**No. 16-2269**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAIME C. LOPEZ,
Defendant-Appellant.

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On Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
The Honorable Tanya Walton Pratt
Case No. 15-cr-00069

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# BRIEF OF APPELLANT

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## DISCLOSURE STATEMENT

I, the undersigned counsel for Defendant-Appellant, Jaime C. Lopez, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Jaime C. Lopez.

2. This party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O'Rourke Schrup (attorney of record) and Wyatt Honse and Patrick Simonaitis (senior law students) of the Bluhm Legal Clinic at the Northwestern Pritzker School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear: Charles Hayes and Kathleen Sweeney of Sweeney Hayes LLC, 141 E. Washington St. Ste. 225, Indianapolis, IN 46204.

/s/ Sarah O'Rourke Schrup
Date: December 6, 2016

Pursuant to Circuit Rule 3(d), I am the Counsel of Record for the above-listed party.

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## JURISDICTIONAL STATEMENT

The government charged Jaime Lopez in a sixty-six-count indictment with violations of 18 U.S.C. §§ 1343 and 1957 and 15 U.S.C. §§ 78j(b) and 78ff(a). (R.1.)[1] The United States District Court for the Southern District of Indiana exercised jurisdiction over Lopez's prosecution pursuant to 18 U.S.C. § 3231, which grants district courts original jurisdiction of "all offenses against the laws of the United States." The government submitted, and the district court granted, a motion to dismiss multiple counts in the original indictment, leaving twenty counts against Lopez alleging violations of the above-mentioned statutes. (A.30.)

The government tried Lopez before a jury, which found him guilty of all twenty counts remaining against him: fifteen counts of wire fraud, four counts of money laundering, and one count of securities fraud. (A.8–27.) The district court entered judgment on May 24, 2016, and sentenced Lopez to fifty-seven months in prison, three years of supervised release, and $293,171.84 in restitution. (A.1–8.) Lopez timely filed notice of appeal, pursuant to an oral request at the conclusion of his sentencing hearing, on May 19, 2016. (A.29.) This Court has jurisdiction over "all final decisions of the district courts of the United States" pursuant to 28 U.S.C. § 1291.

[1] Citations to the attached and separate appendix are designated as (A.___). The consecutively paginated pretrial hearing transcripts are cited as ([date] Hr'g Tr. ___) and the trial transcripts are cited as (Trial Tr. ___). All other references to the record are cited as (R.__).

## STATEMENT OF THE ISSUES

1. Whether the district court denied Lopez a fair trial by allowing the government's summary witness to testify that payments made by Lopez to his clients were "lulling payments" intended to deceive them into a sense of comfort.

2. Whether Lopez was denied a fair trial after the government twice compared him to infamous fraud perpetrator Bernie Madoff during closing arguments and the district court failed to correct the error.

3. Whether the district court erred in not following the requirements of Federal Rule of Evidence 702 by preventing defense expert witness Michael Alerding from testifying as an expert at trial.

4. Whether the district court abused its discretion by failing to allow Lopez to fully impeach the initial complaining witness Danny Cole through extrinsic evidence of a prior inconsistent statement.

## STATEMENT OF THE CASE

In 2008, in the wake of the financial crisis, Jaime Lopez and his wife Amanda moved from California to Indiana to be closer to Amanda's family and to start a family of their own. (Trial Tr. 2-557–59.) With his wife's now-successful consulting firm still in its nascent stages, Lopez likewise set out on an entrepreneurial path by starting his own investment company: JCL & Company, Inc.

JCL & Company was an ambitious undertaking. At its core, the company's goal was to act as a private source of capital for growing businesses and to eventually purchase and operate other businesses that it would manage. (Gov't Ex. 9K (Confidential Offering Memorandum – Summary of the Offering).) The company planned to offer promissory notes at fixed rates and then either earn profit when its investments exceeded the promised rate of return, or lose money if the returns were less than expected. (Gov't Ex. 7K.) JCL would accomplish this goal by conducting due diligence on target companies and investing where it saw growth potential above the interest rates that it was paying to investors. (Gov't Ex. 7K.)

Such a business needs a large amount of capital to succeed, and it is an undertaking not without risk, as Lopez broadcast throughout his offering materials. (Gov't Ex. 7K at 14–15.) ("We cannot assure you that our business strategy will succeed or that we will achieve our anticipated financial results. Our financial and operational performance depends upon a number of factors, many of which are beyond our control. . . . [W]e may not be able to generate sufficient cash flow from operations or to obtain sufficient funding to satisfy all of our obligations . . . .").) In

its initial offering, JCL & Company sought a maximum of $100,000,000 in funding, with the minimum investment level set at $25,000. (Gov't Ex. 7K at 19.)

To make his commercial vision a reality, Lopez created marketing materials, including brochures, (Gov't Exs. 7H, 9I), and a website, (Gov't Exs. 8G, 8H). These materials outlined the industries and named some specific companies in which Lopez might invest with the funding he secured. Listed in this portfolio were some big-name blue-chip companies like American Express and Coca-Cola, and other smaller start-up companies, like his own JCL entities and his wife's consulting firm, Transform Consulting. (Gov't Ex. 8G.) Next, Lopez began approaching friends and family friends to jump-start the business, and offered these individuals promissory notes with high rates of return if they would loan his company the money.

Specifically, in his first round of fundraising, Lopez was loaned the following amounts of money from the following individuals:

- 12/16/2009: Thomas Holsworth – $35,000 at 12% interest with a maturity of 1/1/2015. (Gov't Exs. 8B, 8C.)

- 1/15/2010: Jerry Wilson – $13,500 at 12% interest with a maturity of 2/15/2014 (Gov't Exs. 9B, 9C) and $121,500 at 12% interest with a maturity of 2/15/2014 (Gov't Exs. 10B, 10C).

- 3/23/2010: Colleen Wilson – $21,000 at 12% interest with a maturity of 4/15/2015 (Gov't Exs. 11B, 11C) and $12,000 at 12% interest with a maturity of 4/15/2015. (Gov't Exs. 12B, 12C; Trial Tr. 2-273 (noting correct maturity date)).

- 1/12/2011: Danny Cole – $100,000 at 6% interest with a maturity date of 2/1/2021. (Gov't Exs. 7B, 7C.)

At trial, each of these individuals[2] acknowledged that the promissory notes they executed were unsecured and did not earmark their money to be spent on any specific investment; in fact, each investor admitted the note was unrestricted with respect to the types of investments that could be made with those funds. (Trial Tr. 2-229 (J. Wilson), Trial Tr. 2-399 (Holsworth), Trial Tr. 2-347 (Cole).) The agreement guaranteed just one thing: monthly interest payments and a return of principal on the maturity date, so long as Lopez used the money to invest through his JCL companies. (Trial Tr. 2-229 (J. Wilson), Trial Tr. 2-399 (Holsworth), Trial Tr. 2-347 (Cole).)

