. R.699, PageID#10304:12.

6. Ruling on whether the government breached its *Brady* obligations. R.699, PageID#10135:14-25.

7. Jury instructions. R.554, PageID#5251.

8. Ruling on defense objection to the court's answer to a jury question. R.672, PageID#7741.

9. Denial of motion for acquittal or new trial. R.601, PageID#5743.

SUMMARY OF THE ARGUMENT

First, this Court should reverse because there was insufficient evidence that I2G's Emperor program was an illegal pyramid scheme, which the indictment charged in Count 1 and which was a subsidiary element of Count 13. A program is a pyramid scheme only if it is characterized by buyers' dependence on continued recruitment of others into the program. But all ten of the government's witnesses who had bought Emperor packages testified that they had no interest in recruitment whatsoever. Alternatively, to the extent that the jury instructions permitted the jury to find Maike guilty of Counts 1 and 13 without finding a pyramid scheme, there was a constructive amendment or material variance that violated Maike's Fifth and Sixth Amendment rights to indictment and apprisal of the particular conduct charged. The government charged Maike with running a pyramid scheme, and it defies the Constitution to let the government change course and get a conviction without proving a pyramid scheme.

Second, this Court should reverse as to Counts 1 and 13 because the district court failed to give a requested and legally correct instruction on anti-saturation. Anti-saturation is an affirmative defense to a pyramid-scheme charge when a company has measures in place that ensure it is not destined to collapse due to an inability to find new recruits, and Maike demonstrated that a 5000-member cap on the number of Emperors was one such anti-saturation measure. This Court should

also reverse as to Counts 1 and 13 because the district court's instructions on scienter were legally erroneous because they failed to require the jury to find that Maike *knew* that I2G was a pyramid scheme and because they permitted the jury to find a "scheme to defraud" without finding any *mens rea* element in the first place. This Court should reverse as to Counts 11 and 12 because the district court gave a legally incorrect instruction on reliance on an accountant's advice.

Third, numerous other errors independently require reversal:

(A) The district court erred in allowing the government to elicit testimony of a co-conspirator's guilty plea and use it as substantive evidence of Maike's guilt, all without giving a promised (and required) limiting instruction.

(B) The district court abused its discretion in admitting GX1, a prejudicial diagram of a pyramid.

(C) The district court abused its discretion in excluding Maike's expert on pyramid schemes, Professor Manning Warren, the day before trial began, even though Maike had disclosed Professor Warren four years earlier and even though Professor Warren was eminently qualified under Fed. R. Evid. 702.

(D) The district court abused its discretion in permitting IRS Agent Basham to give undisclosed expert testimony.

(E) The district court failed to hold the government to its *Brady* obligations, most importantly as to exculpatory statements of Maike's accountant Mike Pierce.

(F) The district court erred in denying Maike's motion for acquittal as to Count 13 when no overt act occurred within the limitations period for securities fraud and when the Emperor package was not an investment contract and was thus not a security in the first place. The Emperor package was not an investment contract because Emperors, by marketing I2G's casino to potential gamblers, contributed to their own potential earnings and thus did not expect to be paid *solely* from the efforts of others. Moreover, Emperors did not reasonably expect to make a "profit" on their $5000 membership fee; rather, Emperors paid that fee and expected to share in the profits of I2G's casino, which is not the sense in which "profit" applies under the relevant securities statute.

(G) The district court erred in insinuating to the jury that there had in fact been an overt act occurred within the limitations period for securities fraud.

(H) The district court abused its discretion in permitting Special Agent McClelland to testify about what putative victims told him in interviews when that testimony was both improper hearsay and violative of Maike's Confrontation Clause right to cross-examine his accusers.

(I) The district court abused its discretion in denying Maike's motion for new trial, both because the verdict was against the weight of the evidence and because the interests of justice required a new trial in light of the individual and cumulative errors.

(J) The errors that require reversal of Count 1 (mail-fraud conspiracy) also require reversal of Counts 2 through 10 (money laundering), because the money-laundering counts apply only if Maike was guilty of mail-fraud conspiracy. And the errors that require reversal of Counts 1 and 13 caused spillover prejudice that further require reversal as to Counts 11 and 12.

Maike thus asks this Court to vacate his convictions entirely on Counts 1 through 10 and Count 13 and to remand for retrial on Counts 11 and 12 only. Alternatively, Maike asks this Court to remand for retrial on all counts so that Maike may have the fair trial that our Constitution promises him.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING MAIKE'S MOTION FOR ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF AN ILLEGAL PYRAMID SCHEME.

This Court should reverse Maike's convictions on Counts 1 and 13 because there was insufficient evidence for the jury to find that I2G's Emperor package employed an illegal pyramid scheme.

Background. Maike moved for acquittal, under Fed. R. Crim. P. 29, on the grounds that there was insufficient evidence of a pyramid scheme, and the court denied that motion. R.569, PageID#5350; R.601, PageID#5756.

Standard of Review. This Court reviews a challenge to the sufficiency of evidence *de novo* "and examine[s] the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the ***essential elements*** of the crime beyond a reasonable doubt." *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008) (emphasis added).

Count 1 charged Maike with conspiring to commit mail fraud by engaging a "fraudulent pyramid scheme." R.230, PageID#1452. Count 13 charged Maike with conspiring to commit securities fraud while "engaging in acts, practices, and courses of business . . . as charged in Count 1," *i.e.*, in the course of a pyramid scheme. R.230, PageID#1467. The essential elements of mail-fraud conspiracy (Count 1) include *both* the elements of conspiracy under 18 U.S.C. § 371, *see United States v.*

Strong, 702 F.2d 97, 100 (6th Cir. 1983), *and* the elements of mail fraud under 18 U.S.C. § 1341. And, because Count 13 incorporates the fraudulent "scheme" element charged in Count 1, both Count 1 and Count 13 required the jury to find, beyond a reasonable doubt, the existence of the same fraudulent scheme.

The elements of conspiracy are not in dispute. *See* R.554, PageID#5259.

But the elements of mail fraud under 18 U.S.C. § 1341 are in dispute: Maike asserts that the statute, as charged in this indictment, required proof of a pyramid scheme. The government disagrees. (Maike also asserts, *see* Section II.B *infra*, that the statute required proof that Maike *knowingly* participated in a pyramid scheme.)

To be clear, the statutory text of 18 U.S.C. § 1341 does not even mention the words "pyramid scheme," let alone does it define its elements. Some criminal statutes are "fully descriptive of the offence," such that the language of the statute itself suffices to put the defendant on notice of the offense charged. *Potter v. United States*, 155 U.S. 438, 444 (1894). But other statutes fail to "set forth all the elements necessary to constitute the offence intended to be punished" and thus require reference to other statutes or to the common law. *United States v. Carll*, 105 U.S. 611, 612 (1881).

Section 1341 is among the latter, and it requires a review of applicable caselaw to articulate its elements. *See United States v. Maddux*, 917 F.3d 437, 443 (6th Cir. 2019) (articulating three elements of mail fraud: a scheme to defraud, use of the mail,

and intent to defraud), *United States v. Faulkenberry*, 614 F.3d 573, 580-81 (6th Cir. 2010) (further defining the "scheme" to defraud as "any plan or course of action by which someone ***intends to*** deprive another of money or property by means of false or fraudulent pretenses, representations, or promises" (emphasis added)); *see also Neder v. United States*, 527 U.S. 1, 25 (1999) (the false representations in the scheme to defraud must be "material").

The Sixth Circuit Pattern Jury Instruction distills the teachings of *Maddux*, *Faulkenberry*, and *Neder* into four, rather than three, elements of mail fraud: (1) a scheme to defraud, (2) the scheme's inclusion of material misrepresentations or concealments, (3) intent to defraud, and (4) use of the mail. 6th Cir. Pattern Jury Instructions § 10.01, App. A181. Notably, the "scheme to defraud" element contains a scienter element (*i.e.*, the defendant must *intend* that the *scheme itself* be designed to defraud) that is separate from and in addition to the "intent to defraud" element of mail fraud. *See id*. The latter "intent to defraud" element can be satisfied by the defendant's intent contemporaneous with making a single misrepresentation—but that intent does not, on its own, prove the existence of a scheme that itself was intended to defraud. That matters because Congress has not sought to punish every misrepresentation that a person might make in the course of day-to-day business; rather, Section 1341 applies only when the scheme itself is intended to defraud and only when, in carrying out such a fraudulent scheme, a defendant makes a

misrepresentation intended to defraud. *See United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1179 (2d Cir. 1970) (finding "white lies" to be "repugnant" but insufficient to "constitute a scheme to defraud [. . .] under section 1341"); *cf. United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (Thapar, J.) ("The wire-fraud statute, 18 U.S.C. § 1343 does not enact as federal law the Ninth Commandment given to Moses on Sinai. For § 1343 forbids only schemes to *defraud*, not schemes to do other wicked things, *e.g.*, schemes to lie, trick, or otherwise deceive."), *modified in part on panel reh'g*, 838 F.3d 1168.

The preceding two paragraphs define ordinary mail fraud, but this Court has gone yet one step further to set forth the essential elements of a "scheme to defraud" when that scheme is a "pyramid scheme." In *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 484 (6th Cir. 1999), this Court held that, "[u]nquestionably, an illegal pyramid scheme constitutes a scheme to defraud." And it followed the Ninth Circuit in adopting the two-element definition of "pyramid scheme" established by *In the Matter of Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1975 WL 173318 (1975):

> Such [pyramid] schemes are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users.

1975 WL 173318 at *60. *See also Gold Unlimited*, 177 F.3d at 480-81 (approving the Ninth Circuit's adoption of *Koscot* in *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1996)).

The Ninth Circuit explained in *Omnitrition* that *Koscot*'s second element—that the scheme is characterized by payments for recruitment-based rewards—is the hallmark of a pyramid scheme:

> The satisfaction of the second element of the *Koscot* test is the *sine qua non* of a pyramid scheme: "As is apparent, the presence of this second element, recruitment with rewards unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay a valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed."

Omnitrition, 79 F.3d at 781 (quoting *Koscot*, 86 F.T.C. at 1181).

