UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, v. FARADAY HOSSEINIPOUR, ET AL., DEFENDANTS.	CASE NO. 4:17-CR-00012-GNS-CHL *Electronically Filed*

MOTION FOR ACQUITTAL

Defendant Faraday Hosseinipour ("Hosseinipour"), by counsel, incorporates by reference her prior motions made pursuant to Federal Rule of Criminal Procedure 29 (expressed both verbally and in writing) at the close of the case in chief of the United States and at the close of all the proof at trial, and also incorporates all arguments asserted by Defendants Maike and Barnes in their motions for new trial and acquittal under Federal Rule of Criminal Procedure 33 and 29, respectively. In addition, Hosseinipour moves for a judgement of acquittal and new trial pursuant to Rule 29 and 33 because she has been convicted of criminal charges despite the government's failure to meet its burden of proof at trial.

I. LEGAL STANDARD

Federal Rule of Criminal Procedure 29(a) provides that a court must, "on the defendant's motion[,]" "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The Court must view the evidence in a light most favorable to the prosecution and decide whether any rational jury could find the essential elements of the crimes were proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Hernandez*, 227 F.3d 686, 694 (6th Cir. 2000). Although the Court

draws all inferences in favor of the government, these inferences must be drawn from facts that a reasonable jury might believe as true. *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993). "This is understandable, as a man's liberty should not be placed in jeopardy by an inference drawn from mere speculation or conjecture." *United States v. Heavrin*, 144 F. Supp.2d 769, 772–73 (W.D. Ky. 2001).

Federal Rule of Criminal Procedure 33 permits a new trial if a verdict is against the "manifest weight" of the evidence. *United States v. Hughes*, 505 F.3d 578, 592 (6th Cir. 2007). Such a motion calls on the trial judge to take on the role of a thirteenth juror, weighing evidence and making credibility determinations without holding the prosecution in a favorable light, to ensure there is not a miscarriage of justice. *See id.* at 593; *see also United States v. Mallory*, 902 F.3d 584, 596 (6th Cir. 2018).

II. ARGUMENT

Hosseinipour is not guilty as a matter of law and is therefore entitled to have her conviction vacated because her guilty verdict was not only against the great weight of the evidence, but in complete opposition to it.[1] The government did not meet its burden in proving either that Hosseinipour conspired with the other defendants, committed mail fraud, or committed securities fraud. Throughout this trial, the Court incorrectly instructed the jury, admitted prejudicial and irrelevant evidence, and wrongfully excluded evidence favorable to the defendants. Yet, the evidence presented at trial was not evidence upon which any reasonable juror could find that Hosseinipour committed any of the crimes she was charged with. The evidence instead proved that Hosseinipour did not have the requisite intent to conspire with the other defendants. Additionally, the government failed to prove the necessary element of either

[1] There are additional reasons Hosseinipour should have a new trial. These are set forth in her motion for new trial, filed contemporaneously with this motion. *See* Hosseinipour Motion for New Trial.

mail fraud or securities fraud, the underlying crimes to Hosseinipour's conspiracy charges. Had the jury been properly instructed and the government been required to prove the elements of the crimes charged beyond a reasonable doubt with appropriate evidence, Hosseinipour would not have been convicted. Instead, the jury was confused by misstatements of law, inappropriate and prejudicial evidence, and incorrect instructions, and convicted Hosseinipour despite the substantial evidence supporting her innocence.

A. The government failed to prove beyond a reasonable doubt that Hosseinipour conspired to commit mail fraud.

Count 1 of the Second Superseding Indictment charged Hosseinipour with conspiracy to commit mail fraud. DN 230. The indictment alleged Hosseinipour promoted Infinity2Global ("I2G") products while misrepresenting I2G "investors'" ability to profit off of their investments in I2G products by: not disclosing the flaws in the products offered; not disclosing that profits from the products were negligible, and that most profits were received were from investments; stating that major celebrities were supporting one of the products, Songstagram, and; receiving and posting promotional cardboard checks as if they accurately evidenced the payments she was receiving from her involvement with I2G. *Id.* This constituted conspiracy to commit mail fraud, according to the government, because these alleged misrepresentations made by Hosseinipour and her co-defendants caused individuals to purchase "Emperor" packages with I2G and send their payments through "mail and commercial interstate carrier." *Id.* However, the government failed to prove that Hosseinipour had any intent to commit mail fraud, and could not even prove that she did commit mail fraud.

1. No reasonable juror could find that Hosseinipour conspired with the co-defendants based on the evidence presented at trial.

"The gist of the crime of conspiracy is the agreement to commit an illegal act, not the accomplishment of the illegal act." *United States v. Fruehauf Corp*, 577 F.2d 1038, 1071 (6th

Cir. 1978). The Supreme Court has held that "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *United States v. Feola*, 420 U.S. 671, 686 (1975). The degree of criminal intent necessary for the crime of mail fraud is "intent to defraud," which means to act with an intent to deceive or cheat for the purpose of either causing financial loss or bringing about financial gain. *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007). Moreover, to convict a defendant of conspiracy, the government must prove beyond a reasonable doubt that the defendant knowingly and voluntarily joined the conspiracy; that is, the defendant must have known the conspiracy's main purpose was to commit fraud. *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986).

