IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	
	:	**NO. 14-574**
DEVOS LTD. d/b/a GUARANTEED RETURNS, et al.	:	

MEMORANDUM

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Tucker, J. **January 17, 2019**

Before the Court are Defendants' Motions for Judgment of Acquittal and, in the Alternative, a New Trial (Doc. 344), the United States' Response to Defendants' Post-Trial Motions (Doc. 359), Defendants' Reply in Opposition thereto (Doc. 370), and all letter briefs filed by Defendants. Upon careful consideration of these submissions, Defendants' Motions for Judgment of Acquittal and, in the Alternative, a New Trial are DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

This case involved a number of decade-long, insidious fraud schemes perpetrated by a pharmaceutical returns company and its brother and sister corporate officers. After an eight-week jury trial, the jury found the Defendants guilty for defrauding their customers, including the United States Department of Defense ("DOD"), of nearly $180 million.[2] The underlying fraud schemes engendered other criminal activity, including conspiracy to launder the proceeds of the fraud, attempts to obstruct justice by lying to federal agents, concealing computer hard drives, deleting data from company computers, and theft of government pharmaceuticals that were part of the Government's system of supplying drugs to various army hospitals and medical facilities.

A. Superseding Indictment And Charges

On February 11, 2016, a Grand Jury returned a Superseding Indictment against Defendants charging Guaranteed Returns, Dean Volkes, and Donna Fallon with various crimes committed in connection with their operation of their pharmaceutical returns company. The Superseding Indictment charged Defendants as follows:

[1] All citations to trial exhibits will be designated as "GX" for Government Exhibit followed by the exhibit number or "DX" for Defense Exhibit followed by the exhibit number.
[2] GX 70-30 (showing that by October 2014 $179,907,751.23 worth of pharmaceutical refunds that were to be passed through to Guaranteed Returns's customers, was, instead, taken by Guaranteed Returns).

Fraudulent Indate Schemes

Counts 1 through 23 charged Guaranteed Returns and Dean Volkes with wire fraud in violation of 18 U.S.C. § 1343;

Counts 24 through 40 charged Guaranteed Returns and Dean Volkes with mail fraud in violation of 18 U.S.C. § 1341;

Other Fraudulent Schemes

Counts 41 through 52 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with mail fraud and attempt to commit mail fraud in violation of 18 U.S.C. §§ 1341 and 1349;

Theft Of Government Property

Count 53 charged Guaranteed Returns and Dean Volkes with theft of government property in violation of 18 U.S.C. §§ 641, 2;

Money Laundering Conspiracy

Count 54 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h);

Obstruction Of Justice And False Statements

Count 55 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with conspiracy to obstruct justice in violation of 18 U.S.C. § 371;

Count 56 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with obstruction of justice in violation of 18 U.S.C. §§ 1512(c)(1) and 2;

Count 57 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with obstruction of justice in violation of 18 U.S.C. §§ 1512(c)(1) and 2;

Count 58 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with obstruction of justice in violation of 18 U.S.C. §§ 1519 and 2;

Count 59 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with obstruction of justice in violation of 18 U.S.C. §§ 1519 and 2;

Count 60 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with making false statements in violation of 18 U.S.C. § 1001(a)(1) and (a)(2);

Count 61 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with making false statements in violation of 18 U.S.C. § 1001(a)(1) and (a)(2);

Count 62 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with obstruction of justice in violation of 18 U.S.C. §§ 1512(c)(1) and 2;

Count 63 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with obstruction of justice in violation of 18 U.S.C. §§ 1519 and 2; and

Count 64 charged Guaranteed Returns, Dean Volkes, and Donna Fallon with making false statements in violation of 18 U.S.C. § 1001(a)(1) and (a)(2).

B. Eight-Week Jury Trial; Convictions; Rule 29 Motion For Judgment Of Acquittal; Rule 33 Motion For New Trial

On March 22, 2017, after eight weeks, the testimony of more than thirty witnesses, and the admission of more than 500 exhibits, the jury returned its verdict. The jury found Guaranteed Returns guilty on all counts; Dean Volkes guilty on Counts 1 through 55, and 62 through 64; and Donna Fallon guilty on Counts 41 through 52, 54, and 56 through 61. Jury Verdict Form, ECF No. 315. Immediately after the jury returned its verdict, Defendants made an oral motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, and an oral motion for new trial under Federal Rule of Criminal Procedure 33. Mar. 22, 2017 Trial Tr. 62:19–63:6, ECF No. 323. In accordance with this Court's instructions, the Parties later submitted written briefs on the motions. The motions are ripe.

C. Fraudulent Indate Drug Schemes And Other Fraudulent Drug Schemes

Ultimately, each of the crimes charged, and for which the Defendants were convicted, stem from Guaranteed Returns and Dean Volkes's fraudulent handling of various pharmaceutical products. For this reason, the Court first provides a limited overview of the evidence on which the jury relied in convicting Guaranteed Returns and Dean Volkes of mail and wire fraud relating to their handling of pharmaceuticals, including so-called "indate" drugs, before addressing each of Defendants' arguments in support of acquittal and/or new trial.

1. Pharmaceutical Returns Company

Guaranteed Returns is a pharmaceutical returns company. As a returns company, Guaranteed Returns acted as an intermediary between pharmaceutical retailers, such as pharmacies and hospitals, and the wholesalers and manufacturers of pharmaceuticals. *See* Feb. 1, 2017 Trial Tr. 169:18–23, ECF No. 282 (Markhoff). Guaranteed Returns would accept surplus, expired, or not-yet-expired drugs[3] from a pharmaceutical retailer and return the drugs to the drugs' manufacturer for a refund. This refund would then be passed through to the originating Guaranteed Returns customer minus some established percentage. This percentage constituted Guaranteed Returns's advertised "all-inclusive fee" for service.

Generally, such arrangements are useful to pharmaceutical retailers for a number of reasons. Among other reasons, a pharmaceutical retailer might hire a returns company because: (1) the returns company has expertise and special knowledge of the drug manufacturers' complex and varied refund policies; (2) the retailer lacks space to store the surplus products at its own facility, or because the retailer ordered more of a single drug product than the retailer could

[3] In the case of a drug that is not yet expired, the drug is normally not eligible for refund by the manufacturer. This not-yet-expired drug is known in the returns industry as an "indated drug" or an "indate." *See* Feb. 1, 2017 Trial Tr. 171, ECF No. 282 (Markhoff) (testifying to the meaning of the word "indates").

use or sell. *See* Feb. 1, 2017 Trial Tr. 171–72, ECF No. 282 (Markhoff) (testifying to the reasons why a pharmacy would return product to a manufacturer); Feb. 27, 2017 Trial Tr. 159–60, 162:3–15, ECF No. 253 (Hall) (explaining, for example, why a particular company uses a returns company).

2. Pharmaceutical Indates

Around 1999, Guaranteed Returns initiated a program, the "ReverseLink One Program," by which all of a given customer's drugs would be boxed up at the customer's facility and then shipped to a central Guaranteed Returns sorting warehouse. *See* Feb. 1, 2017 Trial Tr. 172–73, ECF No. 282 (Markhoff) (explaining the ReverseLink One Program and the boxing process); Feb. 7, 2017 Trial Tr. 206, ECF No. 284 (Dooley) (same). At the sorting facility, Guaranteed Returns employees would sort the drugs into three categories: (1) immediately returnable drugs; (2) drugs to be destroyed; and (3) indated drugs. *See* Feb. 1, 2017 Trial Tr. 172–73, ECF No. 282 (Markhoff); Feb. 7, 2017 Trial Tr. 206, ECF No. 284 (Dooley). Under the ReverseLink One Program, if a drug was categorized as indated, it would be warehoused by Guaranteed Returns on behalf of the originating customer until it became eligible for return. Feb. 7, 2017 Trial Tr. 206:17–25, ECF No. 284 (Dooley) (explaining the treatment of indates under the program). Once the drug had aged sufficiently to render it eligible for return, Guaranteed Returns would ship the product to the manufacturer who would, in turn, issue a check or credit to the customer or the customer's credit account. Feb. 7, 2017 Trial Tr. 207:6–23, ECF No. 284 (Dooley) (explaining the payment process); Feb. 23, 2017 Tr. 36:18–25, ECF No. 248 (afternoon) (Carlino) (explaining treatment of indates). In some cases, the credit or check would be issued directly to the customer, but in most cases, the credit or check was sent to Guaranteed Returns.

Upon receipt of the credit or check, Guaranteed Returns would assess a fee against the

amount refunded. Feb. 7, 2017 Trial Tr. 207:21–23, ECF No. 284 (Dooley) (explaining that Guaranteed Returns would take a negotiated and preset fee from the refunds received from the manufacturers). The assessed fee was predetermined and negotiated between Guaranteed Returns and the customer as part of Guaranteed Returns's "all-inclusive fee" for service.[4]

Evidence at trial showed that Guaranteed Returns's sales and marketing staff consistently advertised Guaranteed Returns's indate management as an automatic, value-added service as part of its all-inclusive fee. *See, e.g.*, Feb. 1, 2017 Trial Tr. 183–84, ECF No. 282 (Markhoff) (explaining that indate management was part of the all-inclusive service package and that indate management occurred "automatically" and was offered to "all customers").

3. Fraudulent Indates Schemes (Counts 1 Through 40)

While Guaranteed Returns's customers were led to believe that Guaranteed Returns would—as Guaranteed Returns's industry competitors did—manage indates exclusively for the benefit of the customers, over time, Guaranteed Returns and Dean Volkes developed schemes to defraud their customers. Stated simply, Guaranteed Returns and Dean Volkes began taking their customers' indates, returning the indates to the drugs' manufacturers, and rather than passing the resulting refunds through to the originating customer, Guaranteed Returns and Dean Volkes kept the refunds for themselves. Feb. 22, 2017 Trial Tr. 20–21, ECF No. 257 (Sellitto) (testifying that not all indates were returned for the originating customer's benefit, but instead, some indates

[4] *See, e.g.*, Feb. 6, 2017 Trial Tr. 149, 159, 164, ECF No. 297 (Gingrich); GX 10-18 (sales material showing that Guaranteed Returns offered indate management as part of an all-inclusive fee for service); GX 10-7 (advertising an "all-inclusive service fee" and "additional benefits," including "in-dated product aging service" in same category as "24 Hour Customer service Line," which was itself advertised as a "value added service" in other materials); GX 13-1 (advertising an "all inclusive service fee" with "indate holding" and "no up-front fee for indate processing/aging"). The amount of the all-inclusive fee ranged, but in many cases, was between 7.4% to 8.9% of the value refunded. *See, e.g.*, GX 10-7 (advertising an all-inclusive 7.4% fee); GX 10-5 (advertising an all-inclusive 7.9% fee); GX 10-4 (advertising an all-inclusive 8.9 percent fee).

were returned and the refund kept by Guaranteed Returns); Feb. 23, 2017 Trial Tr. 37, ECF No. 248 (afternoon) (Carlino). Ultimately, at trial, the Government presented evidence showing that Guaranteed Returns and Dean Volkes engaged in at least three indates fraud schemes: (i) the managed and unmanaged indates scheme, (ii) the G-13 scheme, and (iii) the three-year cut-off scheme.

a. Managed And Unmanaged Indates Scheme

Over the course of trial, the Government presented evidence that Guaranteed Returns and Dean Volkes consistently represented to their customers that indate management was a value-added, free service included as part of Guaranteed Returns's overall business. Despite these representations, Guaranteed Returns and Dean Volkes deprived their customers of their refunds for indated drugs through a number of fraud schemes, including a scheme that was identified as the "managed and unmanaged indates fraud scheme."

In essence, the managed and unmanaged indates fraud scheme consisted of dividing customers into two categories, "managed" and "unmanaged"—that is, customers who appeared to manage their indates actively and those who appeared to leave their indates unmanaged or relied upon Guaranteed Returns. The diversion of customer indates occurred in the company's FilePro inventory system based on a master list of customers that Dean Volkes maintained; here, clients were identified as "managed" or "unmanaged." For customers who Dean Volkes considered "unmanaged," their indates would be diverted and kept by Guaranteed Returns and Dean Volkes for their own benefit. Dean Volkes's and Guaranteed Returns's diversion of customer indates was hidden from their customers and employees because the diverseion was completed through the company's internal inventory system pursuant to computer code written at Dean Volkes's direction.

At trial, the jury heard testimony from two Guaranteed Returns's IT Department employees who explained the managed and unmanaged indates scheme in detail. IT employee Chris Sellitto, for example, explained that if Dean Volkes had categorized a customer as "unmanaged," ownership of the indated drugs would be reassigned in the company's internal computer system from that customer to a "GRX Store," a fake, sham customer. Among the GRX Stores was a Guaranteed Returns account designated "GRX Store 753." GX 70-30C (showing that customer indates were reassigned from customers to GRX Store 753 as early as 12/15/1998); *see also* Feb. 22, 2017 Trial Tr. at 20–21, ECF No. 257 (Sellito) (testifying that depending on whether a customer was coded as "I" or "C" in the computer system, a customer may or may not receive money for their indates. "I" was a customer deemed by Dean Volkes to be "managed," whereas "C" was unmanaged and the customer would not receive money for its indates); Feb. 23, 2017 Trial Tr. 37, 52–59, ECF No. 248 (afternoon) (Carlino).

IT employee Ronald Carlino confirmed the existence of the managed and unmanaged fraud scheme in testifying that a customer's indates would be siphoned off or kept for the benefit of the customer depending on whether Dean Volkes categorized the customer as "managed" or "unmanaged." Feb. 23, 2017 (afternoon) Tr. 37, 52–57 (Carlino) (testifying that Dean Volkes directed actions relating to "managed" and "unmanaged" indates). The fact that only some customers would receive money for their indates, while others did not, directly contradicted Guaranteed Returns's and Dean Volkes's advertisements and representations to their customers that all indates would be managed on their customers' behalf.

b. FilePro Cover-Up Of Managed And Unmanaged Indates Fraud Scheme

Among other things, to conceal the fact that Dean Volkes and Guaranteed Returns were improperly diverting indates from their customers, Dean Volkes directed IT personnel to

reprogram the internal computer system—FilePro—to create a false product manifest that showed from whom the indate originated *rather than* to whom the refund would ultimately be paid. These manifests were then provided to the drug manufacturers as supporting documents to induce them to provide refunds to Guaranteed Returns.

In perpetrating the managed and unmanaged indates fraud schemes, Dean Volkes and Guaranteed Returns successfully diverted millions of dollars' worth of indates from Guaranteed Returns's "unmanaged" customers.

c. G-13 Fraud Scheme

In 2010, Dean Volkes implemented another fraudulent scheme relating to indates—the G-13 Fraud Scheme. Feb. 23, 2017 Trial Tr. 69:6–22, ECF No. 248 (afternoon) (Carlino) (acknowledging the existence and implementation of G-13 Fraud Scheme). The G-13 Fraud Scheme allowed Dean Volkes and Guaranteed Returns to steal indates from their "managed" customers and "unmanaged" customers. Until the implementation of the G-13 Fraud Scheme, Guaranteed Returns's "managed" customers still received credits for their indates.

At the direction of Dean Volkes, IT Department employees Ron Carlino and Chris Sellitto coded a new computer program in the FilePro computer inventory system that would identify every thirteenth product received from a "managed" customer. The program would then identify whether that product was under $3,000.00 in value. If the product was under $3,000.00 in value, the program would relist the product as property of Guaranteed Returns *instead of* the property of the originating customer. Feb. 22, 2017 Trial Tr. 59–93, ECF No. 257 (Sellitto) (describing the way in which the G-13 computer code worked and how it identified products to be diverted); GX 38-61 (showing that Chris Sellitto "[a]dded code to handle special 'G13' logic per Dean"); GX 38-62 (showing that Chris Sellitto, took handwritten notes at two meetings with

Dean Volkes relating to the programming of the G-13 computer code); GX 3-367 (Dean Volkes's email from October 12, 2010 showing his direct involvement in planning the G-13 Fraud Scheme by setting the computer program's parameters). Thus, when the product was ultimately returned to the manufacturer for a refund, the refund would not pass through to the originating customer, but instead, would be retained for the benefit of Dean Volkes and Guaranteed Returns.

By October 2014, Guaranteed Returns and Dean Volkes, in executing the G-13 Fraud Scheme, had taken approximately $330,000.00 of customer indated pharmaceuticals and resulting refunds. GX 70-24 (showing the value taken from customers).

d. Three-Year Cutoff Fraud Scheme

At around the time Dean Volkes and Guaranteed Returns implemented the G-13 Fraud Scheme, Dean Volkes also planned and implemented another scheme—the Three-Year Cutoff Fraud Scheme. Dean Volkes directed IT employee Chris Sellitto to code another program that would enable Dean Volkes and Guaranteed Returns to take all indated products that were in the Guaranteed Returns's system identified as three years or older. Sellitto coded the program first to identify products that were older than three years. Then, the program would relist the indate as the property of a fake GRX Store, instead of the property of the originating customer. Feb. 22, 2017 Trial Tr. 90–93, ECF No. 257 (Sellitto) (testifying that Dean Volkes ordered Sellitto to implement the Three-Year computer program and that Dean Volkes specified how the program would operate); GX 3-251 (Dean Volkes requesting update on the implementation of Three-Year Cutoff Scheme); GX 38-61 (showing electronic log entry relating to Three-Year Cutoff Fraud Scheme computer code). The Three-Year Cutoff Fraud Scheme, thus, directly contradicted the representations and promises that Dean Volkes and Guaranteed Returns were made to their

customers.

4. Defendants' Other Schemes

In addition to Guaranteed Returns and Dean Volkes's fraudulent indates schemes, Guaranteed Returns, Dean Volkes, and Donna Fallon participated in other fraud schemes that took customer pharmaceutical products and refunds regardless of whether the products were considered indated.

a. Hidden Fees Schemes: Adjustment Scheme

Under the Adjustment Scheme, Defendants identified specific batches of customer refunds to which Defendants would apply an undisclosed and concealed fee. In this way, Defendants "adjusted," but in reality, skimmed, value from the refunds that ultimately were passed through to their customers. The imposition of the undisclosed and concealed fee contradicted the Defendants' representations that it would charge a single "all-inclusive fee" for its services.

In the Fall of 2010, Dean Volkes ordered IT employee Ronald Carlino to create a computer program that would "adjust" refunds for certain customers. Feb. 23, 2017 Trial Tr. at 70–72, 89–90, ECF No. 248 (afternoon) (Carlino) (testifying about the way the Adjustment Scheme computer programming worked to impose a hidden fee). Though Defendants characterized the program as "adjusting" a customer's refunds, the program would actually "skim" approximately one percent of the total value of a customer's refunds. Feb. 23, 2017 Trial Tr. at 70–72, ECF No. 248 (afternoon) (Carlino). After Carlino finished coding the program, Dean Volkes ordered Carlino to create a program shortcut—a virtual button—and install that shortcut on Donna Fallon's computer desktop. *Id.* When clicked, the shortcut would prompt the user to select a percentage to skim from a designated customer refund. *Id.* The user would then

run the program and the selected percentage of funds—which came from the refunds to be passed through to the customer—would be directed into a Guaranteed Returns account. *Id.*

Ultimately, evidence at trial showed that the user who activated the program was Dean Volkes's sister—Chief Financial Officer, and former head of the Reconciliations Department—Donna Fallon. Feb. 23, 2017 Trial Tr. 72–74, ECF No. 248 (afternoon) (Carlino). Over the course of half a year, Donna Fallon used the computer program to steal over $570,000.00 worth of customer refunds. *See* GX 70-26 (showing the total amount of money diverted from customer accounts to Guaranteed Returns's GRX Stores). The skimming of customer refunds through the application of the "adjustment fee" directly contradicted the representations that Guaranteed Returns and Dean Volkes had been making to their customers regarding Guaranteed Returns's all-inclusive fee for service.

b. Hidden Fees Schemes: Inactivity Fee

Like the Three-Year Cutoff Fraud Scheme, Dean Volkes directed IT employee Ron Carlino to design another computer program that would assess an undisclosed "inactivity fee" on customers who had not sent in new product to Guaranteed Returns during the preceding fourteen months. To conceal this fraud from Guaranteed Returns's customers, Dean Volkes ordered Carlino to alter the company's extranet (its client-facing internet portal) to characterize the assessment of the fee as "pending" distribution—instead of a "fee"—to suggest to the customer that it would ultimately receive full payment for its returned drugs. Feb. 24, 2017 Trial Tr. 9–18, ECF No. 259 (Carlino) (testifying to how the inactivity fee worked and how Dean Volkes directed Carlino to change the description of the "inactivity fee" from a "fee" to "distribution pending"); GX 3-356 (Email from Dean Volkes regarding "indate fee/adjustment"); GX 3-358 (Email from Dean Volkes indicating involvement in implementation of "inactivity adjustment

fees"); GX 3-361 (Email from Dean Volkes in which he explains that the inactivity fee is "applied to the account (no visibility to the customer at this time)").

5. Obstruction Of Justice And False Statements (Counts 55 Through 64)

In late 2009, in the course of investigating another criminal matter involving separate Guaranteed Returns's employees, Defendants Donna Fallon, Dean Volkes, and Guaranteed Returns took steps to obstruct the Government's investigation of the separate criminal matter, as well as the investigation of the matters that ultimately formed the basis of Defendants' prosecution in this case. Among other things, in response to a grand jury subpoena for the production of certain electronic records relating to the separate criminal matter, Donna Fallon falsely told Government agent Joanne Woodring ("Agent Woodring") that Guaranteed Returns did not have, nor did it retain, the requested records. Mar. 6, 2017 Trial Tr. 235, ECF No. 325 (Woodring). Donna Fallon also told Agent Woodring that Guaranteed Returns did not have the computer hard drives belonging to the separate employees, hard drives that could provide copies of the requested electronic records. Mar. 6, 2017 Trial Tr. 237:22–244, ECF No. 325 (Woodring).

In April 2011, during a judicially-authorized search of Guaranteed Returns's office building, the computer hard drives that Donna Fallon represented did not exist were found in her office in a locked cabinet. *See, e.g.*, Feb. 6, 2017 Trial Tr. 61–71, ECF No. 297 (Price) (describing hard drives seized and imaged); Feb. 6, 2017 Trial Tr. 112, ECF No. 297 (Linn) (identifying Donna Fallon's office as the room in which the concealed hard drives were located and testifying that the hard drives were found in a locked credenza). On these hard drives, the FBI found records responsive to the grand jury subpoena. *See, e.g.*, Mar. 2, 2017 Trial Tr. 179–183, ECF No. 291 (Glik) (testifying to finding data contained on the seized hard drives that was

responsive to the grand jury subpoena); Mar. 6, 2017 Trial Tr. 23–65, ECF No. 325 (same).

As Donna Fallon was misrepresenting the nonexistence of various electronic data and hard drives to Government agents, Dean Volkes took steps to purge Guaranteed Returns's computer servers of certain data requested in connection with the grand jury subpoena. Indeed, evidence at trial showed that after the Government sought to forensically preserve the data contained on Guaranteed Returns's servers, Dean Volkes ordered IT Department employees to purge and delete all data responsive to the grand jury subpoena that was more than three years old. *See* GX 2-90 (showing, through metadata, that FilePro information was deleted and backed up on March 17, 2010); Feb. 27, 2017 Trial Tr. 91, ECF No. 253 (Carlino) (testifying that the meeting in which Dean Volkes ordered that data be deleted occurred on approximately March 17, 2010); Feb. 27, 2017 Trial Tr. 115, ECF No. 253 (Ahrens) (testifying that the meeting during which Dean Volkes asked him to purchase wiping software occurred in March 2010). Dean Volkes further ordered IT Department employees to purchase, install, and run a data wiping software on the company servers to ensure the purged and deleted data could not be recovered. *See* GX 2-82 (showing that the BCWipe wiping software generated a computer log file on March 29, 2010); Feb. 27, 2017 Trial Tr. 118 (Ahrens), ECF No. 253 (testifying that on March 30, 2010, American Express posted a transaction memorializing the IT Department's purchase of the BCWipe software); GX 36-1 (depicting the website through which Ahrens purchased the BCWipe software as it appeared on March 27, 2010). In an attempt to impeted the Government's investigations further, Dean Volkes ordered IT employee Carlino to lie to federal agents. *See, e.g.*, Feb. 24, 2017 Trial Tr. 41–42, ECF No. 259 (Carlino) (testifying that Dean Volkes instructed him to misstate the availability of electronically stored information to federal agents).

6. Theft Of Government Property (Count 53); Money Laundering Conspiracy (Count 54)

The remaining crimes for which the Defendants were convicted, including theft of government property and money laundering conspiracy, arise in the context of the foregoing fraud schemes and will be addressed below and in connection with the Court's discussion of Defendants' multifarious arguments for acquittal and new trial.

II. STANDARD OF REVIEW

A. Rule 29 Motion For Judgment Of Acquittal

The standard that governs a motion for judgment of acquittal is well known, but bears repeating and emphasis because the standard narrowly circumscribes the Court's review of the jury's verdict.

Federal Rule of Criminal Procedure 29 governs a motion for judgment of acquittal. Rule 29(a) provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Such a motion may be made after the jury has returned a verdict. Fed. R. Crim. P. 29(c). When "reviewing the sufficiency of the evidence, we apply a 'particularly deferential' standard which imposes a 'very heavy burden' on the [movant]." *United States v. Rawlins*, 606 F.3d 73, 80 (3d Cir. 2008) (citing *United States v. Cothran*, 286 F.3d 173, 175 (3d Cir. 2002)). The reviewing court must "examine the totality of the evidence, both direct and circumstantial. We must credit all available inferences in favor of the government." *Id.* (citing *United States v. Gambone*, 314 F.3d 163, 170 (3d Cir. 2003)). While the Court must consider both direct and circumstantial evidence, there need not necessarily be any direct evidence to overcome a challenge for sufficiency. *See United States v. Iglesias*, 535 F.3d 150, 156 (3d Cir. 2008) (providing that "the government may defeat a sufficiency-of-the-evidence challenge on

circumstantial evidence alone."). Thus, the reviewing court "must sustain the verdict if, viewing the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Rawlins* 606 F.3d at 80 (citing *United States v. Introcaso*, 506 F.3d 260, 264 n.2 (3d Cir. 2007)).

This strict standard of review protects the role of a jury as the finders of fact against improper judicial second-guessing. Indeed, courts are frequently warned not to usurp the jury's role by reweighing credibility and evidence or otherwise substitute a court's judgment for that of the jury's. *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). In view of this stringent standard of review, the Third Circuit has advised that "[a] finding of insufficiency should be confined to cases where the prosecution's failure is clear." *Brodie*, 403 F.3d at 133 (internal quotation marks omitted).

B. Rule 33 Motion For New Trial

A motion for new trial differs from a motion for judgment of acquittal in that "[u]nlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Silveus*, 542 F.3d 993, 1004 (3d Cir. 2008) (quoting *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Accordingly, a decision under Rule 33 is committed to the sound discretion of the district court. *United States v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006).

Even still, if the court believes the jury verdict is contrary to the weight of the evidence, it cannot order a new trial unless it believes "that there is a serious danger that a miscarriage of

justice has occurred—that is, that an innocent person has been convicted." *Silveus*, 542 F.3d at 1004–05 (quoting *Johnson*, 302 F.3d at 150)). Rule 33 motions are otherwise, like motions for judgment of acquittal, greatly disfavored and should be "granted sparingly and only in exceptional cases." *Id.* at 1005 (quoting *Gov't of Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)).

III. DISCUSSION

A. Rule 29: Motion For Judgment Of Acquittal

1. Counts 1 Through 40: Mail And Wire Fraud In Connection With The Indate Fraud Scheme

Dean Volkes and Guaranteed Returns were convicted on Counts 1 through 40 for mail fraud and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343.

Mail fraud is prohibited under 18 U.S.C. § 1341, which provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341 (West 2017). To convict for mail fraud, the Government must prove three elements beyond a reasonable doubt: "(1) the defendant knowingly devised a scheme to defraud . . . ; (2) the defendant acted with the intent to defraud; and (3) in advancing, furthering, or carrying out the scheme, the defendant used the mails, or caused the mails to be used." *United*

States v. Tartaglione, 228 F. Supp. 3d 455, 462 (E.D. Pa. 2017) (citing *United States v. Yusuf*, 536 F.3d 178, 186–87 (3d Cir. 2008)).

Wire fraud is prohibited under 18 U.S.C. § 1343, which provides:

> Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate . . . commerce any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned, not more than 20 years, or both.

18 U.S.C. § 1343. A conviction for wire fraud requires the Government to prove the same elements as mail fraud except the defendant must have used interstate wires—instead of the mails—to further the scheme. *See United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994) (providing that "[t]he wire fraud statute, 18 U.S.C. § 1343, is identical to the mail fraud statute except it speaks of communications transmitted by wire").

Dean Volkes and Guaranteed Returns argue that the Government's evidence was insufficient in connection with their convictions on Counts 1 through 40, which charged them with mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. Dean Volkes advances two grounds for acquittal on Counts 1 through 40 specific to his own convictions, Guaranteed Returns advances a single argument for acquittal on Counts 1 through 40 specific to its own convictions, Dean Volkes and Guaranteed Returns jointly advance an argument for acquittal on 31 of 40 of the fraud counts, and Dean Volkes and Guaranteed Returns submit a second joint theory for acquittal on Counts 1 through 40.

Dean Volkes argues for acquittal on Counts 1 through 40 for two reasons. He asserts that: (1) the Government's evidence was insufficient to prove the first element of the crime of mail/wire fraud—knowing and willful participation in a scheme to defraud, and (2) the

Government's evidence was insufficient to prove the second element of the crime of mail/wire fraud—that he acted with specific intent to defraud.

Guaranteed Returns's argument for its own acquittal on Counts 1 through 40 is contingent upon Dean Volkes's acquittal on Counts 1 through 40. Guaranteed Returns reasons that because Dean Volkes neither knowingly participated in the fraud nor had specific intent to defraud, that Guaranteed Returns cannot, as a matter of law, have knowingly participated in a fraud nor had specific intent to defraud as a corporation.

Both Dean Volkes and Guaranteed Returns seek acquittal on Counts 1 through 40 arguing that in light of various fine print provisions on the back of shipping forms and other contracts, no reasonable juror could have concluded that Dean Volkes and Guaranteed Returns's taking of customer indates and resulting refunds for Dean Volkes—for their own gain—could satisfy the elements of mail/wire fraud.

Finally, both Dean Volkes and Guaranteed Returns seek acquittal on 31 of 40 of the fraud counts arguing that the Government's evidence was insufficient to establish the third element of mail/wire fraud—that the Defendants used the mails or interstate wires in furtherance of a scheme to defraud.

For the reasons that follow, the Court rejects Defendants' arguments and concludes that the evidence was sufficient as to Counts 1 through 40 to permit a reasonable jury to convict Defendants of all counts beyond a reasonable doubt.

a. Evidence Was Sufficient For A Reasonable Trier Of Fact To Conclude That Dean Volkes Knowingly And Willfully Participated In A Scheme To Defraud

The Court concludes that the evidence submitted at trial was sufficient for a reasonable juror to conclude, beyond a reasonable doubt, that Dean Volkes knowingly and willfully

participated in a scheme to defraud Guaranteed Returns's customers of their indates and resulting refunds. The evidence presented, as well as all inferences drawn from that evidence in favor of the Government, fully supports the jury's conclusion.

At the outset, in arguing for acquittal, Dean Volkes complains generally that the Government failed to present "any evidence at trial that connected Dean Volkes to any material false statements, representations, or promises regarding the indate refunds." Defs.'Mem. 17, ECF No. 344. To the extent that Dean Volkes suggests in this statement that the Government was required to introduce direct evidence showing that he made false statements, representations, or promises in connection with indates, the statement is rejected.