This Court in *Gold Unlimited* applied the two-element *Koscot* test to uphold the mail-fraud and money-laundering convictions of a corporation that sold gold coins through a distribution network wherein buyers would make a cash down payment on gold coins and then recruit new buyers in order to earn commissions to pay off the remaining balance owed. 177 F.3d at 476-77. Evidence showed that the corporation's "financial success ***depended*** on the 'recruitment of an increasing number of new investors into the Binary Compensation Program,' and not on product sales." *Id.* at 477 (quoting trial transcript) (emphasis added). This was because the only way the operation could continue was if each new buyer was able to find subsequent buyers to recruit and thereby generate commissions to fund the

recruiting buyer's purchase of gold. *Id.* at 476. No one simply came to the corporation to buy gold outright. *See id.* There was no plausible revenue stream independent of recruitment. *See id.* The jury thus found that the defendants "knowingly operated an illegal pyramid scheme with the intent to defraud." *Id.* at 475.

Here, because the indictment charged Maike with engaging in a pyramid scheme, both Count 1 and Count 13 required the jury to find, beyond a reasonable doubt, the existence of a pyramid scheme as defined in *Koscot* and as applied in *Gold Unlimited*. For the reasons that follow, there was insufficient evidence for the jury to do so.

A. No reasonable juror could have found that the government met its burden to establish that I2G was an illegal pyramid scheme under *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999).

This case is fundamentally unlike *Gold Unlimited*. The evidence at trial firmly established that I2G's online casino generated revenue *entirely independently* of any recruiting whatsoever. *See, e.g.*, R.487, PageID#3870 ($1.2m in casino chip revenue in April 2014 alone); GX101C, App. Flash Drive (listing over $300,000 in casino chip purchases). While I2G distributors themselves could and in fact did gamble at the casino, undisputed testimony showed that the casino generated external revenue as well. R.504:#4299-4301; R.487:#3873-3874; R.465, PageID#3603:5-16; R.497, PageID#4045. And if the casino had taken off, it could have grown and succeeded

indefinitely, generating substantial profits (again, *independent* of recruiting) both for I2G's owners and for the 5000 Emperors who stood to split 50% of I2G's share of the profits.

In *Gold Unlimited*, on the other hand, there was no way around the corporation's fundamental dependence on recruitment: because individuals never purchased gold coins from the corporation absent an expectation of being able to subsidize their purchase with commissions earned from recruiting new buyers, there was no possibility of the corporation's success independent of recruitment. That is why the jury in *Gold Unlimited* reasonably found that the corporation's "financial success depended on" recruitment. 177 F.3d at 477.

The government's theory in this case was that I2G's Emperor package constituted a pyramid scheme. R.230, PageID#1452-53. The government charged *only* that the Emperor package, and not the other packages, operated as an illicit pyramid scheme, and the district court's instructions on mail fraud accordingly required the jury to find that the fraud occurred "through the sale of Emperor positions" rather than through packages of other ranks. R.554, PageID#5265. But the evidence at trial was insufficient to prove *Koscot*'s second element, because there was no "elaborate chain letter device" wherein Emperors who paid "a valuable consideration with the expectation of recouping it to some degree via ***recruitment*** are bound to be disappointed." *Omnitrition*, 79 F.3d at 781 (quoting *Koscot*, 86

F.T.C. at 1181). Rather, Emperors expected to recoup their payment when foreigners *gambled* at I2G's online casino.

No reasonable juror could have found that I2G's growth depended on recruitment

As set forth above, *Koscot* requires that distributors pay money to receive "(1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users." 86 F.T.C. at 1181. The first element is not in dispute: Emperors received the right to sell I2G's products, such as the Touch. The second element is missing: Emperors did not seek the right to receive rewards "in return for recruiting other participants" in the first place. To be sure, I2G's binary compensation plan provided incentives in the form of commissions to those who bought an Emperor package and recruited other distributors who in turn sold I2G products. *See* GX106A, App. A92-99. But I2G did not depend on recruitment.

The government subpoenaed ten I2G distributors to testify about their purchases of Emperor packages. And ***all ten*** unequivocally swore that they were in it for the casino profit-sharing, not for any recruitment rewards:

- R.500, PageID#4263:13-15 (Jordan Adams):

> Q: Was recruiting a part of the profit sharing that you were buying into?
> A: No, I didn't really understand it like that. I just was more interested in just the profit sharing. I wasn't – I'm not a recruiter.

- R.515, PageID#5017:4-7 (Justin Moyer):

  Q: Did you have any interest in recruiting people?
  A: No.
  Q: Was your game plan to recruit people?
  A: No.
  Q: What was your game plan?
  A: To try to make more than my $5,000.
  Q: Based on casino profits?
  A: Yes.

- R.667, PageID#6724:8-11 (Dino Aiello):

  Q: Were you interested in recruiting in other people and earning recruitment bonuses and then building a downline and all that?
  A: No, sir.

- R.512, PageID#4982:3-9 (Jeff Bennett):

  Q: And were you interested in that [network sales] part?
  A: No.
  Q: Okay. Next part there on The Infinity Comp Plan Q&A.
  A: Oh, boy. As I recall, that's where they put up levels of what you could make by selling, you know, certain levels and such.
  Q: Were you interested in that part?
  A: I think that actually tied in with the Business Building, to be honest with you; but, no, it – none of that did.
  Q: Okay. Then next section, Let's Talk Casino.
  A: That was my interest.

- R.669, PageID#6862:1-13 (Shawn Vougeot):

  Q: And what were the benefits that interested you about the emperor package?
  A: Yes. So I didn't – at the time I didn't have a huge network of people. And so I was finding, in the first two weeks, that getting other people interested in this business opportunity was more difficult than I thought it would be, and the emperor package said that no sponsoring was required. [. . .]
  Q: So you could make money without recruiting?

A: Yes.
Q: Okay. And what was your understanding of how you would make money without recruiting? Where would the money come from?
A: My understanding is there was online gambling[.]

- R.669, PageID#6957:5-15 (Mark Logue):

  Q: Did you understand, based on the representations you had heard before making the purchase, that you were required to recruit people in order to make money, or did you think of it as something that was passive[?]
  A: You could do both [. . .] but my [. . .] intention was for it to be more passive.

- R.683, PageID#8683:13-21 (Erik Wiksten):

  Q: And you knew that [recruiting] was – that's an important thing in MLMs; correct?
  A: Yes, sir.
  Q: Not what you were interested in though; correct?
  A: That's correct.

- R.683, PageID#8719:5-8 (Victoria Sieb):

  Q: You didn't know at the time what, if any, level you were on; correct?
  A. No, did not know.
  Q. And you weren't interested in that?
  A. No.

- R.683, PageID#8744:12-17 (Bruce Fredericks):

  Q: What caught your eye the most?
  A: [. . .] the one that really I hung my hat on and wanted to become an emperor was, "Join as an emperor, and you do not have to recruit, and you do not have to gamble."

- R.699, PageID#10253:23-10254:1 (Margaret Alderdice):

  Q: Okay. Were you hoping on making money from this?
  A: Absolutely.

> Q: Okay. And were you – did you have any plan of recruiting other people into the business and building a downline and things like that?
> A: Honestly, no.

If the Emperor package were a pyramid scheme, then it would have *required* continued recruitment of downline distributors in order to succeed. It did not. In light of the uncontroverted testimony of the government's own witnesses that Emperors had zero concern for recruitment in the first place, and in light of the absence of *any* evidence that the Emperor program's success required continued recruitment efforts (as opposed to continued *marketing* efforts for the casino), no reasonable juror could find that it was a pyramid scheme.

Ultimately, in part due to the government's early intervention, the casino was unsuccessful. But a business's failure does not turn an otherwise lawful multi-level marketing enterprise into the object of federal criminal law let alone into a pyramid scheme. *See, e.g.*, *FTC v. Neora LLC*, No. 3:20-cv-01979-M, 2023 WL 8446166 (N.D. Tex. Sep. 28, 2023) (upholding Neora as a lawful MLM program, rather than an illegal pyramid scheme, even though earning most of the offered commissions required recruitment and even though 96% of the approximately 400,000 distributors lost money). Nor is there any allegation, for instance, that Emperors were paid less than their fair share of casino profits when such profits did accrue. Simply put, no federal law is violated when a company sells a limited pool of memberships that feature the right to receive a share of the company's profits.

Finally, even if the Court disagrees with the proposition that the Emperor package was not characterized by recruitment-related rewards, there was still insufficient evidence to find *Koscot*'s second element because commissions were not "unrelated to sale of the product to ultimate users." 86 F.T.C. at 1181. I2G's ultimate users included I2G's distributors themselves, who used I2G's products such as the Touch and Songstagram. R.504, PageID#4512, 4519. And for the casino, I2G's ultimate users included distributors who were located outside the United States and thus gambled lawfully at I2G's casino. R.504, PageID#4299-4301. Even assuming any distributors *did* acquire an Emperor package for the recruitment rewards, those rewards accrued from the sale of I2G's products like the Touch, not from endless chain-letter-like recruitment. *See* GX106A, App. A92-99.

Because there was insufficient evidence to satisfy the second element of *Koscot*, this Court should reverse as to Counts 1 and 13.

B. The district court erred as a matter of law in permitting the jury to find Maike guilty of conspiracy to commit mail fraud without finding that I2G was in fact an illegal pyramid scheme.

Because the indictment charged a pyramid scheme, and because there was insufficient evidence of a pyramid scheme, *see* Section I.A, *supra*, this Court should reverse as to Counts 1 and 13.

The government argued below, however, that the jury did not need to find a pyramid scheme. R.692, PageID#10009:11-24. And the government cast a wide net

in direct examination of its witnesses, seeking to prove up any misrepresentations at all—or even business practices that involved no misrepresentations and bore no relevance to a pyramid-scheme allegation but that the government portrayed as somehow vaguely deceptive. *See, e.g.*, R.504, PageID#4352-56 (discussing I2G's practice of holding back certain higher-positioned spots, *i.e.* spots at lower-numbered levels, in order to show "one of the many ways that the investors were deceived"), *but see* R.498, PageID#4197:24-4198:19 (government witness Jerry Reynolds explaining that reserving such spots is "a common practice in the MLM industry" that helps attract good salespeople and is "good for the company"). (There was also no evidence that anyone was ever told that I2G *wasn't* holding back choice spots for sought-after salespeople.)