After Lopez secured this initial funding, he began investing in his wife's management consulting firm, 413 Solutions (later renamed to Transform Consulting), which as noted above was one of the portfolio companies identified in Lopez's marketing materials. (Gov't Ex. 8G.) Transform Consulting specializes in assisting nonprofits, schools, universities, and agencies in grant writing and applications, strategic planning, and other operations. (Trial Tr. 3-559.) Amanda Lopez had founded and remains the CEO of the company, which since its inception operated out of the Lopez home. With the infusion of capital, Transform Consulting paid some of its administrative and business expenses. (Trial Tr. 3-425.) These expenses included mortgage payments on the house—the headquarters of the business—vehicles, and other expenses like restaurant meals and trips. Some

[2] Colleen Wilson said that she did not read the note because she entrusted her financial matters to her husband, Jerry. (Trial Tr. 2-287.) Colleen Wilson's promissory note was identical—except for the monetary value and maturity dates—to her husband's, which he acknowledged did not earmark the money for any specific investment.

payments also came directly out of JCL bank accounts, but as stated in the Confidential Offering Memorandum, this was something the investors could have or should have expected: "The company intends to use the net proceeds to fund the purchase of companies and for other general corporate purposes, which include the payment of general and administrative expenses." (Gov't Ex. 7K at 2.)

In 2010 when Lopez first invested in Transform Consulting, it had virtually no revenue. (Trial Tr. 3-582; Def. Ex. 135) ($1,000 in revenue in 2010). In 2012 JCL successfully acquired Transform Consulting, which resulted in the transfer of all operations to JCL. (R.42-1 at 4.) In 2014 the company had more than $400,000 in revenue, and in 2015 had grown to just under $500,000 in revenue. (Trial Tr. 3-565, 3-568; Def. Ex. 135.) The company made money in those two years as well—with what would have been more than $150,000 in profits but for various legal expenses in 2015. (R.42-1 at 7.) Thus, from the time that JCL originally invested in 413 Solutions, through its subsequent acquisition, and up to the present day, Lopez's first major investment with JCL was in a company that grew 40,822% revenue-wise in a 5-year period—consistent with his representation that he was seeking to invest and buy companies with "excessive growth potential." (Gov't Ex. 7K at 1.)

Further, from the time of the first loan into JCL until early 2012, Lopez continuously made the interest payments he was obligated to make to his investors. *See, e.g.,* (Gov't Ex. 7F at 3 (showing monthly $500 payments to Cole); Gov't Exs. 9H, 10E (J. Wilson Account Statement (p. 3 of 4) through 1/19/2012 showing monthly interest payments into his Entrust account); Gov't Exs. 11D, 12D (same as

to C. Wilson).) Thus, from December 2009—when Lopez obtained his first funding—through March 2012, Lopez had: (1) invested the money derived from the promissory notes in Transform Consulting, which led to the acquisition of that expanding business; and (2) continuously made the requisite interest payments into each of his investors' accounts.

In mid-2011 and early 2012, however, JCL and Lopez faltered. On July 15, 2011, Lopez placed $122,000 more of Danny Cole's money into a 10-year, 2% note. According to Cole's testimony at trial, Lopez represented that he was putting those funds into a money market account, a liquid asset. (Gov't Ex. 7E; Trial Tr. 2-316.) Then, on March 30, 2012, Lopez—according to testimony by the two Wilsons—unilaterally extended each of their promissory notes and forged their signatures on the new documents. (Trial Tr. 2-217, 2-278.) The new notes matured in 2022 and were for a 6%, rather than a 12%, rate of interest. (Gov't Exs. 9D, 10D, 11E, 12E.) Similarly, Holsworth testified that Lopez had unilaterally extended his note terms in the same way earlier that year, in January. (Trial Tr. 2-371; Gov't Ex. 8D.)

These alterations to his investors' accounts initially went unnoticed. Then, in June 2012, Cole realized that he had not received one of his scheduled interest payments. (Trial Tr. 2-321.) According to Cole, Lopez initially tried to deflect this inquiry and claimed some sort of clerical error, (Trial Tr. 2-345), but Cole then looked more closely at his account and the related documents and realized that Lopez had placed the $122,000 into a promissory note rather than a money market account, (Trial Tr. 2-323–24). Over the next several months, Cole attempted to

recoup all of his money from Lopez—including the $100,000 that he had originally invested—and Lopez eventually stopped responding after telling Cole that the promissory notes were not set up that way. (Trial Tr. 2-323–24.) On September 17, 2012, Lopez wrote Cole a check for $125,049.55 (which covered the full amount of his second investment), and Lopez has continued to pay Cole his monthly $500 interest payments on the original loan. (Trial Tr. 2-348.) Cole was still upset, at one point threatening to do everything in his power to send Lopez to jail. (Trial Tr. 2-346–47.)

Sometime in early 2013 Cole complained to the Indiana Secretary of State Securities Division. (Trial Tr. 2-346.) The state looped the Internal Revenue Service into the investigation, and all records relating to Lopez's investments through JCL were subpoenaed in October 2013. (Trial Tr. 3-535.) In February 2014 IRS Agent Jimmy Shivers interviewed Cole at his home. (A.49.) During that interview, Cole led Shivers to believe that Lopez had forged his signature on *all* documents relating to his promissory notes with Lopez—including the original $100,000 loan that he had actually authorized. (A.50.)

Specifically, Cole told Shivers that he signs all legal documents by including his middle initial, which was conspicuously absent on all of the initial paperwork between Cole and Lopez. (A.50.) In reality, Cole had verbally authorized Lopez to sign the original papers for him—a fact that he did not tell Shivers. (A.50.) Cole admitted at trial for the first time that he had actually authorized Lopez to sign the documents for him. (A.50.)

Investigators aggressively pursued Lopez, apparently under the impression that Lopez had initially completely stolen Cole's original $100,000 in addition to the subsequent $122,000 loan (which had already been returned). The government filed a sixty-six-count indictment in April 2015, which included sixty-one counts of wire fraud, four counts of money laundering, and one count of securities fraud. (R.1.) The indictment was later amended to twenty counts (fifteen counts of wire fraud, four counts of money laundering, and one count of securities fraud). (A.30.) Among those fifteen wire fraud counts, the first eight occurred before Lopez placed Cole's $122,000 into the 2% loan without his consent in July 2011. Similarly, three of the four money laundering counts occurred during that same pre-July 2011 time frame. (A.34-35.)

At trial, each of the four initial investors testified that they would not have given Lopez permission to invest in his wife's business, (Trial Tr. 2-327, 2-221, 2-378), but also acknowledged that the initial notes they approved did not mandate any specific investment by Lopez, (Trial Tr. 2-229, 2-399, 2-347). The district court additionally refused to permit defense expert witness Michael Alerding to testify as an expert at trial. (A.46.) Alerding would have offered his expert opinion on the following matters: (1) Lopez operated family-owned, closely held businesses in a manner not atypical of most businesses of that size and nature, including the payment of personal expenses through the businesses; (2) Lopez ran for-profit businesses that have economic substance, have generated significant revenues, and have performed services of value to his clients; and (3) Lopez's investment company

was a profitable business that had the potential to generate a viable and consistent revenue stream if Lopez had the ability to operate the business going forward. (R.42-1.) Due to the district court's pretrial restrictions on Alerding, however, his trial testimony was limited and subject to repeated government objections. (A.59, A.61.)

The district court entertained several other motions in limine, two of which are relevant to this appeal. First, the district court granted a defense motion, (R.50), to exclude the term "lulling payment" from various government summary exhibits because it found the term "argumentative" and that it might "prejudicially influence the jury when used to summarize bank accounts that do not otherwise include [the term]" (A.47). At trial, however, the government's summary witness—IRS Agent Janet DeLancey— was allowed, over defense objections, to use the term more than fifteen times during her direct examination. (*E.g.*, Trial Tr. 3-534.)