Section 1341 does not require evidence to show that a defendant himself effectuated the fraudulent scheme. "[T]he mail fraud statute, by its own terms, proscribes a scheme to defraud and is not necessarily limited to direct participation in all of the concrete actions taken to effectuate the scheme. Rather, a mail fraud conviction can be based upon a defendant's willful participation in a scheme to defraud with knowledge of its fraudulent nature." *United States v. Kelly*, 507 F. Supp. 495, 503 (E.D. Pa. 1981) (citing *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978)). It is enough when the Government introduces evidence that allows the jury to conclude, beyond a reasonable doubt, that the defendant "knowingly and willfully" participated in a fraudulent scheme whether or not the defendant directly participated in all steps of that scheme. Though the scheme itself must, under § 1341, involve "some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension," there need be no direct evidence that the defendant personally made such misrepresentations or omissions. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 528 (3d Cir. 1998) (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1413 (3d

Cir. 1991)).

Having made clear that there exists no requirement that the Government prove that a defendant personally made any misrepresentations or omissions to convict on charges of mail or wire fraud, the Court turns to the two specific areas in which Dean Volkes contends evidence was insufficient. Dean Volkes argues that the evidence adduced at trial was insufficient because it failed to "establish that *Dean Volkes in particular* (1) was aware that Company employees told customers that the Company would age and hold their indates, or directed Company employees to do so, or (2) was aware of or directed the creation or dissemination, of marketing materials that promised indate aging services to all of the Company's customers." Defs.' Mem. 18, ECF No. 344. The Court concludes that the evidence at trial was sufficient to prove both of these points and to allow the jury to conclude, as they did, that Dean Volkes "knowingly and willfully" participated in the indates fraud schemes.

This conclusion accords with the Court's limited role in reviewing a motion for insufficiency of the evidence and further comports with the various principles articulated by the Third Circuit regarding evidence of intent and the inferences that may properly be drawn therefrom. In particular, in reaching this conclusion, the Court is mindful of the rules relating to the consideration of: circumstantial evidence of intent, evidence of close familial relationships as probative of intent, and direct evidence of a defendant's role as a manager/supervisor/founder of a private company as probative of intent.

The Third Circuit has made clear that for purposes of a criminal conviction "the Government need only rely on circumstantial evidence." *United States v. Repak*, 852 F.3d 230, 251 (3d Cir. 2017). Therefore, the fact that evidence is circumstantial does not detract from its evidentiary value. This is because circumstantial evidence does not have less probative value

than direct evidence. *Sileo v. Superintendent Somerset SCI*, 2017 WL 3168962, at *5 (3d Cir. Jul. 26, 2017) (not precedential) (citing *Lukon v. Pennsylvania R. Co.*, 131 F.2d 327, 329 (3d Cir. 1942)) (stating that circumstantial "evidence has probative value equal to that of testimonial evidence"). Accordingly, even if a conviction is based solely upon circumstantial evidence, such evidence alone may provide sufficient support for the conviction. *United States v. Cohen*, 455 F. Supp. 843, 851–52 (E.D. Pa. 1978), *aff'd*, 594 F.2d 855 (3d Cir. 1979).

Regarding evidence of close familial relationships in connection with criminal schemes, the Third Circuit has explained that, in some situations, it is entirely appropriate for a jury to find the criminal elements of knowledge and intent based, in part, on the existence of a close familial relationship. *United States v. Brodie*, 403 F.3d 123, 151 (3d Cir. 2005). "A rational jury . . . [can] legitimately consider the relationship . . . in drawing reasonable inferences about [a] Defendant's knowledge and intent." *Id.* Certainly, guilt "cannot be proven solely by familial relationships." *Id.* (emphasis added). Still, in *Brodie*, for example, the Third Circuit found it wholly proper that a jury inferred a defendant's knowledge and intent for purposes of a criminal conspiracy based on the totality of the evidence, including the fact of a fraternal relationship between the defendant and another officer of a company because the defendant and his "brother[] owned the entities involved, were active participants in company affairs, and appear[ed] to have communicated with one another on business-related issues." *Id*. It is appropriate, therefore, for a fact finder to consider the existence of a close familial relationship, in tandem with other corroborating evidence for purposes of finding criminal knowledge and/or intent.

Regarding evidence of a defendant's role as a manager/supervisor and founder of a private company, a rational fact finder may conclude that a defendant had knowledge of the activities of his employees if other corroborating evidence is also presented. For example, in

United States v. Kelly, the court held that evidence of the defendant's position as an immediate supervisor, participation in the foundation of the business, as well as his activities in hiring employees and creating promotional materials was sufficient to allow a reasonable fact finder to conclude that the defendant was "responsible not only for his own participation but for the fraudulent activities of his coschemer." 507 F. Supp. 495, 503–04 (E.D. Pa. 1981); *see also United States v. Chandler*, 658 F. App'x 841, 844 (9th Cir. 2016) (holding the following evidence was sufficient for a rational juror to find a CEO/President had intent to defraud: CEO/President shared in the company's profits, CEO/President held the position throughout the company's existence, CEO/President received commissions from company activities).

In this case, a reasonable juror could conclude, based on the evidence, that Dean Volkes not only knew that Guaranteed Returns's employees were misrepresenting to customers that Guaranteed Returns would age, hold, and return indates for the customers' benefit, but also that Dean Volkes, himself, made such misrepresentations and directed employees to make such misrepresentations to customers. Such misrepresentations directly contradicted the truth: that Guaranteed Returns and Dean Volkes were taking customer indates and resulting refunds through their fraudulent indates schemes—that is, the managed and unmanaged indates fraud scheme, the G-13 Fraud Scheme, and the Three-Year Cutoff Fraud Scheme.

Among other things, the Government showed Dean Volkes's participation in the fraudulent indates schemes by direct evidence in the form of three emails sent by Dean Volkes himself. These three emails showed that Dean Volkes acted directly and personally to further the fraudulent indates schemes.

i. Dean Volkes's First Email

Dean Volkes sent the first email, dated January 13, 2004, to a representative at

Pharmerica, a Guaranteed Returns customer. GX 3-12. In the email, Dean Volkes represented to Pharmerica that Guaranteed Returns was providing "Free Indate Aging." GX 3-12 at 2. This email shows that Dean Volkes directly communicated with Pharmerica about how Pharmerica's indates would be handled. From this evidence, the jury could infer that Dean Volkes—contrary to Dean Volkes attempts to distance himself from direct sales and marketing work—was not only aware of Guaranteed Returns's sales and marketing practices, but also personally participated in the selling and marketing of company services to customers. Accordingly, a reasonable juror could rely on Dean Volkes's first email, in tandem with other evidence discussed below, to conclude that Dean Volkes had knowledge of Guaranteed Returns's sales and marketing misrepresentations to customers.

ii. Dean Volkes's Second Email

Dean Volkes sent the second email, dated July 2, 2008, to the head of the marketing department, his brother, Darren Volkes, explaining that "[e]very customer has indate management just not reporting to the web yet." GX 3-339. Dean Volkes's statement was false but had the effect of reinforcing what sales staff at the company had been led to believe. This second email, thus, supports a number of conclusions and inferences including: that Darren Volkes, Dean Volkes's brother and head of marketing, directly consulted with Dean Volkes about day-to-day marketing and sales activities; that Dean Volkes communicated company directives to Darren Volkes for dissemination to staff; that Dean Volkes's own communications were disseminated to sales and marketing staff as answers to staff inquiries into the indates policy at Guaranteed Returns; that Dean Volkes represented that "[e]very customer['s]" indates and associated refunds were being managed and returned for the benefit of the customer when, in fact, some customers' indates were being held for Guaranteed Returns's and Dean Volkes's

benefit.[5]

iii. Dean Volkes's Third Email

Dean Volkes sent the third email, dated July 27, 2009, in response to an inquiry from a Guaranteed Returns customer account manager, regarding the absence of contractual language dealing with indates in customer service agreements. The customer account manager explained that:

> I just looked over our service agreements and it does not say anything about indates. However, on most bids including all [Group Purchasing Organization] bids we usually include the section attached as an indate page or do a write on depending on the bid. We are going to need a standard answer for all bids.

GX 3-154. In response to this message, Dean Volkes wrote to his brother, Darren Volkes—the head of marketing—"See attachment green section [sic] for new verbiage for all new/renewed contracts. Dean." GX 3-154. The attachment included language representing that the "in-dated product aging program" was a "value added service[]." GX 3-154. This email shows that Dean Volkes circulated—even if he did not personally draft—language for marketing and sales and knew the specific ways in which customer account managers and other sales employees were representing and advertising Guaranteed Returns's policies and practices to customers.

From Dean Volkes's third email, the jury could draw multiple inferences and conclusions relating to Dean Volkes's knowledge and willingness to further the indates schemes. First, Dean Volkes was actively involved in marketing and sales as evidenced by his receipt of personal emails from sales staff relating to day-to-day sales, marketing, and customer service issues. Second, Dean Volkes actively communicated policies and specified the inclusion of particular language in sales, marketing, and contract bid materials. Third, Dean Volkes knew that his sales staff had raised concerns about the lack of information about indates in their service agreements

[5] *See* above Section I.C.3 for a short summary of the evidence of the fraudulent indates schemes.

and sought an official statement of company policy to address the deficiency. Fourth, knowing of his sales staff's concerns, Dean Volkes instructed his brother, the head of marketing, to include language in all new and renewed customer service agreements indicating that indate management was a value added service for no charge, and that all indates would be managed and returned for the sole benefit of the customer. Dean Volkes's instructions, however, directly contradicted the reality that he and Guaranteed Returns were not holding all customer indates for the benefit of the originating customer, but instead, had been siphoning off some indates for Dean Volkes and Guaranteed Returns's own benefit.[6]

These three emails provide direct proof of Dean Volkes's participation in the fraudulent indates schemes and provide an appropriate basis on which the jury could conclude that Dean Volkes had the requisite knowledge of the schemes and willfully participated in the schemes. These emails, when viewed in the context of the totality of the trial evidence, provide more than sufficient support for a reasonable fact-finder to conclude that Dean Volkes knowingly and willfully participated in the fraudulent indates schemes.

In addition to these three emails, other indirect and circumstantial evidence provided further support for the conclusion that Dean Volkes had the requisite knowledge of the fraud. Among other evidence, the Government introduced the following evidence of Dean Volkes's knowing and willful participation in the fraud schemes: [7]

[6] *See* above Section I.C.3 for a short summary of the evidence of the fraudulent indates schemes.
[7] In light of the volumes of evidence received over the course of an eight-week trial it is impossible to recount all evidence supportive of the conclusion here. However, the Court provides a short summary of the evidence on which the jury properly relied in reaching its conclusions regarding Dean Volkes's knowledge and willful participation in the fraudulent indates schemes.

iv. Evidence Showed That Dean Volkes's Knew Of The Company's False Statements And Misrepresentations Made In Marketing, Sales, And Customer Service Policies, And Other Written Materials

Evidence was presented that Dean Volkes knew that Guaranteed Returns's sales and marketing staff were making false statements and representations to customers about the way Guaranteed Returns handled customer indates. The Government showed that Dean Volkes attended various company conferences during which sales and marketing materials were distributed for sales staff use. Feb. 1, 2017 Trial Tr. 188:25–189:1–2, ECF No. 282 (Markhoff). In fact, Dean Volkes conceded his attendance at these conferences. *See* Defs.' Mem. 18, ECF No. 344 (indicating that "Dean Volkes's involvement with the sales and marketing team was his attendance at annual sales conferences"). The sales and marketing materials distributed at the conferences included representations that indates would be held for the benefit of Guaranteed Returns's customers for no additional fee, and that Guaranteed Returns would return all customer indates for the benefit of the customer.[8] These representations, however, contradicted other evidence at trial establishing that customer indates were being diverted for the benefit of

[8] *See, e.g.*, GX 2-34 (advertising "Company Strengths" including that Guaranteed Returns provided "Free . . . In-date Aging Programs"); GX 2-38 (slide show advertising "In-date . . . Management" as a "Value Added Service[]"); GX 2-41 (advertising an "[a]ll inclusive Service Fee's [sic]" including "Indate Aging Program"); GX 2-43 (advertising that Guarantted Returns "[w]ill [p]roperly [m]anage [Indates]," and that the management required no "[a]dditional [s]ervice [f]ees."); GX 2-49 (representing that service fee included "in-dated product aging service & reporting"); GX 2-55 (advertising that "[i]ndate morgue" as an "included" and "value-added service[]"); GX 10-2 (advertising "free indated product service . . . never any hidden fees"); GX 10-7 (advertising an "all-inclusive service fee" and "additional benefits" including "in-dated product aging service" in same category as "24 Hour Customer service Line," which was itself advertised as a "value added service" in other materials); GX 13-1 (advertising an "all inclusive service fee" with "indate holding" and "no up-front fee for indate processing/aging"); Feb. 1, 2017 Trial Tr. 173–75, 178–80, 185–88, ECF No. 282 (Markhoff); Feb. 6, 2017 Trial Tr. 138–44, 163–64, ECF No. 297 (Gingrich); GX 2-38 at 8 (advertising "In-date . . . Management" as a "value added service[]"); GX 10-18 (flyer advertising free "indate product processing").

Guaranteed Returns and Dean Volkes as part of various fraudulent schemes.[9]

This evidence supports the conclusion that Dean Volkes knew of the sales and marketing materials that Guaranteed Returns was distributing at these conferences to its sales and marketing personnel for use in selling and marketing to customers or for responding to customer service complaints. Further, rather than disabusing unwitting customers and Guaranteed Returns employees of the falsity of the representations, Dean Volkes allowed the misrepresentations to flourish and, indeed, circulated such misrepresentations himself. GX 3-12 (showing that Dean Volkes circulated sales and marketing materials to customers and that Dean Volkes was involved in the day-to-day management of granular customer matters).

v. Evidence Showed That Dean Volkes Knew About Untrue Statements Made By Employees Regarding The Handling Of Indates

A Guaranteed Returns customer account manager, Michael Baumann, testified that Dean Volkes's brother, Darren Volkes—the head of marketing—told Baumann that the company's policy regarding indates was that for customers that Dean Volkes deemed "unmanaged, the customers' indates were destroyed and no credit was returned to the customers."[10] This

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[9] *See* above Section I.C.3 for a short summary of the evidence of the fraudulent indates schemes; s*ee also* Feb. 22, 2017 Trial Tr. 20–21, ECF No. 257 (Sellito) (testifying that if a customer was deemed "unmanaged" then the customer "did not get . . . credits back. It would go to a GRX store."); Feb. 23, 2017 Trial Tr. 37, 52–59, ECF No. 248 (afternoon) (Carlino) (testifying that for customers deemed "unmanaged" the credits for returned indates were "given to a GRX store," rather than to the originating customer); Feb. 23, 2017 Trial Tr. 65–67, ECF No. 248 (Carlino) (testifying that he created a program in FilePro that would generate a false report to curious customers that showed that indates that were returned on behalf of a GRX store was instead returned on behalf of the customer).

[10] Feb. 21, 2017 Trial Tr. 104–105, ECF No. 247 (Baumann) (testifying that Darren Volkes told Baumann that unmanaged customer indates "would be listed under the non-returnable manifest and destroyed"). Michael Baumann further testified that Dean Volkes established this policy. Feb. 21, 2017 Trial Tr. 106:3–10, ECF No. 247 (Baumann) (testifying that Darren Volkes told him that "Dean Volke[s]" decided whether a customer was deemed "managed" and its indates managed for the customer's benefit, or whether a customer was deemed "unmanaged" and its

representation was false because, as testimony from IT Department employees Ron Carlino and Chris Sellitto established, and as other documentary evidence showed, the indates for "unmanaged" customers were not destroyed by Guaranteed Returns, but were rather diverted into a fake shell GRX store, aged, and then returned for the benefit of Guaranteed Returns and Dean Volkes.[11] This evidence supports the conclusion that Dean Volkes knew that Guaranteed Returns, on one hand, told employees and customers that indates were either managed for the customers or destroyed because they were unreturnable, while, on the other hand, diverted customer indates for Guaranteed Returns and Dean Volkes's benefit.

vi. Evidence Showed That Dean Volkes Directed The Diversion Of Customer Indates And Resulting Refunds For Dean Volkes's And Guaranteed Returns's Own Benefit

While on one hand Dean Volkes knew that: (a) Guaranteed Returns's policies, sales and marketing literature, and sales and marketing staff were representing that indates were maintained for the sole benefit of Guaranteed Returns's customers and that such service was part of an all-inclusive fee, and (b) company employees believed that "unmanaged" customers' indates were destroyed, on the other hand Dean Volkes diverted customer indates into sham GRX stores for his and Guaranteed Returns's benefit. Through the managed and unmanaged indates fraud scheme, the G-13 Fraud Scheme, and the Three-Year Cutoff Fraud Scheme, Guaranteed Returns and Dean Volkes funneled indated drugs, which should have been reserved for the benefit of their customers into various fake GRX stores.

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indates purportedly destroyed).

[11] *See* above note 9 and accompanying text for a discussion of the evidence showing that Guaranteed Returns and Dean Volkes diverted indates, instead of destroying indates.

vii. Evidence Showed That Dean Volkes Knew That The Diversion Of Indates Was Fraudulent Because He Directed The Concealment Of The Fraudulent Indates Schemes Through Manipulation Of The FilePro Computerized Inventory Programming

In support of the conclusion that Dean Volkes knew of the fraud schemes, the Government presented evidence that Dean Volkes instructed IT Department employee Chris Sellitto to conceal the existence of the G-13 fraud scheme. Chris Sellitto testified at trial that the existence of the G-13 program was kept secret. *See* Feb. 22, 2017 Trial Tr. 70, ECF No. 257 (Sellitto) (testifying that the G-13 program was not discussed "with people outside of IT or outside of Dean Volkes."). Indeed, in some cases, where customers had become suspicious after learning that their indates had been diverted, Dean Volkes directed Chris Sellitto to return the indates to the customer's account and then exclude the customer from the G-13 program all together. *See* Feb. 22, 2017 Trial Tr. at 79–90, ECF No. 257 (Sellitto) (testifying that Dean Volkes instructed him to return indates to customers that questioned why their indates had been taken as a result of the G-13 programming and to further exempt the customers so as not to raise suspicions). Dean Volkes also, tellingly, directed Chris Sellitto to delete the G-13 program following the FBI's April 5, 2011 raid. Feb. 22, 2017 Trial Tr. 93:9–15, ECF No. 257 (Sellitto). This evidence supports, at a minimum, an inference that Dean Volkes knew that the diversion of customer indates through the G-13 programming was fraudulent.

Similarly, the Government presented evidence of Dean Volkes's attempts to conceal the existence of the managed and unmanaged indates scheme from customers. Feb. 23, 2017 Trial Tr. 65–67, ECF No. 248 (afternoon) (Carlino) (testifying that he was instructed to alter the FilePro computer code to display the originating customer for indates that had been diverted to GRX store to coax the wholesalers into providing Guaranteed Returns credit for indates); GX 41-

7 at 11 (demonstrating the way that information was altered to provide false information to wholesalers for reimbursement even though reimbursements were made to GRX store instead of to the listed originating customer).

viii. Evidence Showed That Dean Volkes Was The Founder, Sole Owner, CEO/President, And That He Managed Even Granular Day-To-Day Activities, Therefore, He Knew About The Misrepresentations

Finally, though the fact that Dean Volkes is the founder, sole owner, and CEO/President of Guaranteed Returns is not sufficient, standing alone, to allow a reasonable fact finder to conclude that Dean Volkes had the requisite knowledge of and willfully participated in the indate fraud schemes, these facts may be considered with the additional direct and circumstantial evidence of Dean Volkes's intent. In light of the fact that Dean Volkes was the founder, sole owner, and CEO/president; directly contacted customers; addressed day-to-day inquiries from sales and marketing staff; directed IT staff's handling of inventory programs and servers; attended annual sales and marketing conferences; forwarded proposed marketing and sales materials language to sales staff; and maintained exclusive discretion over the categorization of customers as managed or unmanaged, a reasonable fact finder had more than sufficient evidence to conclude, beyond a reasonable doubt, that Dean Volkes was fully aware of his sales and customer service employees' activities and willfully participated in and, indeed, orchestrated the fraudulent indate schemes.

In an attempt to negate the value of the evidence of Dean Volkes's role as the founder, sole owner, CEO/President of Guaranteed Returns, Dean Volkes cites to the Tenth Circuit case *United States v. Phillips*, for the proposition that it is wholly inappropriate for a fact finder to draw any inference that Dean Volkes had knowledge of the fraudulent indates scheme or that his actions in furtherance of these schemes were willful. 543 F.3d 1197 (10th Cir. 2008). Dean

Volkes argues that "the fact that [he] was the president and sole owner [and founder] of Guaranteed Returns does not and cannot support the inference that he was aware of the actions of his subordinates." Defs.'Mem. 23, ECF No. 344. Dean Volkes's conclusion, however, directly contradicts the holding in *Phillips* and further contradicts the holding in the Second Circuit case *United States v. Archer*, 671 F.3d 149, 158 (2d Cir. 2011), to which Dean Volkes also cites to undermine the evidentiary value of his leadership role at the company.

In *Phillips*, the defendant—an owner of a law firm in which he was the sole lawyer—was convicted of various counts of fraud which were carried out, in part, by his non-lawyer employees. 543 F.3d at 1200. On appeal, the Tenth Circuit affirmed the defendant's conviction, despite the defendant's objection that the evidence was insufficient to prove that he had knowledge of the fraudulent activities of his non-lawyer employees. *Id*. at 1209. The Tenth Circuit explained that, while the defendant's "position as the sole lawyer in a small law firm . . . . would not be enough, in itself, to support the conviction," the fact that he was the owner and sole lawyer was one pertinent fact among many others that supported the conclusion that the defendant had the requisite knowledge of his employee's fraudulent acts. *Id*. (emphasis added). Indeed, among other evidence that the Tenth Circuit found supportive of the conviction was the fact that the defendant's wife—who was also an employee—was a wrongdoer and participant in the scheme. *Id*. at 1210. The decision in *Phillips*, thus, stands for the proposition that a defendant's position of authority is not dispositive on the issue of criminal knowledge or intent, but may be an important factor in establishing a defendant's criminal knowledge or intent.[12]

[12] The Second Circuit agreed with this proposition in *Archer* stating that *Phillips*, "properly construed, does not prohibit the jury from considering the fact that an attorney is a solo practitioner as one piece of circumstantial evidence from which, along with other evidence, it can infer the attorney's knowledge." 671 F.3d at 159. That this is not a controversial point of law is supported by other courts' holdings that a defendant's position of authority is a significant piece

In view of the foregoing, the Court concludes that the trial evidence was sufficient to allow a reasonable factfinder to conclude, beyond a reasonable doubt, that Dean Volkes knowingly and willfully participated in a scheme to defraud.

b. Evidence Was Sufficient For A Reasonable Fact Finder To Conclude That Dean Volkes Had Specific Intent To Defraud

Given the Court's holding that the trial evidence was sufficient for a reasonable fact finder to conclude that Dean Volkes knowingly and willfully participated in the fraudulent indates schemes, it is with little difficulty that the Court holds that the trial evidence was sufficient for a reasonable fact finder to conclude, beyond a reasonable doubt, that Dean Volkes had specific intent to defraud.[13] Even still, the Court will address Dean Volkes's two arguments for acquittal that are based on alleged insufficiencies of the evidence.

First, Dean Volkes contends that the purported dearth of evidence to prove his knowledge of the fraud schemes forecloses any conclusion that he had specific intent to defraud. Second, Dean Volkes argues that evidence at trial proved that he did not have specific intent to defraud. Dean Volkes asserts, instead, that the evidence showed that he acted in good faith and believed that his actions were not fraudulent. Dean Volkes's first argument is easily rejected in view of this Court's conclusion that the evidence was sufficient to prove his knowledge of the fraud schemes.[14] The Court also rejects Dean Volkes's second argument, as outlined in detail below, because this argument requires the Court to weigh evidence and improperly draw inferences in

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of evidence from which to draw a conclusion of criminal knowledge or intent. *See Chandler*, 658 F. App'x at 844 (9th Cir. 2016) (holding the following evidence sufficient for a rational juror to find a CEO/President had intent to defraud: CEO/President shared in companies' profits, CEO/President was CEO/President throughout the company's existence, CEO/President received commissions from company activities).

[13] *See* above Section III.A.1.a for a recitation of evidence and inferences supporting the jury's conclusion that Dean Volkes had knowledge of the fraud and willfully participated in the scheme.

[14] *Id.*

favor of the defense which is in contravention of the standard governing the review of a motion for acquittal.

To prove mail and/or wire fraud, the Government must present sufficient evidence to allow a reasonable factfinder to conclude, beyond a reasonable doubt, that the defendant "acted with the intent to defraud." *United States v. Tartaglione*, 228 F. Supp. 3d 455, 462 (E.D. Pa. 2017) (citing *United States v. Yusuf*, 536 F.3d 178, 186–87 (3d Cir. 2008)). Regarding the element of intent, the Third Circuit has recognized that "[e]xcept in unusual cases, intent can be proven only through circumstantial evidence." *United States v. Davis*, 664 F. App'x 150, 153 (3d Cir. 2016) (citing *United States v. Jannotti*, 673 F.2d 578, 603 (3d Cir. 1982)); *see also United States v. Riley*, 621 F.3d 312, 333 (3d Cir. 2010), *as amended* (Oct. 21, 2010) ("Juries may infer intent from circumstantial evidence.").

The Third Circuit case *Riley* is instructive on the present facts, and therefore, a brief recitation of the facts and law in that case is helpful in resolving this case. 621 F.3d 312. In *Riley*, defendant Sharpe James—the former Mayor of Newark, NJ—and Tamika Riley—the owner/CEO of a public relations firm—were convicted of mail fraud as part of a scheme to defraud the City of Newark. *Id.* at 317. In short, James directed the sale of city property to Riley, with whom James had an intimate relationship, as part of Newark's South Ward Redevelopment Plan ("Redevelopment Plan"). *Id.* at 319. Under the Redevelopment Plan, Newark was to sell city property to developers at low prices and in exchange, the developer promised to construct new or renovated housing on the property for sale to and occupancy by city residents. *Id.* Despite the requirement that developers build housing on the property they received from the city, Riley failed to meet this requirement on two of four city properties she purchased. *Id.* at 333. Instead, after receiving the property from the city, Riley resold the

property to other persons without having performed any construction on the property. *Id.* At trial, a jury found James and Riley guilty of, among other things, mail fraud. *Id.*

After conviction, Riley moved for judgment of acquittal asserting that the evidence presented at trial was insufficient to prove that she had the requisite intent to commit fraud. *Id.* at 332. After the trial court denied Riley's motion, on appeal to the Third Circuit, Riley argued that "the evidence only supported a conclusion that [she] intended to comply with her contractual obligations as she understood them with the advice of counsel." *Id.* at 333. The Third Circuit, however, held that "[i]n light of the evidence . . . a reasonable jury could conclude that Riley had the requisite intent to defraud." *Id.* In arriving at this conclusion, the Third Circuit reviewed the circumstantial evidence supporting her conviction and found that "a reasonable jury could have concluded that Riley's intent to defraud was demonstrated by her promises to renovate the [Redevelopment Plan] properties and her failure to fulfill those commitments for all but two of the properties she received." *Id.* Specifically, the Third Circuit found that evidence of Riley's failure to "mention [] the two . . . properties she [previously] sold without renovation" to the city while attempting to buy more city properties, considered in tandem with the fact that she later sold the additional properties without renovation, supported a finding that she had fraudulent intent. *Id.*

Regarding Riley's argument that the evidence showed her good faith intent to comply with her contractual obligations especially given her reliance on counsel, the Third Circuit stated that "[i]f Riley had discussed the legality of her schemes with her lawyers, and they advised her that her actions were legal, such evidence might have refuted her intent to defraud." *Id.* However, the Third Circuit acknowledged that the "testimony indicate[d] . . . that Riley employed the attorneys primarily to help her sell the properties and neither provided counsel

regarding her obligations under the [Redevelopment Plan]." *Id.* There was no evidence that Riley relied on the advice of counsel that her actions were legal at the time she took the actions. *Id.* Thus, "a reasonable jury could have determined that the evidence was sufficient to demonstrate Riley's intent to defraud the City of Newark even if her lawyers did not advise her of the nature of her acts." *Id.*

In the present case, the Court concludes that on the evidence presented at trial, a reasonable fact finder could have concluded, beyond a reasonable doubt, that Dean Volkes had the specific intent to defraud. At trial, evidence was presented that on one hand, Dean Volkes knew of and, in some cases directed, sales and marketing employees' misrepresentations to customers that Guaranteed Returns maintained customer indates for the sole benefit of the customer for no additional fee, while on the other hand, Dean Volkes was diverting customer indates for his own and Guaranteed Returns's own benefit. Just as evidence of the defendant saying one thing and doing another was sufficient to support a finding of fraudulent intent in *Riley*, so too is such evidence sufficient to support a finding of Dean Volkes's fraudulent intent in this case.

Dean Volkes also attempts to negate the evidence of his specific fraudulent intent by pointing to "direct evidence of his intent," purportedly establishing that he "never intended to deceive or defraud." Defs.' Mem. 26, ECF No. 344.[15] In particular, Dean Volkes points to two pieces of evidence: (1) Guaranteed Returns's Return Authorization Form and standard customer contract, and (2) witnesses' testimony that they were told that Dean Volkes justified the

[15] To the extent Dean Volkes's reference to "direct evidence of his intent" suggests that by virtue of the evidence's direct nature it is entitled to greater or dispositive weight compared to the volumes of circumstantial evidence relating to his intent, this proposition is rejected. Defs.' Mem. 26, ECF No. 344. As the Court explained, above, both direct and circumstantial evidence have the same evidentiary validity, and it is up to the jury to weigh such evidence in determining matters of fact.

diversion of customer indates on the basis of the Return Authorization Form and standard customer contract.[16] This evidence, contrary to Dean Volkes's assertions, however, does not compel his acquittal because the evidence does not prove that Dean Volkes had innocent intent and, therefore, cannot summarily resolve the issue.

i. The Return Authorization Forms ("RA Forms") And Contract Language

Dean Volkes's contention that the evidence undermines the jury's finding of specific intent fails for two reasons. First, the RA Forms and contract language, when viewed in conjunction with the other trial evidence, support various inferences that must be drawn in favor of the Government. These inferences formed a basis on which the jury could properly find intent to defraud. Second, Dean Volkes's argument that evidence of: (a) the RA Forms; (b) contract language; (c) others' perception that he relied on such to take customer indates mirrors the defendant's argument in *Riley*, which the Third Circuit rejected as contrary to the evidence. Therefore, Dean Volkes's argument is, as the defendant's argument was in *Riley*, rejected.

In the context of a motion for judgment of acquittal, "'pieces of evidence must be viewed not in isolation but in conjunction . . . and the jury's verdict may be based on circumstantial evidence.'" *Riley*, 621 F.3d at 333 (quoting *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir.1994)). A corollary principle is that the government is under no duty to prove that a piece of evidence supports only one inference. The Third Circuit has explained this rule by stating that "[t]here is no requirement . . . that the inference drawn [from a piece of evidence] by the jury be the only inference possible or that the government's evidence foreclose every possible innocent

[16] Indeed, Dean Volkes's argument tracks the argument made by the defendant in *Riley*, an argument that the Third Circuit expressly rejected. Riley argued that "the evidence only supported a conclusion that [she] intended to comply with her contractual obligations as she understood them with the advice of counsel." 621 F.3d. at 333.

explanation." *United States v. Rawlins*, 606 F.3d 73, 81 (3d Cir. 2010) (citing *United States v. Iafelice*, 978 F.2d 92, 97 n. 3 (3d Cir.1992)). Accordingly, it is up to the jury to determine—when confronted by evidence that supports an inference of guilt or innocence—how evidence should be interpreted and what weight it should be given. This rule dovetails with the well-established standard of review applicable to motions for acquittal—that all inferences supported by the evidence be drawn in favor of the government.