The government itself presented evidence that Hosseinipour did not have the requisite intent to conspire. From the outset, the government's key witness, Richard Anzalone, admitted that Hosseinipour came into I2G at a late point in its existence and with the intent to promote what she believed was a legitimate business opportunity. Anzalone Transcript Vol. 4 at p. 38–39. Richard Anzalone testified that it was hard to convince Hosseinipour to join him in I2G because she wanted to know that everything was legal and that the company had attorneys approve the business plan. *Id.* at 37–38.

Anzalone also testified that he and Hosseinipour were told that a highly reputable MLM attorney, D. Jack Smith, had approved the business plan, as well as that an attorney with 25 years of compliance experience, David Koerner, was retained to ensure I2G continued to comply with the law. *Id.* at 37–38; *see also* Anzalone Transcript Vol. 2 at p. 8. Conference calls played at trial included Richard Maike proclaiming to all those present, which included Hosseinipour and many other individuals like her, that he had hired multiple, experienced domestic gaming,

international gaming, and MLM compliance attorneys to supervise I2G's activities. Anzalone Transcript Vol. 2 at p. 123–24. In those same conference calls, Attorney Koerner suggested that I2G was legal and compliant. *See id.* at p. 244–45. Reliance by a layperson on a lawyer is common. *United States v. Boyle*, 469 U.S. 241, 251 (1985). It is unreasonable for a jury to find that Hosseinipour intended to commit any illegal act when the government's own evidence proved she did not want to join I2G unless it was legitimate and legal.

The government also admitted evidence of the defendants' previous involvement with BidXcel, another multi-level-marketing company that was dissolved but not due to any regulatory or legal issues, to prove that the defendants knew each other and thus must have been conspiring with each other here. *See id.* at p. 20. Yet, Anzalone testified Hosseinipour did not have a close relationship with Mr. Maike. In fact, he described their relationship as contentious. Anzalone Transcript at p. 8.

Also, Anzalone, the government's key witness against Hossesinipour, repeatedly stated that he did not believe he was doing anything wrong or criminal at the time they were involved in I2G. Anzalone Transcript, Vol. 3 at p. 195–96. He also testified that he did not believe he joined a criminal conspiracy, and did not have the criminal intent to do so. *Id.* He testified further that he never knowingly tried to deceive anyone joining I2G, and that he and Hosseinipour believed in Maike and the products. *Id.* at p. 218. Anzalone held a position in I2G longer than Hosseinipour did and recruited Hossesinipour to join I2G; thus, no reasonable jury could conclude beyond a reasonable doubt that Hosseinipour had a state of mind that her long-time business companion who was more experienced with I2G did not have. Anzalone Transcript Vol. 4 at p. 38–39. This is especially true when considering that Anzalone

confirmed that Hosseinipour did not knowingly lie, misrepresent, or deceive anyone. Anzalone Transcript Vol. 3 at p. 218.

Further, the government states in its indictment that after Hosseinipour posed with the cardboard checks that were used to falsely advertise her commissions from I2G, she emailed Richard Maike asking why she had not received that amount of money in commissions. DN 230. This further shows her complete ignorance as to I2G's illegality. She, just as the other thousands of individuals involved with I2G who were not indicted for federal fraud crimes, believed in I2G and its products. *See* Reeves Transcript at p. 26. Also, Anzalone testified that Hosseinipour was left out of meetings and did not travel overseas with Anzalone, Maike, or Barnes. Anzalone Transcript Vol. 2 at p. 47–48. There is no evidence to show that Hosseinipour even had enough information about I2G to conspire with the other defendants. Hosseinipour may not have become aware of the alleged criminality of I2G as quickly as the prosecution believed she should have, but that is not the state of mind a conspiracy crime requires. The state of mind required, intent, was clearly not proven.

2. No reasonable juror could find that Hosseinipour committed mail fraud based on the evidence presented at trial.

Mail fraud requires proof of two elements: "(1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts)." *Schmuck v. United States*, 489 U.S. 705, 721 (1989). Thus, the degree of criminal intent necessary for the crime of mail fraud is "intent to defraud," which means to act with an intent to deceive or cheat for the purpose of either causing financial loss or bringing about financial gain. *McAuliffe*, 490 F.3d at 531. The Court's jury instructions required proof beyond a reasonable doubt that Hosseinipour, with the intent to defraud, knowingly agreed to defraud others through

the sale of Emperor positions and that the scheme included a material misrepresentation or concealment of material fact. *See* DN 554, Instruction Nos. 3 and 8. Thus, the government had to prove beyond a reasonable doubt that Hossesinipour made a misrepresentation to purchasers of Emperor positions with the knowledge it was false and the intent that it induce those individuals to purchase Emperor positions. It did not.