Second, the district court granted a defense motion in limine seeking to exclude "[*a*]*ny references* that Lopez's actions constitute a 'Ponzi scheme' or drawing any similarity to other infamous fraud prosecutions such as 'Bernie Madoff.'" (A.38) (emphasis added). The government responded only in part, indicating that it did not intend to offer any such testimony, but it failed to address whether it would refer to Madoff during closing arguments. (R.33 at 3.)

The district court similarly addressed only part of Lopez's motion in limine, characterizing his request as seeking to "exclude testimony by any witness comparing his actions" to a Ponzi scheme or Madoff. (R.37 at 4.) Again, the district

court neglected to address Lopez's request that encompassed argument, though it specifically recognized the "prejudicial impact of the statements." (R.37 at 4.) During closing argument, the government twice compared Lopez to Bernie Madoff—over Lopez's objections. (Trial Tr. 4-618, 4-626.) In overruling those objections, the district court twice gave the government an extra minute of argument time. (Trial Tr. 4-618; A.63.)

The jury convicted Lopez on all twenty counts. He was sentenced to fifty-seven months' imprisonment, three years of supervised release, and ordered to pay restitution in the amount of $293,171.84. (A.1–8.)

## SUMMARY OF THE ARGUMENT

Jaime Lopez's convictions should be reversed and his case remanded for a new trial for four reasons. First, the district court denied Lopez a fair trial when it allowed the government's summary witness, IRS Agent Janet DeLancey, to testify that Lopez's interest payments to his clients were "lulling payments" designed to deceive the clients into a false sense of security. DeLancey's statements were argumentative, beyond the scope of her role as a summary witness, and improper opinion testimony. The district court then exacerbated the impact of this prejudicial evidence by curtailing the defense efforts to cross-examine her. Lopez did not receive a fair trial because DeLancey's statements veered from straight factual reporting into veiled commentary on Lopez's supposed fraudulent intent.

Second, the district court also denied Lopez a fair trial by twice permitting the government to equate Lopez with notorious Ponzi schemer Bernie Madoff during closing arguments. And both times the government did so, it referred back to DeLancey's lulling-payments testimony to tie Lopez to Madoff. The statements were improper because they inflamed the jury's prejudices, facilitated false and unjustified inferences, and violated the spirit of one of the trial court's pretrial rulings. Longstanding precedent establishes that comparisons between criminal defendants and notorious criminals are improper, and Lopez did not provoke these statements. Despite this, the district court did nothing to cure the harm of the government's Madoff comparisons. To the contrary, on both occasions it overruled

Lopez's objections and gave the government additional time for its closing argument.

Third, the district court impermissibly prevented defense expert Michael Alerding from testifying as an expert at trial, and thus violated Lopez's Sixth Amendment right to present a complete defense. Simply put, the court confused the question whether a witness should be permitted to offer expert testimony at trial with the question whether the jury should hear the moniker "expert witness." As a result, the district court misapplied Federal Rule of Evidence 702 in a way that virtually eliminates expert testimony at trials, and that caused ambiguity and confusion at Lopez's trial in particular. And, because Alerding could not testify as an expert, Lopez was unable to put forth his defense—that he chose sensible investment vehicles for the investors' monies. Finally, the district court gave an expert instruction to the jury, one neither party requested, and even though there were now no experts testifying in the case. At a minimum, this instruction would confuse the jury and, even worse, it could have caused the jury to unduly elevate DeLancey's lulling-payment testimony.

Fourth and finally, the Federal Rules of Evidence provide that extrinsic evidence of a prior inconsistent statement is admissible so long as the witness is given a chance to explain the inconsistency and the adverse party—in this case the government—had the opportunity to question the witness about it. The district court abused its discretion by excluding extrinsic evidence of an inconsistent statement by Danny Cole—a key governmental witness—even though these criteria

were met. Specifically, Cole initially lied by omission to investigators by leading them to believe that Lopez had forged Cole's signature on all of the initial loan paperwork. In reality, as came out at trial, Cole had authorized Lopez to sign those documents for him. The district court improperly excluded the investigator's testimony about what Cole had told him (and not told him) during their interview, which undermined Lopez's ability to present his most convincing evidence of Cole's dishonesty.

## ARGUMENT

### I. The district court erred in admitting Agent DeLancey's testimony regarding "lulling payments."

The district court erred when it allowed the government's summary witness, IRS Agent Janet DeLancey, to testify that transactions between Lopez and his clients were "lulling payments" designed to throw investors off his trail of alleged fraudulent behavior. *See, e.g.*, (Trial Tr. 3-425, 3-436); *see also Lull, v.*, Oxford English Dictionary Online, http://www.oed.com/view/Entry/111033?result =3&rskey=P6wodp& (last visited December 6, 2016) (stating that to lull is "[t]o quiet (suspicion) by deception; to delude into a sense of security").

First, her statements were argument, which has no place in evidence of any type, whether live or documentary. Second, DeLancey's role as a summary witness meant that the scope of her testimony was circumscribed, commensurate with its purpose—to report facts in voluminous documents and any conclusions that necessarily flow from the documents that she summarizes. DeLancey's statements

about lulling payments fell outside of those boundaries, touching on Lopez's intent, a fact that does not necessarily flow from his financial statements.

Third, even if DeLancey's statements are deemed opinion testimony rather than straight factual reporting, they still were improper. The government offered DeLancey as a lay summary witness, not an expert. (A.43) (prosecutor stating, "Agent DeLancey is not testifying as an expert witness. She's testifying as a summary witness who received voluminous records . . . and will summarize them in her testimony . . . ."). Accordingly, even if she were permitted to offer an opinion, it needed to be based on her own personal knowledge of Lopez's intent when remitting the interest payments to his clients. And although the district court could have possibly cured its error by allowing Lopez's attorney to fully cross-examine DeLancey on the issue of lulling payments, it instead cut off defense counsel's line of questioning.

This Court reviews such evidentiary decisions for an abuse of discretion. *United States v. Wantuch*, 525 F.3d 505, 513 (7th Cir. 2008). Should the Court find error, the defendant "is entitled to a new trial if there is a reasonable possibility that a trial error had a prejudicial effect upon the jury verdict." *United States v. Van Eyl*, 468 F.3d 428, 436 (7th Cir. 2006).

### A. DeLancey exceeded the narrow scope of permissible testimony as a summary witness.

By labeling certain transactions between Lopez and his clients "lulling payments," DeLancey exceeded the scope of her permissible summary witness testimony. As a threshold matter, witness testimony cannot contain argument.

FED. R. EVID. 401, 403. Before trial the district court itself recognized the argumentative nature of the term "lulling payment" when it ordered the phrase excluded from the summary exhibits. (A.47–48.) The district court should have drawn no distinction between the inclusion of the term in the documents and DeLancey's use of the term in her own role as a summary witness, speaking for and summarizing these documents. The district court thus erred when, at trial, it allowed her to use the very same argumentative term it had banned via its pretrial ruling.