In this case, evidence of the RA Forms and other form contracts, and testimony that certain Guaranteed Returns employees were led to believe that Dean Volkes justified the taking of his customers' indates based on the form language, do not weaken the Government's proof that Dean Volkes had the specific intent to defraud. As discussed above, Dean Volkes knew that Guaranteed Returns and its staff were actively and continuously misrepresenting the way in which Guaranteed Returns handled customer indates, and yet, Dean Volkes actively siphoned off customer indates for his and Guaranteed Returns's benefit. The fact that the RA Form and other contract language contradicted what Guaranteed Returns advertised, in tandem with the fact that Dean Volkes used the language to justify the taking of customer indates to certain persons, supports an inference that the RA Forms and contract language were used as tools to facilitate the fraud and conceal the scheme from unwitting Guaranteed Returns employees and customers.

Although Dean Volkes and Guaranteed Returns contend that the RA Forms and contracts can be viewed as supporting the conclusion that Dean Volkes had innocent intent, this is not enough to warrant acquittal. Dean Volkes and Guaranteed Returns urge the Court to reweigh the evidence presented to the jury. The Court, however, is explicitly prohibited from weighing the evidence in this case. While there might exist an innocent explanation for the diversion of

indates from Guaranteed Returns's customers, the existence of an innocent explanation is not dispositive on the issue of Dean Volkes's intent.

The RA Forms and contracts, viewed together with the volumes of evidence showing the existence of the fraudulent indates schemes, fully support the jury's conclusion that Dean Volkes and Guaranteed Returns had the specific intent to defraud.

ii. Purported Reliance On RA Forms Does Not Prove Innocent Intent

Dean Volkes's second argument fails in the same way that the defendant's argument in *Riley* failed. The defendant in *Riley* argued "that she did not have the requisite intent to commit § 1341 mail fraud (Counts 1–3) and that the evidence only supported a conclusion that Riley intended to comply with her contractual obligations as she understood them with the advice of counsel." *Riley,* 621 F.3d at 332–33. Although the defendant elicited evidence that she used attorneys to sell the city property, no evidence was admitted showing that she used those attorneys to provide counsel on her contractual obligations. *Id.* The Third Circuit, instead, held that evidence that the defendant made representations that she had renovated properties—when, in fact, she had not—was sufficient to show that she understood her contractual obligation to renovate the properties and that by failing to meet her obligation, she had an intent to defraud.

Here, Dean Volkes advances essentially the same argument as the defendant in *Riley* when he asserts that evidence showed that "[he] believed the Company's policy statements gave him the right to keep indate refunds." Defs.' Mem. 26, ECF No. 344. Just as the evidence in *Riley* showed that the defendant understood her obligation and decided to defraud her clients, the evidence in this case showed that Dean Volkes understood his obligations to his clients and decided to defraud his clients anyway.

The evidence at trial showed that Dean Volkes pointed to the RA Form language to justify his taking of customer indates when doing so was consistent with perpetrating and perpetuating the scheme. For example, IT Department employee Ronald Carlino testified that once he became concerned with Dean Volkes's and Guaranteed Returns's handling of customer indates, Dean Volkes told Carlino the RA Forms permitted him to divert customer indates for himself and Guaranteed Returns's benefit. Feb. 24, 2017 Trial Tr. 138:1–19, ECF No. 259 (Carlino). Although Dean Volkes told Carlino that he had a right to keep customer indates, Dean Volkes told John Markhoff, a Sales Department employee, that the customer indates were being destroyed. Feb. 2, 2017 Trial Tr. 63:14–64:2, ECF No. 283 (Markhoff). Markhoff was surprised by this explanation because it directly contradicted: (1) what he was trained to believe by Guaranteed Returns, and (2) what he was directed to advertise to his customers. Feb. 2, 2017 Trial Tr. 66:8–25, ECF No. 283 (Markhoff). Another Sales Department employee, Michael Baumann, was similarly told that customer indates were being destroyed, not that Dean Volkes was invoking a right under the RA Forms to keep indates for his and Guaranteed Returns's benefit. Feb. 21, 2017 Trial Tr. 105:24–106:10, ECF No. 247 (Baumann). This evidence supports an inference that Dean Volkes told persons who were concerned about the handling of indates that he relied on the RA Form language to support his taking of customer indates only when doing so would allow Dean Volkes to further the scheme.

The Court concludes that the evidence presented at trial was sufficient to allow a reasonable fact finder to conclude, beyond a reasonable doubt, that Dean Volkes had the requisite fraudulent intent to be convicted of mail and wire fraud.

c. Evidence Was Sufficient For A Reasonable Trier Of Fact To Conclude That Guaranteed Returns Had Enough Knowledge Of The Fraud Schemes To Form Specific Intent To Defraud

Having concluded that the evidence adduced at trial was sufficient for a reasonable fact

finder to conclude that Dean Volkes knowingly and willfully participated in the indates fraud schemes with specific intent to defraud, it follows that the evidence was sufficient for a reasonable factfinder to make the same conclusion as to Guaranteed Returns. *See, e.g.*, *Lind v. Jones, Lang Lasalle Americas, Inc.*, 135 F. Supp. 2d 616, 622 (E.D. Pa. 2001); *United States v. Gallagher*, 856 F. Supp. 295, 299 (E.D. Va. 1994) (citing *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir. 1949)) (holding "illegal acts, knowledge, and guilty intent of corporate president [are] imputable to corporation for purpose of proving guilt of corporation").

d. Evidence Was Sufficient For A Reasonable Trier Of Fact To Conclude That Guaranteed Returns And Dean Volkes Used The Mails And/Or Interstate Wires In Furtherance Of, Or Incident To, The Scheme To Defraud

Dean Volkes and Guaranteed Returns next argue that the evidence was insufficient on 31 of 40 of the fraud counts to support the third element of mail and wire fraud—that each mailing or wiring furthered, advanced, or carried out the fraudulent indate schemes.[17] Dean Volkes and Guaranteed Returns contend that the Government fatally failed "to introduce any evidence showing that, as a result of the invoices that are at the heart of the 31 Unsupported Counts, the drugs included therein were obtained by Guaranteed Returns [and Dean Volkes] as the result of fraud." Defs.' Mem. 35, ECF No. 344. Stated otherwise, Defendants contend that "absent a showing that the customers who sent in the indates had actually been 'defrauded,'" the evidence is insufficient to support the conclusion that the individual mailings were in furtherance of the fraudulent indate schemes. Defs.' Reply Mem. 8, ECF No. 370.

As explained below, however, there is no requirement that the Government prove that

[17] Dean Volkes and Guaranteed Returns contend that the following 31 counts of fraud are unsupported by the evidence: Counts 1–11, 13, 15, 18, 20, 21, 23–31, 32, 34, 35, 37–39. Defs.' Mem. 31, ECF No. 344.

each victim of Guaranteed Returns and Dean Volkes's schemes to defraud suffered any actual injury, nor is there any requirement that there be proof that victims relied upon or received a fraudulent misrepresentation from Defendants. The mail and wire fraud statutes only require that the mailing or wiring on which any conviction is based was made in furtherance of the fraudulent scheme, "incident to an essential part of the scheme," or a "step in [the] plot." *Schmuck v. United States*, 489 U.S. 705, 711 (1989). In this case, the evidence sufficiently demonstrated that the mailings and wires on which Guaranteed Returns and Dean Volkes's convictions were based were sent in furtherance of the indates fraud scheme as Guaranteed Returns and Dean Volkes intended.

In resolving Guaranteed Returns and Dean Volkes's argument, the Court remains mindful that the "purpose of the mail [and wire] fraud statute is 'to prevent the post office from being used to carry [fraudulent schemes] into effect.'" *Schmuck*, 489 U.S. at 722 (Scalia, J., dissenting). For this reason, the mail and wire fraud statutes prohibit not only mailings and wirings that themselves effectuate the fraud, but also those that are "in furtherance of the fraud." *Id*. at 723. Whether a mailing or wiring is in furtherance of the fraud scheme turns on whether the mailing or wiring is "incident to an essential part of the scheme," or, otherwise, a "step in [the] plot." *Id.* at 711 (citing *Badders v. United States,* 240 U.S. 391, 394 (1916)). The relevant question is whether the mailing or wiring is part of the "execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing [or wiring] later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Schmuck,* 489 U.S. at 715.

Given the United States Supreme Court's relatively expansive understanding of what mailings and wirings may be "in furtherance" of a fraud, it is no surprise that courts have

routinely held that even mailings and wirings that are "routine and innocent" can form the basis of a conviction under the mail and wire fraud statutes. *Id.* As the First Circuit has noted, "a mailing can serve as the basis for a mail fraud conviction even if the fraud would have been successful had the mailing never occurred." *United States v. Tavares*, 844 F.3d 46, 59 (1st Cir. 2016). The mail and wire fraud statutes simply require that a "mailing [or wire]—even if dispensable—must at least have some tendency to facilitate execution of the fraud." *Id.*

"Even mailings made after the fruits of the scheme have been received may come within the statute when they are 'designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'" *United States v. Coyle*, 63 F.3d 1239, 1244–45 (3d Cir. 1995) (citing *United States v. Otto*, 742 F.2d 104, 108 (3d Cir. 1984)).

Here, there was sufficient evidence to permit the jury to conclude that each mailing and wiring charged in the Superseding Indictment was made in furtherance of the overall indates fraud schemes because the mailings and wirings effectively converted illegally obtained customer pharmaceuticals into money for Guaranteed Returns and Dean Volkes's benefit. These mailings and wirings were, thus, each made to advance the indates fraud schemes. These mailings and wirings, together, constituted the method by which Guaranteed Returns and Dean Volkes monetized the customer indates that they had taken for themselves.

The evidence at trial showed that the unmanaged/managed indates fraud scheme transferred ownership of customer drugs to Guaranteed Returns by designating the drugs as belonging to fake GRX stores.[18] The drugs themselves had no value to Guaranteed Returns,

[18] GX 2-73 (listing the GRX store numbers); *see also* Mar. 7, 2017 Trial Tr. 26:20–27:5 (Woodring) (testifying that when a customer's indate was taken by Dean Volkes and Guaranteed Returns and placed into a fake GRX store, the FilePro system created an INDAT file entry

except for the cash or credit refunds that Dean Volkes and Guaranteed Returns could obtain by returning the drugs to the drugs' manufacturer. Accordingly, Guaranteed Returns had no choice but to submit paper or wire credit memos to the drugs' manufacturers in order to convert the drugs into fungible cash or credit. Mar. 7, 2017, Trial Tr. 36–39, ECF No. 326 (Woodring) (testifying that the credit memo requesting refunds for returned drugs was either mailed or wired). Indeed, IT Department employee Carlino confirmed that once the drugs had been reprocessed from the customer to the fake GRX store, the drug had to be returned to "get converted into cash." Feb. 23, 2017 Trial Tr. 59:21–24, ECF No. 248 (Carlino). Each mailing and wire underlying each of Defendants' convictions for mail and wire fraud[19] was in the form of credit memos from Guaranteed Returns to the drug manufacturer. Each credit memo requested that stolen customer drugs be converted into fungible cash or credit that Guaranteed Returns could then transfer into various company and private accounts belonging to or controlled by Guaranteed Returns, Donna Fallon, Dean Volkes, or Dean Volkes's daughter. This evidence was sufficient to support the conviction because each mailing and wiring was not only made in furtherance of the fraud scheme but was essential to its successful operation.

Defendants cite to the Ninth Circuit's unpublished and non-precedential decision in *United States v. Powers* to support their contention that the mailings and wires in the present case cannot form the basis of Defendants' convictions. 43 F. App'x 10 (9th Cir. 2002) (unpublished). In arguing that *Powers* compels acquittal in this case, however, Defendants draw too broad a conclusion from the Ninth Circuit's decision. Instead, when properly construed, the

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showing the original owner/customer of the particular indate drug and the fake GRX store to which the indate was designated).

[19] *See* GX 70-44 (providing a summary showing which particular mailing or wire undergirds each count in the Superseding Indictment, along with a citation to the trial exhibit number for the actual mailing or wire).

Ninth Circuit's decision stands for the proposition that each mailing or wiring must be made in furtherance of the fraud scheme. Thus, in applying this proposition to the facts before it, the Ninth Circuit concluded that some wires could not support certain of defendant's wire fraud convictions because the wires did not further the scheme, while other mailings could support defendant's mail fraud convictions because the mailings furthered the scheme. *Id.* In so holding, the Ninth Circuit did nothing more than apply the standard established by the United States Supreme Court in *Schmuck* to determine whether particular mailings or wirings were made in furtherance of the charged fraud scheme.

Finally, Defendants also cite to a Northern District of Illinois case, *United States v. Jedynak*, in support of their argument for acquittal on the mail and wire fraud convictions. 45 F. Supp. 3d 812 (N.D. Ill. 2014). Defendants assert that *Jedynak* compels acquittal in this case because in *Jedynak* the court required that the Government prove each wire underlying each of the defendant's convictions for wire fraud was sent to an actual victim of fraud. The decision in *Jedynak* is not only not binding in this jurisdiction; it is also at odds with the Third Circuit's own non-precedential decision in *United States v. Lucas*. No. 15-2153, 2017 WL 4118346, at *3 (3d Cir. Sept. 18, 2017) (citing *Neder v. United States*, 527 U.S. 1, 25 (1999)) (providing that there need be no "actual reliance [on misrepresentations] to prove wire fraud"). Indeed, the Second Circuit has similarly explained that the "Government need not prove 'that the victims of the fraud were actually injured,' but only that 'defendants contemplated some actual harm or injury to their victims.'" *United States v. Greenberg*, 835 F.3d 295, 305–06 (2d Cir. 2016) (quoting *United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006)).

In sum, the Court concludes that the evidence adduced at trial was sufficient to permit the jury to conclude that the mailings and wires undergirding each conviction were made in

furtherance of some fraud scheme.

i. That Some Fine Print And Other Contractual Language Existed Does Not Preclude A Reasonable Trier Of Fact From Concluding That Dean Volkes And Guaranteed Returns Participated In A Mail/Wire Fraud Scheme Relating To Indates

Guaranteed Returns and Dean Volkes next argue that their convictions on Counts 1 through 40 must be set aside because certain fine print language on their RA Forms and contractual disclaimers in other standard form contracts insulate the Defendants against a finding of fraud. Guaranteed Returns and Dean Volkes contend that:

> In light of the contracts' repeated, clear, and unambiguous disclaimer of all extra-contractual statements regarding Guaranteed Returns's services, and in light of the RA form's clear disclosure that returned products that were not immediately creditable would not be remunerated, as a matter of law, the Defendants did not defraud those customers whose indated products were allegedly transferred to GRx stores.

Defs.' Mem. 42. ECF No. 344. Guaranteed Returns and Dean Volkes assert that notwithstanding the oral promises that Guaranteed Returns made to customers through its sales employees and customer service agents, and promotional and sales materials, the contractual language in Guaranteed Returns's standard form contracts and RA Forms worked as an effective notice to all customers that Guaranteed Returns could keep all customer indates for Guaranteed Returns's and Dean Volkes's own benefit.

Despite Defendants' repeated claims that the contracts and RA Form language were "clear" and "unambiguous" as to Guaranteed Returns's and Dean Volkes's right to keep their customers' valuable indate drugs, Defendants' actions show how unclear and ambiguous the language was in reality. As the Court explains below, even if the language were "clear" and "unambiguous" as Defendants claim, such reliance on contractual disclaimers cannot absolve

persons of criminal liability for fraud as the Second Circuit most recently explained in *United States v. Weaver*, 860 F.3d 90 (2d Cir. 2017).

As an initial matter, while Defendants assert that their contracts and RA Forms were clear that customers were not to rely on any representation or promise by Guaranteed Returns that indates would be managed for the customers' benefit, the evidence showed that customers were not only unclear about where their indates were going, but also Guaranteed Returns continued to assure customers falsely that Guaranteed Returns was managing all indates for the benefit of the originating customer. Guaranteed Returns acknowledged that one of the "[t]op 19 [d]issatisfaction [i]ssues" voiced by customers was "[w]here are my indates?" GX 10-1 (GRX 101 training presentation provided to Guaranteed Returns's sales and customer service staff). That one of the top complaints by customers was confusion over how Defendants treated customer indates demonstrates that the RA Form language and contractual disclaimer language was not as "clear" and "unambiguous" as Defendants contend. Indeed, Guaranteed Returns's standard response to the customer question of "where are my indates" was that all indates will appear on customer reports "as they become eligible for credit." GX 10-1. There was no evidence at trial suggesting that Guaranteed Returns trained its customer services agents or sales staff to direct customers to the RA Form or contract language regarding Defendants' purported right to keep all indates if and when the customers became dissatisfied about their indates.

Even if the language of the RA Form and standard form contracts were as "clear" and "unambiguous" as Defendants contend, such contractual disclaimers cannot, as a matter of law, absolve Defendants of criminal fraud. The per curiam Second Circuit decision in *Weaver* specifically rejected the argument Defendants make in this case. While not binding in this circuit, the decision in *Weaver* is particularly persuasive on the present facts.

In *Weaver*, the Second Circuit held, consistent with a number of other circuits, "that contractual disclaimers of reliance on prior misrepresentations do not render those misrepresentations immaterial under the criminal mail and wire fraud statutes." 860 F.3d at 95. Defendant Edward Weaver, CEO of a vending machine company, was convicted of conspiring to commit mail and wire fraud. Weaver's mail and wire fraud schemes consisted of disseminating promotional materials and directing salespeople to represent to potential customers that Weaver's company, Vendstar, would work with potential customers to "install [] vending machines in advantageous places to maximize profits." *Id.* at 93 n.2. If a potential customer wished to purchase Vendstar's services, the potential customer would execute a contract setting forth the services offered by Vendstar. *Id.* The contracts used by Vendstar included the following standard disclaimer:

> Purchaser understands that seller has no affiliation or financial relationship with professional locating companies and that seller has no involvement whatsoever in securing retail locations . . . .
>
> Purchaser and seller agree that this purchase order contains the entire understanding of the agreement between the parties and there is no reliance upon any verbal representation whatsoever. Seller has not guaranteed any minimum or maximum earnings . . . .
>
> It is further acknowledged that no statements, promises[,] or agreements influenced this purchase or are expected other than anything contained in this purchase order . . . .

Id. (omissions in original) (emphasis added). Ultimately, the jury concluded that, among other crimes, Weaver engaged in criminal fraud by failing to provide services to Vendstar's customers as promised by Vendstar in its promotional materials and by Vendstar's sales staff. On appeal, Weaver argued that his conviction for mail and wire fraud warranted reversal because "Vendstar customers signed purchase agreements in which they disclaimed reliance on extra-contract

representations" and, therefore, the promotional materials and oral promises made by Vendstar sales staff could not form the basis of criminal fraud conviction. *Id.* at 92. The Second Circuit disagreed, stating that "[w]hile such disclaimers may in some circumstances defeat a civil claim for damages based on fraud . . . they do not bear on the defendant's criminal liability." *Id.* at 95.

In reaching this conclusion, the Second Circuit emphasized the difference between the case before it—a criminal fraud case—and the case that Defendant Weaver would have preferred—a civil fraud case. The Second Circuit explained that, indeed, if "Vendstar's victims were plaintiffs in a civil damages action [the contractual disclaimers] would have some force[.]" *Id.* at 97. The disclaimers have no force, however, "where the government criminally prosecutes defendants for participating in a 'scheme or artifice to defraud' . . ." *Id.* Ultimately, the proposition is simple: "[f]raudsters may not escape criminal liability for lies told to induce gullible victims to make worthless investments by inducing them to sign a contract containing disclaimers of reliance." *Id.* at 96. The Second Circuit's decision in *Weaver* is consistent with the Third Circuit's earlier decision in *Riley* in which the Third Circuit rejected a defendant's attempt to rely on her purported adherence to a contract's provision as a defense to mail fraud.[20]

Here, Dean Volkes may not, by invoking boilerplate, fine print language and contractual disclaimers, escape criminal liability for lies told to induce Guaranteed Returns's customers to send in indated products and to maintain a steady stream of indated products that Dean Volkes and Guaranteed Returns, in turn, returned for cash and credit. The written and oral advertising by Guaranteed Returns and at the direction of Dean Volkes could, and did, properly form the basis from which the jury could conclude that Dean Volkes's was guilty, beyond a reasonable doubt, of fraud.

[20] *See* above Section III.A.1.b for a discussion of the Third Circuit's decision in *Riley*.

2. Counts 41 Through 52: Mail Fraud In Connection With The Hidden Fees

Defendants move for acquittal on Counts 41 through 52 on two grounds. First, Defendants assert that the mailings on which Counts 41 through 52 are based are each insufficient to support conviction because each mailing was not proven to have been sent in furtherance of the fraudulent hidden fees adjustment scheme. For this reason, Defendants assert that the Government failed to prove the third element of mail fraud—that the mailing was in furtherance of the fraud scheme. Second, Defendants assert that the Government failed to prove that Defendants knowingly and willfully participated in the fraudulent hidden fees adjustment scheme, the first element of mail fraud.

The Court is unpersuaded by Defendants arguments. First, the evidence was sufficient to prove that the mailings underpinning each of Counts 41 through 52 not only constituted steps in furtherance of the overall fraudulent hidden fees adjustment scheme as contemplated by Defendants, but also that each mailing had the added effect of lulling Defendants' customers and concealing Defendants' fraud. Second, the evidence was sufficient to permit the jury to conclude that Defendants had the requisite knowledge of the fraudulent nature of the adjustment computer program and the requisite intent to defraud.

a. The Mailings Were Each A "Step In The Plot" In Furtherance Of The Overall Fraud

The Supreme Court in *Schmuck* advised courts to remain cognizant of the overall scope of a fraudulent scheme when considering whether a mailing is in furtherance of the scheme as "incident to an essential part of the scheme," or as a "step in the plot." 489 U.S. at 711. As the Seventh Circuit has noted, when a defendant challenges the mailings underlying a conviction for mail fraud, the Supreme Court's holding in "*Schmuck* makes clear that the challenged mailings

must be understood in the context of the full scheme to defraud." *United States v. Ashman*, 979 F.2d 469, 482 (7th Cir. 1992).

The overall scheme charged in Counts 41 through 52 involved: customers submitting drugs to Guaranteed Returns, Guaranteed Returns returning the drugs to manufacturers in exchange for refunds, Guaranteed Returns clandestinely exacting an additional fee on the resulting customer refunds, and, finally, Guaranteed Returns mailing reduced checks to unsuspecting customers.[21] That Defendants' fraud scheme hinged on the mailing or wiring of reduced customer checks to complete the scheme is fully apparent in light of the reality that had Defendants not sent the checks at all, customers not only would have detected Defendants' fraud, but also Defendant would not have had any customers to defraud. If Defendants mailed nothing back to customers, customers would not continue to submit valuable drugs to Guaranteed Returns where competitors in the marketplace for returns would have performed the work. Had Guaranteed Returns not sent reduced checks to their customers, Guaranteed Returns would have, in short, eliminated its stream of incoming drugs, drugs that it sent back to the drug manufacturers in return for cash or credit. When viewed in this context, the mailing of each reduced check underlying Counts 41 through 52 was more than incidental to an essential part of the scheme; the checks and mailings were essential steps in the successful operation of the scheme.

In addition to serving as an essential step in the fraudulent hidden fees adjustment scheme, the checks also served a lulling and concealment function. The Third Circuit, consistent with the principles articulated by the Supreme Court in *Schmuck* explained that:

> Even mailings made after the fruits of the scheme have been

[21] *See* above Section I.C.4 for a brief summary of the evidence of the hidden fees adjustment scheme.

> received may come within the statute when they are 'designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'

United States v. Coyle, 63 F.3d 1244, 1245 (3d Cir. 1995). On the concept of lulling, the Seventh Circuit's decision in *Ashman* is illustrative. 979 F.2d 469 (2d Cir. 1992).

In *Ashman*, the defendants, commodities brokers and traders, were convicted of mail and wire fraud related to their unlawful fixing of prices for commodities futures contracts. 979 F.2d at 476. The brokers and traders executed trades for their clients based on fraudulently fixed prices rather than market prices as their clients expected. *Id.* The specific mailings and wires on which the convictions were based consisted of various "confirmation of trade" notices that were sent to customers indicating that the customers' requested trades had been executed. *Id.* at 481.

In appealing their mail and wire fraud convictions, the defendants argued that the convictions warranted reversal "because the requisite mailing and wiring was not in furtherance of the scheme to defraud." *Id.* at 469. Specifically, the defendants argued that "the jury could not rationally have found that the mailing and wiring of statements confirming the execution of trades to customers furthered the defendants' scheme to defraud." *Id.* at 481. The defendants argued that by the time the confirmation of trade notices were sent to defendants' victims, the fraud scheme had already been completed and, therefore, the confirmation of trade notices mailings and wires could not, as a matter of law, furthered the scheme. *Id.*

In affirming the defendants' convictions, the Seventh Circuit stated that, "through mailing and wiring, the defendants advised customers of the results of their orders, helping to conceal the fraudulent trading and thereby furthering the scheme." *Id.* at 482. The Seventh Circuit's decision was rooted in the Supreme Court's decision in *Schmuck*, which "ma[d]e clear

that the challenged mailings must be understood in the context of the full scheme to defraud." *Id.* at 482. With the full scope of the fraud in mind, the Seventh Circuit observed that "concealment—in this case, the appearance of legitimate trading—formed a vital part of the instant defendants' ongoing scheme." *Id.* at 483 (emphasis added). Indeed, the Seventh Circuit explained that the mailings and wires:

> [W]ere the direct result of fraudulent trading. Had the defendants not executed the arranged transactions, those specific trades would have not occurred, obviating the need for any confirmation. Absent the defendants' fraud, it is quite likely that the same transmission would not have been sent. We hold, then, that the jury reasonably could have found that the mailing and wiring of trading information furthered the defendants' scheme to defraud.

Ashman, 979 F.2d at 483.

In the present case, just as in *Ashman*, the mailings on which Counts 41 through 52 are based, viewed in the context of the overall fraud scheme, advanced the scheme by ensuring that Defendants had a constant flow of refunds to which they could apply the adjustment program and by concealing the overall adjustment scheme from their customers.

b. Evidence Of Defendants' Knowledge And Intent

Here, all three Defendants argue, as Guaranteed Returns and Dean Volkes argued in connection with their convictions on the fraud Counts 1 through 40, that there was insufficient evidence to establish that Defendants knew about, or intended to engage in, the adjustment scheme. In arguing this point, Defendants incorrectly contend that the Government was required to show that each Defendant was directly involved in the dissemination of false statements. Defendants state that "the government presented no evidence whatsoever that Dean Volkes or Donna Fallon: (1) directed the creation or were aware of the 'sales slicks' advertising an 'all-inclusive fee,' or (2) trained any Guaranteed Returns employees to advertise an 'all-inclusive

fee.'" Defs.' Mem. 52, ECF No. 344. In short, Defendants complain that "the government presented no evidence connecting the Individual Defendants to the allegedly false and misleading statements." Defs.' Mem. 52, ECF No. 344. This complaint, however, is void of any legal basis because to prove mail fraud, the Government is not required to prove that each defendant personally disseminated false statements or misrepresentations.[22]

As discussed in detail above, Dean Volkes and Guaranteed Returns were well-aware of, and directly contributed to, the misrepresentations that Guaranteed Returns staff were making regarding the handling of customer indates and the fee structure for Guaranteed Returns's services.[23] Accordingly, the Court need not exhaustively recount the evidence of Dean Volkes's and Guaranteed Returns's knowledge of and participation in the fraud schemes.

As to Donna Fallon's knowledge and intent, the Court focuses on four pieces of evidence showing that Donna Fallon had knowledge that her actions were in furtherance of a fraudulent scheme and that she acted with intent to defraud. First, IT employee Carlino testified that he told Donna Fallon about Dean Volkes's scheme to "skim" customer funds and that Dean Volkes selected Donna Fallon, alone, to oversee the skimming program. Second, Donna Fallon was aware that the computer program used to skim customer funds would be applied after all other employees' involvement had concluded and that the program would skim funds without any customer or employee knowing how the program operated or why it was created. Third, Donna Fallon's position as Chief Financial Officer, and former head of the Reconciliations Department, supports an inference that she knew that use of the skimming program was at odds with what

[22] *See* above Section III.A.1 discussing the proposition that the Government need not prove that the defendant personally disseminated false statements or misrepresentations.
[23] *See* above notes 3, 8 and accompanying text for a discussion of the evidence regarding Dean Volkes and Guaranteed Returns's knowledge of Guaranteed Returns's misrepresentations to its customers, including evidence of Dean Volkes and Guaranteed Returns's advertisement of an "all-inclusive fee" structure.

Guaranteed Returns's customers should have received. Fourth, Donna Fallon's relationship as the sister of Dean Volkes, when viewed in conjunction with other corroborating evidence, supports an inference that she was aware of her brother's fraud scheme and willfully participated in the scheme.

i. Ronald Carlino's Testimony: He Told Donna Fallon About The Skim

Carlino testified that after Dean Volkes had directed Carlino to code the adjustment computer program, Carlino walked a short distance from Dean Volkes's office to Donna Fallon's office to tell Donna Fallon about her role in the scheme and about Dean Volkes's plans. Feb. 23, 2017 Trial Tr. 73–74, ECF No. 248 (Carlino). Carlino testified that he explained to Donna Fallon that the adjustment computer program was a "skim," that Dean Volkes directed Carlino to install it only on Donna Fallon's computer, and that Dean Volkes explained that he wanted Donna Fallon to be in charge of activating the computer program to skim customer refunds. Feb. 23, 2017 Trial Tr. 73–74, ECF No. 248 (Carlino); *see also* Feb. 23, 2017 Trial Tr. 77, ECF No. 248 (testifying that when speaking with Fallon, Carlino only ever referred to the scheme as a "skimming program"). In response to Carlino's explanation, Donna Fallon shook her head and stated, "I can't believe that we're doing this, we have to do it." Feb. 23, 2017 Trial Tr. 74, ECF No. 248 (Carlino). Despite her initial disbelief, Donna Fallon activated the adjustment program on multiple occasions and, as her brother Dean Volkes had planned, she skimmed customer refunds. Feb. 23, 2017 Trial Tr. 74, ECF No. 248; GX 3-374 (email from Donna Fallon in which she states, "Ron, I ran it at . . . let me know if Lisa can run it on her end . . .); GX 3-357 (email from Donna Fallon in which she states "Hi Ron, Please look and see if we can run a batch adjustment on a second (Batch # 22367-207)"). In activating the adjustment computer program, Donna Fallon ultimately skimmed more than $500,000.00 worth of customer refunds. GX 70-27

(summarizing the checks and amounts underlying Counts 41 through 52); GX 70-26 (summarizing amounts taken by way of adjustment program).

ii. Donna Fallon Knew She Was Selected By Dean Volkes To Skim Customer Funds And That She Was The Only One With The Capability To Apply The Skim

That Donna Fallon knew that she, alone, would be in charge of activating the adjustment computer program and that the skimming would occur after all other Reconciliation Department employees had completed their roles in preparing customer refunds for delivery to the customers supports the jury's conclusion that Donna Fallon knew her actions were in furtherance of the fraud scheme. In short, Fallon understood that she would be directly involved in the skimming of customer funds and be a central figure in the successful operation of the scheme. *See* Feb. 23, 2017 Trial Tr. 71:18–24, ECF No. 248 (afternoon) (Carlino) (testifying that Donna Fallon would run the program after she checked the "preliminary distribution," thereby supporting the conclusion that she understood that exacting an additional undisclosed charge on a customer's distribution was beyond the ken of normal operations); *see also* Feb. 23, 2017 Trial Tr. 84, ECF No. 248 (afternoon) (Carlino) (testifying that Donna Fallon reversed a distribution after she realized that she had not applied the skim program to one batch); Mar. 7, 2017 Trial Tr. 18:13–21, ECF No. 292 (afternoon) (Woodring) (testifying that the adjustment scheme stopped after the FBI raided Guaranteed Returns's offices and executed a search warrant, supporting a conclusion that Fallon and her co-conspirators understood that the adjustment scheme was unlawful and fraudulent).

iii. Donna Fallon: Chief Financial Officer

Donna Fallon's role as Chief Financial Officer and head of the Reconciliation Department can—just as Dean Volkes's role as Chief Executive Officer and Founder can—

support the conclusion that Guaranteed Returns's adjustment program fraud scheme was fraudulent and in contradiction to the established expectations of Guaranteed Returns's customers.[24] Of course, while Fallon's position as CFO and head of the Reconciliation Department cannot, alone, support a finding that she had the requisite knowledge or intent to defraud, it can supply support for such finding when properly considered with other evidence of Fallon's knowledge and intent.

iv. Donna Fallon: Sister of Dean Volkes With An Adjacent Office

Among other facts that form the backdrop against which the evidence of Fallon's knowledge and intent should be considered is the ineluctable fact that Donna Fallon was not only the Chief Financial Officer of Guaranteed Returns, but she was also Dean Volkes's sister whose office was adjacent to and mere feet away from her brother's. Feb. 6, 2017 Trial Tr. 111 (Linn) (describing the layout of Guaranteed Returns's offices). This close familial relationship, while not dispositive on the issue of knowledge, supports the inference that Donna Fallon was aware of her brother's schemes, including the Adjustment Scheme.

v. Defendants' Other Arguments

Defendants point to a number of other purported flaws in the Government's proof on Counts 41 through 52 including that the Government: (1) introduced no evidence from which the jury could infer that the one percent fee was not reported to customers;[25] (2) did not submit sufficient proof that Defendants knew about inaccurate extranet fees;[26] (3) did not elicit sufficient proof that the Defendants benefitted from any inaccurate extranet fees, to the extent

[24] *See* above note 13 and accompanying text for discussion of the evidentiary import of a defendant's leadership roles at a company and what inferences may be drawn from evidence of a defendant's leadership roles; *see also* Section III.A.1.a (discussing same).
[25] Defs.' Mem. 55, ECF No. 344.
[26] Defs.' Mem. 55–56, ECF No. 344.

they existed,[27] (4) did not submit proof that customers were not notified that Guaranteed Returns would assess a distinct inactivity fee above the "all-inclusive fee" that Guaranteed Returns normally charged;[28] and (5) did not submit proof that Defendants kept the inactivity fee that it charged its customers.[29]

As each of these purported flaws relate to the weight of the evidence rather than the sufficiency of the evidence, and it is inappropriate for the Court to reweigh the evidence, the Court will address each, in turn, only briefly.