Quite the contrary, the government presented evidence disproving such requirements. Part of the government's allegations against Hosseinipour were that she failed to disclose flaws in the I2G products so that individuals would invest in the products and thus make her money. DN 230. However, the government introduced emails that Hossesinipour wrote and forwarded to Koerner and Maike when individuals complained about I2G, evidencing her dedication to ensuring that I2G remained legal and resolved any issues or misunderstandings with members. Anzalone Transcript Vol. 2 at p. 88–90; *see also* Anzalone Transcript Vol. 3 at p. 16. Indeed, the testimony heard was that Hossesinipour believed in I2G. Anzalone Transcript Vol. 4 at p. 37–39; *see also* Anzalone Transcript Vol. 3 at p. 22–22. While the government insisted that it was not required to show intent, but deliberate ignorance, even that argument here would fail, as testimony proved that other members continued to believe in I2G and promote the company even after becoming aware of purchaser complaints regarding the products and company, too. Anzalone Transcript Vol. 3 at p. 27, 138. It is plain here that Hosseinipour did not realize there was any issue with I2G's structure.

Hossesinipour's holding of the cardboard check, expressing her belief that I2G was a great business opportunity, and claiming celebrities were backing Songstagram is not enough for a reasonable jury to find intent to defraud beyond a reasonable doubt. These may have been untrue statements, but there was absolutely no showing at trial that Hosseinipour knew these

statements were false or that they caused any individual to purchase an Emperor package. First, Hosseinipour was not an owner, officer, or employee of I2G. *See* Anzalone Transcript Vol. 4 at p. 10. Thus, she would have had no access to company records, contracts, bank accounts, reports, or supplier agreements. She further would have had no more knowledge of I2G's inner-workings than any of the other thousands of I2G members who were not charged for these crimes. Additionally, the statements she made regarding I2G were made in reliance on the I2G corporate PowerPoint, shown at trial to have been received by every I2G distributor, or on statements made by Maike to the distributors at large. See Anzalone Transcript Vol. 2 at p. 232; *see also* Anzalone Transcript Vol. 4 at 37–38. Specifically, the statement regarding Songstagram's celebrity support was shown to have been made by Rocky Wright at an event with hundreds of individuals like Hosseinipour. Anzalone Transcript Vol. 2 at p. 228. Hossesinipour was simply repeating information that she was told and believed to be true.

Also, the only proof that Hossesinipour's alleged misrepresentations resulted in an individual purchasing an Emperor package was the mere existence of her "Google Hangout" in which she simply discussed I2G, an action at least a few of the other 23,000 other individuals holding the same positions as her in I2G surely also engaged in. Anzalone Transcript Vol. 2 at p. 229–30. The Government did not prove any of the Emperor witnesses who testified at trial relied on or saw Hosseinipour's Google Hangout at the time they purchased an emperor package, or that a material misrepresentation was made in a Google Hangout that convinced them to purchase an Emperor package. Many witnesses testified that they watched Hossesinipour's Google Hangout. *See, e.g., id.* at p. 230. However, these witnesses also participated in video presentations, live meetings, and conference calls by other promoters across the country, and would have relied on their own sponsors when making the decision to join I2G. *See* Anzalone

Transcript Vol. 2 at p. 12, 114, 229; Anzalone Transcript Vol. 4 at p. 48. The government still, however, relied on the argument that these witnesses *may* have viewed a specific Google Hangout made by Hossesinipour around the time that they upgraded to an Emperor package over 9 years ago, and otherwise provided no evidence of Hosseinipour's knowledge that her statements were false or caused any individual to purchase an Emperor package. Speculation and conjecture is not enough to support a conviction, *United States v. Heavrin*, 144 F. Supp.2d 769, 772–73 (W.D. Ky. 2001), and this is pure speculation. This evidence plainly casts doubt on whether Hosseinipour knew she was making false statements as well as whether those statements actually induced any individual to purchase an Emperor package, so much so that no reasonable jury could find Hosseinipour guilty of conspiracy to commit mail fraud.

3. I2G is not a pyramid scheme as a matter of law.

The Court instructed the jury that a pyramid scheme was per se a scheme to defraud. DN 554 Instruction No. 8. At trial, the government established that the Emperor program was limited to 5,000 purchasers and that those purchasers were told that they were entitled to share in any profits received by I2G from the online casino without any requirement that they recruit new participants in I2G. Anzalone Transcript Vol. 3 at p. 156. The government also established that Emperors purchased the Emperor packages because there was no requirement that they recruit and they believed the casino had potential to make profits. *Id.* The business plan was instead that Emperors would enjoy the ability to access present and future virtual products of the company and to share in any profits that would result from the use of those products, like the online casino. While the business plan failed, that does not make it a pyramid scheme.

In *United States v. Gold Unlimited, Inc.*, the Sixth Circuit adopted the following definition of an illegal pyramid scheme:

> 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.

United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999). In Instruction No. 8, the Court added the following to the *Gold Unlimited* definition: "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." DN 554 Instruction No. 8(2)(B).