Not only was the argumentative nature of her use of the term "lulling payments" problematic, but she also exceeded the permissible scope of her role. Summary witnesses are special types of trial witnesses employed to discuss and summarize voluminous documents or demonstrative charts pursuant to either Federal Rules of Evidence 1006 or 611.[3] *United States v. Pree*, 408 F.3d 855, 869–70 (7th Cir. 2005). Where, as here, the underlying exhibits are admitted as substantive evidence,[4] the summary witness's primary role is as a mouthpiece for the documents admitted at trial, and her testimony is limited to a straight reporting of facts from those documents. *United States v. Swanquist*, 161 F.3d 1064, 1073 (7th

[3] Courts also use the term "summary witness" to refer to "overview" witnesses, who are called either as a party's first or last witness for the purpose of reviewing and summarizing the entirety of the evidence and testimony. *United States v. Moore*, 651 F.3d 30, 54–55 (D.C. Cir. 2011). Agent DeLancey did not act in this capacity; rather, as noted above, she was offered as a standard summary witness.

[4] Courts distinguish between Rule 1006 summary exhibits, which are "supposed to substitute for the voluminous documents themselves" and Rule 611 "pedagogical charts" which are not substantive evidence. *United States v. White*, 737 F.3d 1121, 1135 (7th Cir. 2013). Here, because the government's summary exhibits were admitted as evidence and sent to the jury room, (Gov't Exs. 26–30, 40–42), they were Rule 1006 summaries, *White*, 737 F.3d at 1136.

Cir. 1998) (FBI agent "acted within the appropriate parameters of a summary witness by testifying simply as to what the government's evidence showed").

Although sometimes allowed to draw conclusions that "necessarily flow from those facts," *United States v. Stierhoff*, 549 F.3d 19, 28 (1st Cir. 2008), a standard summary witness generally is not competent to opine on the nature or character of the facts presented in the documents she summarized, *cf. Swanquist*, 161 F.3d at 1072–73 (finding no error where summary witness's charts classified loans as "unsecured" and ample evidence supported conclusion that the loans were unsecured); *Stierhoff*, 549 F.3d at 28 (finding IRS agent's characterizations of terms such as "income" and "expenses" conclusions that necessarily flowed from the facts on the balance sheets).

But that is precisely what DeLancey did at Lopez's trial. Far from the type of objective, analytical conclusions courts have permitted summary witnesses to present, DeLancey's reference to lulling payments was a conclusion about Lopez's intent: that he meant to lull his clients in order to deceive them.[5] That is not a conclusion that "necessarily flowed" from the brute fact that Lopez made periodic interest payments to his clients.

[5] Although DeLancey never explicitly stated that the transfers were intended to deceive Lopez's clients, the government relied upon the term's commonsense—i.e. argumentative—meaning throughout the trial. For example, during opening arguments: "Lopez lulled these victims into thinking that their investments were successful, and he did that by taking later investment money . . . and then he used that to make it appear that he was paying them interest . . . ." (Trial Tr. 1-51–52) (Warden); and also during closing arguments: "You heard Agent DeLancey talking over and over about the lulling payment . . . . [I]n the fraud scheme, it's a way of making sure you don't get caught." (A.62–63) (Ong).

Finally, DeLancey's improper testimony cannot be resuscitated by calling it lay opinion testimony. Summary witnesses are occasionally allowed to offer opinion testimony—most often as experts[6]—but it must hew to the Federal Rules of Evidence like any other opinion testimony.

A lay witness may only testify as to opinions rationally based on her perception. FED. R. EVID. 701(a). This rule, in conjunction with Rule 602's personal-knowledge requirement, means that the lay witness's testimony must rest on her "first hand knowledge or observation." *Wantuch*, 525 F.3d at 513 (quoting Rule 701(a) Advisory Committee note). Expert witness opinion, by contrast, is based on specialized knowledge, skills, and experience in the field. FED. R. EVID. 702; *United States v. Miller*, 738 F.3d 361, 371–72 (D.C. Cir. 2013). As relevant here, the distinction applied to summary witnesses means that one acting in a lay capacity may only testify to those facts that the previously admitted government evidence shows, and may not insert her expert opinion as to their meaning. *Swanquist*, 161

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[6] *See, e.g.*, *Pree,* 408 F.3d at 869–70 (noting that "[a]s an expert witness, an IRS agent's "opinion as to the proper tax consequences of a transaction is admissible evidence"); *United States v. Hart*, 295 F.3d 451, 455–60 (5th Cir. 2002) (remanding where government's non-expert summary witness had opined on the proper preparation of "byzantine" federal farm loan application documents); *United States v. Sabino*, 274 F.3d 1053, 1067 (6th Cir. 2001), *amended by Unites States v. Sabino*, 307 F.3d 446 (6th Cir. 2002) (noting that in a tax fraud case "a summary witness may give an opinion that 'events assumed in [a] question would trigger tax liability[,]' or 'whether particular payments under assumed circumstances would be taxable,'" but "he or she may not give a legal opinion that necessarily determines the guilt of a defendant") (quoting *United States v. Monus*, 128 F.3d 376, 386 (6th Cir. 1997)). Here the government emphatically asserted that DeLancey was *not* testifying as an expert and did so in the context of trying to exclude the defense's own expert witness from trial. (A.43) (1/14/16 Hr'g on Gov't's Opp'n to Expert Report at 4) (stating that DeLancey would "not testify[] as an expert witness," but rather simply "testify[] as a summary witness who received voluminous records pertinent to the case . . . and . . . summarize them in her testimony"). In fact, the government never identified DeLancey as an expert in its pretrial disclosures or otherwise complied with Rule 16's requirements for offering experts at trial. *See infra* Section I.A.

F.3d at 1073 (distinguishing lay summary witness testimony from expert testimony that "offer[s] opinions and draw[s] inferences based on some special skill, knowledge, or experience that the jurors themselves d[o] not possess").

When she opined from the witness stand that certain bank transfers between Lopez and his clients were intended to "lull" the clients, DeLancey transgressed the boundaries of lay witness testimony. Nothing in her testimony, nor any other evidence presented at trial, suggested that she had specific first-hand knowledge of why the transfers occurred. *See United States v. Akins*, 746 F.3d 590, 599–600 (5th Cir. 2014) (finding no abuse of discretion where lay witness, a secret service agent, testified as to the meaning of code words used by defendants based on his experience in *that particular investigation*); *Miller*, 738 F.3d at 373 (finding plain error where there was no evidentiary basis upon which the jury could "verify[] [the lay witness's] inferences or . . . independently reach[] its own interpretations") (citation omitted). Instead, DeLancey drew upon her knowledge and experience as a tax investigator to conclude not just how money moved between accounts, but *why* it did, as she explained during cross-examination:

> The reason that I refer to them as lulling payments is because *in these types of fraud investigations*, what you're looking for is to see if those funds that are invested as, in this case Lopez represented to the investor.

(Trial Tr. 3-534) (emphasis added). Thus, to the extent she could conclude why the payments were made, she relied upon her knowledge of "these types of fraud investigations"—*not* this particular fraud investigation—and in so doing stepped outside the bounds of permissible lay opinion testimony.

### B. The district court failed to cure the error when it limited Lopez's opportunity to cross-examine DeLancey on the lulling payments issue.