Defense counsel protested that, "now despite what the indictment says, the government is trying to allege [. . .] practices that are common in multi-level marketing companies" rather than sticking to the charged pyramid-scheme theory. R.504, PageID#4356:2-4. Counsel continued, "there's no notice to that, it is not in the indictment." R.504, PageID#4356:7-8; *see also* R.505, PageID#4576:16-4579:3 ("specifically preserv[ing] the issue that defendants had "a constitutional right to be indicted" and were "on notice" of the charged conspiracy, which was that they "engaged in a $25 million fraudulent pyramid scheme by representing that investors would receive a return on investment based upon an online Internet gaming site

called I2Gcasino.com"). As counsel argued: "[T]his case has evolved into something way beyond what this indictment is," into something "that's impossible to defend." R.505, PageID#4578:8-10.

But the district court ultimately gave the government's sought instructions under which the jury had the *option* to find a pyramid scheme or to convict instead on some other scheme to defraud. *See* R.554, PageID#5265-66. Thus, to the extent that the jury was permitted to find guilt without finding a pyramid scheme, this Court should reverse on the grounds that the instructions constructively amended the indictment in violation of Maike's Fifth Amendment right to an indictment. Alternatively, the instructions worked a fatal variance in violation of Maike's Sixth Amendment to notice of the accusation against him.

First Principles

For most of the past millennium, the grand jury has played a vital role in the common law regime, protecting individuals from undue accusations by means of the indictment procedure. *See, e.g.*, Sir William Blackstone, Commentaries on the Laws of England, 4:298–307, 317–19, 342–55. In the case of John Wilkes, a publisher who circulated a radical London newspaper (*The North Briton*), Lord Mansfield wrote that "there is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the King's suit. An

officer of the Crown has the right of framing them originally; he may, with leave, amend in like manner, as any plaintiff may do." *Rex v. Wilkes*, 4 Burr. 2527 (1770).[7]

When the American Founders insisted that the Constitution be amended to enumerate the right to an indictment, they had Lord Mansfield's teaching in mind:

> Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value.

Ex parte Bain, 121 U.S. 1, 12 (1887) (overruled in part on other grounds by *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

In *Bain*, the Supreme Court vacated the conviction of a banker who had been indicted for making a false cashier's report with intent to deceive the Comptroller of the Currency. The jury convicted only after the trial court struck out the words "the Comptroller of the Currency" from the indictment, thus permitting the jury to convict based only on making a false report rather than requiring the jury to find specifically that Bain had made the report with intent to defraud the Comptroller of the Currency. *Bain*, 121 U.S. at 4. This required reversal under the Fifth Amendment

[7] The *Wilkes* case is known more famously for Lord Mansfield's pronouncement therein, "fiat justitia, ruat cælum." ("Let justice be done, though the heavens fall.")

right to an indictment, even though the statute itself did not require that any particular person be defrauded: intent to defraud *anyone* or *any entity* sufficed. *Id.* at 5 (citing U.S. Rev. Stat. § 5211). The Court held:

> While it may seem to the [trial] court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him.

Bain, 121 U.S. at 10. The point was that permitting the jury to convict on a different, less-particular theory than the indictment charged was a violation of the right to have a grand jury determine whether the charge is proper in the first place—it did not matter that the statute of conviction would have permitted the less-particular charge for which the jury convicted.

Similarly, in *Stirone v. United States*, 361 U.S. 212 (1960), the defendant was convicted for unlawfully interfering with interstate commerce in violation of the Hobbs Act. The indictment first described the victim's contract, under which the victim "caused supplies and materials [sand] to move in interstate commerce between various points in the United States and the site of his plant for the manufacture or mixing of ready mixed concrete." 361 U.S. at 213. The indictment alleged that the defendant, Stirone, interfered with that victim's contract to ship sand in interstate commerce:

> Stirone, using his influential union position, "did . . . unlawfully obstruct, delay [and] affect interstate commerce between the several states of the United States and the movement of the aforesaid materials and supplies in such commerce, by extortion . . . of $ 31,274.13 . . . induced by fear and by the wrongful use of threats of labor disputes and threats of the loss of, and obstruction and prevention of, performance of his contract to supply ready mixed concrete."

Id. at 213-14. The statute of conviction was not limited to interference in the delivery of *sand*, of course:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). Nevertheless, the government introduced, over Stirone's objection, "evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other States but also in ***steel*** shipments." *Stirone*, 361 U.S. at 214 (emphasis added). And the court instructed the jury, again over Stirone's objection, that it could find guilt based on interference with commerce in *either* sand *or* steel. *Id.* And the jury convicted.

The Supreme Court reversed. The Court observed that the statute of conviction "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery[,] or physical violence. The Act outlaws such interference 'in

any way or degree.'" *Id.* at 215. But the Court held it was fatal error to allow the jury to convict on interference with steel when that was not charged in the indictment:

> The indictment here cannot fairly be read as charging interference with movements of ***steel*** from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of ***sand***. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of ***steel*** from a mill later to be built with Rider's concrete.

Id. at 217 (emphases added). There was no true "amendment" of the indictment—after all, the statute of conviction was still § 1951(a)—but this was nevertheless a Fifth Amendment violation:

> Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous.

Id.

Modern Approach: Amendments, Variances, and Constructive Amendments

Since the days of *Bain* and *Stirone*, this Circuit and others have developed doctrines that distinguish three categories of reversible error: (1) an "amendment," which is a "per se prejudicial" violation of the Fifth Amendment and occurs when a district court permits conviction for a different "charge" from what the grand jury specified; (2) a "variance," which does not result in conviction for a different *charge* but "permits the proof of *facts* to establish the criminal charge materially different

from the facts contained in the indictment," and which, if prejudicial, violates the Sixth Amendment right "to be informed of the nature and cause of the accusation"; and (3) an the intervening "concept of the constructive amendment[,] which is a variance that is accorded the per se prejudicial treatment of an amendment." *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989) (emphasis added); *see also id.* at 1232-33 (reversing conviction for felon in possession of a firearm where indictment charged possession "on or about September 28, 1987" and the trial court permitted the jury to find possession on "any date from November 2nd, 1986, the date he allegedly purchased the firearm, up until the date of September 28th, 1987, the date of the alleged domestic violence"). *Ford* viewed the issue in that case as a constructive amendment, and it likewise recast *Stirone* as an example of a constructive amendment, though it did not disturb the notion that *Stirone* was a Fifth Amendment teaching. *Id.*

Just this year, this Court reaffirmed the fundamental principle behind according "per se prejudicial" status to a constructive amendment. *United States v. Belcher*, 92 F.4th 643, 650 (6th Cir. 2024). *Belcher* observed:

> Constructive amendments, however, infect the entirety of a criminal case. Not only does the amendment obliterate a defendant's grand jury rights, but, in moving the goalposts, it also raises notice and due process concerns while limiting a defendant's ability to prepare for trial. Every step in the life cycle of a criminal case—from the grand jury's finding of probable cause to the issuing of an indictment, a defendant's trial preparation and execution, the reading of jury instructions, and sentencing—is impacted by a constructive amendment. And because

> the entirety of the process is disrupted, this court has found constructive amendments to be per se prejudicial.

Id. The basic point is that where "an indictment charges particulars," the Government's case "must comport with those particulars." *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008) (Gorsuch, J.).

1. Permitting the jury to find Maike guilty based on "any plan or course of action" that defrauds another—rather than on an illegal *pyramid* scheme as charged in the indictment—constructively amended the indictment in violation of the Fifth Amendment.

This Court reviews *de novo* the question whether there was an amendment to the indictment. *United States v. Robison*, 904 F.2d 365, 368 (6th Cir. 1990).

Bain and *Stirone* decide this issue: although Maike was convicted for Counts 1 and 13 under the same *statute* charged in the indictment, the jury instructions permitted the jury to convict without finding a pyramid scheme and thus to convict on a *theory* for which the indictment provided no notice. It does not matter that the indictment provided notice of the general *idea* that Maike was being charged with fraud, or even that the indictment mentioned other misrepresentations. After all, the indictment in *Bain* fully put the defendant on notice of the *idea* that he was being charged with making a fraudulent cashier's report, with the amendment removing from the government's burden only the additional circumstance that the Comptroller was the target of the fraud. *Bain*, 121 U.S. at 5. Maike had the right to have the grand jury indict him for the conduct of conviction: and "it is not impossible nor very

improbable that the grand jury" indicted based on the presence of the pyramid-scheme allegations. *Id.* at 10; *see also Stirone*, 361 U.S. at 217.

Permitting the jury to convict without finding a pyramid scheme thus worked a constructive amendment, which is per se prejudicial, requiring reversal. *Ford*, 872 F.2d at 1235.

2. Alternatively, the jury instructions worked a material variance in violation of Maike's Sixth Amendment right "to be informed of the nature and cause of the accusation" against him.

Alternatively, even if this Court does not view this case as analogous to *Bain* or *Stirone*, there was at least a variance that violated Maike's Sixth Amendment apprisal right.

Of course, "[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'" *United States v. Miller*, 471 U.S. 130, 136 (1985) (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)); *see also United States v. Kettles*, 970 F.3d 637, 649 (6th Cir. 2020) ("That the indictment contained superfluous elements is of no consequence.").

But here, the "pyramid scheme" language in Count 1 was no accident: from the beginning, the government knew that by invoking the pyramid-scheme language, it derived a great benefit, in that it could meet its burden on proving a scheme to defraud by proving a pyramid scheme: after all, proving the existence of the pyramid

scheme, at least as this jury was instructed, required no *mens rea* element whatsoever. R.554, PageID#5265-66 (Instruction No. 8, ¶ (2)(B)) (defining "pyramid scheme").

Nor was the "pyramid scheme" language in the indictment somehow "independent of" the allegations: it was a sufficient condition to establish a required element of Count 1 and thereby Count 13. *Miller*, 471 U.S. at 136. That is, by proving "pyramid scheme," the government thereby proved the required "scheme to defraud" element. R.554, PageID#5265-66. Perhaps if there were two counts of mail-fraud conspiracy (one charging a pyramid scheme and one charging something else) or even language in the indictment alleging in the disjunctive that Maike conspired to commit mail fraud *either* by engaging in a pyramid scheme *or* by some other means, there might then be no variance. But Count 1 was the *only* mail-fraud conspiracy count, and the government charged precisely *one* theory: pyramid scheme. It was at least a material variance to deviate from that theory in the jury instructions. *Cf. Farr*, 536 F.3d at 1181 (the "particulars" in this indictment were the pyramid-scheme allegations, and the government's case here needed to "comport with those particulars").