In *Gold Unlimited*, the Sixth Circuit relied on the holding in *Webster v. Omnitrition Int'l*, 79 F.3d 776 (9th Cir. 1995). *Id.* at 479. In *Omnitrition*, the Ninth Circuit explained why illegal pyramid schemes are inherently fraudulent: "Pyramid schemes are said to be inherently fraudulent because they must eventually collapse. *See, e.g., S.E.C. v. International Loan Network, Inc.*, 297 U.S. App. D.C. 22, 968 F.2d 1304, 1309 (D.C. Cir. 1992). Like chain letters, pyramid schemes may make money for those at the top of the chain or pyramid, but 'must end up disappointing those at the bottom who can find no recruits.' *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975) (emphasis in original), *aff'd mem. sub nom, Turner v. F.T.C.*, 580 F.2d 701 (D.C. Cir. 1978)." *Id.* at 781. Also, the Sixth Circuit stated in *Gold Unlimited*, 177 F.3d at 475, that "[n]o clear line separates illegal pyramid schemes from legitimate multilevel marketing programs." In *Gold Unlimited*, the Government's own witnesses testified that the factors the Government considered indicative of a pyramid scheme, like recruitment of members, positions in a tree, and the granting of favored slots to proven sales performers, were common features in legitimate multilevel marketing companies. *Id.* at 483.

As a matter of law, the Emperor program does not constitute a pyramid scheme. The Emperor program prohibited recruitment of additional Emperors beyond 5,000. Moreover, at trial, the purchasers of Emperor packages indicated that they did not buy the packages to recruit; the plan and the motive of the purchasers was to profit from other individuals' use of the products I2G offered. Therefore, the program was not doomed to fail for the inability to find new recruits. Instead, the success of the program, like all legitimate business ventures, was dependent on the successful marketing of the product. Further, instructing the jury that a pyramid scheme was a per se scheme to defraud likely confused the jury into forgetting the necessary scienter requirement when deciding to convict Hosseinipour. This consideration was especially necessary here, where the line between legitimate business ventures and pyramid schemes is so blurred. It was critical to require the Government to prove beyond a reasonable doubt, and for the jury to find beyond a reasonable doubt, that Hosseinipour knew she was and intended to be involved in a pyramid scheme. This is because it is entirely possible, and in fact likely, that Hosseinipour did not mean to involve herself in a pyramid scheme. The failure to require proof beyond a reasonable doubt that I2G was a pyramid scheme, and that Hosseinipour intentionally engaged in a pyramid scheme knowing that it was a pyramid scheme, requires the verdict be set aside and Hosseinipour be found not guilty as a matter of law.

4. The Court erred in its decisions to include or exclude expert testimony on pyramid schemes.

The jury was further denied an opportunity to gain clarity on what constitutes a pyramid scheme because of the expert testimony admitted and excluded at trial. For example, the defendants sought to use Manning Warren, a law professor who has taught students and trained state regulators on the relevant issues, as an expert witness at trial. Warren would have applied the correct legal standard as to whether I2G was a pyramid scheme, but was incorrectly found by

this Court to be not qualified to testify. This kept the jury from hearing an expert's opinion that the Emperor program was not an illegal pyramid scheme, clearly prejudicing the defendants. The Court erred in this ruling and deprived the defendants their ability to defend themselves properly against the government's allegations and incorrect expert testimony.

The incorrect expert testimony was supplied by William Keep, a marketing professor, who was permitted to testify as an expert on pyramid schemes. Defendants Barnes's and Defendant Maike's Motions in Limine to exclude Keep were denied by the Court before the government even responded to them. DN 562. Keep misstated the legal definition of a pyramid scheme. Keep Transcript Vol. 1 p. 6–7. This definition was inconsistent with the Court's instructions and should have been excluded. Keep then testified at length about certain statements, calling them false and misleading. *Id.* at 76–100. It is a well-recognized principle of our trial system that "determining the weight and credibility of [a witness's] testimony.... belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men...." *Nimely v. City of New York*, 414 F.3d 381, 397–398 (2d Cir. 2005) (*quoting Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)); *see also* Fed. R. Evid. 702(a); *Halcomb v. Wash. Metro. Area Transit Auth.*, 526 F. Supp. 2d 24, 29 (D.D.C. 2007) (expert's statements were held inadmissible where expert stated he was "inclined to accept the Plaintiff's version of events" and implied that the defendant was untruthful). This is true even when such evaluations are rooted in scientific or technical expertise. *See, e.g., United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir.1999); *Nimely*, at 397–98. The Sixth Circuit and the Western District of Kentucky have made no exception to this principle. *See Greenwell v. Boatwright*, 184 F.3d 492, 496 (6th Cir. 1999) ("Regardless of the intent or motivation of the expert in commenting on the eyewitness testimony, we agree . . . that the testimony regarding the credibility of eyewitness

testimony was improper."); *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990) (finding that, under Kentucky law, the credibility of child witnesses was for the jury to decide and, therefore, expert testimony that he found them to be credible should have been excluded); *Johnson v. Baker*, 2009 WL 3486000, at *6 (W.D. Ky. Oct. 23, 2009) ("Allowing experts to testify as to credibility removes that role from the jury…. This issue becomes especially important when, as here, the credibility of witnesses weighs heavily on the outcome of the trial.") (citing *Aetna Life*, 140 U.S. at 88 (1891), *EEOC v. Ford Motor Co.*, 98 F.3d 1341 (6th Cir. 1996) ("The credibility of witnesses has historically been the sole function of the fact finder."); *Nimely*, 414 F.3d at 398 (2d Cir. 2005)).