First, Defendants' argument that there was no evidence from which the jury could infer that customers had been misled regarding Guaranteed Returns's imposition of the one percent "adjustment fee" is misplaced because, among other things, testimony from IT employee Carlino provided a sufficient base from which the jury could make its inferences. Carlino testified that the Adjustment Program was specifically designed, at the direction of Dean Volkes, to ensure that the fee could not be detected. *See, e.g.*, Feb. 23, 2017 Trial Tr. 84, ECF No. 248 (Carlino). This evidence is sufficient to allow the jury to infer that the fraudulent fee worked as it was designed; it allowed the fee to avoid detection by customers.

Second, Defendants' argument that the jury could not infer that Defendants were aware that false information regarding fees was displayed on the extranet directly contradicts the evidence at trial. Among other things, the evidence showed that Defendants were involved in the development and maintenance of the extranet system. *See, e.g.*, Feb. 24, 2017 Trial Tr. 9–18, ECF No. 259 (Carlino) (testifying to how Dean Volkes directed Carlino to change the description of the inactivity fee from a "fee" to "distribution pending" in the extranet system to

[27] Defs.' Mem. 56, ECF No. 344.
[28] Defs.' Mem. 58, ECF No. 344.
[29] Defs.' Mem. 58, ECF No. 344.

conceal the inactivity fraud scheme from customers); Feb. 28, 2017 Trial Tr. 51:7–21, 52, ECF No. 254 (Stieglitz) (testifying that Dean Volkes wanted to develop an extranet system and that Dean Volkes, Donna Fallon, and Darren Volkes provided Stieglitz with information on which the extranet system was built); Feb. 22, 2017 Trial Tr. 127–128 (Sellitto) (testifying that Dean Volkes emailed him with a "sample of extranet reporting" and ideas for how to "handle reporting indates to the customer" on the extranet).

In addition to the fact that Dean Volkes and Donna Fallon supplied information to and worked with Dan Stieglitz to create the extranet system, an audio recording played at trial showed that Sharon Curley, a Reconciliations Department employee, stated that she had been complaining for years to Guaranteed Returns regarding inaccurate extranet data. Feb. 7, 2017 Trial Tr. 12–13, ECF No. 284 (Gingrich). The jury could properly infer that Curley—in stating that she had been complaining "for years"—made Donna Fallon aware of these concerns because Donna Fallon supervised Curley and worked closely with Curley on precisely the matters on which Gingrich and Curley were discussing. *See, e.g.*, Feb. 24, 2017 Trial Tr. 12:2–10, ECF No. 259 (Carlino) (testifying that "Sharon Curley is the Reconciliation manager who was responsible . . . for collecting credits and applying them and sending out the checks for it . . . . Donna, who Sharon reported to, would give the okay"); GX 3-359 (email from Ronald Carlino to Donna Fallon and copying Sharon Curley, reporting that he had trained "Lisa and Sharon what to look for in the adjustment file after a distribution and asked them to alert me when a distribution creates the adjustments"); Feb. 28, 2017 Trial Tr. 52, ECF No. 254 (Stieglitz) (testifying that Donna Fallon and Dean Volkes met with Dan Stieglitz as part of the "executive committee" who met with the managers of each department each month). From this evidence, the jury could conclude that Defendants knew about the complaints and problems with the extranet.

Third, Defendants' argument that the inaccurate extranet fees represented only the "wholesaler charges" and not a fee that would benefit Guaranteed Returns is only superficially attractive. The name of the fee is not dispositive on the issue of whether the inaccurate extranet fee, whether a wholesaler charge or some other charge, was intended to be a part of Defendants' fraud scheme.

Fourth, while Defendants contend that there was no proof that customers were not notified that Guaranteed Returns would assess a new and previously nonexistent inactivity fee, the evidence at trial was sufficient to permit the jury to conclude that the inactivity fee was concealed from customers. Among other things, the evidence showed that Defendants created the inactivity fee so that the fee would not be visible to customers. GX 3-361 (Dean Volkes email to Darren Volkes, and Donna Fallon indicating that the inactivity fee would not be visible to customers, and that rather than tell customers that Guaranteed Returns was assessing an inactivity fee, that customer service should "tell the [customer] that it has been a long time since they last sent in return goods and try to get [the customer] to do so"); GX 3-358 (showing that Dean Volkes, Sharon Curley, and Donna Fallon, among others, were involved in the implementation of the inactivity fee). Indeed, Dean Volkes also instructed Ron Carlino to characterize the "[i]nactivity [f]ee" not as a fee, but instead, as "[d]istribution [p]ending." GX 3-363. This evidence was sufficient for the jury to infer that the inactivity fee was not disclosed to customers, but was, instead, intended to be concealed from customers.

In an attempt to undercut the evidence of Defendants' fraudulent inactivity fee, Defendants argue that the inactivity fee was merely a method of "induc[ing] customers to continue working with the Company." Defs.' Mem. 58, ECF No. 344. The fundamental flaw in this proposition, however, is that Ron Carlino testified that under the inactivity fee scheme, the

"fee that was going to be applied" would "wipe out credit," that is, credit rightfully owed to the customer. Feb. 24, 2017, Trial Tr. 16:24–17:15 (Carlino). Guaranteed Returns cannot impose an undisclosed inactivity fee on customers to fraudulently induce customers to provide drugs and work to the company.

Fifth, Defendants' argument that there was no proof that Defendants kept the inactivity fees they charged overlooks not only the evidence presented at trial but also one of the many ways in which Guaranteed Returns benefited from the inactivity fee scheme. Again, Carlino testified that the inactivity fee was a "fee that was going to be applied to the customer," and that the fee would "wipe out credit" that should have been passed on to the customer. Feb. 24, 2017, Trial Tr. 16:24–17:15 (Carlino). Wiping out credits that Guaranteed Returns was liable to pay to its customers allowed Guaranteed Returns to avoid paying the amount of the wiped credits from its revenues. In this way, Guaranteed Returns benefited from the inactivity fee even if it did not affirmatively receive any new money from its client.

Ultimately, the Court rejects Defendants scattershot approach to challenging the sufficiency of the evidence undergirding Defendants' convictions on Counts 41 to 52.

3. Count 53: Theft Of Government Property

Next, Guaranteed Returns and Dean Volkes attack their conviction for theft of government property by asserting that the Government's proof on the first element of the offense was lacking. Defendants argue that "the government wholly failed to prove at trial . . . that the property in question [the pharmaceuticals] belonged to the United States government." Defs.' Mem. 63, ECF No. 344. Defendants point to two failings in the Government's proof. First, Defendants assert that the Court's jury instructions identified the government property at issue as the "refunds for indated product," but because the property at issue was the "refunds," the

Government failed to submit sufficient evidence to support the conclusion that the Government had "title to, possession of, or control over" the "refunds." Defs.' Mem. 63, ECF No. 344. Second, Defendants argue, in the alternative, that to the extent the Government contends that the property at issue was not the refunds for drug products but the drug products themselves, the Government waived such contention when it agreed to the jury instructions used at trial and, therefore, all proof at trial relating to this point is irrelevant. The Court rejects Defendants' first argument and concludes that the jury instruction fairly and adequately submitted the matter of Defendants' theft of government property to the jury. Accordingly, the Court need not address Defendants' second argument.

When reviewing a jury charge, the court must determine "whether the charge, taken as a whole and viewed in light of the evidence, fairly and adequately submits the issues in the case to the jury," and reverse "only if the instruction was capable of confusing and thereby misleading the jury." *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1259 n. 15 (3d Cir. 1991) (citing *Link v. Mercedes-Benz of North Am., Inc.*, 788 F.2d 918, 922 (3d Cir. 1986)); *see also United States v. Repak*, 852 F.3d 230, 255 (3d Cir. 2017) (quoting *United States v. Thayer*, 201 F.3d 214, 221 (3d Cir. 1999)) (stating that "[j]ury instructions satisfy due process if 'the charge as a whole fairly and adequately submits the issues in the case to the jury.'").

In this case, the crime at issue, theft of government property, consists of four elements. Defendants allege that the Court's instruction on the first of the four elements of the crime was erroneous such that the verdict should be set aside. On the first element of the crime, the Court instructed the jury that:

> The Government has accused the Defendants of stealing, purloining, and knowingly converting a thing of value of the United States . . . that is, at least $27,221,401.51 worth of pharmaceutical products that were entrusted to Guaranteed Returns

> to Return for refund . . . . In order to prove the Defendants Guilty of stealing, purloining, or knowingly converting money or property belonging to the United States government, the Government must prove . . . beyond a reasonable doubt: first, that the money or property described in the indictment belonged to the United States Government . . . . The first element the Government must prove beyond a reasonable doubt is that the money or property described in the indictment belonged to the United States Government. To satisfy this element, the Government must prove that the refunds for indated product at issue in the indictment were—was a thing of value of the United States.

Mar. 20, 2017 Trial Tr. 123–25, ECF No. 321 (the Court's jury instructions) (emphasis added). Defendants assert that the last sentence of this part of the instruction prejudicially identified the property at issue as the refunds, not the pharmaceutical products. The Court disagrees for three main reasons: (1) the charge itself earlier identifies the property at issue as the pharmaceutical product, (2) the charge refers the jury to the property described in the indictment as the property at issue, and (3) the description of the property at issue is consistent with the description that was used in the Jury Verdict Form, as well as, consistent with the description used by the Parties throughout trial.

First, the jury charge by its own terms identified the pharmaceutical product as the government property at issue. The charge starts with the statement: "The Government has accused the Defendants of stealing, purloining, and knowingly converting a thing of value of the United States . . . that is, at least $27,221,401.51 worth of pharmaceutical products that were entrusted to Guaranteed Returns to Return for refund . . . " Mar. 20, 2017 Trial Tr. 123, ECF No. 321 (emphasis added). Even in the last sentence, while the Court stated that "the Government must prove that the refunds for indated product at issue in the indictment were—was a thing of value of the United States," the words "indated product at issue in the indictment," clarified that it was the indated pharmaceutical product that was at issue, not the refunds. Mar. 20, 2017 Trial

Tr. 125, ECF No. 321 (emphasis added). Thus, the Court concludes that the charge, when taken as a whole, properly submitted the issue to the jury.

Second, the jury charge's reference to the Superseding Indictment also eliminates any ambiguity regarding what property the jury was to consider in deliberating on Defendants' criminal liability for theft of government property. In the jury charge, the Court stated that "the first element the Government must prove beyond a reasonable doubt is that the money or property described in the indictment belonged to the United States Government." Mar. 20, 2017 Trial Tr. 125, ECF No. 321 (emphasis added). The Superseding Indictment's description of the property at issue, which tracked the description contained in the final Jury Verdict Form, was "a thing of value . . . that is, at least $27,221,401.51 worth of pharmaceutical products that were entrusted to GUARANTEED RETURNS." Superseding Indictment 26, ECF No. 120. The Court's reference to the property as described in the Superseding Indictment, thus, clarified that the property at issue was the "pharmaceutical products" valued at "at least $27,221,401.51."

Third, this conclusion comports with the plain language of the Jury Verdict Form on which the jury memorialized its verdict. The Jury Verdict Form provided that:

> On Count 53 of the indictment, which charges Guaranteed Returns and Dean Volkes with theft of government property—pharmaceutical products sent to Guaranteed Returns by certain government agencies—and aiding and abetting the theft of that government property . . .

Jury Verdict Form 19, ECF No. 315 (emphasis added). The Jury Verdict Form, thus, made clear, consistent with the overall jury charge that the property at issue was the "pharmaceutical products sent to Guaranteed Returns." Jury Verdict Form, ECF No. 315.

Although not evidence, in closing, the Government, consistent with their contention throughout trial, referred to the property at issue as the pharmaceutical drugs—Defendants

lodged no objection to this description before, during, or after closing. In closing, the Government stated:

> what happened here is that the DOD contracted with Guaranteed Returns, gave it its pharmaceutical product to be processed, and that Guaranteed Returns took much of this product for itself. That's theft of government property. Guaranteed Returns promised to age this property for the DOD and other government customers. It aged them, but it took it for itself. And instead, it reclassified those drugs in its own name and returned it for itself, and that's the theft here . . . .

Mar. 15, 2017 Trial Tr. 75:1–10, ECF No. 333 (Government Closing). To the extent Defendants felt the description of the property at issue was inaccurate, the time to object was at trial, during the Court's instruction, or immediately after the Court's instruction but before the jury retired to deliberate.[30]

In their Reply Brief, Defendants argue that even if the Court finds that the drugs were the allegedly stolen property, there was insufficient evidence to show that the Government had retained title to, possession or control of the drugs to meet the first element of the crime of theft of government property. This argument is merely a restatement of Defendants' unsuccessful trial theory that the Government had abandoned the pharmaceutical products. Defendants presented their abandonment theory to the jury and the jury rejected it. The Court will not substitute its own judgment for that of the jury where, as here, the Court finds that the evidence adduced at trial was sufficient to permit the jury to conclude, as it did, that the Defendants stole government property.

In making their argument, Defendants overlook much of the evidence showing that the

[30] *See, e.g.*, *United States v. Davis*, 183 F.3d 231, 252 (explaining that "counsel is required to draw the court's attention to a specific instruction, or to a problem with an instruction, in order to put the court on notice so that a possible error may be corrected before the jury begins to deliberate").

Government "contemplated and manifested" supervision over the pharmaceutical products such that the Government's interest in the pharmaceutical products meant that the products were the property of the Government for criminal law purposes. *See United States v. Perez*, 707 F.2d 359, 361 (8th Cir. 1983) (stating that "[t]he key factor involved in [the] determination . . . is the supervision and control contemplated and manifested on the part of the government").

Indeed, the evidence showed that the relationship between Guaranteed Returns and the Government was such that the Government would maintain a meaningful level of control over the returned pharmaceutical drugs. Among other pieces of evidence supporting this conclusion was that: (1) Guaranteed Returns represented that their service offered "indate management" and not "indate disposal," "transfer," or "destruction," (2) Guaranteed Returns offered, and the Government expected various reports and manifests to track the Government's products accurately once warehoused at Guaranteed Returns facilities, (3) Guaranteed Returns itself frequently referred to the pharmaceutical products from the Government as the Government's property and not Guaranteed Returns's property, and (4) the Government did, in at least one instance, actively seek the return of, or otherwise credit for, the Government's pharmaceutical products sent in to Guaranteed Returns after the Government terminated its relationship with Guaranteed Returns.

First, Guaranteed Returns advertised its services as an indate "management" program and not an "indate disposal," "transfer," or "destruction" program. By its own name, Guaranteed Returns indate management program represented to customers that Guaranteed Returns would manage, not keep or own the product that customers sent to Guaranteed Returns. This fact undermines Guaranteed Returns theory that by sending drug products to Guaranteed Returns the Government contemplated or, in fact, relinquished all supervision or control over the drug

products. A vast collection of documentary evidence showed that Guaranteed Returns consistently referred to and advertised its program as "In-date Aging Programs,"[31] "In-date Product Management Program,"[32] and "Integrated In-Dated Product Aging Program."[33] The name of the program itself, "Indate Management Program," thus, suggested that the Government and any Guaranteed Returns customer would maintain ultimate control over their drug products.

Not surprisingly, the name of the program was consistent with Guaranteed Returns's representations about how the program would operate. For example, Guaranteed Returns promised that part of its indate management service included "[f]ree warehousing until eligible for credit," that the customer would "[n]ever [be] billed until credit is received," and that the customer would receive "[f]ree manifesting & documentation." GX 12-27 (presentation on 2007 DOD contract, showing that Indate Product Aging Program included "Free warehousing until eligible for credit, Never billed until credit is received . . . Free manifesting & documentation"). Had Guaranteed Returns and the Government contemplated that by sending valuable pharmaceutical products to Guaranteed Returns the Government would relinquish all control and supervision over its property, the program would have been more appropriately called a drug disposal or drug transfer service, and Guaranteed Returns would not need to "warehouse" the drugs, but instead simply "transfer" the drugs to its own possession, control, and ownership. Similarly, Guaranteed Returns would not need to provide manifests or documentation to the Government if the Government did not contemplate that it would exercise supervision or control over the valuable customer drugs.

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[31] GX 2-34 (advertisement showing "Company Strengths" including that the Guaranteed Returns offers "In-date Aging Programs").
[32] GX 12-24 (Guaranteed Returns's authored memorandum to the Department of Defense advertising Guaranteed Returns's "In-date Product Management Program").
[33] GX 12-25 (Guaranteed Returns's authored commercial flyer on DOD contract advertising "Integrated In-Dated Product Aging Program").

Second, the Government required various reports to ensure that Guaranteed Returns was accurately inventorying, aging, and warehousing the Government's pharmaceutical products. Had the Government not contemplated some meaningful control and supervision over its drugs, there would have been no need for Guaranteed Returns to submit any reports. Of course, to garner the Government's business, Guaranteed Returns eagerly promised and advertised its ability to maintain, generate, and send along a wide variety of reports and summaries to the Government to assure the Government of Guaranteed Returns's proper handling of the pharmaceutical products. For example, Guaranteed Returns consistently advertised that it had the capability of providing "Over 150 Thorough and Comprehensive Reports,"[34] to its customers, as well as "[computer generated inventory of Schedule II-V products," "[c]omplete [d]ocmentation," "[r]eturned [d]rug [s]ummary [r]eport for tracking credits," and an "[i]ndate morgue for returnable products until qualifying return dates."[35] Guaranteed Returns also advertised its ability to provide "more accountability and transparency with reporting" through its customer portal, which showed, among other things, customer "Indate Cycle Activity." GX 12-32 (presentation to DOD explaining program features). Even on Guaranteed Returns's customer portal, Guaranteed Returns listed customer products as "held"—not "taken"—if the products were still aging in the company "indate morgue." GX 12-32. A number of witnesses testified that accurate reports and inventorying was a central customer concern. *See, e.g.*, GX 5-4 (email from Kasper with Program summary for Government Contract advertising "product storage and handling" advertising reports to track customer's products). Had the Government

[34] GX 2-38 (2004 Annual Sales Meeting Presentation showing that Guaranteed Returns provided "Over 150 Thorough and Comprehensive Reports").

[35] GX 2-55 (Service Comparison Chart showing that Guaranteed Returns advertised to the Government that it would provide "[c]omputer generated inventory of Schedule II-V products" and "Complete Documentation" and "Returned Drug Summary Report for tracking credits" and an "[i]ndate morgue for returnable products until qualifying return dates").

contemplated that it would have no control or supervision over the products it sent to Guaranteed Returns then there would have been no need for "Complete Documentation" or "Summary Report[s] for tracking credits" or an "Indate morgue for returnable products until qualifying return dates." GX 2-55.

Third, Guaranteed Returns itself referred to customer products as belonging to the customer. For example, Guaranteed Returns sent a solicitation document to the Department of Defense explaining that "it is [the Government's] RESPONSIBILITY to ensure that the reverse distributor is properly handling your outdated drugs." GX 12-24 (Guaranteed Returns's solicitation directed to the DOD). Elsewhere, Guaranteed Returns also explained to the Government that "[t]he returning facility has the option of deciding whether to prepare their outdated pharmaceuticals for shipment themselves, or have the contractor work on site to prepare their outdates for shipment." GX 12-24 (emphasis added); *see also* GX 20-19A (emphasis added) (advertisement at page 5 "the returning facility has the option of deciding whether to prepare their outdated pharmaceuticals for shipment themselves, or have the contractor work onsite to prepare their outdates for shipment").

Fourth, in at least one instance, the Government actively sought to invoke its right to supervise and control drug product that had been sent to Guaranteed Returns for warehousing. After the closure of the Womack Army Hospital, Government representatives contacted Guaranteed Returns to determine why the Government's indates from Womack Army Hospital had not been processed after Womack Army Hospital terminated their relationship with Guaranteed Returns. Feb. 16, 2017 Trial Tr. 55–58, ECF No. 288 (Smithers). The Government sought reports and documentation of what Guaranteed Returns had done with Government indated pharmaceutical products. Feb. 16, 2017 Trial Tr. 55–58, ECF No. 288 (Smithers).; *see*

also GRX 3-302 (emails showing that after Womack Army Hosptial changed returns companies, DOD representatives were inquiring after the Government's indates). Indeed, Christian Smithers, a Guaranteed Returns regional manager, explained that the Government was "wondering where their indates were, and there were some pretty upset people that were expecting some answers." Feb. 16, 2017 Trial Tr. 56, ECF No. 288 (Smithers). Here, again, had the Government contemplated relinquishing supervision and control over its pharmaceutical products, the Government would not have actively sought to determine why it had not received credit or reports regarding the status of the valuable indates that the Government had sent to Guaranteed returns for warehousing and management.

In support of Defendants' argument that the Government either abandoned its pharmaceutical products or otherwise relinquished all supervision and control over the products when the Government sent them to Guaranteed Returns, Defendants cite to the 1954 Ninth Circuit case of *Heath v. United States*. 209 F.2d 318 (9th Cir. 1954). The decision in *Heath*, however, is inapposite on the present facts.

In *Heath*, a defendant was convicted of a single count of converting and selling government property. 209 F.2d at 319. The Government contracted with a scrap metal company to handle scrap brass from a government ordnance depot in Hawaii. *Id.* Under their initial agreement, the Government would send scrap brass from an ordnance depot in Hawaii to New York in exchange for specified amounts of copper. *Id.* Under the contract, the Government was to deliver the scrap brass to a pier for shipment to a New York facility. *Id.* Later, however, the scrap metal company asked that instead of the Government delivering the scrap metal to the pier, that the scrap metal company be permitted to hire a subcontractor to pick up the scrap from the Government site and then deliver the scrap to the pier. *Id.* The Government agreed. *Id.* The

scrap company then hired a subcontractor, the defendant, to haul the scrap metal. *Id.* The defendant subcontractor, however, converted some of the scrap for his own benefit while the scrap was in transit to the pier. *Id.* The Government charged the defendant subcontractor with theft of government property. *Id*. The defendant subcontractor was convicted. *Id.*

On appeal, the Ninth Circuit reversed the conviction, concluding that based on the Government's conduct and the agreement between the Government and the scrap metal company, that the scrap brass that the defendant subcontractor converted did not constitute the Government's property at the time the defendant subcontractor converted it. *Id.* In so holding, the Ninth Circuit necessarily ruled that the contract between the Government and the defendant subcontractor, as well as the bills of lading, were valid and binding contracts. *Id.*

Heath, however, is fully and, quite easily, distinguishable from the instant case. Here, unlike in *Heath*, there is not a standalone conviction for theft of government property. The contract and return authorization forms should not be considered in a vacuum nor without consideration of the reality that Defendants here were charged and convicted of a complex fraud scheme not merely the conversion of scrap metal on its way to a shipping yard as in *Heath*. Here, Defendants not only stole government property—the Government's pharmaceutical products—Defendants also defrauded the Government by, among other things, inducing the Government into sending in its pharmaceutical products under the guise of a legitimate returns business. Thus, whereas the defendant in *Heath* did not himself make the arrangement with the Government to alter the Government's shipping arrangement, here, Guaranteed Returns was the party responsible for communicating with the Government, formulating contract bids, and shipping arrangements.

The conduct of the Government in this case also differs significantly from the conduct of

the Government in *Heath* in that, here, the Government contemplated the retention of some control over the pharmaceutical products that it sent to Guaranteed Returns. In *Heath*, by contrast, the Government had no mechanism for controlling or supervising the subcontractor defendant. Here, the evidence showed that on multiple occasions, Government officials sought statements and documentation relating to the Government's indates, they further sought to exercise some oversight over their products through audits, and, in at least one instance, demanded that products be returned after the Womack Army Hospital closed. In *Heath*, by contrast, the Government did nothing to control the scrap brass once it was loaded on the defendant subcontractor's trucks. Indeed, there was no evidence that the Government sought to exercise control over the scrap brass after it left the Government facility.

4. Count 54: Money Laundering Conspiracy

Money laundering conspiracy under 18 U.S.C. § 1956(h) consists of two elements: (1) an agreement between two or more persons to commit money laundering; and (2) the defendant knowingly became a member of the conspiracy. *United States v. Greenridge*, 495 F.3d 85, 100 (3d Cir. 2007). "[T]he government may . . . prove conspiracy even if the underlying substantive object of the conspiracy is never completed. For this reason, a conspiracy indictment need not allege every element of the underlying offense but need only put defendants on notice that they are charged with a conspiracy to commit the underlying substantive offense." *Conley*, 37 F.3d at 981 n.5.

Defendants assert that the evidence was insufficient to prove the first element of money laundering conspiracy. First, Defendants contend that there was no evidence of an agreement to commit money laundering. Second, Defendants contend that there was no evidence to prove the object of the agreement was to launder money. In light of the dearth of circumstantial and direct

evidence of Defendants' agreement to engage in a conspiracy, Defendants assert that the Government improperly relied on the fact that the fraud proceeds were commingled with legitimate funds to supply a basis on which an agreement could be inferred. The Court addresses each purported failure relating to each element of the crime in turn below.

a. Evidence Of An Agreement

The Third Circuit has explained that "the essence of a conspiracy is an agreement . . . and that the Government may rely on circumstantial evidence of appellant's involvement in the conspiracies alleged, rather than having to prove a formal agreement." *United States v. Nolan*, 718 F.2d 589, 595 (3d Cir. 1983) (citations omitted). Indeed, the government may prove every element of conspiracy "entirely by circumstantial evidence." *United States v. Gibbs*, 190 F.3d 188, 196 (3d Cir. 1999). For example, "[a]s long as a co-conspirator has knowledge of the conspiracy's illicit purpose when acts in furtherance of that purpose are performed, it can reasonably be inferred that a party who associates himself with an ongoing conspiracy has achieved a tacit agreement with members of the ongoing conspiracy." *United States v. Sosa*, No. CRIM A. 05-44, 2006 WL 1687150, at *11 (E.D. Pa. June 15, 2006), *aff'd sub nom*., *United States v. Melendez*, 388 F. App'x 178 (3d Cir. 2010). Not surprisingly, a defendant's participation in a money laundering scheme is sufficient to establish the existence of an agreement.

In this case, the evidence of Dean Volkes's and Donna Fallon's knowledge of and agreement to engage in the conspiracy to launder the proceeds of specified unlawful activity is more than sufficient to support their convictions.

b. Evidence Of Dean Volkes's Participation

Dean Volkes's participation in the money laundering conspiracy is evidenced: (1) by his

participation in the indates fraud schemes; and (2) by his coordinated efforts with Donna Fallon to move hundreds of millions of dollars into, out of, between, and among various corporate accounts and personal accounts in an effort to conceal and disguise the true nature and source of his fraud proceeds.

c. Evidence Of Donna Fallon's Participation

In evaluating whether the evidence was sufficient to prove that Donna Fallon agreed to participate in the conspiracy to commit money laundering, the Court begins by noting that while "knowledge that the funds have been obtained illegally is required, knowledge of what the specified unlawful activity is not." *United States v. Wert-Ruiz*, 228 F.3d 250, 254 (3d Cir. 2000) (emphasis added). The Third Circuit has itself acknowledged that "the statute defines 'knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity' as meaning that the person involved 'knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified" under the Statute. *Id.* (citing 18 U.S.C. § 1956(c)(1)) (emphasis added)). In *United States v. Carr*, for example, the Third Circuit held that a defendant can be convicted of money laundering conspiracy where the defendant "knew the funds he was carrying [to be laundered] represented the proceeds of *any* form of unlawful activity which is a felony under state, federal, or foreign law," even if the funds, in actuality, were not proceeds of some specified unlawful activity. 25 F.3d 1194, 1204 (3d Cir. 1994).[36] Indeed, evidence that a defendant knew

[36] *See also* Third Circuit Model Crim. Jury Instructions, 6.18.1956-4 (Comm. on Model Crim. Jury Instructions 3d Cir. 2017) (providing that "the first element the government must prove beyond a reasonable doubt is that in conducting a financial transaction defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity . . . . The government is not required to prove that defendant knew what the unlawful

that her expenditures vastly exceeded her income can supply the necessary basis from which a jury can infer that the defendant knew that money she was moving constituted unlawful proceeds. *See, e.g., United States v. Podlucky*, 567 F. App'x 139, 145 (3d Cir. 2014) (not precedential) (noting that among the evidence from which the jury could infer that the defendant knew that transactions involved proceeds of unlawful activity was the fact that defendant's expenditures "vastly exceeded the amount of available funds" defendant claimed was part of her lawful income). That a defendant's knowledge that the proceeds involved in a transaction involve unlawful activity can be inferred from a wide array of evidence is not surprising given the Third Circuit's observation that "[e]xcept in unusual cases, intent can be proven only through circumstantial evidence." *United States v. Davis*, 664 F. App'x 150, 153 (3d Cir. 2016) (citing *United States v. Jannotti*, 673 F.2d 578, 603 (3d Cir. 1982)); *see also United States v. Riley*, 621 F.3d 312, 333 (3d Cir. 2010), *as amended* (Oct. 21, 2010) ("Juries may infer intent from circumstantial evidence.").

In the present case, the Court concludes that the evidence at trial was sufficient to show that Donna Fallon knew that she was participating in a money laundering conspiracy by assisting her brother and CEO Dean Volkes in executing numerous transactions to move funds among various accounts. The evidence at trial relating to her knowledge and participation in the conspiracy can be divided into five categories: (1) evidence of Donna Fallon's participation in her own fraud scheme and convictions for obstruction of justice and lying to federal agents, (2) evidence of Donna Fallon's supervision of the returns/credit reconciliations process, (3) evidence of Donna Fallon's supervision of day-to-day financial activities, (4) evidence of Donna Fallon's knowledge of customer dissatisfaction with indates processing, and (5) evidence that Dean

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activity was.").