The district court also abused its discretion when it brusquely cut short defense counsel's cross examination of DeLancey on lulling payments. Lopez's defense was hamstrung by this inability to present his version of why the payments were made. District courts generally retain "wide latitude in limiting the extent and scope of cross-examination 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *United States v. Saunders*, 166 F.3d 907, 918 (7th Cir. 1999) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

Still, the opportunity for "ample cross-examination" is uniformly recognized by this Court and others in summary-witness cases as critical to ensuring that the defendant can present his case to the jury. *See, e.g.*, *Pree*, 408 F.3d at 872–73 (finding no plain error where IRS Agent's testimony that defendant's stock had no market value, determination as to whether defendant received stock as gift or compensation was supported by abundant evidence, and defendant had ample opportunity to cross-examine the witness); *Swanquist*, 161 F.3d at 1064 (finding no abuse of discretion where Rule 1006 witness's charts describing discrepancies between defendant's statements and defendant's actual finances, and defendant had ample opportunity to cross-examine); *United States v. Paulino*, 935 F.2d 739, 752–54 (6th Cir. 1991) *superseded by statute on other grounds accord. United States v.*

*Kerley*, 784 F.3d 327, 341 (6th Cir. 2015) (finding no abuse of discretion where Rule 1006 charts and summaries were not substantially inconsistent with the evidence, they were not admitted into evidence, the court gave a limiting instruction at the close of evidence, and the court allowed a full cross-examination of the witness).

Defense counsel asked DeLancey during cross-examination about the basis for her opinion that the transactions were lulling payments. (Trial Tr. 3-532–34.) Specifically, counsel asked her to clarify that the payments she had labeled "lulling" were in fact "payments that Mr. Lopez was required to make" under the contracts he had executed. (Trial Tr. 3-532–33.) That is, counsel attempted to show an alternative theory of intent—that Lopez was simply fulfilling his contractual obligations and not intending to lull. Without stating an objection, the government interjected and the following exchange took place:

> **MR. WARDEN**: Your Honor, is he asking did he adhere to a specific sentence in the contract, the whole contract? I'm not sure that –
>
> **MR. HAYES:** Judge, she –
>
> **MR. WARDEN:** – the witness can answer the question the way it's put.
>
> **MR. HAYES:** Judge, she's characterized these payments as lulling payments.
>
> **THE COURT:** Let her explain. She was in the process of explaining. You may finish your answer.
>
> **THE WITNESS:** Okay. All right. I'm referring them to lulling payments because when you're doing fraud investigations –
>
> **MR. HAYES:** Judge, my question was, he was required by the terms of this agreement to pay that money.

> **MR. WARDEN:** Judge, she should be allowed to answer the question.
>
> **THE COURT:** Yes. I think your question, you asked her why was she referring to them as lulling payments, so let her explain.
>
> **MR. HAYES:** Okay.
>
> **THE COURT:** You may.
>
> **THE WITNESS:** The reason that I refer to them as lulling payments is because in these types of fraud investigations, what you're looking for is to see if those funds that are invested as, in this case Lopez represented to the investor. So when I look at these payments, I was looking to see if these funds were then going to third-party investments. And what I expected, if Lopez had done what he represented he was going to do, you would see those funds then going to a third party and them making payments back to JCL, and then those funds being used to make the payments, because in this case the promissory note was used as a vehicle for the individuals for Mr. Holsworth; and in this case, Colleen Wilson, to get their funds for JCL to invest in the way he promised.
>
> **MR. HAYES:** Judge, I don't believe I asked the question –
>
> **THE COURT:** She answered the question. Next question.
>
> **MR. HAYES:** Thank you.

(Trial Tr. 3-533–34.) The tense tone of the exchange is clear from the transcript—defense counsel struggled to get words in—but most important is the fact that the court and the government hijacked the defense's line of questioning. Defense counsel's original question, whether Lopez "was required by the terms of his agreement to pay [the] money" was never fully answered. Instead, the district court imposed its own question: "why was she referring to them as lulling payments"?

After DeLancey answered that question, defense counsel tried to have his initial question answered, but the judge cut short his efforts.

**C. The district court's errors were not harmless.**

The district court's failure to exclude DeLancey's lulling payment testimony and its truncating the defense's cross-examination of that witness was not harmless error. First, the testimony on its own undermined the fairness of the trial because it provided the jury a bridge between acts that were otherwise facially neutral—the interest payments shown in the bank documents—and the fraudulent intent the government was required to prove beyond a reasonable doubt to convict Lopez. *Cf. United States v. Hart*, 295 F.3d 451, 459 (5th Cir. 2002) (quoting *United States v. Taylor*, 210 F.3d 311, 316 (5th Cir. 2000) ("The government *cannot* use a 'summary' chart under FRE 1006 to assume that which it was required to prove beyond a reasonable doubt as operative facts of the alleged offense.") (emphasis in original) (internal quotations omitted).

What is more, by unfairly connecting the interest payments with a deceptive intent, the testimony set the stage for the government's improper comparison during closing arguments between Lopez and notorious Ponzi schemer Bernie Madoff.[7] Indeed, Ponzi schemes by definition require lulling payments, so permitting DeLancey to stamp that label on Lopez's interest payments was tantamount to her stating his business was just that. *See Ponzi scheme, n.*, Oxford English Dictionary Online, http://www.oed.com/view/Entry/147694?Redirected From=ponzi+scheme& (last visited December 6, 2016) ("A form of fraud in which

[7] *See infra* Section II.A.

belief in the success of a non-existent enterprise is fostered by payment of quick returns to first investors using money invested by others; any system which operates on the principle of using the investments of later contributors to pay early contributors.").

Second, the district court's actions during DeLancey's cross-examination removed the jury's ability to place her testimony in context. Instead, the jury saw the district court halt Lopez's attorney's line of questions and redirect to a different one that reinforced the government's theory of intent. (A.62–63) (Ong: "You heard Agent DeLancey talking over and over about the lulling payment . . . . [I]n the fraud scheme, it's a way of making sure you don't get caught.") The natural implications for the jury were: (1) that Lopez's alternate theory for the interest payments was specious; (2) that the government's theory, which garnered additional airtime during the defense cross-examination, was not; and (3) that DeLancey held the only valid interpretation of Lopez's payments to his investors.

Finally, DeLancey's testimony was harmful in conjunction with the district court's failure to certify Lopez's would-be expert witness Michael Alerding.[8] By neutering Alerding's testimony as discussed below—precluding Alerding from countering the government's Ponzi scheme theory—while freely allowing the government to put in place essential components of a Ponzi scheme via improper opinions by its summary witness, the district court further inhibited Lopez's ability to present his defense.

[8] *See infra* Section III.

## II. The government engaged in misconduct during closing argument.

The government's statements during closing argument constituted prosecutorial misconduct because they equated Lopez with one of the most notorious criminal fraudsters in history and thus rendered Lopez's trial fundamentally unfair. When determining whether prosecutorial remarks during closing rise to reversible error, this Court first considers the remarks in isolation to determine whether they were improper. *United States v. Bell*, 624 F.3d 803, 811 (7th Cir. 2010). When a defendant has objected to the challenged statements, this Court reviews the district court's decision to permit the government's argument for an abuse of discretion. *United States v. Richards*, 719 F.3d 746, 764 (7th Cir. 2013).

Should the Court find the remarks improper, it then considers the prejudicial effect of the remarks in the context of the entire proceedings to determine if the defendant was denied his right to a fair trial. *Id*. at 766. To that end the Court considers: (1) whether the prosecutor misstated the evidence; (2) whether the remark implicated a specific right; (3) whether the defendant invited the remark; (4) whether the district court provided (and the efficacy of) a curative instruction; (5) whether the defendant had an opportunity to rebut the remark; and (6) the weight of the evidence against the defendant. *Id*. at 766. In the final balance, "[p]rejudice does not require an ironclad guarantee that, absent the prosecutorial misconduct, the outcome of trial would have differed." *Id*. at 765. Thus, the defendant "need not show that, on remand, a jury would not convict him a second time" to obtain a new trial. *Id*. at 765–66.