Further, it is a plain violation of Federal Rule of Evidence 704(b) for an expert to opine on mental states that constitute elements of, and defenses to, the crime charged. Whether misrepresentations were made is not considered in the definition of a pyramid scheme. Keep's statements that some of the defendants made misrepresentations were outside of the scope in which he was permitted to testify and only made to convince and confuse the jury that the scienter requirement was met, because the government had no other evidence to prove that.

Keep also improperly testified about the performance of the online casino, which had no relevance to the question of whether the Emperor Program was a pyramid scheme. *See* Keep Transcript Vol. 1. His improper testimony continued through his expressing his impressions of I2G's announcement that it was changing its name. Keep Transcript Vol. 2 at pp. 40–46. Keep's opinions were incorrect, improper, irrelevant, highly prejudicial, and had no application to the issue of whether I2G was a pyramid scheme. The above described evidence and instances

show that the government failed to prove, let alone through proper and admissible evidence, that Hosseinipour conspired to commit mail fraud. As a result, the verdict against her must be vacated.

B. The government failed to prove beyond a reasonable doubt that Hosseinipour conspired to commit securities fraud.

Count 13 of the Second Superseding Indictment charged Hosseinipour with conspiracy to commit securities fraud and alleged that she defrauded and made misrepresentations to individuals during their purchases of Emperor packages. DN 230. The government claimed the payments made to become I2G Emperors were securities because the defendants promised "passive" profits would result from the purchase of Emperor packages. *Id.* Yet, again, the government did not provide the necessary proof to support its allegations that Hosseinipour intended to commit securities fraud, nor did it prove that she did in fact commit securities fraud.

1. No reasonable jury could find that Hosseinipour conspired to commit securities fraud based on the evidence presented at trial.

The evidence mentioned under the conspiracy discussion for Count 1 equally applies to the jury's unreasonable finding of a conspiracy under Count 13. *See supra* II.A.1. However, the proof of Hossesinipour's lack of intent to defraud was even more patent for Count 13's conspiracy charge. In the evidence presented at trial, Hosseinipour told people that they had to work hard to make money with I2G. Anzalone Testimony Vol. 2 at p. 232–33; *see also* Gov. Ex. 155. She therefore provided disclaimers that there was no promise that anyone else would achieve anything with the company. In fact, the only promise she made was that not working or putting in effort would result in no revenue. She did not promise passive profits from the casino. There was also no evidence that Hosseinipour knew what the casino's profits were. Hosseinipour's multiple statements about the work required to achieve any profit with I2G

completely disproved the alleged conspiracy to convince purchasers that the Emperor packages resulted in passive profits, like a security would.

Also, the government did not prove the occurrence of an overt act for Count 13 that supported the existence of any conspiracy, and Instruction No. 7 failed to properly inform the jury regarding the overt acts that were charged in Count 13 of the Second Superseding Indictment. DN 554, 239. Paragraph 40 of the Second Superseding Indictment specifically alleged that the overt acts were various acts "which operated and would operate as a fraud and deceit upon persons as charged in Count 1 of this Second Superseding Indictment during the sale of the following securities[.]" DN 230. Thus, as charged in the Second Superseding Indictment, the overt acts were the alleged fraudulent acts of a conspirator. The only event that occurred within the statute of limitations was the wiring of money by a non-conspirator to a bank account of an entity. That is not one of the overt acts charged in Count 13 and thus cannot satisfy the requirement that an overt act occur within statute of limitations. Without proof of her intent or any overt act to support a conspiracy, Hosseinipour must be found not guilty of conspiracy to commit securities fraud as a matter of law, and the judgment against her must be vacated.

2. No reasonable jury could find that the government proved any defendant, let alone Hosseinipour, committed securities fraud.

The government attempted to prove that one component of the Emperor Program – the right to share in 50% of the profits I2G received from the Plus Five casino – was an "investment contract" under the *Howey* test. DN 230. The proof presented by the government instead established, as a matter of law, that the right to share casino profits was not an "investment contract." There are four elements under the *Howey* test:

1. the presence of an investment
2. in a common venture
3. premised on a reasonable expectation of profits

4. to be derived from the efforts of others.

See, e.g. Union Planters National Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174, 1181 (6th Cir. 1981). The government failed to sufficiently prove any of these elements.

In *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 559–560 (1979), the United States Supreme Court held, "In every decision of this Court recognizing the presence of a 'security' under the Securities Acts, the person found to have been an investor chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security . . . . In every case the purchaser gave up some tangible and definable consideration in return for an interest that had substantially the characteristics of a security." When Emperors paid $5,000, they received (1) the right to promote the business and earn commissions, (2) a license to use the I2G Touch and future I2G products, and (3) a contract right to share in revenues received by I2G from the online casino. The government failed to submit proof by which a jury could conclude beyond a reasonable doubt that a specific and severable portion of the $5,000 was paid to obtain the contract right to receive a portion of I2G's revenue from the online casino. For this reason alone, the jury verdict should be set aside because there was insufficient proof that the purchases constituted investment contracts.