The variance was prejudicial: had Maike been on notice that he was up against an ordinary mail-fraud charge, then he would have had reason to prepare a defense accordingly, such as by (1) showing that alleged misrepresentations (whether check

flashing or exaggerated predictions of earnings) were puffery, (2) sowing reasonable doubt as to whether any of the alleged misrepresentations were actually *material* to purchases of Emperor packages, (3) demonstrating that Maike subjectively lacked intent to use I2G as a scheme to *defraud* distributors, and so on. Instead, Maike marshaled all his defensive resources to combat the charge in the indictment: conspiracy to engage in a pyramid scheme.

On those points, particularly on Maike's *mens rea*, it was a very close case. During the charge conference, the district court even acknowledged "that the defendants have a pretty good argument [. . .] that – Mr. Maike in particular – that he believed that [Songstagram] was going to make everybody a ton of money. [. . .] frankly, he thought that the casino royalties were going to blossom." R.692, PageID#10026.

In sum, a defendant's right to a factually particular indictment is no mere procedural boondoggling; it is a fundamental right buttressed by a thousand-year history, a right so important to our Framers that they protected it twice, in both the Fifth Amendment indictment clause and the Sixth Amendment apprisal clause. This Court should reverse the denial of Maike's motion for acquittal on Counts 1 and 13 because the trial evidence was insufficient to prove those crimes as charged in the indictment. Alternatively, this Court should reverse Maike's convictions and remand for retrial with instructions to charge the jury in conformity with the indictment.

II. THE DISTRICT COURT INCORRECTLY INSTRUCTED THE JURY ON SATURATION, SCIENTER, AND RELIANCE.

Three of the district court's jury instructions were so erroneous as to provide independent bases for reversal and retrial: the denial of an anti-saturation instruction, the failure to include a *scienter* requirement in the "scheme to defraud" element of the mail-fraud instruction, and the denial of an advice-of-accountant instruction.

Background. Maike requested all three of these instructions. The district court denied them. *See* pp. 31-33, *supra*.

Standard of Review. This Court reviews the legal accuracy of a jury instruction de novo, and it reviews the failure to give a requested jury instruction for abuse of discretion. *Fencorp v. Ohio Ky. Oil Corp.*, 675 F.3d 933, 943 (6th Cir. 2012).

A. The district court erred in denying an anti-saturation instruction.

A defendant is entitled to a jury instruction on an affirmative defense so long as "that 'defense finds ***some support*** in the evidence and in the law.'" *United States v. Johnson*, 416 F.3d 464, 467 (6th Cir. 2005) (quoting *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976)) (emphasis added). Failure to instruct on an affirmative defense is an abuse of discretion that requires reversal when (1) the requested instruction is a correct statement of the law; (2) the requested instruction is not substantially covered by other delivered instructions; and (3) the failure to give the

instruction impairs the defendant's theory of the case. *United States v. Carr*, 5 F.3d 986, 992 (6th Cir. 1993). All these conditions are satisfied here.

Ample Evidence and this Court's Rulings Supported Maike's Requested Anti-Saturation Instruction

As discussed in Section I.A, *supra*, there was no evidence that the Emperor program depended on recruitment. But even if distributors *were* buying Emperor packages with the expectation of recouping their payment through recruitment rewards, Maike met his burden to show, as an affirmative defense, that I2G featured an effective anti-saturation measure as defined in *Gold Unlimited*.

"Saturation" is the idea that a pyramid scheme, by its nature, is "destined for collapse after the saturation of the market for new investors." *Gold Unlimited*, 177 F.3d at 476. *Koscot* explained further:

> Such a scheme must cease when it exhausts the number of people willing to invest in it. The exhaustion of prospects results from over-saturation, leading potential purchasers to realize that their chance for success is limited in view of the numbers already recruited [. . .]. Recruiting must always cease, and those recruited into the program at or near its conclusion must lose.

86 F.T.C. at 1132.

In an illegal pyramid scheme, ***no one*** wants to be on the bottom row of the pyramid. By definition, if you end up there, you "must lose," *id.*, because there is no next layer. There is no one else to recruit. You have bought in, and you cannot sell. That is fundamentally why pyramid schemes are illegal: once they reach their bottom

layer, they are destined to collapse, and buyers on the bottom row ***must*** by definition lose out.

Here, there was no risk of saturation in the Emperor program precisely because it was disclosed from the beginning that exactly 5000 Emperor packages would be sold. The trial testimony established that distributors *wanted* to be among the 5000. *See* pp. 17, 46-49, *supra*. Even if a potential distributor knew that 4999 of the 5000 spots were filled, that would not dissuade the distributor from buying the 5000th Emperor package, because Emperors were not in it for recruitment. They were in it for casino profit-sharing. Upon the sale of the 5000th and final Emperor package, *nothing* was "destined for collapse," *Gold Unlimited*, 177 F.3d at 476, because Emperors did not need to recruit more Emperors in order to get rich; what they needed was for the casino to take off. In a pyramid scheme, of course, no one would ***ever*** knowingly purchase the last spot (or any spot on the bottom level) because by that point in time the market for recruits has become saturated. But the notion of saturation does not even apply to the Emperor program because of its 5000-member cap.

Moreover, with the cap of 5000 Emperors, there was no risk of dilution of the casino profit-sharing (as there would be if unlimited Emperors could continue to enroll). And because distributors knew about the 5000-member cap, there was no risk of surprise.

Gold Unlimited held that anti-saturation measures provide an affirmative defense to a pyramid-scheme allegation. 177 F.3d at 482 ("We find it more appropriate, however, that a defendant carry the burden of establishing that it has effective anti-saturation programs."), 483 (referring to this as "an affirmative defense of anti-saturation"). Maike met his burden in at least two ways: first, there was a 5000-member cap on the number of Emperors rather than a superficially limitless universe of potential recruits that fails when the market for new recruits runs dry. Second, trial evidence showed that there was revenue that was unrelated to recruitment. *See, e.g.*, GX101C, App. Flash Drive (listing casino chip purchases).

Maike thus had more than just "some support in the evidence and in the law," *Johnson*, 416 F.3d at 467, for an anti-saturation defense. And Maike's requested anti-saturation instruction was a "correct statement of the law," *Carr*, 5 F.3d at 992, given that it came directly from this Court's ruling in *Gold Unlimited*. *See* R.692, PageID#9938-40. The government even proposed its own anti-saturation instruction in the event the district court agreed to give one. *See* R.429, PageID#3303. Maike accepts the government's proposed instruction, except for paragraph (4) thereof, which provides: "Safeguards are 'effective' if they are more than cosmetic **and** have the *actual effect of preventing* the company from collapsing on the later investors." *Id.* (emphases added). This paragraph is a distortion of *Gold Unlimited*. *Gold Unlimited* held that anti-saturation measures were insufficient where a company

factually ***was*** "destined for collapse." 177 F.3d at 481. But paragraph (4) takes that language to mean that an anti-saturation measure must affirmatively ***prevent*** collapse (as in, it must prevent *any* collapse for *any reason*) in order to be sufficient. Incidentally, the wording of the government's paragraph (4) aligns with a pretrial ruling. *See* R.347, PageID#2809. Maike also challenges that ruling for the above-stated reasons to the extent that doing so is necessary in order to preserve Maike's challenge to paragraph (4).

Maike's Requested Anti-Saturation Instruction Was Not Covered Elsewhere, and Its Absence Impaired Maike's Defense

The preceding section explained that Maike's sought instruction had at least "some support in the evidence and in the law," *Johnson*, 416 F.3d at 467, and was a "correct statement of the law." *Carr*, 5 F.3d at 992. The other two conditions set forth in *Carr* are also satisfied. That is because no other instruction made mention of saturation. And the failure to instruct on anti-saturation impaired Maike's "theory of the case," *id.*, because it deprived Maike of an affirmative defense that would have foreclosed a conviction on Counts 1 and 13 (and, by extension, Counts 2 through 10). Specifically, without the anti-saturation instruction, the jury had no way to follow *Gold Unlimited* and acquit Maike based on the reality of I2G's Emperor program: namely, that there was no risk that it would collapse *due to a lack of recruits*.

The district court fundamentally misunderstood saturation. In the district court's view, all that mattered was that once the 5000-member cap was reached, there was no more room for recruitment. R.692, PageID#9950:9-11. And the district court thought that anti-saturation required "proof that [a company is] ***not*** going to collapse." *Id.* at PageID#9987:24-25. Even though the court at one point "absolutely agree[d] [. . .] that there has been no evidence that the [I2G] program failed because of saturation," R.692, PageID#9954:14-16, the court later decided not to give an anti-saturation instruction because it then thought there was "no" evidence of "an effective anti-saturation program." R.601, PageID#5750. That was incorrect, and it was reversible error.

Maike thus asks this Court to reverse and require either the government's proposed instruction (without its paragraph (4)) or the instruction that defense counsel proposed below. *See* R.533, PageID#5090.

B. The district court erred in denying an instruction that would have required the jury to find that Maike knew he was furthering an illegal pyramid scheme.

As set forth in Section II.A, failure to give a requested jury instruction is an abuse of discretion when the instruction is legally correct, it is not substantially covered by other instructions, and failing to give the instruction impairs the defense. *Carr*, 5 F.3d at 992.

1. Failing to require proof that Maike *knew* I2G was a pyramid scheme contravenes *Ruan v. United States*, 597 U.S. 450 (2022).

Maike requested an instruction that, to find guilt, Maike had to ***know*** he was participating in a pyramid scheme. R.424, PageID#3202. That was a legally correct instruction drawn from *Gold Unlimited* and informed by the Supreme Court's warnings that lower courts should tread carefully in assessing otherwise-lawful behavior that is made criminal by an offered interpretation of a federal statute. *See Gold Unlimited*, 177 F.3d at 475 ("In this case, the jury found that Gold and the Crowes ***knowingly*** operated an illegal pyramid scheme with the intent to defraud.") (emphasis added); *see also Ruan v. United States*, 597 U.S. 450, 458 (2022); *Elonis v. United States*, 575 U.S. 723, 736 (2015).