**A. The references to Bernie Madoff were improper in isolation.**

During closing arguments, the government twice compared Lopez to Bernie Madoff. The statements were improper because they served no purpose other than inflaming the jury's prejudices, opened the door to false or unwarranted inferences, and could not be justified on the basis of evidence presented at trial. Further, the defense had moved in limine to exclude precisely such references to Madoff. (A.38.) Despite the district court's granting the motion, the government nonetheless mentioned him, twice.

An attorney may only draw upon the facts on the record and reasonable inferences that can be drawn from them when making final arguments to the jury. *Unites States v. Cheska*, 202 F.3d 947, 950–52 (7th Cir. 2000). Outsize comparisons or outright falsehoods are improper because they risk misleading the jury and ignite the jury's revulsion or scorn. *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643–46 (7th Cir. 1995) (reversing after attorney's misstatement of the law was adopted by the trial court); *United States ex rel. v. Petrelli*, 331 F. Supp. 792, 795–96 (N.D. Ill. 1971) (reversing after the state's attorney alleged at closing that, among other things, the defense used a doctrine espoused by Adolf Hitler in trying the case). The jury's deliberations must be based on a fair evaluation of the evidence and law, not blunt emotional appeals. *United States v. Morgan*, 113 F.3d 85, 90 (7th Cir. 1997) (finding impropriety where, after defense counsel questioned the credibility of a government witnesses, prosecutor asked jurors to consider how it would feel to be called liars); *see also United States v. Nobari*, 574 F.3d 1065, 1077 (9th Cir. 2009)

(finding impropriety where government asked jury to imagine the danger to a hypothetical boy standing nearby the drug transaction at issue in the trial).

Specifically, courts have long held that it is improper for prosecutors to compare criminal defendants to notorious criminals. *See, e.g.*, *State v. Thompson*, 578 N.W.2d 734 (Minn. 1998) (finding misconduct where prosecution compared defendant to O.J. Simpson); *Defreitas v. State*, 701 So.2d 593 (Fla. Dist. Ct. App. 1997) (same); *People v. Walker*, 411 N.Y.S.2d 377, 380 (1978) (ordering new trial after the prosecutor had, in addition to making other offensive comments during closing argument, compared the defendant to Lee Harvey Oswald, Sirhan Sirhan, and Lindberg baby kidnapper Richard Hauptmann).

Despite this well-known principle, the government twice compared Lopez to the most notorious fraud perpetrator in United States history. On both occasions Lopez's attorney objected, was overruled, and, in response, the district court allotted extra argument time to the government. Here is the first instance:

> **Mr. Ong:** "The fact that through the gift of Jaime Lopez's father-in-law that [Danny Cole] got money back doesn't mean he wasn't defrauded. I would suggest to you, you may know about the Bernie Madoff case. Lots and lots of people got investments –
>
> **Mr. Hayes:** Judge, I'm going to object at this time. I don't think having –
>
> **The Court:** Overruled, counsel. This is closing argument.
>
> **Mr. Hayes:** Thank you judge.
>
> **The Court:** We'll give him another two minutes—one minute.

> **Mr. Ong:** Lot's [sic] of people got money back through Bernie Madoff.

(Trial Tr. 4-618.) Not long after, when discussing the payments that the government's summary witness DeLancey had classified as lulling payments, Ong again brought up Madoff:

> **Mr. Ong:** You heard Agent DeLancey talking over and over about the lulling payment. In the fraud world, just like I talked about at Potemkin village, a little fake camp is not really a camp. It's a ruse. It's designed to mislead. These are not interest payments. Interest payments clearly connote that some sort of return on capital. This is interest. This is just lulling. It's, in the fraud scheme, it's a way of making sure you don't get caught. Just like, again, Bernie Madoff paid people for 15, 20 years or more, hundreds of thousands of people –
>
> **Mr. Hayes:** I object. This was covered in the motion in limine.
>
> **The Court:** Overruled, counsel, he can argue what he wants in closing. We'll give him another minute.
>
> **Mr. Ong:** – paid people back doesn't mean they were getting interest on their capital or returns on their capital. They were getting lulling payments designed to keep this from being revealed, and that's exactly what these payments are.

(A.62–63.) Considering the scale of the crimes involved, a comparison between Lopez and Madoff was simply unjustified. Whatever superficial similarities the cases may have are outweighed by the grossly unfair false equivalence of the two men's impact on society, and repeating the comparison only cemented it in jurors' minds. *See United States v. Andreas*, 216 F.3d 645, 672 (7th Cir. 2000) (considering frequency of improper statements as relevant to seriousness, and noting that a single reference "could not have weighed that heavily in the minds of the jury").

Further, the government used this improper argument in concert with DeLancey's improper testimony about lulling payments to urge the jurors to find that Lopez himself engaged in fraud. That is, DeLancey's testimony had already transformed before the jury Lopez's unremarkable interest payments into the nefarious, premeditated acts that underlie Ponzi schemes. With this groundwork laid, the government could then link Lopez to Madoff by showing that they both engaged in the same reprehensible conduct: deceptive lulling payments. Doing so both bolstered DeLancey's inadmissible evidence and unjustifiably placed Lopez in the same category as a man who defrauded hundreds of thousands of people and lost billions of dollars.

Finally, the Madoff statements were doubly improper because the government made them in the wake of a pretrial motion in limine that precisely addressed this very concern: excluding unfair references to Bernie Madoff and Ponzi schemes.[9] The one criminal that defense counsel identified before trial as improper

[9] Like the lulling-payment motion in limine, (R.50 at 1–2), the district court once again mischaracterized Lopez's request in ruling on his Madoff-centered motion. Lopez's motion in limine asked the court to exclude "[*a*]*ny* references that Lopez's actions constitute a 'Ponzi scheme' or drawing *any* similarity to other infamous fraud prosecutions such as 'Bernie Madoff'" (A.26) (emphasis added). The defense's Madoff/Ponzi scheme portion of the motion was not limited to testimony. (A.26.) Indeed, defense counsel would not have needed to object with respect to witness testimony given the obvious irrelevance of Madoff to Lopez's case, FED. R. EVID. 401, 402, so the defense was clearly concerned with improper argument in this portion of its motion, *see* (A.26) (separating headings "Opinion Testimony" (which dealt with witnesses) from "Inflammatory Statements" (which addressed all aspects of the trial)). In ruling, however, the court stated that Lopez sought to "exclude *testimony* by any witness comparing his actions to a 'Ponzi scheme' . . . ." (R.37 at 4) (emphasis added). Thus, when the court ruled that Madoff references were excluded only from testimony, it both misinterpreted Lopez's motion and established a superfluous rule regarding witness testimony at trial. *See Gruca*, 51 F.3d at 645 (trial court failing to correct misstatement weighs in favor of finding misconduct.).

for both testimony and argument was the one criminal the government encouraged the jury to consider in assessing Lopez's guilt.