The Court gave the jury an incorrect definition of an investment contract, which likely confused it and explains why the jury thought this element was satisfied. DN 554. The instruction allowed the jury to find that an investment contract, and hence a security, could be established if "a person invests his or her money, in a common enterprise, and is led to expect profits derived primarily from the efforts of others (i.e., persons other than the investor)." *Id*. Instruction No. 9(4). By confining the definition to "persons other than the investor" rather than "persons other than the investors" the instruction drastically lessened the

Government's burden of proof, effectively nullifying the abundant evidence presented at trial that Emperors were told they would have to drive players to I2G's foreign online casinos to receive any payments from the casino profits.

Also, there was insufficient evidence to show that the common enterprise element required by *Howey* was established, since the Emperor purchase funds were not pooled. In the Sixth Circuit, to establish a "common enterprise," the government must prove that investor funds were pooled for the purpose of generating the "profits" that investors would earn from their investment. *Newmyer v. Philatellic Leasing, Ltd*., 888 F.2d 385, 394 (6th Cir. 1989). In *Newmyer v. Philatellic Leasing, Ltd*., the Sixth Circuit held,

> Finally, we come to the vexed question of whether there is any prospect of the plaintiffs being able to show not only a "common venture," but a common venture in which the plaintiffs' funds were pooled with those of other investors. This circuit…has repeatedly said that proof of a vertical relationship between seller and buyer is not in itself enough to establish the existence of investment contracts; there must also be a horizontal relationship between or among investors, with the funds of two or more investors going into a common pool from which all may benefit.

Id. Similarly, *Union Planters National Bank*, 651 F.2d at 1183, held, "A horizontal common enterprise . . . requires a heightened degree of affiliation . . . . In fact, a finding of horizontal commonality requires a sharing or pooling of funds." In *Michaelian v. Lawsuit Fin., Inc*., 2019 U.S. Dist. LEXIS 45706 *18 (E.D. Mich. 2019), the Court held, "The Sixth Circuit has declined to find a common enterprise where plaintiffs have failed to show 'an arrangement to pool investments for common developments.'" (*quoting Hart v. Pulte Homes of Michigan Corp*., 735 F.2d 1001, 1005 (6th Cir. 1984)); *see also Procter & Gamble Co. v. Bankers Trust Co*., 925 F.Supp 1270, 1277–78 (S. D. Ohio 1996) (holding that derivative swaps between two companies were not investment contracts because the plaintiff "did not pool its money with that of any other company or person in a single business venture"). Other circuits that require horizontal

commonality agree that the requirement of horizontal commonality requires pooling of the investor funds: "Horizontal commonality requires a pooling of investors' contributions and distribution of profits and losses on a pro-rata basis among investors." *Steinhardt Group v. Citicorp*, 126 F.3d 144, 151 (3rd. Cir. 1997) (emphasis added) (citing Maura K. Monaghan, *An Uncommon State of Confusion: The Common Enterprise Element of Investment Contract Analysis*, 63 FORDHAM L. REV. 2135, 2136 (May, 1995)); *see also SEC v. Life Partners, Inc.*, 87 F.3d 536, 543 (D.C. Cir. 1996) (defining horizontal commonality as the "pooling of investment funds, shared profits, and shared losses") (emphasis added); *see also Goldberg v. 401 North Wabash Venture LLC*, 755 F.3d 456, 465 (7th Cir. 2014) ("a 'common enterprise' . . . means an enterprise in which 'multiple investors ... pool their investments and receive pro rata profits.'") (emphasis added); *see also SEC v. Infinity Group Co.*, 993 F. Supp. 321, 323 (E. D. Penn. 1998) ("horizontal commonality 'requires a pooling of investors' contributions and distribution of profits and losses on a pro-rata basis among investors . . . . Our review of cases in other Circuits that apply the definition of horizontal commonality suggests that pooling of investor funds is most often the determinative factor.") (emphasis added).

At the close of the proof, the Court noted that courts have employed some flexibility when analyzing potential investment contracts. But the United States Supreme Court, the Sixth Circuit, and other circuits applying the horizontal commonality requirement have consistently and inflexibly applied the requirements set forth above. The undisputed proof was that there was no pooling of the invested funds. *See* Anzalone Transcript Vol. 3 at p. 190. Because this invalidates the existence of an investment contract and the jury instructions did not encompass these legal concepts, the verdict against Hosseinipour must be set aside, as she is not guilty as a matter of law.