In an ordinary mail-fraud case, the ordinary pattern jury instruction might suffice because it requires the jury to find that the defendant "***knowingly***" participated in a "scheme to defraud" and it then defines "scheme to defraud" to include "any plan or course of action by which someone ***intends*** to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." 6th Cir. Pattern Jury Instructions § 10.01(1)(A), (2)(A), App. A181 (emphases added). The definition of "scheme to defraud" in that instruction thus has a scienter requirement built into it.

As discussed at pp. 41-42, *supra*, the scienter requirement in the "scheme to defraud" element of mail fraud is wholly separate and in addition to the "intent to

defraud" element. The "scheme to defraud" element requires the defendant to have intended to use the scheme as a means of defrauding others. The "intent to defraud" element, on the other hand, refers only to the defendant's *mens rea* at the time of making a material misrepresentation in furtherance thereof. *See* pp. 41-42, *supra*. The ordinary mail-fraud instruction contains all of these components. 6th Cir. Pattern Jury Instructions § 10.01(1), App. A181.

There is a key difference between ordinary mail fraud and a pyramid-scheme case, however: here, the government sought and received an instruction that "[a] pyramid scheme *constitutes* a scheme or artifice to defraud for purposes of this instruction." R.554, PageID#5266 (emphasis added). And the definition of "pyramid scheme" in the instruction, over counsel's objection, contained **no** *mens rea* requirement whatsoever:

> A "pyramid scheme" is any plan, program, device, scheme, or other process characterized by the payment by participants of money to the company in return for which they receive the right to sell a product and 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. The structure of a pyramid scheme suggests that the focus is on promoting the sale of interests in the venture rather than the sale of products, where participants earn the right to profits by recruiting other participants, who themselves are interested in recruitment fees rather than products. A pyramid scheme constitutes a scheme or artifice to defraud for purposes of this instruction.

Id.

That instruction, as counsel argued below, invited the jury to convict based on the existence of a pyramid scheme *without* finding that Maike knowingly participated in a scheme that was intended to defraud people out of their money or property. R.702, PageID#11108.

This Court wrote in *Gold Unlimited*: "No clear line separates illegal pyramid schemes from legitimate multilevel marketing programs." 177 F.3d at 475. And the Supreme Court has cautioned that "[a] strong scienter requirement helps to diminish the risk of 'overdeterrence,' *i.e.*, punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line." *Ruan v. United States*, 597 U.S. 450, 459 (2022) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978)).[8]

As this Court observed in *Kettles*:

> The Supreme Court has instructed us generally to apply a "presumption in favor of scienter" when interpreting criminal statutes. *See Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019). Thus, we must usually presume that Congress intended to require some degree of scienter for "***each*** of the statutory elements that criminalize otherwise innocent conduct." *Id.* (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, at 72 (1994)).

[8] The defendants' conduct in *Ruan* was egregious, but that did not stop the Supreme Court from vacating their convictions and remanding for further proceedings. *See United States v. Ruan*, 966 F.3d 1101, 1122 (11th Cir. 2020) ("appellants prescribed nearly 12.5 million units of Schedule II opioids"), and *United States v. Khan*, 989 F.3d 806, 812 (10th Cir. 2021) (defendant "prescribed patients various controlled substances, including oxycodone, alprazolam, and carisoprodol" based on "what patients were able to pay, rather than the patients' medical need," leading to a patient's death), *both rev'd sub nom. Ruan v. United States*, 597 U.S. 450 (2022).

970 F.3d at 647 (emphasis added). Here, that meant enforcing at least "some degree of scienter for" the "scheme to defraud" element of the mail-fraud statute. *Id.* In this case, where the key issue was whether Maike had the "vicious will" to use I2G as a scheme to defraud, *Morissette v. United States*, 342 U.S. 246, 251 (1952), it was imperative that the district court charge the jury with finding that Maike actually had such intent. But it did not.

Counsel argued this point exhaustively, proposing a jury instruction that would have required the jury to find that Maike knew he was participating in an illegal pyramid scheme. *See* R.290, Trial Memo, PageID#2013; R.702, Charge Conference Tr. 9/2/2022, PageID#11109 (citing *Ruan*, *Ratzlaf*, and *Cheek*); R.702, PageID#11109:20-21 ("All right. You've preserved it for the record."); R.569, Motion for Acquittal and New Trial, PageID#5357-5358.

The district court rejected this argument, believing that "the scienter element is in there" even without the proposed instruction. R.702, PageID#11124; R.601, PageID#5748-5749 (denial of motion for acquittal and new trial). But it was not, in plain violation of *Ruan*.

2. Even ignoring *Ruan*, the jury instructions omitted the required *mens rea* component in defining the "scheme to defraud" element of mail fraud.

Instead of charging the jury to find that Maike knew he was participating in a pyramid scheme, the district court provided an instruction that *deleted* the *mens rea*

requirement from the "scheme to defraud" element altogether by permitting the jury to find a scheme to defraud using only the strict-liability language of the "pyramid scheme" definition in the instruction it was given. R.554, PageID#5265-66; *see Faulkenberry*, 614 F.3d at 580-81. Because a pyramid scheme per se "constitute[d]" a scheme to defraud under the instructions provided, the jury did not have to find that anyone *intended* I2G to be a scheme to defraud. The jury could have convicted Maike so long as *the jury* believed that I2G was a pyramid scheme and that Maike participated in it (regardless of whether it thought *Maike* knew or believed I2G was a pyramid scheme). And the jury could have convicted Maike without finding that anyone intended there to be any scheme to defraud at all. *Compare* R.554, PageID#5265-66 (Jury Instruction No. 8) *with* 6th Cir. Pattern Jury Instructions § 10.01, App. A181 (including a scienter requirement in the definition of "scheme to defraud").

Thus, even ignoring *Ruan* and ignoring Maike's argument that the jury needed to find that Maike knew there was a *pyramid* scheme, the instruction on mail fraud was legally erroneous under this Court's teachings on the elements of mail fraud, *see* pp. 41-42, *supra*, because it allowed the jury to convict without any *mens rea* finding at all as to the "scheme to defraud" element.

In short, Maike requested a legally correct instruction that was not covered by other instructions, and its omission impaired Maike's defense that he lacked the intent to engage in a pyramid scheme. This Court should reverse.

C. The district court erred in refusing to instruct the jury that reliance on an accountant's advice was a defense to the tax-evasion counts.

This Court reviews "the 'legal accuracy' of jury instructions de novo." *Hurt v. Commerce Energy, Inc.*, 973 F.3d 509, 523 (6th Cir. 2020) (quoting *United States v. Blanchard*, 618 F.3d 562, 571 (6th Cir. 2010)).

Maike sought an instruction, relevant to Counts 11 and 12, that his good-faith reliance on his tax accountant's advice provided a defense to tax evasion. R.424, PageID#3200. (Maike also sought an advice-of-counsel instruction, but he does not pursue that instruction on appeal.) The proposed instruction would have charged, among other things, that "[r]eliance on the advice of an accountant, among other things, may constitute good faith." *Id.*

The district court first indicated that it would give the advice-of-accountant instruction. R.692, PageID#10033:15-19. It then appeared to change its mind, deleting it in a redlined version of the instructions. R.702, PageID#11075:4-19. It then agreed to "undelete" the instruction and provide it. R.702, PageID#11081:7.

Nevertheless, the district court, when it actually *gave* the instruction, inserted an extra sentence that had not yet been discussed: "Advice of an accountant *is not a defense* to the crimes charged under the indictment." R.554, PageID#5279 (emphasis

added). Maike promptly objected. R.671, PageID#7520:5-14. That additional sentence essentially negated the force of the entire instruction. Notably, when Maike raised this again in his post-trial motion, the government did not defend the insertion of this sentence other than to state: "The instruction given by the Court, in its totality, correctly states the law." R.583, PageID#5482. But it does not correctly state the law: as Maike argued below, this Court has stated that reliance is a "defense" so long as there is "(1) full disclosure of all pertinent facts, and (2) good faith reliance on the accountant's advice." *United States v. Duncan*, 850 F.2d 1104, 1116 (6th Cir. 1988); *see* R.569, PageID#5362 (Maike's argument). This alone requires reversal.

III. NUMEROUS OTHER ERRORS EACH INDEPENDENTLY REQUIRE REVERSAL OF ONE OR MORE COUNTS.

A. The district court erred in permitting the government to use a co-defendant's guilty plea as substantive evidence of Maike's guilt without issuing a limiting instruction.

The district court erred in letting the government use the guilty plea of co-defendant Richard Anzalone (the government's sole cooperating witness) as substantive evidence of Maike's guilt. Under binding precedent, the court was *required* to give a limiting instruction so that the jury received evidence of the plea only to weigh Anzalone's credibility and *not* to prove Maike's guilt. *United States v. Christian*, 786 F.2d 203, 213-14 (6th Cir. 1986). The defense requested, and the district court said it would give, a limiting instruction. *See* R.678, PageID#8159,

8161. But it never did. Under *Christian*, that is "reversible error." 786 F.2d at 214.[9] The government, in its briefing in the appeals of Maike's co-defendants Barnes and Hosseinipour, has conceded that the failure to give a limiting instruction was error. *See* Consolidated Answering Brief for the United States in 6th Cir. Nos. 22-6121/23-5561/23-5029/23-5560 ["Government Brief"] at 97.

Notably, at a sentencing hearing, the district court even stated: "It's my impression that without Mr. Anzalone's testimony these convictions might not have happened. It would have been a lot harder." R.675, PageID#7855. Anzalone's testimony was harmful precisely because he gave several days of extensive firsthand testimony about I2G's operations—after the jury had been told that he had been charged as a co-conspirator and had pleaded guilty. The district court's failure to give the instruction was error, and it was prejudicial, requiring reversal.

B. The district court erred in admitting GX1, a two-page diagram of a pyramid that prejudicially misrepresented the structure of I2G.

The district court erred in allowing the government to admit GX1 over Maike's objection. R.486, PageID#3743. *See* GX1, App. A90-91. This Court reviews evidentiary rulings for abuse of discretion. *United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012). The district court abused its discretion because any

[9] Defense counsel objected to the elicitation of Anzalone's testimony regarding his plea, to the government's use of Anzalone's plea in its opening, and to the court's failure to give a limiting instruction. *See* n.5, *supra*.

probative value provided by GX1 was substantially outweighed by the danger of "unfair prejudice" and "misleading the jury." Fed. R. Evid. 403.