**B. The statements undermined the fairness of the trial.**

Not only were the Madoff comments improper in isolation, but in context of the entire trial, the government's statements denied Lopez his right to a fair trial. Under the first factor, although the government did not explicitly misstate evidence, it invited the jury to make an improper inference from the evidence, which essentially has the same effect. *Richards*, 719 F.3d at 766. As mentioned above, the comparison to Madoff was on its own a false equivalence that risked aggravating the jury, and by incorporating DeLancey's use of the term lulling payment into its argument, the government amplified the harm. Further, although the government's conduct did not implicate one of Lopez's specific trial rights—the second factor—these statements in concert with the other trial errors deprived Lopez of a fair trial. As for the third factor, it cannot be disputed that the defense did not invite the government's improper remarks. After all, it was the defense who first flagged the impropriety of comparing Lopez to Bernie Madoff in its pretrial motion. (R.26 at 3.)

Fourth, the district court utterly failed to address the impropriety of the prosecutor's statements regarding Madoff. Not only did the court overrule both of Lopez's objections, it offered no limiting instruction to cure these references that violated the spirit of the motion in limine. *Richards*, 719 F.3d at 766 (jury instruction to disregard improper statements weighed against finding of misconduct but did not overcome prejudice). What is more, the district court took the unusual

step of giving the government an additional minute of extra time after each of the defense's objections during closing. This odd move no doubt sent a signal to the jury: it legitimized the government's characterization of Lopez and DeLancey's so-called lulling payments as directly analogous to Madoff. *Cf. Gruca*, 51 F.3d at 645 (finding that district court effectively adopted defense counsel's improper statement by overruling other side's objection and then reiterated the same, incorrect position to the jury).

The fifth factor—whether the defendant had the opportunity to counter the statements—does not affect the analysis here. The defense countered the statements by objecting. Each time it did, however, the district court not only overruled them but rewarded the government with additional minutes of argument time. In so doing, the district court signaled that raising the issue further was futile. In any event, defense counsel was no doubt aware of the danger of "re-ringing the bell" by mentioning Madoff for yet a third time during its own closing. *Cf. United States v. Lowis*, 174 F.3d 881, 885 (7th Cir. 1999) (finding trial court's curative instruction adequate to "unring the bell" after prejudicial testimony excluded in a pretrial ruling was admitted at trial).

Finally, the weight of the evidence against the defendant is also not dispositive where, as here, there are indications that the defendant's defense was hampered by other court rulings. *See United States v. Simpson*, 479 F.3d 492, 503–05 (7th Cir. 2007) *abrogated on other grounds accord. United States v. Richards*, 719 F.3d 746, 764 (7th Cir. 2013) (prosecutor's explicit request in closing that jury infer

defendant's propensity as a drug dealer, combined with improper admission of propensity evidence, warranted new trial despite fact that "circumstantial evidence in th[e] case would be enough to uphold the jury's guilty verdict"). By permitting the government to weave together two issues—lulling and Madoff—that had both been excluded from trial in pretrial rulings the district court allowed the government to unfairly bolster its argument that Lopez possessed an intent to defraud.

## III. The district court erred in requiring the defense's expert witness to testify in a lay capacity.

The district court acknowledged that defense witness Michael Alerding was an expert, but nonetheless required him to testify as a lay witness at trial. It did so by misconstruing authority that counsels against using the "expert" moniker in front of the jurors. The result is a wholesale ban on expert testimony, which is precisely what happened in Lopez's trial. This was an error of constitutional magnitude because it deprived Lopez of his Sixth Amendment rights to prepare and present a complete defense. Moreover, the jury instructions and rulings on DeLancey's testimony—discussed above—exacerbated the district court's error. *See supra* Section I. This Court reviews the exclusion of Alerding's expert testimony *de novo* because the district court did not follow the procedures required by Federal Rule of Evidence 702. *United States v. Glover*, 479 F.3d 511, 517 (7th Cir. 2007); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.").

The district court functions as a gatekeeper for expert testimony, ensuring that it is both relevant, reliable, and properly founded, and does not consider the weight to be provided to the expert. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–49 (1999); *see also* FED. R. EVID. 702. Once the district court has determined that the two criteria of relevance and reliability are met, a party's expert should be permitted to testify as an expert witness at trial. *United States v. Williams*, 81 F.3d 1434, 1441 (7th Cir. 1996) (referencing criteria for expert admissibility under Rule 702 and stating "[a]ll you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury").

Here, after correctly reciting the applicable legal standards under Rule 702 and *Kumho*, the district court simply failed to apply them. (A.44.) For example, although the district court did find Alerding's testimony relevant, (A.46), the district court never addressed the reliability prong of the expert-admissibility test. It did not ask whether Alerding's "testimony [would be] based upon sufficient facts or data," whether "[Alerding's testimony would be] the product of reliable principles and methods," or whether Alerding "[had] applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702. Instead, the district court acknowledged Alerding as an "expert in his field." (A.44) (stating that the government did not challenge this fact). Had the district court properly applied the Rule 702 procedures, however, it would have realized that the inquiry stopped there. Its only role was to ascertain Alerding's competence as an expert and all remaining questions of weight should have been left to the jury. *See Mannino v.*

*Int'l Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981) ("[T]he only thing a court should be concerned with in determining the qualifications of an expert is whether the expert's knowledge of the subject matter is such that his opinion will likely assist the trier of fact in arriving at the truth. The weight of the expert's testimony must be for the trier of fact.").

Yet, after finding that Alerding was "an expert in his field," the district court perplexingly stated that Alerding would "be permitted to testify, but only as a lay witness." (A.46.) The district court reached this conclusion by improperly grafting ABA Guidance as to how to refer to experts in front of the jury onto the threshold inquiry under Rule 702 as to whether a witness qualifies as an expert. In so doing, the district court abandoned the procedures required by Rule 702 and created a new standard that effectively prevents all expert testimony.

Specifically, the district court hinged its expert-admissibility ruling on whether Alerding's testimony would be "improperly elevated." (A.44) ("The court agrees that an expert determination by the Court is not warranted. Characterizing Mr. Alerding's testimony as that of an 'expert' may unduly confuse the jury, given the anticipated nature of Mr. Alerding's testimony."). It is true that some commentators and courts have suggested that the *label* "expert" should not be used in front of the jury because the label might cause the jurors to assign too much weight to the expert's testimony. *See United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007) (quoting ABA Civil Trial Practice Standard 17 (Feb. 1998)) ("Except in ruling on an objection, the court should not, in the presence of the jury, declare

that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so."); *Courtroom and Trial Practices Before The Honorable Tanya Walton Pratt*, Dec. 2015, page 11 ("Counsel may establish qualifications; the Court will not declare a witness to be 'an expert.'"). Prior to the district court's ruling here, however, no court had ever held that an expert witness must be relegated to lay witness status based on this concern.[10]

The district court's decision had tangible and deleterious effects on Lopez's trial. Alerding's expert testimony was pivotal to Lopez's defense. It would have shown that Lopez and his wife operated the very kinds of middle-market businesses with prospects for high rates of returns that were represented in the offering materials, thus explaining Lopez's decision to invest monies there. (A.40) (explaining to the court that the government's accusation is that Lopez operated a Ponzi scheme and that he could not defend against this accusation without Alerding's expert testimony as to Lopez operating a profitable business in a manner not atypical of most businesses of similar size and nature); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right[] to . . . call witnesses [on] one's own behalf has long been recognized as essential to due process."). Not only was this