The expected earnings from the online casino were also not "profits" as they are defined by the Sixth Circuit. In *Union Planters National Bank v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174, 1184 (6th Cir. 1981), the Sixth Circuit stated that "profits," as that term is used in the *Howey* test, means either capital appreciation resulting from the development of the initial investment or a participation in earnings resulting from the use of the investors' funds. *See Michaelian v. Lawsuit Fin., Inc.*, 2019 U.S. Dist. LEXIS 45706 *15 (E.D. Mich. 2019). The government failed to present any evidence that proves this element beyond a reasonable doubt. To the contrary, the government's proof was that I2G established a contractual relationship with Plus Five Gaming and committed to a minimum revenue payment of 3,000 Euros per month. Revenue from the casino was applied to this amount, and I2G would owe the difference only if the revenue failed to cover the minimum payment. The "profits," as that term is used in the *Howey* test, were to arise solely from the use of the online casino. People had to gamble in the casino, and more money had to be lost than won, for anyone to receive any money through an Emperor package. The $5,000 paid by Emperors was not used to generate and had no impact on whether there were "profits" from the casino. Rather, the $5,000 was revenue to Finance Ventures, which Finance Ventures was free to use at it saw fit. Under the offer of the alleged investment contract, the "investors'" funds were not used to generate the "profits." This simply does not meet the requirement for this element set forth in *Union Planters National Bank*. The jury verdict should be set aside because the proof did not establish this element and the jury instructions did not encompass these legal concepts.

The evidence also did not support the "to be derived from the efforts of others" element of the *Howey* test because, as a multi-level marketing company, the profitability of the casino depended on the efforts of "investors." When the United States Supreme Court in *Howey* held

that "profits" must "come solely from the efforts of others," it referred to the "profits that investors seek on their investment, not the profits of the scheme in which they invest." *SEC v. Edwards*, 540 U.S. 389, 394 (2004). The Supreme Court "used 'profits' in the sense of income or return, to include, for example, dividends, other periodic payments, or the increased value of the investment." *Id.* Thus, in applying this element of *Howey* here, "profits" refers to the profits that Emperors hoped to receive from I2G's share of profits from the Plus Five casino. Moreover, when evaluating the offer in this case, the Court must consider the economic realities of I2G's offer of the Emperor program from the perspective of an objectively reasonable purchaser. *Union Planters National Bank v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174, 1180 (6th Cir. 1981) ("[I]n determining the scope of the term 'security,' the Supreme Court has disregarded form in favor of substance and counselled that application of the federal securities statutes turns on the 'economic realities' underlying a transaction."); *Piambino v. Bailey*, 610 F.2d 1306, 1320 (5th Cir. 1980) ("This, of course, would be determined on the expectations of a 'reasonable investor' as prompted by Bestline's standardized presentation, rather than the subjective beliefs of any particular individuals, *See International Brotherhood of Teamsters, supra*, 99 S. Ct. at 797; *United States Housing Foundation, Inc. v. Forman*, 421 U.S. 837 at 852 . . . . The motivation of particular individuals might vary; the application of the statute must be objectively based.").

Here, because I2G was a multi-level marketing company, the success of the casino depended on the "investors" using the online casino and driving international gambling on the online casino. There was no other mechanism in place to drive traffic to the online casino, and there is no evidence contradicting this fact. When investors have the ability to control the profitability of their investment (individually or as a group), the "efforts of others" element is not

satisfied. *See Gordon v. Terry*, 684 F.2d 736, 741 (11th Cir. 1982). Further, in *Union Planters National Bank*, the Sixth Circuit made clear that the "efforts" that are relevant to the analysis are not the performance of administrative tasks. 651 F.2d at 1185. Rather, it is the effort that creates the "profits" at issue. In *Union Planters National Bank*, the relevant "effort" was the retailing of furniture. *Id.* "If the investor retains the ability to control the profitability of his investment, the agreement is no security." *Albanese v. Florida Nat'l Bank*, 823 F.2d 408, 410 (11th Cir. 1987). "The owner of a security lacks the ability to control the venture in which he is investing. This concept of control, or lack of control, is the basis for the requirement that a security derives its value from the managerial or entrepreneurial efforts of others." *First Financial Federal Sav. & Loan Asso. v. E.F. Hutton Mortg. Corp.*, 834 F.2d 685, 689 (8th Cir. 1987). Here, not only did Emperors retain the ability to drive profit, the objectively reasonable Emperor when considering the economic realities of the offer would understand that the generation of the profits from the casino not only permitted but required the effort of the alleged investors.

The profitability of the casino was also entirely dependent on sales, i.e. driving users to the online casino, a task left entirely to the "investors." This means that the sharing of casino profits was not an investment contract because the "profits" were not derived from the efforts of others, but the purchasers themselves. The jury verdict should be set aside because the proof did not support this element and the jury instructions did not encompass these legal issues.

C. The government failed to produce any evidence of any criminal act that occurred within the statute of limitations.

The jury asked a question about whether it was limited to considering evidence of the purchases that occurred within the statute of limitations. This was crucial since the issue of whether there was a purchase made within the statute of limitations was contested at trial. Yet, the Court's answer assumed the very issue in controversy by indicating to the jury that it could

consider the evidence of the purchase within the statute of limitations. It was an error for the Court to tell the jury that a purchase occurred within the statute of limitations, since the jury's possible finding otherwise would have required Hosseinipour be found not guilty. For this reason alone, Hosseinipour is further entitled to a new trial on Count 13.

D. The absence of an anti-saturation affirmative defense instruction created a verdict that conflicted with evidence about the Emperor Program.