GX1 is a two-page diagram of a pyramid that was incredibly prejudicial because the structure it reflected looked nothing like I2G either as charged or as shown by the testimony of the government's own witnesses. *Compare* GX1, App. A90-91, *with* GX101G-1, App. Flash Drive (including accompanying visual depiction, *see* p. 10, *supra*). Any probative value that GX1 had, whether in showing the jury the shape of a pyramid or depicting how to do simple math (*i.e.*, how to calculate the powers of two), was substantially outweighed by the undue prejudice of communicating to the jury that I2G was in fact a pyramid scheme.

What GX1 shows is a 33-level pyramid with over 8 billion participants (more than the Earth's population). The government used this throughout Keep's and Reynolds's testimony to illustrate how pyramid schemes are destined to collapse when there is no more opportunity for low-tier members to find new recruits. *See, e.g.*, R.486, PageID#3746 (Keep); R.498, PageID#4140-41 (Reynolds). But Keep and Reynolds also testified that I2G in fact had distributors as far downline as level 273—with the obvious consequence that each level was not possibly intended to be filled up. (2 to the power of 273 is approximately $1.52 \cdot 10^{82}$.) R.487, PageID#3848 (Keep); R.498, PageID#4139 (Reynolds).

This was prejudicial, for instance, because the government emphasized that one of its distributor-witnesses, Jordan Adams, came in at "Row 26" as though to imply that more than 33 million distributors were ranked "above" Adams when, in fact, there was less than one-tenth of one percent of that number of distributors in *total*. R.487, PageID#3852-53. Keep testified that I2G's structure was in reality "leggy" (and Reynolds said it looked more like "roots" of a tree), but the court allowed the government to wave GX1 in the air, repeatedly, to persuade the jury prejudicially that I2G in fact took the shape of a pyramid and therefore *was* an illegal pyramid scheme. R.487, PageID#3974:4; R.498, PageID#4139:7. This use continued throughout trial. R.692, PageID#9956-57 (AUSA Sewell to the court, discussing GX1 on Trial Day 21: "[T]he bottom row was 278 [*sic*] or something and that person is, like – you know, there's ten zillion times the population of the earth at that point. . . There's just this exceedingly large number of people–of spots[.]"). Moreover, the pyramid-scheme allegation in the indictment and in the jury instructions concerned only the Emperor package, and the 5000-member cap on Emperors was undisputed, so there was no probative value whatsoever in arguing that spots numbering "ten zillion times the population of the earth" would exist in a pyramid that looked like GX1 but had 273 levels.

Even the district court, at the charge conference, articulated the prejudice:

> I think you make a perfect argument. I think this is to be argued to the jury and that is a pyramid is a solid structure. This arguably was

> a jellyfish and the tentacles are hanging down and there's between [*sic*] them.
>
> The evidence that I heard was it doesn't matter where you are on the pyramid —I'll say the structure because pyramid is pejorative, yes. [. . .] I think an argument can certainly be made that this was not a pyramid just for the basis you said.
>
> At level 278 there had to be 400 trillion people involved and there weren't, so ***there couldn't be*** a level 278.

R.692, PageID#9968:10-16, PageID#9969:6-9 (emphases added).

Allowing admission of GX1 at all, let alone such pervasive use of it—to insinuate that there was a pyramid scheme that could somehow harm millions or even billions of victims if left unprosecuted—was error, and it warrants reversal.

C. The district court abused its discretion in excluding the testimony of Maike's expert, Professor Manning Warren, as to the definition of an illegal pyramid scheme and the presence of effective anti-saturation measures.

This Court reviews the exclusion of expert testimony for abuse of discretion. *See Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676 (6th Cir. 2011). But "rejection of expert testimony is the exception, rather than the rule," *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008) (quoting Fed. R. Evid. 702 advisory committee's note to 2000 amendments).

Under Fed. R. Evid. 702, "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify" so long as "it is more likely than not that" the expert testimony (1) "will help the trier of fact to understand the evidence or to determine a fact in issue," (2) "is based on sufficient

facts or data," (3) "is the product of reliable principles and methods," and (4) "reflects a reliable application."

Further, "[a]lthough a witness is not a qualified expert simply because he self-identifies as such, we take a liberal view of what 'knowledge, skill, experience, training, or education' is sufficient to satisfy the requirement." *Bradley v. Ameristep*, 800 F.3d 205, 209 (6th Cir. 2015) (quoting *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir. 2000)). In *Bradley*, this Court reversed where the district court "seized on [an expert]'s more specific references to metallurgical expertise as the foundation for a negative inference that Powell did not possess the necessary qualifications as to other types of material analysis, including polypropylene polymers." 800 F.3d at 209.

Despite the fine line between legitimate MLM and an illicit pyramid scheme, and although Maike had disclosed for *four years* that he intended to call Professor Manning Warren to provide expert testimony as to the definition of a pyramid scheme and his opinion on whether the 5000-participant cap on Emperors was an effective anti-saturation measure, the district court excluded such testimony *the day before trial began*. R.381, PageID#2917; R.454, PageID#3539. This was an abuse of discretion because Professor Warren had 40 years of experience as a law professor publishing and teaching on business organizations and securities, including teaching pyramid schemes and cases like *Koscot*, cited extensively above. R.390,

PageID#3013. It was also an abuse of discretion because, although the court quoted the text of Rule 702, it failed to apply or discuss any of its factors, all of which would have favored permitting Professor Warren to testify. R.454, PageID#3535-39; *see Good v. BioLife Plasma Servs., L.P.*, 834 F. App'x 188, 198 (6th Cir. 2020) (finding abuse of discretion where district court "failed to justify" exclusion of experts and "based its decision to exclude the experts on their qualifications, not whether their conclusions were based on 'sufficient facts or data' or 'reliable principles and methods'").

The district court's decision here was based on not seeing "anything listed in his CV outlining any expertise in pyramid schemes" and on the court's view of Warren as an expert only in the more general areas of business associations and securities. R.677, PageID#7913. As in *Bradley*, the district court "seized on" Professor Manning Warren's expertise in business associations and securities to draw a "negative inference" (despite evidence that Professor Warren routinely teaches *Koscot*) that Professor Warren was not qualified as an expert in pyramid schemes. 800 F.3d at 209.

That is reversible error.

D. The district court abused its discretion in permitting IRS employee Paula Basham to provide previously undisclosed expert testimony about whether loans from I2G should have been treated as income taxable to Maike.

This Court reviews the admission of expert testimony for abuse of discretion. *Osborn v. Griffin*, 865 F.3d 417, 452 (6th Cir. 2017).

The government's disclosure as to IRS agent Paula Basham stated: "Basham is the IRS employee who will explain the unsurprising conclusion that if Maike had included the Kansas land purchases on his taxes, he would have tax due and owing for 2013 and 2014." R.699, PageID#10281. Defense counsel had no problem with that testimony but objected to Basham's testifying in her capacity as an IRS agent about her understanding of federal tax law and "what is and isn't income." The district court initially sustained this objection. *Id.* Later, the government decided to try again, and the district court changed its mind. R.699, PageID#10304:12 ("All right. I'll give you some latitude."). Basham then gave extremely damning testimony that the circumstances surrounding the loans at issue were the kinds of circumstances that meant the loans "should be treated as income." R.699, PageID#10310:22. This was improper expert testimony because it was not disclosed under Fed. R. Crim. P. 16, and it was an abuse of discretion for the court to allow it. *United States v. Harris*, 200 F. App'x 472, 504 (6th Cir. 2006).

It was particularly prejudicial because the key factual dispute for the jury to resolve on Counts 11 and 12 was whether the loans from I2G HK to RAW Ventures,

LLC, were genuine business-to-business loans or were instead draws that should have been taxable to Maike personally as income. *See* GX300 and GX301, App. A163-164. That fact-sensitive determination centers on Maike's intent, and the district court abused its discretion in letting Basham usurp the jury's role in making that determination. *See Berthold v. Commissioner*, 404 F.2d 119, 122 (6th Cir. 1968).

E. The government's failure to disclose *Brady* evidence requires reversal of Counts 11 and 12.

The government's failure to timely disclose information favorable to the defense warrants reversal if the disclosure comes too late for "its 'effective' use at trial." *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988). Here, the government failed to disclose the 302s (or other interview memoranda) for Maike's accountant Mike Pierce (a government witness) until after Pierce testified and the government impeached Pierce with those 302s. But as defense counsel argued, "effective use" of the 302s required their disclosure pretrial so that counsel could tell the jury up front that Maike's own accountant said, for instance, that Maike "never refused to give me anything, and whenever I asked for a backup document, he gave it to me." R.699, PageID#10125:18-21; *see also* R.683, PageID#8636:14-8642:11 (sidebar in which defense counsel explains that "[i]t's not the ability to impeach" but "the exculpatory mitigating information" in the 302s that the government was wrongfully withholding from defense counsel until too late into trial; the district

court "encouraged" the government to provide the information "two or three days in advance" but said it was "not going to order" such production, telling defense counsel instead to "you know, argue it in Cincinnati").

The government claimed it "had a difference of opinion about what constitutes *Brady*," defending its nondisclosure of Pierce's 302s, even though the government knew that Maike intended to make an advice-of-accountant defense. R.699, PageID#10129. And the district court simply deferred to the government, expressing a belief that the government surely knew what its *Brady* obligations were and thus declining to entertain the idea that the government might have violated *Brady*. *See* R.683, PageID#8635:9-14, PageID#8641:23-25; *see also* pp. 26-27, *supra*. Because Maike could not effectively argue reliance on Pierce without pretrial disclosure of Pierce's 302s, the government's failure to disclose the 302s warrants reversal.

F. The district court erred in denying Maike's motion for acquittal as to Count 13 because (1) no reasonable juror could have found that an overt act took place within the five-year statute-of-limitations period and (2) the Emperor packages were not securities.

This Court reviews *de novo* the denial of a motion for acquittal under Fed. R. Crim. P. 29(a). *Morales*, 687 F.3d at 700. Two of the grounds on which Maike moved for acquittal as to Count 13 (securities fraud) were (1) insufficient evidence of an overt act, as charged in the indictment, within the statute-of-limitations period, R.569, PageID#5363-64; and (2) insufficient evidence that the Emperor package "was a 'security' as alleged" in the indictment, R.569, PageID#5350. The district

court's denial of the motion on each ground was incorrect. *See* R.601, PageID#5753 (paragraph g, "Overt Acts"); R.601, PageID#5751 (paragraph d, "Qualification as a Security").