Volkes trusted Donna Fallon to protect and maintain the conspiracy.

Foremost among the pieces of evidence showing Donna Fallon's participation in the money laundering conspiracy was her personal involvement in criminal activity at Guaranteed Returns, which, in conjunction with other evidence, permitted the jury to conclude that Donna Fallon knew that the funds she was moving for her brother, Dean Volkes, represented proceeds of some form of unlawful activity. As discussed in detail above, Donna Fallon was affirmatively convicted of perpetrating the Adjustment Scheme,[37] obstructing justice by concealing subpoenaed hard drives,[38] and lying to federal agents about what electronic information was available to investigators.[39] That Donna Fallon actively participated in the Adjustment Scheme supports the conclusion that she knew that the funds she was moving through various accounts on behalf of her brother, Dean Volkes, were derived from unlawful activities. Further, the fact that Donna Fallon obstructed justice and lied to federal agents about the existence of hard drives and electronic information responsive to a grand jury subpoena is particularly probative of Donna Fallon's guilt for money laundering because she would not have had any motive to conceal the hard drives and lie to federal agents unless she knew that the hard drives contained information that would reveal her and her brother's criminal activity. Indeed, Agent Glick and Agent Woodring testified at trial that the hard drives supplied by the search of Guaranteed Returns's office and from IT Department employees contained information relating to Dean Volkes and Guaranteed Returns's indates frauds schemes.[40] Thus, Donna Fallon's affirmative

[37] *See* above Section III.A.2 discussing Donna Fallon's conviction for perpetrating and perpetuating the fraudulent hidden fees adjustment scheme.
[38] *See* above Section III.A.6 discussing Donna Fallon's conviction for obstruction of justice and her concealment of various hard drives containing data responsive to grand jury subpoena.
[39] *See* above Section III.A.6 discussing Donna Fallon's conviction for making false statements to federal agents.
[40] *See, e.g.*, Mar. 6, 2017 Trial Tr. 36–38, ECF No. 325 (Glik) (testifying that emails and

participation in the Adjustment Scheme and concealment of evidence of Dean Volkes and Guaranteed Returns's indates fraud schemes supports the jury's conclusion that Donna Fallon knew that the funds she was moving were derived from an unlawful source.

Second, Donna Fallon's participation in the conspiracy to commit money laundering is supported by evidence that Donna Fallon was intimately involved in the returns/credit reconciliation process. The evidence at trial showed that Donna Fallon understood and was involved in the front-end process of batching pharmaceuticals for return to the manufacturers and also involved in the back-end reconciliation process of determining what amount of the resulting refunds would be sent to the originating customers per any arrangement with the customer. On the front end, Donna Fallon demonstrated her detailed understanding and involvement in the warehousing and batching process while discussing these matters with Agent Woodring. Mar. 7, 2017 Trial Tr. 11, ECF No. 326 (Woodring) (testifying that Donna Fallon was the company representative sent to discuss the Government's questions about the drug returns process). On the back end, Donna Fallon was the head of the Reconciliation Department. Indeed, Donna Fallon had ultimate authority and supervision over what funds were distributed to customers. Feb. 23, 2017 Trial Tr. 80–84, ECF No. 248 (afternoon) (Carlino); Feb. 28, 2017 Trial Tr. 67–68, ECF No. 254 (Stieglitz); Feb. 24, 2017 Trial Tr. 73, ECF No. 259 (Carlino) (testifying that Donna Fallon's responsibilities included determining the amount of refunds to return to customers). Given Donna Fallon's knowledge of the front-end batching process and back-end reconciliation process, the jury could infer that she understood that the extra $180 million

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information taken from the Kasper hard drive that was concealed in Donna Fallon's locked credenza involved Guaranteed Returns's promises and policies on indates); Mar. 7, 2017 Trial Tr. 74–75, ECF No. 326 (Woodring) (testifying that information from a hard drive supplied by Chris Sellitto, and not as part of Guaranteed Return's voluntary production of material was necessary to complete the Government's investigation into a fake GRX store by which Dean Volkes and Guaranteed Returns would steal customer indates and resulting refunds).

retained by Guaranteed Returns represented significant revenue above what Guaranteed Returns was entitled to retain. Thus, this evidence lends further support to the conclusion that Donna Fallon knew about and actively participated in the conspiracy to commit money laundering.

Third, Donna Fallon had even greater reason to know that the revenues that Guaranteed Returns generated far exceeded what Guaranteed Returns could have expected because she was the Chief Financial Officer at Guaranteed Returns and was involved in both day-to-day financial decisions as well as broad company-wide financial decisions. Feb. 28, 2017 Trial Tr. 49, ECF No. 254 (Stieglitz) (testifying that Donna Fallon was the Chief Financial Officer); Feb. 28, 2017 Trial Tr. 52, ECF No. 254 (Stieglitz) (testifying that Donna Fallon was on the company's executive committee); Feb. 14, 2017 Trial Tr. 160, 216, ECF No. 298 (Frechette) (same). In her role as Chief Financial Officer, Donna Fallon acted as the intermediary between her brother, Dean Volkes, and the company's Vice President of Finance, Stanley Stieglitz. It was through Donna Fallon, that Dean Volkes ultimately passed orders to make financial transactions. For example, Stieglitz testified that if Dean Volkes wanted money transferred, Dean Volkes would first meet with Donna Fallon who would then communicate to Stieglitz the amount of money that should be moved, from what accounts, and to what accounts. Feb. 28, 2017 Trial Tr. 76–77, ECF No. 254 (Stieglitz). Between Dean Volkes and Donna Fallon, the two maintained absolute control over the financial transaction at the company.

Fourth, with respect to indates, in particular, Donna Fallon knew that Guaranteed Returns's customers had been complaining that the company was not properly remitting all refunds. The evidence showed, for example, that Donna Fallon supervised Toniann Meadows who had voiced concerns about indates and customers' discontent with the company's indate management program. GX 3-187 (Toniann Meadows sent email to Darren Volkes, forwarded to

Dean Volkes, in which Darren Volkes stated that he summarized information for "Dean & Donna" relating to customer complaints about Guaranteed Returns not handling indates properly); GX 20-7 at 13 (organizational chart showing Donna Fallon directly supervised Toniann Meadows). That Donna Fallon was told of these complaints was not surprising in view of the fact that she also was the Vice President of Customer Service. Feb. 28, 2017 Trial Tr. 49, ECF No. 254 (Stieglitz); GX 20-7 at 13 (organizational chart). Donna Fallon was also aware of the marketing and sales representations that Guaranteed Returns's employees were making because she was present at the annual sales conferences at which sales employees were trained and marketing materials were distributed. Feb. 6, 2017 Trial Tr. 143:4–6 (Gingrich) (testifying that Donna Fallon attended sales conferences). Accordingly, the jury could infer that Donna Fallon knew that Guaranteed Returns was improperly keeping customer indates for itself and that when she moved funds on behalf of her brother, Dean Volkes, that the funds were proceeds from some form of unlawful activity.

Finally, Donna Fallon occupied a position of trust in Dean Volkes's company and family. In addition to having served as Chief Financial Officer, Vice President of Customer Service, and the head of the Reconciliation Department, after the Government executed its first search warrant in 2011, Dean Volkes funded an irrevocable trust in the name of his daughter, Ashley Judson, and appointed Donna Fallon as the trustee of the account. Mar. 7, 2017 Trial Tr. 60 (Woodring) (testifying that after the Government's first search of Guaranteed Returns, and before the Government effected a second search and seizure, Dean Volkes transferred funds into a Merrill Lynch irrevocable trust account ending in 4166 "in the name of Ashly Judson" and listing "Donna Fallon, TTE."). The fact that Dean Volkes trusted his sister, Donna Fallon, as trustee over funds that he transferred to his daughter after the Government's search of Guaranteed

Returns, is yet more evidence from which the jury could—when viewed in conjunction with the additional evidence of Donna Fallon's knowledge of and participation in the conspiracy to commit money laundering—conclude that Donna Fallon understood that the funds that she transferred on behalf of her brother were proceeds of some form of unlawful activity.

d. Evidence That Money Laundering Was The Object Of The Conspiracy

The evidence at trial was sufficient to support the jury's conclusion that the object of the conspiracy was to commit money laundering and that Defendants' purpose was to conceal the nature and source of the proceeds of Guaranteed Returns's fraud schemes. Ultimately, Defendants argue that the Government failed to prove that Defendants' purpose was to conceal or disguise the nature, source, ownership, or control of the proceeds of the specified unlawful activity because the defense, at trial, was able to trace the movement of certain funds through example transactions, and because all accounts through which the funds were passed were held openly in the name of one or more of the Defendants. To borrow from the Sixth Circuit's language in the case *United States v. Warshak*, "[w]hile superficially attractive, the defendants' position overlooks several key points." 631 F.3d 266, 320 (6th Cir. 2010). The argument presented by Defendants in this case hews closely to the argument explicitly rejected by the Sixth Circuit in *Warshak* and, therefore, the decision in *Warshak* is particularly helpful in resolving the present issue.

In *Warshak*, the Sixth Circuit confronted the same argument espoused by Defendants in this case. The defendants in *Warshak* were convicted of most of the 112 counts charged in the indictment, which included counts for conspiracy to commit mail fraud and concealment money laundering in connection with a fraudulent herbal supplement scheme. *Id.* at 281. On appeal, the defendants argued that their concealment money laundering conviction could not stand because

"[m]ost of the charged transactions were completely open transfers of funds to [the defendant] personally, into accounts bearing his name, or to family members with the [same] [] surname, or to corporations of which [the defendant] was the owner and 100% shareholder and with which he was openly and publicly affiliated." *Id.* at 320 (internal quotations omitted). The defendants further argued that "some of the 'charged transactions involved purchases of investment products such as life insurance policies and annuities in [the defendant's] own name, [and, therefore, constituted] the simple and visible spending of money that falls outside the ambit of § 1956." *Id.* at 320.

The Sixth Circuit, however, was not persuaded by defendants' "superficially attractive" argument. *Id.* at 320. In so holding, the Sixth Circuit reasoned that while "[i]t is certainly true that a number of the transactions were made under relatively open circumstances . . . . that does not foreclose the possibility that the transactions were designed to conceal some characteristic of the funds involved." *Id*. at 320. Indeed, the Sixth Circuit concluded that in the case before it, there was sufficient evidence of defendants' "intent to conceal the exact source of the proceeds." *Id.* at 320. Among other things, a government witness at trial testified that the transactions at issue were complex and lengthy and involved "hundreds of deposits, withdrawals, transfers, debits, [and] credits . . ." *Id.* at 320–21.

The Sixth Circuit's decision in *Warshak* is consistent with the Third Circuit's observation in *United States v. Richardson*, that:

> Evidence of a purpose to conceal can come in many forms, including "statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of

> criminals." *United States v. Garcia–Emanuel,* 14 F.3d 1469, 1475–76 (10th Cir.1994) (citing cases, including *United States v. Massac,* 867 F.2d 174, 178 (3d Cir.1989)).

658 F.3d 333, 340 (3d Cir. 2011).

Just as the Sixth Circuit rejected the defendants' argument in *Warshak*, so too does the Court reject Defendants' argument in this case. The Court concludes that, although the accounts involved in Defendants' money laundering activities may have been openly associated with Defendants, this alone does not foreclose the conclusion that the "transactions were designed to conceal some characteristic of the funds involved." 631 F.3d at 320. The evidence at trial showed that in executing the transactions—that is the transactions out of Guaranteed Returns's general operating account identified as Citibank account ending in 3981 and into various Citibank, Merril Lynch, and Chase Bank accounts—Defendants intended to perpetuate and promote the concealment of fraud proceeds among legitimate proceeds. The complexity of the transactions and other contextual evidence, including that Defendants knew that the batching of pharmaceuticals for return to the drug manufacturers would enhance the efficacy of the mixing and commingling of fraud proceeds with legitimate proceeds through ensuing transactions, supports the jury's conclusion that the Defendants' purpose in executing the transactions was to conceal the nature and source of the proceeds.

The trial evidence supports the conclusion that the transactions were sufficiently complex to permit the jury to find that the Defendants' purpose in executing the transactions was to conceal the nature and source of the proceeds. The evidence showed that Defendants maintained a number of different accounts;[41] that Defendants conducted hundreds of transactions involving

[41] Defendants maintained at least eight different accounts through which fraud proceeds were laundered. *See* GX 70-28 (providing a summary of transactions and accounts involved in Defendants' money laundering activities based on testimony from and documentary evidence

hundreds of millions of dollars;[42] that Defendants moved over $121 million into Dean Volkes's Personal Account (Merrill 8521)[43] from a number of different company accounts,[44] including an account established as the Customer Payment Account (Merrill 7968);[45] that Defendants moved money out of the Customer Payment Account (Merrill 7968) into a Loan Account (Merrill 2023) that was established to pay off a civil judgment against Dean Volkes and Guaranteed Returns;[46] that Defendants funneled money into the Loan Account (Merrill 2023) not only from the Customer Payment Account (Merrill 7968), but also from a Business Investor Account (Merrill 7009) from which Dean Volkes also took distributions.[47] The constant flow of funds between the various accounts, the vast number of transactions and the vast quantities of funds moved, supports the conclusion that the transactions were sufficiently complex to permit the jury to find

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admitted through VP of Finance Daniel Stieglitz and Agent Woodring).

[42] *See* GX 70-28 (showing that between 2006 and 2014, Defendants conducted hundreds of transactions into and out of the eight accounts, resulting in the movement of hundreds of millions of dollars, including over 300 transactions moving funds into Dean Volkes's Personal Account (Merrill 8521)).

[43] *See* GX 70-28 (showing that as of August 29, 2014, Dean Volkes's Personal Account (Merrill 8521) was valued at $121,345,955.52).

[44] *See* GX 70-28 (showing that money was moved into Dean Volkes's Personal Account (Merrill 8521) from at least four different Guaranteed Returns's accounts).

[45] *See* GX 70-28 (showing that between 2006 and 2013, Defendants executed twenty transactions and moved over $20 million from an account identified as a Customer Payment Account (Merrill 7968) into Dean Volkes's Personal Account (Merrill 8521)); *see also* Feb. 28, 2017 Trial Tr. 68–69, ECF No. 254 (Stieglitz) (identifying Merrill Lynch account ending in "7968" as the account from which customer disbursements were made).

[46] *See* GX 70-28 (showing that between 2009 and 2012, over $3 million was moved out of the Customer Payment Account (Merrill 7968) into the Loan Account (Merrill 2023) that was established to satisfy a civil judgment against Dean Volkes and Guaranteed Returns); *see also* Mar. 7, 2017 Trial Tr. 59:11–25, ECF No. 325 (Woodring) (identifying the Loan Account (Merrill 2023) as the account from which settlement was paid in satisfaction of a civil judgment against Dean Volkes and Guaranteed Returns).

[47] *See* GX 70-28 (showing that between 2012 and 2014, Defendants moved over $2.5 million out of the Business Investor Account (Merrill 7009) into the Loan Account (Merrill 2023), and showing that between 2012 and 2014, Defendants moved over $17 million out of the Buisness Investor Account (Merrill 7009) into Dean Volkes's Personal Account (Merrill 8521)); *see also* Mar. 7, 2017 Trial Tr. 110, 112, ECF No. 292 (Woodring) (identifying Merrill Lynch account ending in 7009 as the "business investor account.").

that the Defendants' purpose was to conceal the exact nature and source of the proceeds by mixing and commingling both legitimate and unlawful proceeds.

In addition to the complexity of the transactions, the number and nature of the transactions and accounts through which funds passed and, the context in which the transactions took place lends further support to the jury's conclusion that concealment of unlawful proceeds was the purpose of Defendants' conspiracy. The evidence showed that together Dean Volkes and Donna Fallon controlled how much money was ultimately distributed to their customers, including when and how the customers would be paid. Daniel Stieglitz, VP of Finance, testified that the decision about how much and in what form customers would be paid was:

> based upon the process that was done in reconciliation, they used the FilePro system to produce a list of checks that would go to customers. Those checks were reviewed and signed off on by Donna Fallon. At that point she would tell me how many checks were being distributed to those customers.

Feb. 28, 2017 Trial Tr. 68, ECF No. 254 (Stieglitz) (emphasis added). Accordingly, Dean Volkes and Donna Fallon maintained complete authority to structure all disbursements to customers and complete authority regarding how much and from which accounts Dean Volkes would take financial distributions. *See* Feb. 28, 2017 Trial Tr. 76–77, ECF No. 254 (Stieglitz) (testifying that Dean Volkes would meet with Donna Fallon when Dean Volkes wanted personal distributions and that Donna Fallon would communicate from which accounts the money should be taken and into what account the money should be deposited). By keeping complete control over the company's finances, Dean Volkes and Donna Fallon could, as they did, structure the transfers of money to Dean Volkes by first filtering tainted proceeds through accounts containing untainted proceeds. Indeed, in at least twenty instances, money was disbursed to Dean Volkes Personal Account (Merrill 8521) after first passing from the General Operating Account

(Citibank 3981) to the Customer Payment Account (Merrill 7968), that was used to hold and then distribute funds to Guaranteed Returns's customers. *See* GX 70-28.

The transactions that undergird the money laundering conspiracy conviction must also be viewed in the context of other evidence. This includes evidence that Dean Volkes knew that by batching fraudulently obtained drugs with legitimately obtained drugs, refunds for those drugs would be deposited into Guaranteed Returns's General Operating Account (Citibank 3981) in a commingled, mixed, and undifferentiated manner.[48] That these refunds were commingled, mixed, and undifferentiated in the General Operating Account simply aided Defendants in their laundering of the fraud proceeds by making it even more difficult to determine the true nature and source of the funds laundered. Each subsequent transaction—transactions forming the basis of Defendants' money laundering conspiracy—involving the fraud proceeds that had been commingled with legitimate proceeds effectively mixed the proceeds further thereby amplifying the concealing effect of the transactions.

Finally, the evidence that Dean Volkes funded an irrevocable trust account (Merrill 4166) after Guaranteed Returns was raided by the FBI and identified his sister Donna Fallon as the

[48] Defendants had the capability to group their fraudulently obtained drugs together for batched return to the manufacturers, but instead, chose to hide the fraudulently obtained drugs among legitimate drugs. The jury could infer from this that not only did this decision make it easier for Defendants to perpetrate their fraud scheme, it also assisted them in laundering the proceeds of the scheme because Defendants knew that the resulting refunds both legitimate and illegitimate would be deposited into the company's general operating account. *See, e.g.*, Feb. 27, 2017 Trial Tr. 65–66, ECF No. 248 (Carlino) (testifying that manufacturers would not provide credit to Guaranteed Returns when Guaranteed Returns attempted to return drugs under its fake shell GRX Stores and that as a result, Carlino programmed the FilePro system to generate manifests that showed the originating customer to induce the manufacturer to provide a credit even though the credit was retained by the fake GRX Store); GX 3-364 (email from Dean Volkes in connection with a manufacturer who would not provide credit where the drug was associated with fake GRX Store 242).

trustee of the account and his daughter Ashley Judson as the beneficiary suggests that Dean Volkes and Donna Fallon were taking yet more steps to conceal the true nature, source, and control of the funds.

In short, the Court concludes that the foregoing evidence provided a sufficient basis from which the jury could conclude that Defendants intended to conceal the true nature and source of, and control over the proceeds of the indates fraud schemes by mixing it with millions of dollars of legitimate proceeds contained in various accounts. Each time the proceeds were moved through, between, and among, Guaranteed Returns's accounts allowed the funds to appear farther removed from the fraudulent scheme and garnered the appearance of legitimacy. This activity constitutes money laundering.

5. Jury Forfeiture Verdict

In addition to the Jury's verdict on the criminal counts in the Superseding Indictment, the Jury also returned a special verdict relating to the Government's Notice of Forfeiture #2. Superseding Indictment 50, ECF No. 120. In issuing the Notice of Forfeiture #2, the Government placed Defendants and the public on notice that upon conviction for conspiracy to commit money laundering under Count 54, the Government would seek the forfeiture of funds contained in various financial accounts as "property . . . involved in such offense, or traceable to such property." Superseding Indictment 50, ECF No. 120. After a special hearing, the jury returned a unanimous finding, by a preponderance of the evidence,[49] that the property contained in two bank accounts, Merrill Lynch Account No. 843-38521 in the name of Dean Volkes and Irrevocable Trust Account for Dean Volkes's daughter identified as Merrill Lynch Account No.

[49] *See United States v. Voigt*, 89 F.3d 1050, 1083 (3d Cir. 1996) (providing that the "preponderance of the evidence" standard governs forfeitures arising out of a conviction for money laundering conspiracy).

843-14166, constituted property involved in Dean Volkes's perpetration of the money laundering conspiracy. Special Jury Verdict Form 2, ECF No. 320.

Defendants argue that the jury's special forfeiture verdict should be set aside for three reasons: (1) the forfeiture verdict is derivative of the purportedly flawed conviction on money laundering conspiracy, (2) the government failed to prove that the "entirety of the funds in the Volkes Account and the Trust Account were the proceeds of" fraud, and (3) the government failed to prove that Defendants deposited fraud proceeds into the Volkes and Trust Accounts to disguise the nature or source of the proceeds.

Defendants' first argument is easily rejected for the same reasons that the Court rejects Dean Volkes's and Guaranteed Returns's argument that their convictions on the substantive money laundering conspiracy conviction should be set aside. As the Court concludes that the evidence was sufficient for the jury to convict Defendants Dean Volkes and Guaranteed Returns of conspiracy to commit money laundering, the fact that the forfeiture verdict is founded on that substantive conviction is no reason to set aside the jury's special verdict on the issue of forfeiture.

Defendants' second and third arguments are also rejected because, contrary to Defendants' assertions, the Government was not required to prove, by a preponderance of the evidence, that all funds contained in the two seized bank accounts constituted proceeds of fraud in order for the funds to be forfeited. Although Defendants are correct that "the mere pooling or commingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture," it is still the case that "forfeiture of legitimate and illegitimate funds commingled in an account is proper as long as the government demonstrates that the defendant pooled the funds to facilitate, i.e., disguise the nature and source

of, his scheme." *United States v. Bornfield*, 145 F.3d 1123, 1134–35 (10th Cir. 1998) (emphasis added). Accordingly, the Third Circuit has stated that "[p]roperty is directly forfeitable under that statute when it is 'involved in' or 'traceable to' the defendant's illegal activity." *United States v. Stewart*, 185 F.3d 112, 129 (3d Cir. 1999) (citing 18 U.S.C. § 982(a)(1)). Property is "involved in" the offense when it "facilitates the commission of money laundering in violation of 18 U.S.C. § 1956." *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1153 (E.D. Pa. 1993). Where the proceeds of specified unlawful activity—tainted property—is hidden and laundered among untainted property in an attempt to conceal or disguise the nature, location, source, ownership, or control of the proceeds, the untainted property becomes "involved in" the commission of the concealment money laundering offense. *See id.* (stating that the facilitation of money laundering "would allow forfeiture of 'innocent' property serving as a cover for 'tainted' property"). The act of mixing these funds is part of the money laundering activity and, therefore, the newly-combined funds become "involved in" the commission of the money laundering offense. *See, e.g.*, *United States v. Nicolo*, 597 F.Supp.2d 342, 351 (W.D.N.Y. 2009) (citing *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1353 (D.C. Cir. 2002) (stating that "[i]ndeed, in many cases '[i]t is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue'").

This is precisely what the Government in this case showed: Defendants mixed tainted money in an account with untainted money in order to facilitate their money laundering and to enable the laundering to continue. *See, e.g.*, Feb. 28, 2017 Trial Tr. at 52–56, 74–75, ECF No. 254 (Stieglitz) (testifying that he did not know that GRX Stores existed and that to his knowledge that the money that was left over after clients' checks were delivered to Guaranteed

Returns's customers constituted the company's legitimate profits).[50]

Defendants concede that the funds in the Trust Account (Merrill 4166) are entirely from Dean Volkes's Personal Account (Merrill 8521), thus, supporting the conclusion that the funds contained in the Trust Account are traceable to funds involved in Defendants' illegal activity. This is because the funds in Dean Volkes's Personal Account (Merrill 8521) were involved in and traceable to the money laundering conspiracy and the indates fraud schemes.

In short, Defendants could have transferred the GRX Store refunds—the proceeds of Defendants' fraud schemes—into separate GRX Store accounts to separate the proceeds from legitimate funds, but, they did not. Instead, Defendants took the tainted funds and mixed them with untainted funds to conceal the true nature and source of the funds. The evidence adduced at trial was sufficient for the jury to conclude that Dean Volkes and Guaranteed Returns designed their transactions to conceal the source and nature of the money. The jury's forfeiture verdict will not be set aside.

6. Counts 55 Through 64: Obstruction Of Justice

Defendants request acquittal on every obstruction of justice conviction for which they were convicted. The Defendants were variously found guilty of obstructing justice under four statutory provisions: 18 U.S.C. § 371, 18 U.S.C. § 1512(c)(1), 18 U.S.C. § 1519, and 18 U.S.C. § 1001. For ease of reference, the table below summarizes which Defendants were found guilty as to each count and under what statutory provision.

Count	Guilty Defendants	Statutory Provision
55	Guaranteed Returns Dean Volkes	18 U.S.C. § 371 (conspiracy to commit offense or to defraud United States)
56	Guaranteed Returns Donna Fallon	18 U.S.C. § 1512(c)(1) (tampering with a witness, victim, or an informant)

[50] *See* above Section III.A.4 discussing the evidence supporting Defendants' conviction for money laundering conspiracy.

57	Guaranteed Returns Donna Fallon	18 U.S.C. § 1512(c)(1) (tampering with a witness, victim, or an informant)
58	Guaranteed Returns Donna Fallon	18 U.S.C. § 1519 (destruction, alteration, or falsification of records in Federal investigations and bankruptcy)
59	Guaranteed Returns Donna Fallon	18 U.S.C. § 1519 (destruction alteration, or falsification of records in Federal investigations and bankruptcy)
60	Guaranteed Returns Donna Fallon	18 U.S.C. § 1001(a)(1), (a)(2) (concealment and false statements)
61	Guaranteed Returns Donna Fallon	18 U.S.C. § 1001(a)(1), (a)(2) (concealment and false statements)
62	Guaranteed Returns Dean Volkes	18 U.S.C. § 1512(c)(1) (tampering with a witness, victim, or an informant)
63	Guaranteed Returns Dean Volkes	18 U.S.C. § 1519 (destruction alteration, or falsification of records in Federal investigations and bankruptcy)
64	Guaranteed Returns Dean Volkes	18 U.S.C. § 1001(a)(1), (a)(2) (concealment and false statements)

See Jury Verdict Form 21–26, ECF No. 315.

Section 1512(c)(1) provides that "[w]hoever corruptly . . . alters, destroys, mutilates, or conceals a record, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding . . ."

Section 1519 provides that:

> [w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined under this title, imprisoned not more than 20 years, or both.

Section § 1001 provides that:

> [e]xcept as otherwise provided . . . whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . falsifies, conceals, or covers up by any trick, scheme, or device a material fact [or] makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this

title, imprisoned not more than 5 years . . . .

Donna Fallon contends that, as to her convictions for obstruction—and Guaranteed Returns's convictions that are contingent on Fallon's convictions—the evidence was insufficient to prove that she "knowingly and intentionally concealed emails or computer equipment" relating to Ryan Kasper and Ken Nitschmann. Defs.' Mem. 85, ECF No. 344. Dean Volkes contends that, as to his convictions for obstruction—and Guaranteed Returns's convictions that are contingent on Volkes's convictions—the evidence was insufficient to prove that he "acted with corrupt intent." Defs.' Mem. 91, ECF No. 344.

For the reasons that follow, the Court rejects Defendants' arguments and finds the evidence sufficient to support Defendants' convictions.

7. Counts 56 Through 61: Evidence Of Donna Fallon's Obstruction Of Justice

Although Defendants argue that the evidence was insufficient to prove Donna Fallon knowingly concealed or made false statements to conceal documents or hard drives from authorities, Defendants' arguments speak, not to the sufficiency of the evidence, but rather, to the weight of the evidence. Defendants argue that the testimony of Agent Woodring and IT employee Keith Ahrens regarding Donna Fallon's actions in connection with the obstruction charges was unreliable and not credible. Defendants, thus, ask the Court to engage in the improper reweighing of the trial evidence and impinge on the Jury's duty to determine how much weight should be placed on witness testimony. The Court may not, and will not, reweigh the evidence. The Court concludes, instead, that the evidence was sufficient to permit a reasonable juror to find that Donna Fallon, and by extension Guaranteed Returns, had the requisite knowledge and intent under 18 U.S.C. §§ 1512(c)(1), 1519, and 1001, beyond a reasonable doubt.

The evidence at trial provided a sufficient basis from which the jury concluded that: Donna Fallon knew about Guaranteed Returns's ongoing duty to respond to a grand jury subpoena, and that Donna Fallon knew about, and intentionally hid, information that was responsive to the subpoena, including the existence of four computer hard drives. Among the evidence submitted in connection with Donna Fallon's obstruction and false statement crimes was testimony from Agent Woodring—establishing that Donna Fallon was asked for emails and hard drives relating to former Guaranteed Returns employees Ryan Kasper and Ken Nitschmann—and testimony from IT Department employee Keith Ahrens—establishing that Donna Fallon not only knew that information and hard drives responsive to the subpoena and Government requests existed, but that Donna Fallon had actual possession of the information and hard drives and lied to the Government by stating that she and Guaranteed Returns did not have the information and hard drives.

a. Agent Woodring's Testimony

Agent Woodring testified, under oath, that in November/December 2009 and March 2010, she asked Donna Fallon for emails and other materials related to Guaranteed Returns's contract with the Department of Defense. Mar. 6, 2017 Trial Tr. 235, ECF No. 325 (Woodring); Mar. 6, 2017 Tr. 238, ECF No. 325 (Woodring). In November/December 2009, Donna Fallon told Agent Woodring that the emails and materials were "not available to be produced." Mar. 6, 2017 Trial Tr. 239, ECF No. 325 (Woodring). Agent Woodring then requested that, instead, Donna Fallon produce certain hard drives that would likely contain copies of the emails and materials that were sought. Mar. 6, 2017 Trial Tr. 239, ECF No. 325 (Woodring). In response, Donna Fallon told Agent Woodring that "the hard drives were not maintained for the former employees." Mar. 6, 2017 Trial Tr. 239, ECF No. 325 (Woodring). Later, in March 2010, Agent

Woodring, again, requested that Donna Fallon and Guaranteed Returns produce the hard drives. Mar. 6, 2017 Trial Tr. 240, ECF No. 325 (Woodring). Donna Fallon, again, stated that she could not provide the hard drives. Mar. 6, 2017 Trial Tr. 240, ECF No. 325 (Woodring).