The Court further erred by failing to give an instruction on the anti-saturation affirmative defense available to the defendants. No reasonable jury appropriately advised on this affirmative defense could find Hosseinipour guilty beyond a reasonable doubt. In *Gold Unlimited,* the Sixth Circuit held that an effective policy that eliminates the risk of a scheme's failure because of the inability to locate additional recruits is an affirmative defense. 177 F.3d 472, 482 (6th Cir. 1999). The Sixth Circuit quoted the position of the defendant as follows: "A pyramid is improper only if it presents a danger of market saturation--that is, only if at some point, persons on the lowest tier of the structure will not be able to find new recruits." *Id.* at 481. The Sixth Circuit then analyzed whether this concept should be included in the elements of the offense or as an affirmative defense, and concluded that it should be included as an affirmative defense so long as the proof supported it.

Here, the proof supported an instruction on this affirmative defense. The Emperor program could not fail because of an inability to locate additional recruits. In fact, the program was proven to be limited to 5,000 Emperors. Anzalone Transcript Vol. 3 at p. 156. Thus, the success or failure of the program depended entirely on the ability to generate profits from the sale of the product like the online casino, instead of recruitment of more Emperors. Therefore, the evidence supported an instruction on the affirmative defense. Because the jury was not instructed on this defense, its verdict should be set aside.

E. The government also committed a Brady violation by not disclosing evidence about Hosseinipour's exculpatory evidence.

Also, Hosseinipour and her co-defendants learned at the close of Barnes's evidence that a report from Special Agent Sauber existed that included his recitation of exculpatory statements made by Hosseinipour. Among other things, the report contains Hosseinipour's statements that she lacked the requisite intent. The government was required to produce this under *Brady v. Maryland*, 373 U.S. 83 (1963). The report of Special Agent Sauber would have been admissible as a statement of an agent of a party opponent. *See* FRE 801(d)(2)(A) and (C); *United States v. McLernen*, 8746 F.2d 1098 (6th Cir. 1984). As the Advisory Committee Notes regarding FRE 801(d)(2) provide, "No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility." Especially because the report arose out of a meeting shortly before trial, withholding the document was likely intentional and done to further impede the defendants' ability to present their defense. For this reason alone, the jury verdict should be set aside.

F. Hosseinipour was prosecuted under a vague law that violates the Fourteenth Amendment's guarantee of Due Process.

Statutes may violate the Due Process clause for vagueness if they fail to provide "adequate guidance to those who would be law-abiding," "advise defendants of the nature of the offense with which they are charged," or "guide courts in trying those who are accused." *Musser v. Utah*, 333 U.S. 95, 97 (1948). Specifically, the "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and

discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In Jury Instruction No. 8, the Court instructed the jury that a pyramid scheme was per se a scheme to defraud for the purposes of satisfying the first element of mail fraud. DN 554. However, the Court added on to the *Gold Unlimited* standard in its instructions and suggested a pyramid scheme could be determined by just promoting the sale of interests more than the sale of products. *Id.* However, promoting the sale of interests, or recruiting, is a characteristic pyramid schemes can share with legitimate and legal multi-level marketing companies. The faint line between illegal pyramid schemes and legal multi-level marketing companies has not been sufficiently defined to advise law-abiding citizens, and these defendants, as to what is legal behavior and what is not. Yet, the Court allowed a scheme to defraud to be proven through the existence of a pyramid scheme. Therefore, these defendants were convicted under a vague law and were deprived of their Due Process right to be advised of the nature of the charges against them.

III. CONCLUSION

No jury, being properly advised and required to find Hosseinipour guilty of the charges beyond a reasonable doubt, could have found Hosseinipour guilty of either conspiring to commit mail fraud or securities fraud. There was no proof, in fact the proof negated, that Hosseinipour ever intended or realized she was doing anything illegal. Additionally, there was no proof Hosseinipour did do anything illegal. I2G was shown not to be a pyramid scheme as a matter of law, and the government failed to meet any element required to prove the existence of an investment contract. These circumstances demand Hosseinipour's guilty verdict on both counts be set aside, and require she receive a new trial.

/s/ Michael M. Denbow
Michael M. Denbow
STITES & HARBISON PLLC
400 West Market Street
Suite 1800
Louisville, KY 40202-3352
Telephone: (502) 587-3400
Email: mdenbow@stites.com

Counsel for Defendant, Faraday Hosseinipour

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all parties of record.

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, v. FARADAY HOSSEINIPOUR, ET AL., DEFENDANTS.	CASE NO. 4:17-CR-00012-GNS-CHL *Electronically Filed*

ORDER

On this day, the Court considered the Motion for Acquittal submitted by Defendant Faraday Hosseinipour. After considering the Motion and any opposition thereto, the Court finds that Faraday Hosseinipour is not guilty as a matter of law.

IT IS THEREFORE ORDERED that the relief sought in the Motion for Acquittal is Granted.

IT IS FURTHER ORDERED that the Final Judgment entered by this Court on September 7, 2022 is vacated in its entirety and it has no force or effect.

Dated: _____