First, the district court erred in denying Maike's Rule 29 motion as to the overt-act requirement of Count 13. Because Count 13 was first charged in the Second Superseding Indictment returned on November 13, 2019, R.230, PageID#1468, and because securities fraud is subject to a five-year statute of limitations, the government had to prove an overt act that occurred after November 13, 2014. The indictment charged various sales of I2G packages, all but one of which transpired, even on the face of the indictment, outside the limitations period. R.230, PageID#1467-68. The only act charged in the indictment and dated after November 13, 2014, was that distributor S.H. paid $15,059.85 on November 25, 2014—but the trial testimony established that S.H. actually paid those funds on October 31, 2014, outside the statute of limitations period.

Scott Magers was an I2G distributor who testified (as the government's rebuttal witness) regarding this overt act. Magers testified that he received the wire on October 31, 2014, for S. H.'s purchase of Emperor packages that S.H. had agreed to acquire on August 14, 2014. R.671, PageID#7450:6-17, PageID#7452:16-24. Magers testified that he further forwarded those funds (which were paid into an account in the name of Heartbeats Worldwide controlled by Magers) to an I2G bank

account (in the name of Tech Entertainment) on November 25, 2014. R.671, PageID#7447-7452. But once S.H. had paid the funds on October 31, 2014, there was (1) no longer anything that S.H. needed to do after that date to transmit his payment to I2G, and (2) there was no further criminal act that occurred that was charged in the indictment. That is, the crime alleged in Count 13 was completed prior to November 13, 2014, and no evidence at trial was presented to the contrary, so it is time barred and the district court should have granted the motion for acquittal.

Alternatively, the district court should have instructed the jury, in line with the indictment, that an act counted as an overt act only if it "operated and would operate as a fraud and deceit upon persons as charged in Count 1"—*i.e.*, only if the act was part of the *commission* of a fraud. R.569, PageID#5363 (Rule 29 motion) (quoting R.230, PageID#1467). That would have foreclosed the possibility of the jury's reliance on the November 25, 2014, funds transfer in finding an overt act. Either way, there was no overt act within the limitations period.

Second, the Emperor packages were not securities in the first place. A "security" includes, *inter alia*, an "investment contract." 15 U.S.C. § 77b(a)(1). The government's theory was that the Emperor packages were investment contracts. R.683, PageID#8603:13-16. But they were not: Emperors did not expect to profit "solely from the efforts of" others, nor did they reasonably expect a "profit" to accrue *on their $5000* purchase price. *SEC v. W. J. Howey Co.*, 328 U.S. 293, 300 (1946).

Each of those two reasons provides independently sufficient grounds to conclude that the Emperor packages were not securities.

"[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits ***solely*** from the efforts of the promoter or a third party." *Howey*, 328 U.S. at 300 (emphasis added) (finding investment contract where seller sold "units of a citrus grove development coupled with a contract for cultivating, marketing[,] and remitting the net proceeds to the investor" under circumstances where the investors could not possibly have contributed to the citrus grove's profitability because they lived far away, had no right to even enter the groves, and could not have exercised control over the grove). In *Howey*, the investors had no choice but to depend *solely* on those in charge of the citrus groves. Here, by contrast, I2G Emperors directly increased their own earnings as they marketed the casino—as they were told to do. R.683, PageID#8747:20-25. The Emperors were thus, at least in part, dependent on their *own* efforts, so they were not expecting profits "solely" from the efforts of others. *Howey*, 328 U.S. at 300.

Next, Emperors were not expecting to "profit" from their $5000 in the relevant sense of that word. "Profits" here is used "in the sense of income or return, to include, for example, dividends, other periodic payments, or the increased value of the investment." *SEC v. Edwards*, 540 U.S. 389, 394 (2004). If there is no reasonable

expectation of "profits" in this sense, then there is no investment contract. *Id.*; *see also Howey*, 328 U.S. at 300.

Here, the $5000 was not principal on which Emperors expected a percentage return, nor did the Emperor position itself have a value that anyone expected to increase over time. The $5000 was simply a fee, a membership fee that was spent once paid. The membership fee had, as a feature, that the member shared in 50% of I2G's share of the casino profits. But that is no different from a member of, say, Recreational Equipment, Inc. (REI)'s rewards program receiving an annual dividend check based on REI's profits. The member expects to receive a share of the company's profits if there are any, but that does not mean that the member expects to make a profit *upon* the member's contributions. In sum, this Court should vacate Maike's conviction on Count 13 because the Emperor packages were not securities.

G. The district court erred in telling the jury that there was an overt act within the five-year statute-of-limitations period for securities fraud.

The district court erred in implying to the jury that the S.H. sale was in fact within the five-year statute of limitations. R.672, PageID#7740 (responding to a jury question: "You are not limited to the evidence regarding ***the purchase within the statute of limitations***."). This was an error that requires reversal for retrial because the court influenced the jury to find that S.H.'s purchase was not time-barred. *See United States v. Davidson*, 367 F.2d 60 (6th Cir. 1966); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) (a trial judge must not

"interfere with the jurors' independent judgment in a manner contrary to the interests of the accused"). Even though the court repeated language that was in the jury's question, the court thereby implicitly affirmed the proposition that there was in fact a "purchase" "within" the statute of limitations, when there was not.

H. The district court abused its discretion in allowing Special Agent McClelland to testify as a "course of investigation" and summary witness regarding numerous prejudicial hearsay statements and two exhibits.

Under the Federal Rules of Evidence, out-of-court statements made by someone other than the witness and offered to prove the matter asserted are inadmissible as hearsay. Fed. R. Evid. 801, 802; *United States v. Nelson*, 725 F.3d 615, 620 (6th Cir. 2013). Additionally, when a government witness testifies about out-of-court statements to explain how an investigation began, that testimony violates the Sixth Amendment Confrontation Clause, because the defendant is unable to cross-examine the declarants whose "accusatory" statements the witness is relaying. *United States v. Cromer*, 389 F.3d 662, 674 (6th Cir. 2004) (reversing conviction and remanding for new trial based on Sixth Amendment violation); *see also Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

Here, the district court permitted Special Agent McClelland to testify about far more than background details concerning how his investigation of I2G began. Instead, McClelland testified to contents of interviews with witnesses and to findings he made based on those interviews and on examinations of out-of-court documents

and websites. R.700, PageID#10412-10655; R.688, PageID#8967-9093; R.541, PageID#5111-98; R.542, PageID#5199-5213; R.689:#9104-81. This violated the rule against hearsay and the Confrontation Clause because McClelland testified as to the truth of what purported victims said to him and because Maike had no opportunity to cross-examine those declarants. Maike filed a pretrial motion to challenge this sort of testimony and objected repeatedly at trial when McClelland testified. *See, e.g.*, R.421, PageID#3162; R.700, PageID#10598-10600:22. Maike further asked for a limiting instruction tailored to McClelland's testimony, but the district court summarily denied that request. R.544, PageID#5217; R.671, PageID#7418:2-6.

Allowing McClelland's testimony as to the statements of his interviewees was error, and the government has conceded as much in the appeals of Maike's co-defendants. *See* Government Brief in 6th Cir. Nos. 22-6121/23-5561/23-5029/23-5560 at 86. The error was prejudicial particularly because *none* of the ten alleged victims who did take the stand actually testified that they were drawn to buy Emperor packages by the prospect of recruitment-based rewards. *See* pp. 46-49, *supra*.

The district court also abused its discretion in admitting GX230 and GX232, App. A161-162, through Special Agent McClelland. The government has conceded that GX230 and GX232 were "secondary-evidence summaries" that were inadmissible because not all the evidence underlying the summaries was also

admitted. *See* Government Brief in 6th Cir. Nos. 22-6121/23-5561/23-5029/23-5560 at 84. This was in violation of Fed. R. Evid. 1006, and it was prejudicial because GX230 and GX232 misrepresented (by inflating) the dollar amount of sold Emperor packages in order to make it seem like I2G was pocketing millions of dollars. In reality, these exhibits were McClelland's own concocted calculations that presumed that every Emperor position that was listed in a spreadsheet on Maike's computer was actually a purchased position, notwithstanding evidence to the contrary. R.700, PageID#10496-10500. The Court should find an abuse of discretion and reverse.

I. The district court abused its discretion in denying Maike's motion for new trial on the grounds that the verdict was against the weight of the evidence or, alternatively, was the result of cumulative errors.

The district court also abused its discretion in denying a new trial because the verdict was against the clear weight of the evidence. *Barnes v. City of Cincinnati*, 401 F.3d 729, 743 (6th Cir. 2005). Even if this Court disagrees that there was insufficient evidence to prove a pyramid scheme under *Jackson v. Virginia* (or, if the Court adopts Maike's *Ruan* argument but disagrees that there was insufficient evidence to prove that Maike knowingly participated in a pyramid scheme), this Court should reverse the denial of Maike's motion for new trial on the grounds that the verdict was against the weight of the evidence: (1) on Counts 1 and 13, as to whether I2G was a scheme to defraud, whether Maike had the requisite scienter, and

whether Maike had the affirmative defense of anti-saturation, and (2) on Counts 11 and 12, as to whether Maike acted in good faith in reliance on his accountant.

Alternatively, the Court should reverse the denial of Maike's motion for new trial in light of the individual and cumulative effect of the errors set forth above. Even if this Court does not believe that any single error set forth above warrants retrial, "[t]he cumulative effect of errors that are harmless by themselves can be so prejudicial as to warrant a new trial." *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012). The district court's series of errors denied Maike his fundamental right to a fair trial, and "the interests of justice" require, at minimum, a new trial. R.569, PageID#5351.

J. The errors that require reversal of Count 1 caused spillover prejudice that requires reversal of the remaining counts.

First, if this Court agrees to reverse on Count 1, then it must also reverse Counts 2 through 10 because a finding of guilt on those counts required a finding of guilt on Count 1. R.553, PageID#5238.