Agent Woodring's testimony, standing alone, is sufficient for a reasonable juror to conclude that Agent Woodring asked Donna Fallon to produce emails and hard drives, and that Donna Fallon stated in November/December 2009, and again in March 2010, that she and the company could not produce the emails or hard drives. Having established this, IT Department employee Keith Ahrens' testimony supplied the necessary base from which the jury could conclude that Donna Fallon knew that, at the very least, her statement in March 2010 was false and that she intended to impede the Government's investigations.

b. IT Department Employee Keith Ahrens' Testimony

Keith Ahrens testified that in December 2009 and January 2010, he was cleaning the IT Department office area and discovered two hard drives in a plastic bag. Feb. 27, 2017 Trial Tr. 114–15, ECF No. 253 (Ahrens). Ahrens specifically recalled that one of the hard drives was labeled with the name "Kenny," while the other hard drive had a name on it containing the letter "Y." Feb. 27, 2017 Trial Tr. 115, ECF No. 253 (Ahrens). At that time, Ahrens gave the hard drives to Donna Fallon who told Ahrens that the hard drives belonged to "someone who had stolen from the company." Feb. 27, 2017 Trial Tr. 115, ECF No. 253 (Ahrens). By this time, Donna Fallon and Guaranteed Returns already knew that former employee Ryan Kasper was under investigation by the Government for his alleged involvement in a scheme to defraud the Department of Defense,[51] and, therefore, the jury could infer that Fallon's acknowledgment that

[51] *See, e.g.*, GX 8-1 (9/11/2009 subpoena in connection with investigation of Ryan Kasper fraud served on Dean Volkes); Feb. 15, 2017 Trial Tr. 155–59, ECF No. 287 (Frechette) (indicating Donna Fallon suspected Ryan Kasper of wrongdoing, and that "Donna Fallon told [Frechette]

the hard drive belonged to "someone who had stolen from the company," coupled with the fact that one of the two hard drives was labeled "Ryan,"[52] meant that Fallon understood that the hard drive belonged to Ryan Kasper. In fact, Bob Frechette testified that in 2008, as Ryan Kasper's successor, he initially had access to Ryan Kasper's hard drive, and that at some point, an IT Department employee or employees removed the hard drive from Frechette's computer. Feb. 15, 2017 Trial Tr. 37–38, ECF No. 287 (Frechette) (testifying that Frechette had access to the hard drive for a time); Feb. 15, 2017 Trial Tr. 115, ECF No. 287 (Frechette) (testifying that he was promoted around 2008). Thus, on this evidence, the jury could reasonably conclude that Donna Fallon knew that the hard drive was responsive to the subpoena and to other Government requests. Withholding the hard drive, therefore, was evidence of Donna Fallon's intent to impede the Government's investigations.

While Defendants may believe that the foregoing evidence was entitled to little, if any, weight in view of the purportedly contradictory testimony and documentary evidence, the duty of weighing the evidence falls to the jury, not the Parties, and not the Court. For this reason, the Court rejects Defendants' argument that Donna Fallon's knowledge and intent to impede and make false statements is without sufficient basis in the evidence.

8. Counts 62, 63, And 64: Evidence Of Dean Volkes's Obstruction Of Justice

Defendant Dean Volkes contends that the Government "failed to prove that either Dean

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that she believed that the Government was investigating Ryan Kasper"); GX 3-125 (2/26/2009 email from Dean Volkes seeking Ryan Kasper's emails); GX 3-291 (2/26/2009 email from Dean Volkes seeking Ryan Kasper emails); GX 3-296 (2/26/2009 email again requesting Ryan Kasper's emails).

[52] *See* GX 4-1 (hard drive identified by FBI Agent Linn as "Ryan C Drive"); *see also* Feb. 6, 2017 Trial Tr. 65, ECF No. 297 (Linn) (testifying that the sticker on one of the seized hard drives from Fallon's locked desk was found with a handwritten sticker identifying the hard drive as "Ryan C Drive").

Volkes or Guaranteed Returns obstructed justice or possessed the requisite intent to do so" in connection with their convictions on Counts 62, 63, and 64. Defs. Mem. 91, ECF No. 344. Dean Volkes contends that the Government failed to prove that Dean Volkes: (1) had corrupt intent—that is, intent to impede a government investigation;[53] (2) actually impeded or obstructed a government investigation because most of the data allegedly deleted from the company servers was later found in back up format;[54] and (3) caused IT employee Carlino to make false statements to federal agents because the statement that Ron Carlino made—that the data sought by the Government did not exist "in the FilePro system"—was not technically false. [55]

In making these arguments, Dean Volkes attempts to renew and reframe the theories that he advanced at trial—theories that the jury, in convicting Dean Volkes of obstruction and obstruction-related crimes, soundly rejected. In reviewing a motion for acquittal, of course, the Court is not to second guess the judgment of the jury in weighing the evidence and determining whether certain witness testimony is entitled to credit or not. Mindful of this narrow scope of review, the Court concludes that there was sufficient evidence from which the jury could conclude that: (1) Dean Volkes had the requisite intent to impede the Government's investigation sufficient to support his conviction on Counts 62, 63, and 64, (2) Dean Volkes actually destroyed and concealed data from the Government resulting in delays to the Government's investigations, and (3) Dean Volkes caused Ron Carlino to make false statements to federal agents.

a. Evidence Of Dean Volkes's Corrupt Intent

First, the evidence adduced at trial was sufficient to support the jury's conclusion that Dean Volkes and Guaranteed Returns intended to impede the Government's investigations. The

[53] Defs.' Mem. 93, ECF No. 344.
[54] Defs.' Mem. 92, ECF No. 344.
[55] Defs.' Mem. 92, ECF No. 344.

evidence of intent can be divided, for purposes of analysis, into three categories: (1) evidence of Dean Volkes's motive to impede the Government's investigations, (2) evidence that the categories of data that Dean Volkes ordered Ron Carlino to delete included categories that were requested in the grand jury subpoena, and (3) evidence that Dean Volkes's orders to Ron Carlino to delete data and lie to federal agents followed shortly after Agent Woodring indicated that the FBI would forensically image Guaranteed Returns's servers.

b. Dean Volkes's Motive To Impede Government Investigation

That Dean Volkes and Guaranteed Returns were involved in and actively perpetrating the various indates fraud schemes at the time the Government was investigating Ryan Kasper's involvement in a separate fraud crime against the Department of Defense provides the backdrop against which the evidence of Dean Volkes and Guaranteed Returns's obstruction must be viewed. Given the existence of Dean Volkes and Guaranteed Returns's indates fraud schemes, the Jury could infer that Dean Volkes sought to impede the Government's investigation to ensure that his own indates fraud schemes would not be revealed. Indeed, the data that Dean Volkes ordered Carlino to destroy and conceal was ultimately relevant to the Government's investigation into the indates fraud schemes and Dean Volkes's convictions for fraud. *See, e.g.*, Mar. 6, 2017 Trial Tr. 99–109, ECF No. 325 (Glik) (testifying about the Government's imaging of company servers, data retrieved from the imaging and comparing the data retrieved to other data recovered from seized hard drives and data provided by Ron Carlino as a cooperating witness; testifying to evidence that wiping software had been installed and run on the company's servers).

c. Dean Volkes Ordered Ron Carlino To Delete Data Requested By The Grand Jury Subpoena

The evidence at trial showed that the categories of data that Dean Volkes ordered Ron Carlino to destroy and conceal included data specifically sought by the grand jury subpoena,

which was relevant to discovering Dean Volkes's fraud crimes. Among the categories of data Dean Volkes directed Carlino to destroy were "actual detail records" that "had to do with the summary totals of monies disbursed," the accounts payable files, the distribution file, the store summary file, the box summary file, and the reconciliation file. Feb. 24, 2017 Trial Tr. 31–33, ECF No. 259 (Carlino) (testifying that, among other things, Guaranteed Returns did not routinely delete the "store summary file, the CRED_A file, the distribution file"). These categories of data mirrored the categories of data requested in the grand jury subpoena that the Government served on Dean Volkes as President and CEO of Guaranteed Returns on September 14, 2009. *See* GX 8-1 (showing that the grand jury subpoena was served on Dean Volkes). The grand jury subpoena directed Guaranteed Returns to produce, among other documents:

> records related to all return transactions . . . relating to contract number SPO200-01-D-1501,
>
> . . .
>
> records documenting the return of pharmaceuticals . . . returned under contract number SPO200-01-D-1501 . . . including correspondence, price lists, credit memos,
>
> . . .
>
> records of the calculation of the sales revenue recognized from each return,
>
> . . .
>
> records of payments made by Guaranteed Returns . . . and the supporting calculations of the individual amounts directed into the account of each customer,
>
> . . .
>
> records related to . . . wholesaler credits and revenue,
> internal monthly, quarterly and/or annual financial reports,
> records of payment between Guaranteed Returns and Defense Medical Services, LLC . . .

GX 8-1. The fact that the categories of data that Dean Volkes ordered Carlino to delete and conceal corresponded to categories of data requested in the grand jury subpoena supports an inference that Dean Volkes intentionally sought to impede the Government's investigations to hide his own crimes.

Not only did Dean Volkes order the destruction of data responsive to the grand jury subpoena, but he also ordered that IT Department employees Keith Ahrens, Chris Sellitto, and Ron Carlino purchase data wiping software, install the software, and use the software to wipe the deleted data permanently.

Keith Ahrens testified, for example, that he was pulled into a meeting with Ron Carlino, Chris Sellitto, and Dean Volkes during which Dean Volkes asked Ahrens to find a way to delete data permanently from the company's servers to ensure that deleted data could not be restored or recovered. Feb. 27, 2017 Trial Tr. 115–20, ECF No. 253 (Ahrens) (testifying that Dean Volkes ordered him to purchase wiping software, and testifying that Ahrens installed and ran the software per Dean Volkes's orders).

Chris Sellitto similarly testified that in a meeting with Dean Volkes, Keith Ahrens, and Ron Carlino, Sellitto was asked whether it were possible to "delete data" and "wipe out the fact that it existed." Feb. 22, 2017 Trial Tr. 55–59, ECF No. 257 (Sellitto).

Finally, Ron Carlino testified, consistently with Keith Ahrens and Chris Sellitto, that Dean Volkes wanted a way to ensure that data was deleted permanently. Feb. 24, 2017 Trial Tr. 33–37, ECF No. 259 (Carlino) (testifying that he expressed concerns about destroying data in the midst of a federal investigation, but that Dean Volkes said that the destruction of the data was necessary and something that "we have to do"). Indeed, after Carlino learned that not only was there an ongoing federal investigation in connection with Guaranteed Returns, but that there was an outstanding grand jury subpoena, Dean Volkes stated that "I [Dean Volkes] never showed you a subpoena." Feb. 24, 2017 Trial Tr. 45, ECF No. 259 (Carlino). The jury was permitted to conclude on this evidence, in conjunction with other evidence, that Dean Volkes intended to impede the Government's investigations by destroying data responsive to the grand jury

subpoena.

d. Dean Volkes Ordered Deletion And Wiping Of Data And Directed Carlino To Make False Statements Shortly After The FBI Sought Forensic Images Of Servers

In addition to the telling overlap between the data Dean Volkes hoped to destroy and the data sought by the Government, the temporal proximity of Dean Volkes's orders to destroy data and the Government's requests to image the company's servers forensically supports the conclusion that Dean Volkes possessed the intent to impede the Government's investigations. On March 12, 2010, Agent Woodring first told Guaranteed Returns's attorney that the FBI would take a forensic image of the company's servers. Mar. 6, 2017 Trial Tr. 241:11–18, ECF No. 325 (Woodring). On March 16, 2010, Agent Woodring followed up with Guaranteed Returns to reiterate that the FBI would image the company's servers. Mar. 6 Trial Tr. 241:23–25, ECF No. 325 (Woodring). The day after Agent Woodring's follow up, on March 17, 2010, Dean Volkes convened a meeting of IT Department employees during which he asked employees to destroy data, to obtain wiping software, and to wipe the destroyed data permanently. *See* GX 2-90 (showing, through metadata, that FilePro information was deleted and backed up on March 17, 2010); Feb. 27, 2017 Trial Tr. 91, ECF No. 253 (Carlino) (testifying that the meeting in which Dean Volkes ordered that data be deleted occurred on approximately March 17, 2010); Feb. 27, 2017 Trial Tr. 115, ECF No. 253 (Ahrens) (testifying that the meeting during which Dean Volkes asked him to purchase wiping software occurred in March 2010). Then, just days before Agent Woodring arrived at Guaranteed Returns's offices to meet with Donna Fallon and Ron Carlino about the Government's investigation, wiping software was installed and run on the company's servers. *See* GX 2-82 (showing that the BCWipe wiping software generated a computer log file on March 29, 2010); Feb. 27, 2017 Trial Tr. 118 (Ahrens), ECF No. 253 (testifying that on March 30, 2010, American Express posted a transaction memorializing the IT

Department's purchase of the BCWipe software); GX 36-1 (depicting the website through which Ahrens purchased the BCWipe software as it appeared on March 27, 2010); Mar. 6, 2017 Trial Tr. 242:24–243:. Thus, when Agent Woodring arrived at Guaranteed Returns's offices on March 31, 2010, the BCWipe software had already been installed and run at least once.

In arguing that the evidence is insufficient to prove Dean Volkes's corrupt intent, Dean Volkes reasserts two theories that he presented to the jury at trial: (1) that Dean Volkes believed that the Return Authorization Forms permitted him to keep all customer indates and, therefore, he had no reason to hide any data from investigators,[56] and (2) that the data responsive to the grand jury subpoena was deleted for "legitimate business reasons."[57] Both theories were rejected by the jury, and both theories are rejected now.

First, Dean Volkes argues that, because he believed that the RA Forms permitted him to keep all customer indates, he had no motive to conceal or destroy data responsive to the grand jury subpoena since he did not believe that his activity was fraudulent or criminal. Dean Volkes, however, presented this theory to the jury, and the jury rejected it. He also put forth this theory in connection with his request for acquittal from his convictions on fraud. The Court rejects Dean Volkes's argument here for the same reasons it rejected the RA Forms argument in connection with his fraud convictions, above.[58] As discussed in connection with Dean Volkes's conviction for fraud, the evidence showed that the RA Forms were only used to justify Volkes's diversion of indates when certain persons questioned the status of indates. In other cases, however, when other persons questioned the status of indates, Volkes told these persons that the

[56] Defs.' Mem. 93, ECF No. 344.
[57] Defs.' Mem. 98, ECF No. 344.
[58] *See* above Section III.A.1.b discussing the reasons why Dean Volkes's RA Forms argument is unavailing.

indates were being destroyed.[59] The jury was entitled to conclude from these inconsistent representations, when considered in conjunction with other evidence of Defendants' fraudulent activity, that Dean Volkes did not, in fact, believe that the RA Forms permitted him to keep customer indates, but that instead, the RA Forms served to conceal his fraud. Accordingly, the existence of the RA Forms does not warrant Dean Volkes's acquittal on charges of obstruction of justice and making false statements to federal agents.

Second, Dean Volkes argues that the evidence supports only the conclusion that data was deleted from the company's servers solely for legitimate business reasons. Again, this is a theory that was presented to the Jury and a theory that the Jury rejected. While the defense elicited some evidence showing that there may have been legitimate business reasons for Guaranteed Returns to archive certain data to increase the efficiency and function of the FilePro system, there was no requirement that the jury draw such an inference in favor of the defense. Indeed, contrary evidence was adduced at trial showing that even if there were legitimate business reasons for archiving certain data, it was Dean Volkes's intent that the data be deleted and permanently wiped to impede and obstruct the Government's investigations.[60]

e. Evidence Of Dean Volkes's Actual Obstruction And Evidence Of Lying To Federal Agents

Having determined that the jury had a sufficient evidentiary basis from which it could conclude that Dean Volkes had corrupt intent, the Court turns to the evidence showing that Dean Volkes actually impeded and obstructed the Government's investigations. As discussed above,

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[59] *Id.*

[60] As discussed above, the Government showed that Dean Volkes was motivated to destroy and conceal evidence on the servers to prevent detection of his own crimes, Dean Volkes ordered that data responsive to the grand jury subpoena and Government agents' requests be deleted and permanently wiped, and Dean Volkes's orders to delete and wipe the company servers occurred shortly after Government activity suggested that a forensic image of the company servers was imminent.

Dean Volkes arranged for his IT Department employees to delete various categories of data requested by the Government in connection with governmental investigations. Not only did the employees actually delete the data from the company's servers, per Dean Volkes's orders,[61] IT Department employees purchased wiping software that was advertised as being the "military standard to surgically clear selected data." GX 36-1. Keith Ahrens, per Dean Volkes's orders, installed the wiping software and ran it. Feb. 27, 2017 Tr. at 118:16–19, ECF No. 253 (Ahrens).

Despite the fact that data was deleted from the company's servers, and despite the fact that wiping software was purchased, installed, and run on the company's servers, Dean Volkes argues that no obstruction occurred because Chris Sellitto and Ron Carlino created backups of the information that they deleted from the servers. Defs.' Mem. 91–92, ECF No. 344. Dean Volkes contends that the existence of the backups means he did not destroy any data. The Court rejects this argument because the simple fact that the Government would have been able to recover the destroyed evidence does not undermine the fact that Dean Volkes destroyed the evidence or otherwise concealed it. The Third Circuit's decision in *United States v. Lessner* is instructive on this point. 498 F.3d 185 (3d Cir. 2007).

In *Lessner*, the defendant appealed the entry of her guilty plea under Federal Rule of Criminal Procedure 11. 498 F.3d at 188. The defendant had pled guilty to various counts of wire fraud, defense procurement fraud, and obstruction of justice. *Id.* The defendant's conviction for obstruction of justice under 18 U.S.C. § 1519 stemmed from her "disposal of [an] appointment book containing [the] home address" of her co-schemer. *Id.* at 196. On appeal, the defendant argued that the facts to which she stipulated in her guilty plea were insufficient to sustain her conviction for obstruction. *Id.* In particular, the defendant argued that while she

[61] *See, e.g.*, Feb. 24, 2017 Trial Tr. 39, ECF No. 259 (Carlino) (testifying about actions he took after deleting the data as directed by Dean Volkes).

stipulated at her guilty plea hearing that she "put [the address book] in the trash can," she did not stipulate to having any intention of impeding the government's investigation of her crime. *Id.* at 197. Notably, although it was undisputed that the defendant threw the address book into the trash can, the Government was ultimately able to recover the address book and, in fact, used it in the Government's prosecution of the case. *Id.* at 191.

The Third Circuit, in affirming the defendant's conviction for obstruction of justice, found that the facts of record—including the reality that the address book was recovered from the trash and not, in fact, destroyed—provided "more than sufficient evidence of [the defendant's] guilt to permit the District Court to accept her . . . plea." *Id.* at 198 (emphasis added). In so ruling, the Third Circuit acknowledged "Congress's intent that § 1519 apply broadly." *Id.* at n.5 (citing 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy)). Thus, even though defendant's attempted "disposal" of her address book by tossing it into the trash can was unsuccessful in destroying the information in the book, her act of disposing of the address book still met the meaning of the term "destruction" proscribed by § 1519. *Id.* at n.5. The Third Circuit further reasoned that the defendant's disposal also constituted a form of concealment proscribed by the law. *Id.* at n.5.

In this case, Dean Volkes argues that the fact that the Government was able to recover data that Dean Volkes deleted from the company's servers forecloses the conclusion that Dean Volkes actually impeded the Government's investigations. As the facts and holding in the Third Circuit's decision in *Lessner* make clear, Dean Volkes's argument is misplaced because the mere fact that the data could, and indeed and was, recovered by the Government is not dispositive. Dean Volkes's deletion of data responsive to the grand jury subpoena and other Government requests is analogous to the defendant's tossing out of her address book in *Lessner*. The fact that

the government was able to retrieve the deleted data in this case does not negate the reality that Dean Volkes destroyed the data in the same way the defendant in *Lessner* destroyed her address book.[62] Thus, the Court concludes that the evidence of Dean Volkes's corrupt intent, the evidence showing that Dean Volkes orchestrated the deletion of data responsive to a grand jury subpoena and Government requests, and the evidence that Dean Volkes ordered the purchase, installation, and execution of military-grade wiping software on the company's server to delete the data permanently are enough for a reasonable jury to conclude that Dean Volkes impeded Government investigations and obstructed justice.

Similarly, there was sufficient evidence adduced at trial to support the jury's conclusion that Dean Volkes directed Ron Carlino to lie to federal agents. Ron Carlino testified on direct examination that Dean Volkes told Carlino that if federal agents "asked anything about the data availability, that I was to say what the policy was, that we that [sic] got rid of everything for three years." Feb. 24, 2017 Trial Tr. 41–42, ECF No. 259 (Carlino). Although Dean Volkes argues in his post-trial brief that Carlino's testimony was that Dean Volkes instructed Carlino to explain to federal agents "that 'only three years of data was available,' because Guaranteed Returns 'was only required by law to provide three years of data,'" Dean Volkes mischaracterizes the testimony. Defs.' Mem. 102, ECF No. 344. By contrast, Carlino's testimony was that Dean Volkes directed him to say "that we that [sic] got rid of everything for three years." Feb. 24, 2017 Trial Tr. 41–42, ECF No. 259 (Carlino). Indeed, Dean Volkes's orders to Carlino were clarified by Ron Carlino's testimony on cross examination.

On cross, Ron Carlino testified as follows:

[62] Even if Dean Volkes's deletion of data did not meet the meaning of "destruction" under the obstruction statutes, it would still constitute concealment. *See Lessner*, 498 F.3d at n.5 (acknowledging that the tossing away of an address book that was ultimately recovered also constituted concealment and a covering up of a record for purposes of obstruction of justice).

Defense Question: March 17th, you testified that Mr. Volkes told you to tell the government agents that data older than three years was not retained by the company; do you remember that?

Gov't Objection: Objection, Your Honor. Mischaracterizes.

Court: Overruled.

Carlino Answer: Yes. I recall him saying that, yes.

Defense Question: Okay. And just to be sure that we're not mischaracterizing this, didn't you tell the government that very same statement, that Mr. Volkes told you, in response to the questions regarding older data, to tell the agents that data older than three years old was not retained by the company?

Carlino Answer: Yes, sir.

Defense Question: And that's what he told you?

Carlino Answer: Yes, sir.

Feb. 27, 2017 Trial Tr. 26–27, ECF No. 253 (Carlino) (emphasis added). Presumably, the defense elicited this testimony to show that Dean Volkes did not lie; unfortunately for Dean Volkes, this testimony, instead, supports the opposite conclusion: that Dean Volkes instructed Carlino to represent that the data sought by federal agents was "not retained" when, in fact, it could have and should have been produced. *See* Feb. 27, 2017 Trial Tr. 105–06, ECF No. 253 (Ahrens) (testifying that Dean Volkes had sought and received archived and backed up data before, thus, showing Dean Volkes understood that even deleted data could be recovered). Coupled with the evidence that Dean Volkes directed his IT Department employees, Keith Ahrens, Chris Sellitto, and Ron Carlino, to destroy data responsive to the Government's requests, and to wipe the company's servers of the data permanently, the jury could reasonably reach the conclusion that Dean Volkes ordered Ron Carlino to lie to federal agents.

Dean Volkes argues that the evidence showed only that: (1) Carlino misunderstood Dean Volkes's instructions about what Carlino was to tell the federal agents, or (2) in the absence of any misunderstanding, Carlino went "far afield" with his comments to federal agents.[63] These arguments are nothing more than a recasting of the defense theories that were presented to the jury at trial. The jury considered these theories and decided that the evidence instead supported opposite inferences and conclusions. The Court concludes that the evidence at trial permitted the Jury to draw such inferences and reach such conclusions. The Court will not second guess the reasonable conclusions and inferences drawn by the jury.

9. Counts 62, 63, And 64: Ron Carlino's Guilty Plea

The Court having concluded that the evidence is sufficient to sustain Dean Volkes's convictions on Counts 62, 63, and 64 for obstruction of justice and making false statements, the Court easily concludes that the evidence is sufficient to sustain Guaranteed Returns's conviction on the same counts. Accordingly, the Court need not exhaustively review Defendants' argument that Ron Carlino's guilty plea on obstruction of justice and making false statements cannot itself sustain Guaranteed Returns's conviction for the same crimes. Still, the Court notes that while Defendants assert there was no evidence that Carlino's job responsibilities included "responding to government inquiries about [IT matters]," much evidence was, in fact, adduced at trial to show that Carlino was enlisted by both Dean Volkes and Donna Fallon to respond to Government requests for electronically stored information. *See, e.g.*, Feb. 24, 2017 Trial Tr. 26:23–27:25, ECF No. 259 (Carlino) (testifying that he provided materials responsive to information requested in the grand jury subpoena to Donna Fallon "in connection with the federal investigation"); Feb. 24, 2017 Trial Tr. 39:4–17, ECF No. 259 (Carlino) (testifying that he met with federal agents,

[63] Defs.' Mem. 103, ECF No. 344.

that he met with Dean Volkes before the meeting with federal agents, and that Dean Volkes was the person who told Carlino that Carlino might be asked to meet with the federal agents); Feb. 24, 2017 Trial Tr. 43:9–14, ECF No. 259 (Carlino) (testifying that Carlino, Donna Fallon, and a company lawyer together met with federal agents to answer Government inquiries about what electronically stored information was available for production). If responding to Government requests for electronically stored information were beyond the scope of Carlino's duties as head of the IT Department then neither Dean Volkes nor Donna Fallon would have sought out his assistance in discussing such matters with the Government or sought out his assistance in compiling information for production to the Government. This evidence, in short, was sufficient to permit the jury to conclude that when Ron Carlino lied to federal agents, it was at the direction of Dean Volkes and that neither Dean Volkes nor Donna Fallon considered Carlino's involvement improper or unusual.

10. Count 55: Evidence Of Dean Volkes's And Guaranteed Returns's Conspiracy To Obstruct Justice

Finally, Defendants Dean Volkes and Guaranteed Returns argue that, to the extent that the Court concludes that Dean Volkes must be acquitted of his substantive convictions for obstruction of justice, then both Dean Volkes and Guaranteed Returns must necessarily be acquitted of the related conspiracy conviction under Count 55 (Conspiracy to Obstruct Justice pursuant to 18 U.S.C. § 371). The Court has concluded, however, that the evidence at trial was sufficient to uphold Dean Volkes and Guaranteed Returns's convictions for their substantive obstruction of justice crimes. Thus, Defendants' motion for acquittal on Count 55 is denied.

B. Rule 33: Motion For New Trial

1. Alleged Juror Misconduct, Sixth Amendment Right To An Impartial Jury

Defendants' first argument in support of a new trial is grounded in their belief that one of the deliberating juror's ("Juror A")[64] failure to respond to a voir dire question was indicative of the juror's bias. Therefore, Defendants argue that their constitutional right under the Sixth Amendment to trial by an impartial jury was violated and a new trial is warranted. The Court rejects Defendants' argument because Defendants have failed to carry their burden of showing, under the Supreme Court's two-pronged test established in *McDonough Power Equip., Inc. v. Greenwood*, that (1) Juror A was affirmatively dishonest when he failed to answer the Court's voir dire question, or (2) had Juror A answered the question, the answer would have provided a valid basis for a challenge for cause. 464 U.S. 548 (1984).

Before applying the *McDonough* test to the present facts, the Court notes that as a matter of better practice, Defendants should have raised their concerns about Juror A with the Court during voir dire when Defendants first learned about the matters on which they now base their motion for new trial. Promptly notifying the Court at the time Defendants became aware of the issues they now raise by post-conviction motion would have permitted the Court to address any concerns before the conclusion of the eight-week jury trial. *See, e.g., United States v. Davis*, 183 F.3d 231, 252 (3d Cir. 1999) (explaining that "counsel is required to draw the court's attention to a specific instruction, or to a problem with an instruction, in order to put the court on notice so that a possible error may be corrected before the jury begins to deliberate"). Defendants'

[64] The juror accused by Defendants of misconduct has been identified as "Juror A" for purposes of this opinion to protect the identity of the juror who Defendants identify as having a criminal background. To the extent that a reviewing court might need to identify Juror A, Juror A is specifically identified in Grover Decl., Exs. 47, 48, and 49, ECF No. 345-9 (Under Seal).

concerns about Juror A were unknown to the Court over the course of the trial, and further, remained unknown until Defendants' filing of the instant motion. Defendants' briefings and accompanying declarations show, however, that Defendants—during voir dire—were aware of at least two of the three issues that Defendants now raise as cause for a new trial.

As discussed in detail below, Defendants contend that Juror A failed to disclose three of Juror A's contacts with the criminal justice system to the Court during voir dire: (1) a DUI offense from 2001, (2) a DUI offense from 2005, and (3) an acquittal on charges of burglary from 1983. Defendants admit that they were aware of the first two of these three contacts at the time of voir dire. Defendants' jury selection consultants discovered, contemporaneously with voir dire, that Juror A had two DUI offenses, and that the offenses occurred in 2001 and 2005. Radick Decl. ¶ 3, ECF No. 371. The jury selection consultants emailed this, and other detailed information about Juror A, to defense counsel while voir dire was ongoing. Radick Decl. ¶ 3, ECF No. 371. The third contact, Juror A's acquittal on charges of burglary in 1983, was unknown to Defendants until after trial. Still, had Defendants raised the issue of the DUI offenses from 2001 and 2005 at voir dire, the Court would have had an opportunity to address their concerns at that time.

Despite Defendants' decision not to alert the Court to Juror A's DUI offenses during trial, as the "absolute minimum standard for a constitutional trial is 'an impartial trial by jury'" the Court will nevertheless address Defendants' substantive juror bias argument below. *McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557, 565 (3d Cir. 2017).

a. Defendants' Burden And The *McDonough* Test

It is well established that "a proponent alleging juror bias bears the burden of proving juror bias." *Knight v. Mooney*, No. CV 14-1058, 2017 WL 1134565, at *4 (W.D. Pa. Mar. 27,

2017) (citing *United States v. McDonald*, 112 F.3d 511 (4th Cir. 1997)). Stated otherwise, the "party moving for new trial because of juror misconduct bears the burden of demonstrating that a juror failed to answer a material question, and that a truthful response by the juror would have provided a valid basis to challenge for cause." *Id.* (quoting *McDonald*, 112 F.3d at 511).

The Supreme Court in *McDonough* set forth a two-part test to determine whether a defendant is entitled to a new trial under a theory that a juror's responses to voir dire examination denied the defendant's right to an impartial jury trial under the Sixth Amendment. 464 U.S. at 556. To obtain a new trial, the defendant must "[f]irst demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* In adopting this two-part test, the Supreme Court sought to focus the courts' attention on those errors during voir dire that "affect the essential fairness of the trial," as opposed to "harmless errors." *Id*. at 553. Thus, the Supreme Court observed that while a juror's "motives for concealing information [during voir dire] may vary, [] only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial" and, therefore, warrant the setting aside of a jury's verdict in favor of a new trial. *Id.* at 556. "To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question," the Supreme Court continued, "is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* at 555. For this reason, satisfaction of the *McDonough* test requires that the juror accused of misconduct have been affirmatively dishonest as opposed to simply "mistaken." *United States v. James*, 513 F. App'x 232, 233 (3d Cir. 2013) (not precedential).

In assessing whether a valid basis for a challenge for cause would have existed had a nonresponsive juror responded to a voir dire question, the court must determine "whether the

juror 'holds a particular belief or opinion that will prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *United States v. Holck*, 398 F. Supp. 2d 338 (E.D. Pa. 2005) (citing *United States v. Murray*, 103 F.3d 310, 323 (3d Cir. 1997)). Answering this question usually "requires a showing of actual, implied or inferred bias or impartiality, which may be demonstrated through a 'personal relationship with a party, witness or attorney in litigation, or a biased state of mind concerning a party or issue[.]'" *Holck*, 398 F. Supp. 2d at 362 (citing *United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002)).

The Supreme Court has acknowledged that impartiality "is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.'" *Dennis v. United States*, 339 U.S. 162, 172 (1950) (citing *United States v. Wood*, 299 U.S. 123, 145–46 (1936)). For this reason, "motions for a new trial are committed to the discretion of the district court." *McDonough*, 464 U.S. at 556 (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). Indeed, that the district court is in the best place to determine juror partiality is supported by the reality that the question of partiality is "one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence . . . . [Therefore,] the trial court's resolution of such questions is entitled, even on direct appeal, to special deference.'" *Murray*, 103 F.3d at 323 (quoting *United States v. Ferri*, 778 F.2d 985, 994 (3d Cir. 1985)).

In the present case, the Court begins its analysis with the voir dire question that Defendants assert is at issue. The Court asked the jury pool:

> **Court**: Have you, any family member, or close friends ever been the victim of a crime or the subject of a criminal investigation? If so, please raise your card.

Jan. 30, 2017 Trial Tr. 10:21–11:2, ECF No. 280. Juror A did not raise his or her card in response to this question. Then, when Juror A was called to side bar for follow up voir dire on other questions to which Juror A responded in the affirmative, Juror A did not volunteer to the Court or to counsel that Juror A had been "the subject of a criminal investigation." Jan. 30, 2017 Trial Tr. 51:5–53:2, ECF No. 280.

Defendants argue that Juror A's failure to respond to the Court's voir dire question establishes Juror A's bias because Juror A, despite his lack of response, had a 34-year-old arrest for and acquittal on criminal charges of burglary in connection with an organized labor dispute ("1983 incident"), and two convictions for DUIs, one in 2001 and the other in 2006. Defendants contend that Juror A's failure to respond to the Court's voir dire question establishes both prongs of the *McDonough* test because (1) Juror A was dishonest when he did not respond to the voir dire question, and (2) had Juror A disclosed the 1983 incident and his two DUI convictions, Juror A's response would have provided a valid basis for a challenge for cause.

The Court disagrees and concludes that Defendants have not carried their burden of establishing both prongs of the *McDonough* test. First, the record does not support the conclusion that Juror A was dishonest by failing to respond to the Court's voir dire question. Juror A's demeanor at side bar and his honest answers to other questions directly contradict the suggestion that Juror A was affirmatively dishonest or sought to conceal the 1983 incident or his two DUI convictions. Second, even if Juror A had responded to the question and disclosed the 1983 incident and his two DUI convictions, this information, standing alone, would not have provided a valid basis for a challenge for cause because the information does not suggest that Juror A could not perform the essential duties of an impartial juror. Finally, Juror A responded to Court questions about Juror A's ability to be fair and impartial by stating that Juror A could

and would be fair and impartial. Thus, whatever the reason for Juror A's failure to respond to the Court's voir dire question, there is no evidence in the record to suggest that Juror A's impartiality was impugned.

i. First Prong Of *McDonough* Test: Juror A Did Not Respond Dishonestly

That Juror A was not affirmatively dishonest in this case is supported by: (1) the differing interpretations of the scope of the Court's question, and (2) Juror A's demeanor during voir dire reflecting his willingness to answer other voir dire questions from the Court and defense counsel honestly.

First, the potential jurors in the jury pool interpreted the scope of the Court's voir dire question differently; thus, Juror A's failure to respond does not necessarily prove that Juror A intentionally and dishonestly concealed information responsive to the question. That the Court's question was interpreted differently by different jurors was made clear when the Court asked the same question to a second, supplemental jury panel called up on the second day of jury selection. The day after the Court first questioned Juror A, the Court ordered a second jury panel and asked the same question of the second panel that the Court had asked of the first:

> **Court**: Have you or any family member or close friend ever been the victim of a crime or been the subject of a criminal investigation? If so, please raise your hand.

Jan. 31, 2017 Trial Tr. 14:4–11, ECF No. 281. In response to this question, a number of potential jurors raised their hands. One juror, however, identified as "Juror B,"[65] did not respond even though, as the Court later learned upon defense counsels' initiative, Juror B had been

[65] In the interest of privacy, the Court refers to this juror as Juror B, consistent with the Government and Defendants' identification of this juror in their briefs. To the extent that a reviewing court might need to identify Juror B, Juror B is specifically identified in Radick Decl. ¶ 4, ECF No. 371 (Under Seal).

arrested and charged on two earlier occasions for Juror B's activity in connection with the possession of controlled substances and consumption of alcohol. Jan. 31, 2017 Trial Tr. 100:5–101:20, ECF No. 281. Indeed, Juror B had been convicted of at least one charge in connection with the possession of a controlled substance. Jan. 31, 2017 Trial Tr. 101:7–8, ECF No. 281.

As Juror B had not responded affirmatively to the Court's voir dire question, Juror B's prior contacts with law enforcement would have gone undetected except that Defendants had retained jury selection experts and consultants who had discovered Juror B's background during their investigations, which took place contemporaneously with the voir dire process. Defs. Reply Mem. 27 n.16, ECF No. 370. Having learned about Juror B's background, Defendants asked the Court to call Juror B to sidebar to inquire further into Juror B's background. Jan. 31, 2017 Trial Tr. 99:16–18, ECF No. 281. At side bar, the Court and defense counsel questioned Juror B, which resulted in Juror B confirming the information discovered by Defendants' jury selection consultants. Despite the confirmation of this information—that Juror B had at least one conviction for a controlled substance offense, and that Juror B had not affirmatively responded to the Court's voir dire question about whether any jurors had been the subject of a criminal investigation—Defendants lodged no challenge for cause. The fact that Juror B, like Juror A, failed to respond to the Court's voir dire question makes clear that different jurors, "[c]alled as they are from all walks of life[,]" can, and in this case did, interpret the scope of the voir dire question differently. *McDonough*, 464 U.S. at 555. The Court cannot conclude that Juror A's failure to respond to the voir dire question was demonstrably dishonest. The fact that Defendants did not challenge Juror B for cause on the basis of Juror B's failure to respond to the voir dire question or on the basis of Juror B's conviction and prior arrests further supports that there was no reason to believe Juror A or Juror B was intentionally dishonest during jury selection.

This conclusion is further supported by Juror A's honest demeanor at side bar and candid and honest answers to the Court's and defense counsels' follow up questions. When called to side bar, Juror A provided detailed answers to the Court's inquiries including, among other questions, whether Juror A had "a family member or close friends [with] training in the law," to which Juror A responded that he had a brother-in-law who is a police sergeant. Jan. 30, 2017 Trial Tr. 51:13–19, ECF No. 280. The Court also asked Juror A whether Juror A "had prior jury service" to which Juror A responded "Yes. Civil. It was [two industrial manufacturers]" in Philadelphia. Jan. 30, 2017 Trial Tr. 51:18–24, ECF No. 280. In fact, regarding his prior jury service, Juror A explained that the trial lasted "one-and-a-half weeks," that the trial concluded with a verdict, and that he was a deliberating juror. Jan. 30, 2017 Trial Tr. 51:25–52:7, ECF No. 280. When asked whether there was "anything about [Juror A's] service that would interfere with [Juror A's] ability to be a fair juror in this case," Juror A responded "not at all." Jan. 30, 2017 Trial Tr. 52:8–12, ECF No. 280.

Defense counsel asked her own follow up questions during side bar, and Juror A similarly answered candidly and honestly. For example, defense counsel prompted the Court to ask Juror A whether Juror A or "any family member or close friends had a dispute with the federal government" to which Juror A responded "no." Jan. 30, 2017 Trial Tr. 52:13–21, ECF No. 280. It is not disputed that all of Juror A's answers to the Court's and defense counsels' side bar questions were candid and honest. Accordingly, the Court concludes that Defendants have not carried their burden of showing that Juror A's failure to respond to the Court's voir dire question was an affirmative act of dishonesty sufficient to satisfy the first prong of the *McDonough* test.

ii. Second Prong Of *McDonough* Test: Had Juror A Responded To The Court's Voir Dire, The Response Would Not Have Provided A Valid Basis For A Challenge For Cause

Even if Juror A's failure to respond to the Court's voir dire question were dishonest—and the Court concludes that it was not—Juror A's response and disclosure of the 1983 incident and his two DUI convictions would not have provided a valid basis for a challenge for cause because his DUI convictions and the 1983 incident have no bearing on whether Juror A held "a particular belief or opinion that will prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Holck*, 398 F.Supp.2d at 338 (citing *Murray*, 103 F.3d. at 323).

First, Juror A had no "personal relationship with a party, witness or attorney in [this] litigation" and nothing about Juror A's DUI convictions or 1983 incident related to the Parties, witnesses, or attorneys in this litigation. *United States v. Holck*, 398 F. Supp. 2d 338 (E.D. Pa. 2005) (citing *United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002)). Defendants have not, and cannot, show that Juror A had any personal relationship with the Parties or that Juror A's background at all touches upon the Parties or the matters litigated in this case. Accordingly, the revelation of Juror A's prior criminal background does not provide any valid basis for a challenge for cause as Juror A appeared fully capable of remaining impartial and executing Juror A's responsibilities.

Second, as discussed in detail above, at side bar, Juror A answered all questions posed by the Court and counsel honestly and in relative detail. Given Juror A's candid answers, there was no reason to believe that Juror A harbored any bias in connection with the case. Indeed, when, for example, the Court asked whether there was anything about Juror A's prior jury service that

would interfere with his ability to be fair in this case, Juror A responded, "not at all." Jan. 30, 2017 Trial Tr. 52:8–11, ECF No. 280.

Third, although not dispositive, Juror A had previously and successfully served as a juror in a case that went to deliberation and ended in a verdict. Juror A's ability to remain impartial in that case and render a verdict suggests that Juror A has had no issue in executing the essential duties of a deliberating juror, namely, maintaining impartiality.

Defendants also implicitly acknowledged that the fact that a potential juror may have been convicted of unrelated offenses does not necessarily give rise to a challenge for cause. Defendants learned that Juror B had not responded to the Court's voir dire question and also had a conviction in connection with possession of a controlled substance and prior arrests, including an arrest in connection with alcohol use, but chose not to challenge Juror B for cause because there was no basis to question Juror B's impartiality on the issues presented by this case.

For the foregoing reasons, the Court concludes that Defendants have not met their burden of establishing the second prong of the *McDonough* test. Therefore, Defendants are not entitled to a new trial on grounds of Juror A's purported bias.

2. Preclusion Of Contract Law Professor's Expert Testimony On The Law

Defendants contend that the Court's exclusion of their expert law professor "fundamentally and unduly crippled the defense;" therefore, Defendants are entitled to a new trial.[66] Defs.'Mem. 113., ECF No. 344. Defendants assert, "the defense to the indate fraud was that the Defendants Guaranteed Returns and Dean Volkes acted in good faith and without the intent to defraud." Defs.' Mem. 118, ECF No. 344. Defendants have characterized this theory

[66] Defendants sought to introduce testimony from Professor Claire Finkelstein, a distinguished professor of law at the University of Pennsylvania Law School.

as "the contract defense." Defs.' Mem. 118, ECF No. 344. Professor Finkelstein's testimony on contract law, Defendants continue, would have established "the contract defense" by demonstrating that Dean Volkes's "interpretation of the [various] contract[s] was objectively reasonable and therefore was consistent with good faith." Defs.' Mem. 119, ECF No. 344.[67]

The Court rejects Defendants' argument for three reasons. First, the testimony of Defendants' expert law professor was excludable because it was not relevant under Federal Rule of Evidence 401 as the law professor's proffered testimony on civil contract law principles would not have been relevant to the criminal fraud case before the jury. Second, even if such expert testimony were relevant to this criminal fraud case, exclusion of the testimony was proper under Federal Rule of Evidence 403 because the probative value of such expert testimony would have been substantially outweighed by the fact that such testimony would have confused the jury as to the issue presented and as to who was authorized to provide instructions on the governing law (the Court, not a third-party law professor). Third, even if such expert testimony were relevant, and not substantially outweighed by the danger of confusing the jury, exclusion of the testimony was proper under Federal Rule of Evidence 702 because the testimony would not have been helpful to the jury.

[67] Understanding that Defendants presented a good faith defense theory, the Court instructed the jury on the defense of good faith. Mar. 20, 2017 Trial Tr. 122:8–123:22, ECF No. 321 (reiterating that criminal fraud requires the jury to find that Defendants had specific intent to defraud and that good faith is a defense). The Court instructed the jury on the defense of good faith despite the Third Circuit's acknowledgment that a good faith instruction is not usually required where, as here, the Court instructs the jury on the mental state required to convict for fraud. *See* Third Circuit Model Crim. Jury Instructions, 5.07 (Comm. On Model Crim. Jury Instructions 3d Cir. 2017) (providing that while good faith defense instructions are recommended, they are not required where the trial judge fully instructs on the mental state requirement); *see also* Third Circuit Model Crim. Jury Instructions, 6.18.1956-4 (Comm. on Model Crim. Jury Instructions 3d Cir. 2017) (providing that a "good faith defense instruction is generally not necessary in mail and wire fraud cases").

a. Law Professor Testimony On Contract Law Not Relevant To Criminal Fraud Case Under Federal Rule Of Evidence 401

At the outset, the Court acknowledges that the threshold requirement of relevance under Federal Rule of Evidence 401 is low. Nevertheless, relevance is an essential threshold over which any proffered evidence must cross to qualify for admission at trial. The relevance of any piece of evidence, therefore, is not assumed. Federal Rule of Evidence 401 provides:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
> (b) the fact is of consequence in determining the action.

Fed. R. Evid. 401. A trial court's decision on the admissibility of evidence is generally entitled to deference as the court's decisions are reviewed for abuse of discretion. *See United States v. Lee*, 612 F.3d 170, 184 n.14 (3d Cir. 2010) (citing *United States v. Serafini*, 233 F.3d 758, 768 n.14 (3d Cir. 2000)) (stating that the appellate courts "review a district court's decision as to the admissibility of evidence for abuse of discretion.").

In this case, Defendants offered the expert testimony of a law professor to show that Dean Volkes's "interpretation of the contract was objectively reasonable and therefore was consistent with good faith." Defs.' Mem. 119, ECF No. 344. The fundamental problem with Defendants' position, however, is that it assumes that the contract carries dispositive weight in this case. It does not. The central issue in this case was not whether Dean Volkes acted reasonably within the confines of any contracts, rather, the issue was whether Dean Volkes had specific intent to defraud having knowingly devised a scheme to defraud. In this case, the scheme to defraud, as contemplated by Defendants, included, among other things, the inducement of customers to enter into contracts and RA Forms that purportedly gave Defendants the right to keep all customer products. The key distinction that informs the relevancy

determination here, in short, is the distinction between a civil contract fraud case and a criminal fraud case. Bearing in mind that this is a criminal fraud case, and not a civil contract fraud case or civil breach of contract case, it is apparent that the expert law professor's testimony on the reasonableness of Defendants' interpretation of the contracts is irrelevant.

The irrelevance of this expert testimony is made clearer in light of the fact that the good-faith-defense to fraud does not require defendants to prove good faith or the objective reasonableness of their good faith belief. Instead, the good faith defense to fraud is effective even where defendants subjectively believe their actions are lawful, but their actions are legally and factually wrong. *See* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 19:06 (6th ed. 2008 & Supp. 2017) (providing that a "person who acts . . . on a belief or an opinion honestly held is not punishable . . . merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong."). Defendants, thus, need not provide any evidence that their purported interpretation of the contract was "objectively reasonable and therefore was consistent with good faith," because Defendants need not be correct or reasonable about their beliefs to be entitled to a good faith defense. Defs.' Mem. 119, ECF No. 344.

The Second Circuit relied on the distinction between civil and criminal fraud cases in affirming the conviction of the defendants in *Weaver*. 860 F.3d at 96. In *Weaver*, while the Second Circuit concluded "that where the parties to an agreement have expressly allocated risks, the judiciary shall not intrude into their contractual relationship" may have "some force" in a "civil damages action" the civil contract principle "has none . . . where the government criminally prosecutes defendants for participating in a 'scheme or artifice to defraud[.]" *Id.*

Here, even if one assumes that Defendants acted reasonably and in accordance with the contracts, this fact would not dispose of the issue of criminal fraud as alleged in the Superseding

Indictment. Indeed, this fact would not even make Defendants' purported good faith defense more or less probable because whether or not Defendants adhered to the terms of the contracts or RA Forms is irrelevant unless the evidence showed that Dean Volkes relied exclusively on the language to justify his diversion of customer indates. Without such conditional proof, the fact that Defendants' taking customer indates may have been permitted under contractual provisions does not mean that Defendants did not commit fraud, have specific intent to commit fraud, or devise a scheme to defraud their customers. In fact, the evidence showed that Dean Volkes did not consistently tell suspicious customers, employees, or the Government, that he had a contractual right to keep the indates. Instead, Dean Volkes's explanations for missing indates shifted depending on the person who sought an explanation from him.[68] In view of the reality that Dean Volkes did not consistently point to the contractual provisions as justification for his diversion of customer indates, Defendants' proposed expert testimony on whether Defendants' diversion of customer indates constituted a reasonable interpretation of the contract provisions is irrelevant.

In short, exclusion of Defendants' expert testimony on contract law principles was appropriate under Federal Rule of Evidence 401 because the testimony would have been irrelevant to the criminal fraud case before the jury.

[68] *Compare* Feb. 24, 2017 Trial Tr. 138:1–19, ECF No. 259 (Carlino) (testifying that Dean Volkes told Carlino that Volkes was permitted to take indates pursuant to the RA Forms) *with* Feb. 2, 2017 Trial Tr. 63:14–64:2, ECF No. 283 (Markhoff) (testifying that Dean Volkes told Markhoff that indates were being destroyed, not that indates were being taken for Dean Volkes's and Guaranteed Returns's benefit) *with* Feb. 21, 2017 Trial Tr. 105:24–106:10, ECF No. 247 (Baumann) (testifying that Baumann was told that indates were destroyed, not that the indates were kept for Dean Volkes' and Guaranteed Returns's benefit).

b. Law Professor's Testimony Would Have Confused The Jury, Therefore, Exclusion Was Also Proper Under Federal Rule Of Evidence 403

Even if the Court were to assume that Defendants' proposed expert testimony were relevant, exclusion would still be proper under Federal Rule of Evidence 403 because the probative value of the expert's testimony would be substantially outweighed by the danger of confusing the jury. Rule 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403. Just as a trial court's decision to admit or exclude evidence under Rule 401 is entitled to deference, the Third Circuit has explained that trial court decisions under Rule 403 are afforded a "high degree of deference" and can only be reversed if the admission or exclusion of evidence was "arbitrary or irrational." *Lee*, 612 F.3d at 185. That the trial court is given wide latitude in deciding admissibility accords with the reality that the "Rule 403 inquiry is inexact, 'requiring sensitivity on the part of the trial court to the subtleties of the particular situation, and considerable deference on the part of the reviewing court to the hands-on judgment of the trial judge.'" *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 275 (3d Cir. 2017) (citing *Vosburgh*, 602 F.3d 512, 537 (3d Cir. 2010)).

In this case, the admission of an esteemed law professor's expert testimony on civil contract principles presented a substantial danger of confusing the jury in at least two ways. First, focused expert testimony on civil contract law principles would have confused the jury on the questions that were before it. That is, the expert testimony would confuse appropriate questions—for example, whether Defendants were guilty of criminal fraud and whether

Defendants had the specific intent to defraud—with inappropriate questions—for example, whether Defendants breached their civil contractual duties or whether they performed their duties in keeping with the covenant of good faith and fair dealing.[69] Second, that Defendants' law professor expert hails from a well-respected institution of legal education, and is in her own right, a highly esteemed academic and professional, would confuse the jury about where legal authority rests in our judicial system. Under our system of justice, of course, it is for the Court alone to instruct the jury on the law no matter how august a party's proffered legal expert may be.[70] Accordingly, the Court concludes that, to the extent that Defendants' law professor testimony would have had any probative value on the issue of a good faith defense to fraud, the probative value of the testimony was slight and the danger of confusing the jury substantially outweighed any marginal probative value of the testimony.

c. Law Professor's Testimony Would Not Have Been Helpful To The Jury, Therefore, Exclusion Was Proper Under Federal Rule Of Evidence 702

Defendants' expert testimony was also properly excluded because it would not have been helpful to the jury under Federal Rule of Evidence 702. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

[69] As discussed in Section III.B.2.a, above, as this case was a criminal fraud case and the central issues were, among others, whether Defendants had specific intent to defraud and whether Defendants contrived a scheme to defraud, the admission of Defendants' expert law professor testimony on civil contract principles would have, at best, provided marginal probative value in connection with the criminal matter before the jury. *See Weaver*, 860 F.3d at 96 (affirming trial court conviction by emphasizing the distinction between criminal fraud cases and civil contracts cases and civil fraud cases).

[70] It is axiomatic that the "District Court must ensure that an expert does not testify as to the governing law of the case . . . . because it would usurp the District Court's pivotal role in explaining the law to the jury." *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006) (internal citations omitted).

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . . .

Fed. R. Evid. 702. The Third Circuit has explained that "expert evidence which does not relate to an issue in the case is not helpful." *United States v. Delgado*, 677 F. App'x 84, 86 (3d Cir. 2017) (not precedential). While the analysis for helpfulness resembles the analysis required for relevance under Federal Rule of Evidence 401, the Third Circuit has advised that in connection with Rule 702 helpfulness inquiries, "[t]he 'standard is not that high,' but 'is higher than bare relevance.'" *Id.* at 86 (citing *United States v. Schiff*, 602 F.3d 152, 173 (3d Cir. 2010)). Accordingly, relevance for purposes of helpfulness under Rule 702 is a harder standard to meet for the proponent of the evidence than the standard under Rule 401. *See, e.g.*, *Delgado*, 677 F. App'x at 86 (gathering cases where the appellate court affirmed decision by trial court to exclude expert as unhelpful because expert testimony was not relevant to an issue at trial).

In this case, Defendants' proposed expert legal testimony would have been unhelpful in two ways. First, as discussed above, Defendants' proposed expert testimony "regarding principles of contract law," "the terms of Guaranteed Returns's contractual and business relationships," "the relationship between oral and written promotional materials on the one hand and actual written contracts on the other," and "the legal principles relevant to" "the company's handling of indated and other pharmaceutical products" are irrelevant because the contracts and RA Forms are not dispositive of the crimes for which Defendants have been found guilty. Defs.' Mem. 113, ECF No. 344. This was not a civil contract or civil fraud case, but a criminal fraud case. Whether or not Defendants met their obligations under various contracts would not foreclose the conclusion, reached in this case by the jury, that Defendants otherwise committed criminal fraud. *See Weaver*, 860 F.3d at 96 (drawing sharp distinction between civil fraud and

contract law principles and criminal law principles).

Second, Defendants' proposed expert testimony was not helpful because there was no evidence to support an inference that Defendants relied on the advice of the law professor or legal counsel in taking their actions or had contract principles in mind when taking their actions.[71] In short, the proposed expert testimony was, at best, conditionally relevant. However, the condition to its relevance was not established. Had the evidence shown that Defendants consistently referred to the contracts, as opposed to misrepresenting that indates were being destroyed, or distributions were pending, in taking their customers' indates, then the proffered expert testimony might have been helpful to the jury in deciding whether Defendants held a good faith belief that their actions were not fraudulent. This, however, was not the case. There was no evidence to permit a reasonable trier of fact to infer the requisite condition precedent to support the relevance of the expert testimony.

In support of their argument that the exclusion of their law professor expert warrants a new trial, Defendants cite principally to *United States v. Safavian*, 528 F.3d 957 (D.C. Cir. 2008). *Safavian* is distinguishable, however, because the crimes charged in that case are different from those charged here, and the evidence adduced in that trial is different from the evidence adduced in this trial. In *Safavian*, the defendant, a senior leader at the General Services Administration ("GSA"), was convicted of two counts of making two different, but consistent false statements to federal authorities. 528 F.3d at 963. The defendant allegedly falsely told a federal ethics agent that the person from whom the defendant received gifts had no "business" with the GSA when, in fact, the person had been exploring a land deal with the GSA. The defendant then made the same statement in a letter to a congressional committee. At trial, the

[71] *See* above note 71 and accompanying text for citations to Defendants' inconsistent explanations for the handling of customer indates.

defendant argued that in making the statements, he had in his mind a specific, technical definition of the term "business" and that an expert would testify that in the context of GSA contracts, "business" did not have a casual, colloquial meaning. The trial court excluded the expert testimony. *Id.* at 966.

On appeal, the Court of Appeals for the District of Columbia found that the trial court's exclusion of defense expert testimony on the meaning of the term "business" in the context of GSA contracts was prejudicial error in view of the evidence adduced at trial. *Id.* The Court of Appeals reasoned that if the defendant had a technical understanding of "business" in mind when he made the two consistent, though false statements, he may not have had the specific intent to falsify, conceal, or cover up a material fact. *Id.* at 967. The excluded expert testimony would have assisted the jury in evaluating whether the defendant, as a senior leader of GSA, had this technical understanding of "business" in mind.

The situation in *Safavian* is different from the situation here because unlike the defendant in *Safavian*, Dean Volkes was not convicted of having made two false though consistent statements. Instead, Dean Volkes was convicted of having perpetrated a complex fraud in which he made a number of false and inconsistent statements. Further, unlike the defendant in *Safavian* who was a trained specialist in GSA contracting protocols, there was no evidence adduced at trial to suggest that Dean Volkes had expert legal training in contract principles. Accordingly, even if Dean Volkes could present expert testimony to show that his interpretation of the contracts and fine print were reasonable, such testimony would have been irrelevant because Dean Volkes may act reasonably under a contract, but also contemporaneously have fraudulent intent. In *Safavian*, by contrast, if the defendant, indeed, believed the person from whom the defendant had received gifts did not have "business" with the GSA, in its technical meaning, then the defendant

could not have had specific criminal intent.

3. Preclusion Of Contract Law Jury Instructions

Defendants also contend that the Court's failure to provide a jury instruction relating to "contract law principles also warrants a new trial." Defs.' Mem. 125.

It is error for a court to refuse a requested jury instruction "only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant." *United States v. Friedman*, 658 F.3d 342, 352–53 (3d Cir. 2011) (quoting *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999)) (internal quotations omitted); *see Treadways LLC v. Travelers Indem. Co.*, 467 F. App'x 143, 148 (3d Cir. 2012) (providing same). The Third Circuit has articulated a specific four-part test of whether a defendant is entitled to a theory of the defense instruction. A "defendant is entitled to a theory of defense instruction if (1) he proposes a correct statement of the law; (2) his theory is supported by the evidence; (3) the theory of defense is not part of the charge; and (4) the failure to include an instruction of the defendant's theory would deny him a fair trial." *Friedman*, 658 F.3d at 352–53 (citing *United States v. Hoffecker*, 530 F.3d 137, 176 (3d Cir. 2008)). The Third Circuit has "cautioned that a defendant is 'not entitled to a judicial narrative of his version of the facts, even [if] such a narrative is, in one sense of the phrase, a []theory of defense.[]'" *Friedman*, 658 F.3d at 352–53 (citing *Hoffecker*, 530 F.3d at 176)).

The Third Circuit's decision in *Hoffecker* is instructive. In *Hoffecker*, a defendant was convicted of conspiracy to commit mail and wire fraud and three counts of mail fraud. 530 F.3d at 145. On appeal, the defendant argued that the district court erred in failing to provide eight "theory of defense" instructions relating to the criminal intent element of the crimes charged. *Id.* at 175. The district court refused to provide the defendant's instruction because, in the court's

view, the instructions constituted argument. *Id.* at 177. The Third Circuit agreed and further stated that "many of [the defendant's] 'theory of the defense' instructions, such as the 'mistake of fact' instruction and the 'lack of intent to enter a conspiracy' instruction, duplicated other instructions that the District Court gave on the subject of criminal intent, such as the charges on 'knowingly and willfully' and the 'good faith defense' to fraud." *Id.* at 177. *See also Friedman*, 658 F.3d at 354 (explaining that in "*Hoffecker*, this Court was faced with a similar argument, namely that a theory of defense to negate intent in a material misrepresentation case should have been permitted in a jury charge to explain that the defendants lacked intent . . . . However, this Court rejected that argument on the basis that it duplicated other instructions that the District Court gave on the subject of criminal intent, such as instructions on "knowingly and willfully" and the "good faith defense" to fraud.").

In this case, the Court concludes that the Court's decision not to provide Defendants' requested contract law instructions was not erroneous and does not constitute a valid ground to order a new trial.

First, while Defendants' requested civil contract law instructions may be proper statements of the law applicable to civil contract law cases, they are not proper statements of the law applicable to criminal fraud cases like this case. The Court need not instruct the jury on legal matters that are not relevant. *See United States v. DeMuro*, 677 F.3d 550, 566 (3d Cir. 2012) (citing with approval to *United States v. Buras*, 633 F.2d 1356, 1360 (9th Cir. 1980), where the Ninth Circuit concluded that where "the availability of a civil remedy is irrelevant to the issue of criminal liability, the court correctly refused to give such an instruction."). Indeed, a district "court's 'charge should direct and focus the jury's attention on the evidence given at trial, not on farfetched and irrelated ideas that do not sustain a defense to the charges involved.'"

United States v. Warner, 614 F. App'x 575, 578 (3d Cir. 2015) (quoting *Hoffecker*, 530 F.3d at 156). As discussed at length above in Section III.A.1.e, concepts like civil contract waivers, disclaimers, and integration clauses may be the proper subject of instruction in civil cases, but they are not necessarily proper in criminal fraud cases. *See, e.g.*, *Weaver*, 860 F.3d 90 (drawing distinction between civil and criminal fraud cases).

Second, Defendants have not been prejudiced nor the fairness of the trial impugned by the Court's rejection of the contract law instructions because the essence of the defense theory—that Defendants lacked the requisite criminal intent to defraud—was provided to the jury in other instructions. Defendants' theory at trial was, at base, a good faith defense to fraud or otherwise a defense based on the idea that Defendants did not have the requisite specific intent to defraud because Defendants were acting consistently with various contract provisions and RA Forms. In consideration of this defense theory, the Court explicitly charged the jury regarding the good faith defense to fraud even though the Third Circuit has noted that courts need not provide such an instruction in mail and wire fraud cases.[72] *See* Mar. 20, 2017 Trial Tr. 122:8–123:22, ECF No. 321. The Court also charged the jury with respect to the criminal intent element of each of the crimes for which Defendants were charged. *See generally* Mar. 20, 2017 Trial Tr. 84:9–170:19, ECF No. 321 (charging jury on each crime and all relevant criminal law concepts including the mens rea element of each crime). Having expressly charged the jury on the good faith defense theory and the Government's burden of proving the criminal intent element of each crime charged in the indictment beyond a reasonable doubt, the Court concludes that Defendants suffered no prejudice from the omission of any contract law instructions.

[72] Third Circuit Model Crim. Jury Instructions, 6.18.1341-4 (Comm. on Model Crim. Jury Instructions 3d Cir. 2017) (explaining that a "good faith defense instruction is generally not necessary in mail and wire fraud cases . . . ").

The Court's decision not to instruct the jury did not prohibit Defendants from arguing that Defendants relied on the contracts and that Defendants' good faith beliefs were inconsistent with a conviction for fraud. Indeed, Defendants presented this precise argument to the jury in closing, having pursued the theory throughout trial. Defendants argued in closing:

> What makes this case different from most cases is the long list of charges . . . flow from one central contested issue in the case . . . and that is . . . what was Mr. Volkes'[s] intent in managing some indates for his clients and not managing them for others? . . . . Did he have the good faith belief that he could salvage unmanaged indates for the benefit of his company? . . . . If Mr. Volkes in good faith thought he could keep the indates under the contracts and the RA Forms, he did not commit fraud . . . . If Mr. Volkes in good faith thought he could keep the indates, he cannot be said to have stolen them . . . . If Mr. Volkes in good faith believed that the contracts gave him the right to salvage indates, there would be no motive to hide anything from the Government . . . . If Mr. Volkes in good faith thought he had the contractual right to keep these indates, there would be no reason to conceal their source through the straightforward financial transactions that the Government somehow has attempted to label money laundering . . . .

Mar. 16, 2018 Trial Tr. 93:1–94:3, ECF No. 334. *See also* Mar. 16, 2018 Trial Tr. 95:9–19, ECF No. 334 (indicating that good faith is a complete defense to fraud and that Dean Volkes believed he had the right to keep indates); Mar. 16, 2018 Trial Tr. 106:16–20 (arguing that "the legal documents control the relationship, and the legal documents say no indates. It's as simple as that."); Mar. 16, 2018 Trial Tr. 141:14–20 (arguing that "Mr. Volkes cannot be convicted of fraud or theft of government property if he in good faith believed he had the right to those abandoned indates . . ."). Defendants, thus, fairly presented their defense theory to the jury in the context of the Court's good faith defense instruction and the Court's various instructions relating to the criminal intent applicable to each of the charged crimes. The Court finds no prejudice on these facts.