Next, if this Court reverses on Count 1 or 13, this Court should also reverse on Counts 11 and 12 because of spillover prejudice from the errors that affected Maike's trial on the pyramid-scheme issue. *Cf. United States v. Singer*, 782 F.3d 270, 276-77 (6th Cir. 2015). At the end of trial, even the district court expressed awareness that it had likely committed some errors: "What I don't know is what exactly is supposed to be done with this so the Court of Appeals can look at it, I

guess, among the 3,000 points that have been raised in this case. I can't wait to see the top 15 list of what the errors have been [. . .]." R. 671, Tr. 9/6/2022 (Trial Day 24), PageID#7438. Maike did not receive the fair day in court that the Constitution promises him, and this Court should reverse so that he may have that day.

CONCLUSION

For the foregoing reasons, Maike respectfully asks this Court to (1) vacate his convictions on Counts 1 and 13 for insufficient evidence, vacate his convictions on Counts 2 through 10 as a consequence thereof, and remand for retrial on Counts 11 and 12; or, in the alternative, (2) remand for retrial on all counts, with such appropriate guidance as will avoid repetition of the errors that warrant said reversal.

Date: October 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 27 and 32, as amended by this Court's Order dated October 2, 2024, because the countable portion thereof contains 21,000 words and was typed in 14-point Times New Roman font.

Respectfully submitted,

/s/ Kyle Singhal
Kyle Singhal
Counsel for Richard Maike

CERTIFICATE OF SERVICE

I certify that on October 7, 2024, a copy of the foregoing brief was served upon opposing counsel by electronic filing.

Respectfully submitted,

/s/ Kyle Singhal
Kyle Singhal
Counsel for Richard Maike

ADDENDUM

DESIGNATION OF RELEVANT RECORD DOCUMENTS

District Court Docket Entry No.	Description	PageID# Range
R.1	Indictment	1-43
R.92	Motion re: Expert (Keep)	560-561
R.95	Notice of Expert Testimony	566-567
R.96	Superseding Indictment	568-586
R.168	Barnes Motion to Exclude Keep	966-1018
R.185	Government Pretrial Memorandum	1092-1121
R.219	Order Denying Motion to Sever	1420-1427
R.230	Second Superseding Indictment	1452-1473
R.238	Order Denying Motion to Exclude	1640-1653
R.290	Maike's Trial Memorandum	2005-2027
R.347	Order on Anti-Saturation	2803-2829
R.378	Government Motion to Dismiss	2910
R.381	Government Motion to Exclude Warren	2917-2938
R.390	Response to Motion to Exclude	3010-3023
R.399	Anzalone Plea Agreement	3054-3063
R.401	Order on Change of Plea Hearing	3069-3072
R.421	Barnes Motion in Limine	3162-3166

R.424	Maike's Supplemental Trial Memorandum	3192-3216
R.427	Government Exhibit List	3259-3283
R.429	Government Proposed Jury Instructions	3290-3310
R.454	Order Granting Motion to Exclude	3535-3539
R.465	Trial Transcript (Anzalone Vol. 1)	3572-3604
R.485	Trial Transcript (Government Opening)	3722-3736
R.486	Trial Transcript (Keep Vol. 1)	3737-3838
R.487	Trial Transcript (Keep Vol. 2)	3839-4000
R.497	Trial Transcript (Reynolds Vol. 1)	4010-4084
R.498	Trial Transcript (Reynolds Vol. 2)	4085-4252
R.500	Trial Transcript (Adams)	4256-4291
R.504	Trial Transcript (Anzalone Vol. 2)	4297-4543
R.505	Trial Transcript (Anzalone Vol. 3)	4544-4821
R.511	Trial Transcript (Anzalone Vol. 4)	4827-4965
R.512	Trial Transcript (Bennett Vol. 1)	4966-4994
R.513	Trial Transcript (Bennett Vol. 2)	4995-5000
R.515	Trial Transcript (Moyer)	5004-5023
R.519	Trial Transcript (Reyes)	5027-5042
R.533	Barnes Response to Court's Proposed Jury Instructions	5087-5094

R.541	Trial Transcript (McClelland Cross)	5111-5198
R.542	Trial Transcript (McClelland Recross)	5199-5213
R.544	Maike's Supplemental Request for Jury Instruction	5217-5219
R.553	Verdict	5238-5250
R.554	Jury Instructions	5251-5291
R.569	Maike's Motion for Acquittal and Motion for New Trial	5349-5365
R.583	Government Response to Defendants' Post-Trial Motions	5466-5492
R.596	Government Motion to Dismiss	5634
R.601	Order Denying Motions for Acquittal and for New Trial	5743-5756
R.615	Maike Judgment	6033-6040
R.617	Maike Sentencing Transcript	6046-6088
R.663	Maike Sentencing Transcript	6516-6670
R.667	Trial Transcript, Vol. 8	6684-6818
R.669	Trial Transcript, Vol. 10	6846-7134
R.670	Trial Transcript, Vol. 11	7135-7407
R.671	Trial Transcript, Vol. 24	7408-7728
R.672	Trial Transcript, Vol. 25	7729-7749
R.675	Hosseinipour Sentencing Transcript	7815-7897

R.677	Final Pretrial Conference Transcript	7901-7996
R.678	Trial Transcript, Vol. 1	7997-8189
R.679	Trial Transcript, Vol. 2	8190-8265
R.681	Trial Transcript, Vol. 4	8297-8362
R.682	Trial Transcript, Vol. 12	8363-8568
R.683	Trial Transcript, Vol. 13	8569-8799
R.684	Trial Transcript, Vol. 14	8800-8946
R.688	Trial Transcript, Vol. 17	8960-9101
R.689	Trial Transcript, Vol. 18	9102-9355
R.690	Trial Transcript, Vol. 19	9356-9653
R.692	Trial Transcript, Vol. 21	9888-10046
R.697	Trial Transcript, Vol. 6	10062-10099
R.698	Trial Transcript, Vol. 7	10100-10116
R.699	Trial Transcript, Vol. 15	10117-10406
R.700	Trial Transcript, Vol. 16	10407-10689
R.701	Trial Transcript, Vol. 22	10690-10968
R.702	Trial Transcript, Vol. 23	10969-11195
R.744	Restitution Order	11535-11557

The above table listed relevant entries from the district court record in numerical order by docket entry number. For the Court's convenience, the following table provides the docket entries, for the trial transcripts only, in chronological order by trial date:[10]

TRIAL TRANSCRIPTS IN CHRONOLOGICAL ORDER BY TRIAL DATE			
Description	**Trial Date**	**Docket Entry No.**	**PageID# Range**
Trial Transcript, Vol. 1 (Day 1)	7/12/22	R.678	7997-8189
Trial Transcript (Government Opening)	7/12/22	R.485	3722-3736
Trial Transcript, Vol. 2 (Day 2)	7/13/22	R.679	8190-8265
Trial Transcript (Adams)	7/13/22	R.500	4256-4291
Trial Transcript (Moyer)	7/13/22	R.515	5004-5023
Trial Transcript (Keep Vol. 1)	7/13/22	R.486	3737-3838
Trial Transcript, Vol. 3 (Day 3)	7/14/22	R.680	8266-8298
Trial Transcript (Keep Vol. 2)	7/14/22	R.487	3839-4000
Trial Transcript (Reynolds Vol. 1)	7/14/22	R.497	4010-4084
Trial Transcript, Vol. 4 (Day 4)	7/15/22	R.681	8297-8362

[10] The docket entry numbers are not in sequence with the trial dates because many of the transcripts were generated, either in part or in full, out of sequence, such as for use by trial counsel during trial.

Trial Transcript (Reynolds Vol. 2)	7/15/22	R.498	4085-4252
Trial Transcript (Anzalone Vol. 1)	7/15/22	R.465	3572-3604
Trial Transcript, Vol. 5 (Day 5)	7/20/22	R.666	6677-6683
Trial Transcript, Vol. 6 (Day 6)	7/25/22	R.697	10062-10099
Trial Transcript (Anzalone Vol. 2)	7/25/22	R.504	4297-4543
Trial Transcript, Vol. 7 (Day 7)	7/26/22	R.698	10100-10116
Trial Transcript (Anzalone Vol. 3)	7/26/22	R.505	4544-4821
Trial Transcript, Vol. 8 (Day 8)	7/27/22	R.667	6684-6818
Trial Transcript (Anzalone Vol. 4)	7/27/22	R.511	4827-4965
Trial Transcript (Bennett Vol. 1)	7/27/22	R.512	4966-4994
Trial Transcript, Vol. 9 (Day 9)	7/28/22	R.668	6819-6845
Trial Transcript (Bennett Vol. 2)	7/28/22	R.513	4995-5000
Trial Transcript, Vol. 10 (Day 10)	8/1/22	R.669	6846-7134
Trial Transcript, Vol. 11 (Day 11)	8/2/22	R.670	7135-7407
Trial Transcript, Vol. 12 (Day 12)	8/3/22	R.682	8363-8568
Trial Transcript (Reyes)	8/3/22	R.519	5027-5042
Trial Transcript, Vol. 13 (Day 13)	8/4/22	R.683	8569-8799
Trial Transcript, Vol. 14 (Day 14)	8/5/22	R.684	8800-8946

Trial Transcript, Vol. 15 (Day 15)	8/23/22	R.699	10117-10406
Trial Transcript, Vol. 16 (Day 16)	8/24/22	R.700	10407-10689
Trial Transcript, Vol. 17 (Day 17)	8/25/22	R.688	8960-9101
Trial Transcript (McClelland Cross)	8/25/22	R.541	5111-5198
Trial Transcript, Vol. 18 (Day 18)	8/26/22	R.689	9102-9355
Trial Transcript (McClelland Recross)	8/26/22	R.542	5199-5213
Trial Transcript, Vol. 19 (Day 19)	8/29/22	R.690	9356-9653
Trial Transcript, Vol. 20 (Day 20)	8/30/22	R.690	9654-9887
Trial Transcript, Vol. 21 (Day 21)	8/31/22	R.692	9888-10046
Trial Transcript, Vol. 22 (Day 22)	9/1/22	R.701	10690-10968
Trial Transcript, Vol. 23 (Day 23)	9/2/22	R.702	10969-11195
Trial Transcript, Vol. 24 (Day 24)	9/6/22	R.671	7408-7728
Trial Transcript, Vol. 25 (Day 25)	9/7/22	R.672	7729-7749