That no prejudice resulted from the Court's omission of Defendants' contract law

instructions is further supported by the fact that the good faith defense does not require that a defendant's good faith belief be reasonable, or factually or legally correct. It is well-established that a defendant cannot be convicted for fraud even though his good faith "belief, opinion, or understanding" about his actions "turns out to be inaccurate or incorrect." Mar. 20, 2017 Trial Tr. 122:8–24, ECF No. 321 (providing good faith jury charge). Accordingly, whether or not Defendants' beliefs about their actions were consistent with civil contract law principles or whether or not Defendants' interpretation of the RA Forms or other form contracts was reasonable was not essential to the Defendants' good faith defense. Rather, Defendants' good faith defense required only that Defendants had a subjective, honest belief that their actions were not unlawful. The jury considered the evidence and determined that Defendants had the criminal intent sufficient to convict Defendants beyond a reasonable doubt.

4. Alleged Prosecutorial Misconduct: Dismissal Of Indictment Not Warranted; Purported Discovery Delays Did Not Rise To The Level Of A *Brady* Violation; Prosecutor Reference To Exhibit Not In Evidence Not Sufficient Reason To Order New Trial

a. Dismissal Of Indictment Not Warranted

Defendants next contend that the Superseding Indictment must be dismissed because it was based on false testimony. Specifically, Defendants contend that Agent Woodring falsely testified to the grand jury that the 2001 Department of Defense ("DOD") Contract "covered" "indate management" even though Agent Woodring's notes after two conversations (one in March 2010 and another in December 2010) with trial witness Vincent Valinotti purportedly suggested that the 2001 DOD Contract "did not apply to indates." Defs.' Mem. 153, ECF No. 344. Ultimately, Defendants are not entitled to dismissal of the indictment because the indictment was not based on false testimony regarding Guaranteed Returns's responsibility for managing government indates. In fact, the evidence at trial proved that Guaranteed Returns was

not permitted to retain indates under the 2001 DOD Contract for Guaranteed Returns own benefit.

At base, Defendants take issue with paragraph 22 of the Superseding Indictment, which provides that the Government awarded the 2001 DOD Contract to Guaranteed Returns "for its services in connection with the return of pharmaceutical products, including indated drug products . . . . Through this contract, [the Government] also handled the returns of pharmaceutical products, including indated drug products." Defs.' Mem. 155, ECF No. 344 (citing Superseding Indictment 7–8, ECF No. 120). Defendants contend that Agent Woodring's notes from discussions with trial witness Vincent Valinotti conclusively established that the 2001 DOD Contract did not require Guaranteed Returns to hold Government indates on behalf of the Government because the term "indates" was not used in the text of the 2001 DOD Contract. Accordingly, when Agent Woodring testified before the grand jury and represented that Guaranteed Returns was not permitted to keep indates under the 2001 DOD Contract, Agent Woodring's testimony was false and, therefore, paragraph 22 of the Superseding Indictment is false. Defs.' Mem. 153–57. This falsity constitutes grounds, Defendants contend, to dismiss the Superseding Indictment.

Defendants' argument, however, fails because paragraph 22 of the Superseding Indictment is not false nor was it based on false testimony.

First, the particular allegation in the Superseding Indictment that Defendants contend is false was actually proven true at trial. The Superseding Indictment alleged that the Government awarded the 2001 DOD Contract to Guaranteed Returns "for its services in connection with the return of pharmaceutical products, including indated drug products . . . . Through this contract, [the Government] also handled the returns of pharmaceutical products, including indated drug

products." Superseding Indictment 7–8, ECF No. 120. That the 2001 DOD Contract included indates was proven at trial through, among other things, testimony from Vincent Valinotti, a contracting officer for the Department of Defense's Defense Logistics Agency—formerly the Defense Supply Center of Philadelphia.

At trial, Vincent Valinotti—the administrator of the pharmaceutical returns contracts at the Defense Logistics Agency—testified about the process used to solicit Guaranteed Returns's services and explained that the 2001 DOD Contract covered indates even though the term "indates" was not used to describe soon-to-be or not-yet-expired products. *See* Feb. 9, 2017 Trial Tr. 44, ECF No. 286 (Valinotti) (explaining his experience with the 2001 DOD Contract); Feb. 9, 2017 Trial Tr. 55, ECF No. 286 (Valinotti) (explaining that indates were included in various categories of the 2001 DOD Contract). Valinotti explained that even though the term "indates" was not used, indated drugs that were sent to Guaranteed Returns under the 2001 DOD Contract would "fall into one of th[e] two categories [under the Contract]. So when the indated drugs reached their expiration date, they would either be returnable or non returnable." Feb. 9, 2017 Trial Tr. 62, ECF No. 286 (Valinotti). That indates were included under the 2001 DOD Contract was consistent with the fact that the disposal of government property at the Defense Logistics Agency was handled through a separate arm of the Defense Logistics Agency—DLA Disposition Services—and that government property was not generally donated to private for profit companies. Feb. 9, 2017 Trial Tr. 57, ECF No. 286 (Valinotti). The jury was entitled to conclude, as they did, that Defendants were not entitled to retain indates under the 2001 DOD Contract for Defendants' own benefit. The jury was also entitled to conclude that Defendants' theory that the Department of Defense provided Guaranteed Returns with valuable indates without an expectation of payment was inconsistent with the terms of the 2001 DOD Contract

and Department of Defense policy relating to the disposal of valuable government property.

Other witnesses and physical evidence also showed that Guaranteed Returns understood that its obligations under the 2001 DOD Contract included managing government indates. For example, in 2004, Guaranteed Returns provided training materials to its sales personnel in which Guaranteed Returns included a screenshot of a computer indate file showing that Guaranteed Returns was aging indated drugs for the "72nd Medical Group" part of the "DOD-DSC," a medical support arm of the Department of Defense. GX 2-38 at 22. *See also* Feb. 8, 2017 Trial Tr. 22–23, ECF No. 285 (Dooley) (testifying that as the point of contact at Guaranteed Returns for military accounts, Dooley told Guaranteed Returns's military customers that indate management was "part of the service."); Feb. 6, 2017 Trial Tr. 147–48, ECF No. 297 (Gingrich) (testifying that, as a sales representative for Guaranteed Returns specifically working on Department of Defense contracts between 2002 and 2004, he understood that Guaranteed Returns was managing indates for the Department of Defense); Feb. 14, 2017 Trial Tr. 172, ECF No. 298 (Frechette) (explaining that from 2001 to 2004 Guaranteed Returns used a slide show presentation in connection with Department of Defense contracts and other government contracts that defined "creditable items" as including "outdated, short-dated, recalled, and overstocked products," and that "short-dated" products were products that were "still in date.").

This, among other pieces of evidence, constituted a sufficient basis from which the jury could conclude, as it did, that Guaranteed Returns and Dean Volkes were required to manage the Department of Defense's indates or else return the indates to the Department of Defense as of 2001. Thus, paragraph 22 of the Superseding Indictment was not only true on its face, but true in fact. Superseding Indictment 7–8, ECF No. 120.

Second, Agent Woodring's testimony to the grand jury in support of paragraph 22 of the

Superseding Indictment was not false. Defendants contend that Agent Woodring's notes, admitted as exhibits DX 3560-I and DX 3560-J, conclusively show that Agent Woodring knowingly and falsely testified in support of paragraph 22 of the Superseding Indictment. As an initial matter, Agent Woodring testified at trial that she could not recall whether her notes related to the 2001 DOD Contract or to the 2007 DOD Contract. Mar. 7, 2017 (afternoon) Trial Tr. 64, ECF No. 326 (Woodring). Accordingly, Defendant's contention that the notes, DX 3560-I and DX 3560-J, show that Agent Woodring knew that the 2001 DOD Contract "did not cover indates" is not supported by the record. The record leaves no basis to make such a sweeping conclusion, especially in view of the overwhelming evidence at trial that the 2001 DOD Contract did cover indates.

Even if the Court assumed, for the sake of argument, that the notes referred to the 2001 DOD Contract, the notes do not foreclose the jury's conclusion that the 2001 DOD Contract covered indated drugs even though the 2001 DOD Contract did not use the term "indates." As discussed in detail above, the absence of the word "indate" from the 2001 DOD Contract is not dispositive of the issue of what Guaranteed Returns was permitted to do with the Government's valuable indates. Agent Woodring's testimony, therefore, was not false, but indeed, consistent with Vincent Valinotti's trial testimony. The Court concludes that there is no basis to dismiss the Superseding Indictment on grounds that it was based on false testimony.

b. Purported Discovery Delays Did Not Rise To The Level Of A *Brady* Violation

Defendants also contend that the Superseding Indictment must be dismissed because the Government has committed a *Brady* violation. The Government's purported *Brady* violation stems, in essence, from what Defendants perceive as the dilatory production of two pieces of evidence: (1) Agent Woodring's notes from her two meetings with trial witness Vincent

Valinotti ("Valinotti Notes"), and (2) a report generated in connection with a Government interview of non-trial witness Linda Magazu ("Magazu Interview Report").

To establish a *Brady* violation, "a defendant must show that (1) the government withheld evidence, either willfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material.[]" *United States v. Walker*, 657 F.3d 160, 185 (3d Cir. 2011) (citing *Lambert v. Blackwell*, 387 F.3d 210, 252 (3d Cir. 2004)). Evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[]" *Id.* (quoting *Lambert v. Beard*, 633 F.3d 126, 133 (3d Cir. 2011)). The Third Circuit has explained that "the touchstone of materiality is a reasonable probability of a different result." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (internal quotations omitted). The focus of a *Brady* inquiry is on whether "the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). "In order to find a *Brady* violation in the first place, a court must find that some prejudice ensued to the defendant." *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 257 n.10 (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). The focus on prejudice, thus, means that "[n]o denial of due process occurs if *Brady* material is disclosed in time for its effective use at trial." *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) (citing *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983)).

It is well-established that "[w]here the government makes *Brady* evidence available during the course of a trial in such a way that a defendant is able effectively to use it, due process is not violated and *Brady* is not contravened." *United States v. Johnson*, 816 F.2d 918, 924 (3d Cir. 1987) (citing *United States v. Peters*, 732 F.2d 1004 (1st Cir. 1984)) (emphasis added); *see*,

e.g., *United States v. Moreno*, 727 F.3d 255 (3d Cir. 2013) (concluding that the Government's disclosure of documents favorable to the defense at 7:00 p.m. the night before trial did not constitute a *Brady* violation because the defendant was able to use the documents effectively at trial). Indeed, "not every failure to disclose evidence favorable to the defense requires a reversal of a conviction." *United States v. Veksler*, 62 F.3d 544, 550 (3d Cir. 1995).

In this case, Defendants have not established that the Government withheld evidence such that Defendants from using the evidence effectively at trial nor have Defendants established that they have been prejudiced by any delay in the production of evidence. The Court finds no reason to believe that confidence in the outcome of the trial has been undermined by the Government's handling of the Valinotti Notes and the Magazu Interview Report for at least two reasons.

First, the Government, in fact, produced the Valinotti Notes and the Magazu Interview Report to Defendants. The Valinotti Notes were produced to Defendants on February 5, 2017—four days before Valinotti testified and two days before Robert Dooley testified, the only other witness to whom the Valinotti Notes were arguably relevant. Indeed, Defendants themselves identified the Valinotti notes as defense exhibits during trial. DX 3560-I; DX 3560-J. Similarly, the Magazu Interview Report was produced to Defendants on January 27, 2017—nearly five days before opening statements began and thirty-eight days before Agent Woodring testified. Defendants also introduced the Magazu Interview Report as a defense exhibit during trial. Mar. 7, 2017 Trial Tr. 83:12–13 (introducing DX 3569, the Magazu Interview Report, as an exhibit to refresh a witness's recollection).

Second, the Government's disclosure was sufficient, under the circumstances, to provide Defendants with the opportunity to use the Valinotti Notes and Magazu Interview Report

effectively. Defendants argue that Defendants' case was prejudiced by the Government's late disclosure of the Valinotti Notes in three ways: (1) it prevented Defendants from using the Valinotti Notes to support their pretrial motion to dismiss the Superseding Indictment or to challenge search warrants executed against Guaranteed Returns, (2) it prevented Defendants from using the Valinotti Notes in their opening statements, and (3) it prevented Defendants from incorporating the Valinotti Notes into their cross examination of Robert Dooley. Defs.' Mem. 158–59, ECF No. 344. The Court rejects each of these alleged forms of prejudice.

First, as discussed in detail above, Valinotti's testimony at trial established that even though the 2001 DOD Contract may not have used the term "indates," Valinotti explained that indated drugs that were sent to Guaranteed Returns under the 2001 DOD Contract would "fall into one of th[e] two categories [under the Contract]. So when the indated drugs reached their expiration date, they would either be returnable or non returnable." Feb. 9, 2017 Trial Tr. 62, ECF No. 286 (Valinotti). This information would not have provided a sufficient basis to dismiss the Superseding Indictment or challenge the underlying search warrants. This is especially the case given the fact that Defendants unsuccessfully presented this exact argument to the Court as part of its pretrial motion to dismiss the Superseding Indictment. The Court rejected Defendants' argument by an Order and Opinion dated January 10, 2017. *See* Order, ECF No. 172; Mem. Op. 22–25, ECF No. 171.

Second, the fact that the Valinotti Notes were not produced before Defendants' opening statements is not sufficient, standing alone, to warrant a new trial. *See, e.g.*, *United States v. Johnson*, 816 F.2d 918, 924 (concluding that the government's failure to provide purportedly exculpatory fingerprint reports before trial was not a *Brady* violation because the defendant "had access to the reports before any cross-examination took place and referred to the reports when

cross-examination did take place."). In this case, even without the Valinotti Notes, Defendants' opening statement foreshadowed the point that Defendants ultimately made with the Valinotti Notes. In their opening statement, Defendants told the jury that "the 2001 Department of Defense Contract[] had no provision, it was silent, on the issue of indates. It didn't say a word . . . . and you will hear from witnesses about that contract." Feb. 1, 2017 Trial Tr. 130:5–25. Later, at trial, Defendants used the Valinotti Notes to support the theory that they had presented to the jury in their opening. On these facts, the Court finds no prejudice to Defendants.

Third, the Valinotti Notes were produced to Defendants two days before Robert Dooley testified, and more than forty days before the end of the Parties' presentation of evidence. Nothing prevented Defendants from effectively using the Valinotti Notes to cross examine Robert Dooley or any other witness.

As for the purportedly late disclosure of the Magazu Interview Report, Defendants argue that it prevented defense counsel from integrating the Magazu Interview Report into their pretrial strategy. In particular, Defendants argue that the late disclosure affected their decision over whether to call Magazu as a trial witness. Defs.' Mem. 159, ECF No. 344. The Court is unpersuaded by this assertion of prejudice because the Magazu Interview Report was produced to Defendants over forty days before Defendants ultimately decided to present any evidence as part of its case-in-chief. Indeed, Defendants made a decision not to call Magazu after using the Magazu Interview Report during their cross examination of Agent Woodring. *See* Mar. 6, 2017 Trial Tr. 182:18–183:16 (DX 3569-A and -B identified, but not admitted, to refresh Woodring's recollection). Accordingly, Defendants were well aware of the Magazu Interview Report by the time of Agent Woodring's cross examination and could have decided at any time to call Magazu as a witness for the defense. The late disclosure of the Magazu Interview Report, in short, did

not prejudice Defendants.

c. Prosecutor Reference To Exhibit Not In Evidence Not Sufficient Reason To Order New Trial

Defendants also seek a new trial on grounds of prosecutorial misconduct. The prosecutorial misconduct at issue is the Government's discussion during rebuttal summation of a document that was not admitted into evidence, GX 3-380. GX 3-380 is a Microsoft Office task list dated October 8, 2010 that is relevant, as the Government prosecutor argued, to the hidden fees adjustment scheme charged in Counts 41 through 52. Defendants contend that the Government's admittedly mistaken, though inadvertent, reference to and argument about GX 3-380 was so prejudicial that the Court should order a new trial. *See* Mar. 20, 2017 Trial Tr. 80:11–15 (Government counsel explaining "Your Honor, my records indicated that it was admitted. Obviously I would not have deliberately put anything in front of the jury that was not admitted."); Mar. 20, 2017 Trial Tr. 82:5–7 (Government counsel explaining "I did not intend to do anything like [introduce documents not in evidence] . . . [GX 3-380] was in the documents that I showed as being admitted."); Gov't's Resp. in Opp'n 119–20 (providing that "government counsel deeply regrets the mistake"). The Court disagrees because even though the Government's actions constitute error, the error was harmless in view of the Court's curative instruction and the weight of the evidence presented over the course of the eight-week trial.

During the Government's rebuttal summation, defense counsel objected to the Government's reference to GX 3-380. Accordingly, after confirming that GX 3-380 was, in fact, not in evidence, the Court provided a curative instruction to the jury explaining that:

> I instruct you that GX 3-380 is not in evidence. Therefore, that aspect of [the Government's] argument is stricken, meaning that you must disregard the document itself and all arguments relating to it, and neither the document nor the related arguments may be considered by you in any way during your deliberations.

Mar. 20, 2017 Trial Tr. 84:21–85:2, ECF No. 321. The Court provided a written copy of this instruction for the jury's use in deliberations.

Two days later, the Court received a note from the jury, identified as Court Exhibit 8, requesting, among other documents, a copy of GX 3-380. Mar. 22, 2017 Trial Tr. 14:18– 15:2; Minute Sheet, Court Exhibit 8, ECF No. 314. As GX 3-380 had not been admitted into evidence, the Court provided a written response to the jury inquiry instructing the jury that the exhibit was not in evidence and that the jury should refer to page five of the Court's jury instruction, which contained a verbatim restatement of the verbal instruction that the Court provided two days earlier relating to GX 3-380. Mar. 22, 2017 Trial Tr. 15:18–20 (the Court stating "the Court will . . . respond to the request [for GX 3-380] that the exhibit was not admitted into evidence."); Mar. 22, 2017 Trial Tr. 17:20–18:7 (defense counsel asking whether the Court would "ask the jury to come out so [the Court] can give that instruction about 380" and the Court responding that the Court had already "directed [the jury] to the instructions that they have in front of them").

Later, at the request of defense counsel, and after the Court had already responded to the jury by directing the jury to refer to the Court's earlier instruction to disregard GX 3-380 and any argument about GX 3-380, the Court called the jury to the courtroom to provide the same curative verbal instruction again. Mar. 22, 2017 Trial Tr. 21:15–22:11. After instructing the jury again, the jury retired to continue deliberations. The Court then received an envelope from the jury, but the envelope was empty. Mar. 22, 2017 Trial Tr. 27:20–21 (the Court noting that "I got an envelope, but it did not have anything in it."); Mar. 22, 2017 Trial Tr. 27:25 – 28:1 (the Court noting that "the record should also reflect that I received an envelope, but the envelope was empty."). Thereafter, the Court received a note, Court Exhibit 10-A, indicating that the jury had

reached a verdict. Minute Sheet, Court Ex. 10-A, ECF No. 314.

The Court finds that, in this case, the Government's admittedly erroneous reference to and argument about a document not in evidence was not so prejudicial that it undermined the fundamental fairness of the eight week trial. Accordingly, the Court will not grant a new trial on this basis.

When considering situations involving prosecutorial error, the Supreme Court has instructed courts to focus on whether a prosecutor's actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Factors that courts consider in making such determinations are: "(1) the cumulative effect of the misconduct, (2) the strength of the properly admitted evidence of guilt, and (3) the curative actions taken by the trial court." *United States v. Abrams*, 108 F.3d 953, 954 (8th Cir. 1997) (citing *United States v. Jackson*, 41 F.3d 1231, 1233 (8th Cir. 1994)).

Here, the relative strength of the properly admitted evidence of guilt and the curative actions taken by the Court militate against Defendants' argument in favor of a new trial. The offending conduct in this case consisted of several references to a single exhibit during rebuttal summation and the publication of that single exhibit to the jury for "several minutes." Defs.' Mem. 152. In comparison to the hours of testimony presented to the jury and the hundreds of exhibits, the short discussion and display of GX 3-380 was of relatively little consequence. Indeed, as discussed above, the evidence of Defendants' guilt on Counts 41 through 52 was strong.[73] To the extent that the Government's error did result in any prejudice, the Court adequately mitigated the prejudice by issuing a curative verbal instruction to the jury on three

[73] *See* Section III.A.2 above for a discussion of the sufficiency of the evidence in support of Defendants' convictions on Counts 41 through 52.

separate occasions.[74] The Court concludes that the prosecutorial error did not undermine the fundamental fairness of the eight-week trial or infect the trial with unfairness such that the trial resulted in a denial of due process.

5. Admission Of Evidence And Defendants' Motion For Severance

Defendants next argue that a new trial is warranted because the Court erred in denying Defendants' request to sever the trial of Guaranteed Returns from the trials of Donna Fallon and Dean Volkes. Defendants argue that the Government's admission of audio recordings taken of Guaranteed Returns's employee Sharon Curley, a direct report to Donna Fallon in the Reconciliations Department, and the Government's admission of Guaranteed Returns's company emails prejudiced Defendants. The Court concludes, however, that Defendants have failed to establish their heavy burden of demonstrating that their joint trial caused "*clear and substantial prejudice*" to Defendants such that the Defendants received a "*manifestly unfair trial*." *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991) (citing *United States v. Reicherter*, 647 F.2d 397, 400 (3d Cir. 1989)).

It is a well-accepted rule that "defendants jointly indicted should be tried together to conserve judicial resources." *Eufrasio*, 935 F.2d at 568 (citing *United States v. Sandini*, 888 F.2d 300, 306 (3d Cir. 1989)). The "public interest in judicial economy favors joint trials where the same evidence would be presented at separate trials of defendants charged with a single conspiracy." *Id.* (citing *United States v. De Peri*, 778 F.2d 963, 984 (3d Cir. 1985)).

[74] Mar. 20, 2017 Trial Tr. 84:21–85:2, ECF No. 321 (providing oral instruction to disregard GX 3-380 and any argument about GX 3-380); Mar. 22, 2017 Trial Tr. 15:18–20 (recording that the Court had provided a written response to the jury's request for GX 3-380 telling the jury to refer to the Court's earlier instruction that GX 3-380 was not in evidence and that the jury should not consider GX 3-380 or any argument about the document); Mar. 22, 2017 Trial Tr. 21:15–22:11 (providing instruction to the jury for a third time that the jury should not consider GX 3-380 in the jury's deliberations).

Accordingly, where there is the potential for substantial overlap in the evidence that would be presented if jointly indicted defendants are tried separately, then the district court would be within its discretion to deny a motion to sever. *Id.* at 569. If a district court has not abused its discretion in denying a motion to sever then the defendant must carry the heavy burden of demonstrating "*clear and substantial prejudice* resulting in a *manifestly unfair trial*." *Id.* at 568 (citing *Reicherter*, 647 F.2d at 400).

The Third Circuit has instructed that "[w]ith respect to prejudice, '[t]he proper question on appeal is whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence.'" *Id.* (citing *De Peri*, 778 F.2d at 984). The Third Circuit has also emphasized that "[p]rejudice should not be found in a joint trial just because all evidence adduced is not germane to all counts against each defendant." *Id.* (citing *Sandini*, 888 F.2d at 307). That the burden of showing prejudice resulting from a joint trial is particularly heavy is supported by the fact that joint trials are routinely upheld. Even where there is a risk of prejudice from a joint trial, a district court may mitigate the risk by instructing the jury specifically that the jury must consider the evidence relating to each defendant separately. *See, e.g.*, *United States v. Brassington*, No. 09-CR-45 DMC, 2011 WL 3475471, at *10 (D.N.J. Aug. 9, 2011) (concluding that court instruction to jury to consider each defendant separately was sufficient to safeguard against improper jury conclusions about the guilt or innocence of codefendants).

In this case, the Court concludes that a joint trial served the public interest and that there was no material prejudice to Defendants by the admission of evidence that was relevant to one or more Defendants but not all Defendants.

First, given the information available to the Court at the time of Defendants' request for severance, joint trial was appropriate. Defendants had been jointly indicted and the volumes of likely evidence to be presented appeared, on balance, to apply to two or more of the Defendants. Accordingly, it appeared at the time, and indeed was evident after the close of the trial, that severance of the individual Defendants was not necessary and would have contravened the public interest.

Second, Defendants have not established "*clear and substantial prejudice* resulting in a *manifestly unfair trial*." *Eufrasio*, 935 F.2d at 568 (citing *Reicherter*, 647 F.2d at 400). The Court is confident in this case that the jury was fully capable of compartmentalizing all evidence and considering the evidence as to each Defendant individually. The Court's confidence is grounded in the fact that the Court specifically instructed the jury about their duty to consider the Defendants separately and the jury's mixed verdict is proof that they were able to compartmentalize the evidence as to each Defendant. Mar. 22, 2017 Trial Tr. 104:24–105:20 (instructing the jury that, among other things, "you must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant for each offense."); s*ee generally* Jury Verdict Form 21–26 (showing that the jury found Donna Fallon guilty on some counts and finding Dean Volkes not guilty on some counts while finding Dean Volkes guilty on some counts and Donna Fallon guilty on others). The Court is satisfied that the jury understood the Court's instruction to consider all evidence as to each offense and each Defendant separately and that the jury heeded the Court's instruction. Accordingly, Defendants suffered no prejudice as a result of their joint trial. Rather, Defendants' joint trial promoted the public interest in judicial economy by avoiding the need to put on duplicative trials in which much of the same overlapping evidence would have been presented.

6. Counts 41 Through 52: Alleged Constructive Amendment

Defendants next argue that the jury verdict form provided to the jury "referred generally to 'undisclosed fees' as the basis for Counts 41 through 52, instead of identifying the charged 'adjustment scheme,' as the charges had been explained to the Grand Jury." Defs.' Mem. 176. This, Defendants assert, amounted to a "constructive amendment and mandates a reversal." Defs.' Mem. 176. Contrary to Defendants' argument, however, the jury verdict form was fully consistent with the charging allegations contained in the Superseding Indictment. Therefore, the Court concludes that no constructive amendment occurred.

"A constructive amendment occurs where a defendant is deprived of his 'substantial right to be tried only on charges presented in an indictment returned by a grand jury.'" *United States v. Syme*, 276 F.3d 131, 148 (citing *United States v. Miller*, 471 U.S. 130, 140 (1985)); *see also United States v. Daraio*, 445 F.3d 253, 259–60 (3d Cir. 2006) (explaining that "[a]n indictment is constructively amended when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged."). "The key inquiry is whether the defendant was convicted of the same conduct for which he was indicted." *Daraio*, 445 F.3d at 260 (quoting *United States v. Robles–Vertiz*, 155 F.3d 725, 729 (5th Cir. 1998)). "If a defendant is convicted of the same offense that was charged in the indictment, there is no constructive amendment." *United States v. Vosburgh*, 602 F.3d 512, 532 (3d Cir. 2010) (citing *United States v. Patterson*, 348 F.3d 218, 227 (7th Cir. 2003)). Thus, the Third Circuit has concluded that even where the drafting of an "indictment is below the level of clarity to which prosecutors should aspire," so long as the indictment, in fact, charges the offense for which a

defendant is ultimately convicted, there is no constructive amendment. *Syme*, 276 F.3d at 151.

The Third Circuit's decision in *Syme* is instructive. In that case, the defendant, Syme, argued that the district court constructively amended the indictment by instructing the jury on a theory of fraud that was not alleged in the indictment. *Syme*, 276 F.3d at 149 (providing that "[t]he text of the indictment for counts 18–29 does not specifically charge Syme under the Pennsylvania rate theory of fraud."). Syme had been indicted for fraudulent billing through the Medicare and Medicaid programs for ambulance trips that his company provided. *Id.* at 135–36. Syme overbilled the Medicare and Medicaid programs by fraudulently billing the programs at higher Pennsylvania ambulance rates rather than lower Delaware and Maryland ambulance rates. *Id.* This theory of fraud, known as the "Pennsylvania rate theory" was not mentioned in the text of the indictment relating to counts 18–29. *Id.* at 149. Nevertheless, the district court instructed the jury on more than one occasion that the jury could convict based on the Pennsylvania rate theory despite any mention of the theory in the indictment. *Id.*

On appeal, the Third Circuit concluded that while the indictment, indeed, failed to mention the Pennsylvania rate theory explicitly, the indictments use of a chart in which the abbreviation "PA" appeared in a column labeled "False State." was a sufficient statement of the conduct for which Syme was to stand trial and for which he was ultimately convicted. *Id.*at 151. Accordingly, the Third Circuit concluded that no constructive amendment had occurred even though the Pennsylvania rate theory for those counts in the indictment were not explicitly mentioned, the indictment was "somewhat inconsistent internally," and the "indictment [was] below the level of clarity to which prosecutors should aspire." *Id.*

In this case, the jury verdict form was fully consistent with the Superseding Indictment. In Counts 41 to 52 of the Superseding Indictment, the Grand Jury charged that Defendants

Guaranteed Returns represented to its clients that it would "return products through wholesalers without pass through fees." Superseding Indictment 22, ECF No. 120. The Grand Jury further charged that "[d]espite these representations, defendants GUARANTEED RETURNS, DEAN VOLKES, and DONNA FALLON charged healthcare provider clients additional hidden fees." Superseding Indictment 22 (emphasis added). While Defendant Guaranteed Returns "sometimes disclosed additional fees to clients on the company's 'extranet' . . . the fees set forth on the extranet did not accurately reflect the higher fees that GUARANTEED RETURNS actually assessed." Superseding Indictment 22 (emphasis added). Accordingly, the Grand Jury charged Defendants of having "knowingly devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses representations, and promises." Superseding Indictment 24. To effectuate this scheme, Defendant Dean Volkes instructed his "Information Technology staff to write computer programs that would increase the revenue obtained by defendant GUARANTEED RETURNS and ultimately, the income of defendant DEAN VOLKES." Superseding Indictment 23. "Among those programs," was a program known as the "adjustment program." Superseding Indictment 23.

The jury verdict form tracked the allegations of the Superseding Indictment closely. The jury verdict form provided:

> Counts 41 through 52 charge Guaranteed Returns, Dean Volkes and Donna Fallon with knowingly devising and intending to devise a scheme to defraud, and to obtain money and property, by means of false and fraudulent pretenses, representations, and promises, specifically by charging undisclosed fees, including by an adjustment program that allegedly reduced the amount of refunds from manufacturers that were distributed to customers, in violation of 18 U.S.C. § 1341.

Jury Verdict Form 15, ECF No. 315. The jury verdict form explicitly referenced the

"undisclosed fees" or "hidden fees" that were identified in the Superseding Indictment. Unlike in *Syme* where the indictment made no explicit mention of a theory of fraud on which the jury was instructed, in this case, the Superseding Indictment and the jury verdict form both make explicit reference to the "undisclosed" or "hidden" fees fraud scheme. This case, therefore, does not present a "substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *Daraio*, 445 F.3d at 259–60. The jury verdict form did not effectuate any constructive amendment of the Superseding Indictment.

C. Alleged Prejudicial Spillover

As the Court has not granted Defendants' Motion for Acquittal or Motion for New Trial as to any of the crimes for which the Defendants were convicted by the jury, the Court need not address Defendants' alternate argument for new trial due to any prejudicial spillover.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motions for Judgment of Acquittal and, in the Alternative, a New Trial are DENIED. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	
	:	**NO. 14-574**
DEVOS LTD. d/b/a GUARANTEED RETURNS, et al.	:	

ORDER

AND NOW, this __17th__ day of January, 2019, upon consideration of Defendants' Motions for Judgment of Acquittal and, in the Alternative, a New Trial (Doc. 344), the United States' Response to Defendants' Post-Trial Motions (Doc. 359), Defendants' Reply in Opposition thereto (Doc. 370), and all letter briefs filed by Defendants, **IT IS HEREBY ORDERED AND DECREED** that Defendants' Motions for Judgment of Acquittal and, in the Alternative, a New Trial are **DENIED**.[1]

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

[1] This Order accompanies the Court's Memorandum Opinion dated January 17, 2019.