[10] Indeed, this Court has specified other methods short of barring otherwise-admissible expert testimony by which a trial court can ensure that the jury is not confused. *E.g.*, *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010) (nothing a preference for cross-examination over exclusion of expert testimony); *United States v. Williams*, 81 F.3d 1434, 1444 (7th Cir. 1996) (holding that a defendant could have requested a jury instruction to alleviate concern pertaining to expert witness designation improperly affecting the jury). In fact, the district court later opted to give just such an instruction at the end of the case, (A.64; A.65), long after holding that Alerding could not testify as an expert. But it failed to account for this remedy in its pretrial ruling on the admissibility of Alerding's testimony.

testimony substantively critical to Lopez's defense, the district court's ruling muddled and hampered the flow of the defense case at trial. Specifically, by creating confusion among the parties as to the scope and limits of Alerding's testimony, the district court's order prompted disruptive objections and other interruptions during trial. The rampant confusion, inconsistency, and disruption are exemplified by the following two exchanges:

> **MR. ONG:** Your Honor, this is gold-played expert testimony. He is arguing the government's case as an expert CPA what – opining about what a promissory note is now. He's talking about what an unsecured note is. What relevance does this have to this case unless they're just trying to get in a back-door argument about their case?
>
> **MR: HAYES:** Judge, I don't know why it's wrong for the jury to understand what these words mean. These are technical financial terms.
>
> **THE COURT:** Those two terms are fine. What else are you going to ask him to define, because they may be helpful to them.

(A.59.) Here, the district court's pretrial ruling spurred the government to interrupt and object. In ruling on the government's trial objection, however, the district court retreated, giving Alerding "some leeway." (Trial Tr. 3-576.) Then, just minutes later:

> **Q.** You also mentioned that giving equity in a company can mean something, as well?
>
> **A.** Yes. Having equity in a company, if you give up that equity –
>
> **MR. ONG:** Objection. Relevance again, Your Honor.
>
> **THE COURT:** I'll sustain.

(A.60–61.) The leeway bestowed for "promissory notes" was withheld for "equity"—a true moving target for the defense, who could not adequately conduct its case without interruption.

This uncertainty infected other aspects of Alerding's testimony, particularly with respect to his ability to offer an opinion. Although the district court's order referenced the parties' ability to "discuss" Alerding's testimony as "opinion testimony," (A.45), the defense was caught between a rock and a hard place. It could not elicit any opinion from Alerding in his position as a lay witness because he lacked the personal knowledge of Lopez's business required for such an opinion. *Wantuch*, 525 F.3d at 513. And the opinion that Alerding could and was prepared to offer—one based on his specialized knowledge and training, *Swanquist*, 161 F.3d at 1073—had been barred by the district court's order. In the end, the district court got it exactly backwards, twice, which compounded the prejudice of both erroneous rulings. That is, DeLancey was a non-expert, summary witness allowed to opine on the meaning of complex and voluminous financial records, (Trial Tr. 3-534), while Alerding, an expert, who has been a CPA since 1975, was forced to withhold his opinion based on a review of complex and voluminous financial records, (A.39). The unfairness from this differential treatment is patent, and it was exacerbated by one additional fact: that the district court affirmatively instructed the jury—at the request of neither party—that it had heard from an expert in this case. (A.65.)[11]

[11] The origin of this instruction is unclear; it does not appear in the proposed instructions of either the government or the defense. (R.31; R.57.) Appellate counsel requested the transcript of the jury instruction conference, but was informed by the court reporter that these proceedings were not recorded or transcribed.

The district court had made clear that the expert was not Alerding, and the way Alerding's testimony unfolded at trial could only have reinforced that notion for the jury, so the only other witness to whom this instruction could remotely apply was DeLancey. Thus, there was a real danger that the jury improperly "elevated" DeLancey's testimony—an acknowledged non-expert, (A.39)—while the district court had simultaneously downplayed Alerding's. The district court's error not only prevented Lopez from preparing and presenting a complete defense, it also impermissibly bolstered the government's case against Lopez.

## IV. The district court erred by failing to allow Lopez to perfect the impeachment of Danny Cole.

Lopez was entitled, but not permitted, to impeach Danny Cole's prior inconsistent statement with extrinsic evidence—here, Agent Shivers's testimony that Cole falsely told him that he never agreed to the initial investment with Lopez. The district court accepted whole cloth the government's position that the fact that Cole's acknowledged on the stand that he lied meant that the defense had no need to close the impeachment with its own evidence. (A.57–58.) Because Cole's falsehood was what initiated the criminal investigation and because Lopez was denied the opportunity to perfect this impeachment with his best evidence, this case should be remanded for a new trial. This Court reviews evidentiary decisions for an abuse of discretion. *United States v. Wilburn*, 581 F.3d 618, 622 (7th Cir. 2009).

The Federal Rules of Evidence allow a party to introduce extrinsic evidence to show prior inconsistent statements. FED. R. EVID. 613(b). This Court

permits such extrinsic evidence even when the witness admits to the discrepancy on the stand. *United States v. Wimberly*, 60 F.3d 281, 286 (7th Cir. 1995). This is so because:

> '[a] party should be allowed to make his case by the most convincing evidence he can obtain . . . and extrinsic proof of a prior statement will often be far more convincing than the acknowledgment of the declarant, and not cumulative.' 3 Federal Evidence, *supra*, § 358, at 564 . . . Prior inconsistent statements can severely undermine the credibility of a witness, by showing either a flimsy recollection of events or worse, a propensity to lie . . . .

*United States v. Lashmett*, 965 F.2d 179, 182 (7th Cir. 1992). Thus, so long as the impeached witness is given an opportunity to explain or deny the statement and the other side is allowed to examine the witness about it, there is no bar to proving up this prior inconsistency with external proof. *Lashmett*, 965 F.3d at 181–182. Extrinsic evidence can be documentary, *id*. at 182, or via live testimony, *United States v. DeMarco*, 784 F.3d 388, 395 (7th Cir. 2015).

Here, Danny Cole, the initial complaining witness in this case, told investigators in February 2014 that he had not signed the paperwork initiating the January 2011 transaction between him and Lopez, (A.50), thus leading the investigators to believe that the transaction was fraudulent from the beginning. Specifically, he told them that it was not his signature on the documents (the Midland account application, buy direction letter, and promissory note) because he always signed legal documents with his middle initial. (A.50.) At trial, however, it came out for the first time that he had agreed to allow Lopez to sign the documents

for him and that he did not tell the investigators this fact, as this exchange during cross-examination reveals:

> **Q.** And you never said, oh, and by the way, I didn't sign it, but I let Jaime sign it for me. You never said that to him, did you?
>
> **A.** No.
>
> **Q.** It's kind of important, don't you think?
>
> **A.** I trusted Jaime.
>
> **Q.** Sir, if you tell someone "I didn't sign this," it makes you think somebody else signed it without your permission, right?
>
> **A.** Correct.
>
> **Q.** And that's what -- and now you're telling us for the first time that he actually had your permission, right?
>
> **A.** On the initial investment.
>
> **Q.** Oh, but it's for the first time, because you didn't tell the agent?
>
> **A.** I guess, no.

(A.50.) Defense counsel expressly gave Cole the opportunity to explain himself, asking "[i]t's kind of important, don't you think?" (A.50.) The government likewise had the opportunity to inquire into the statements during its redirect. (Trial Tr. 2-349.)

The next day, defense counsel sought to call the agent who initially interviewed Cole, Jeremy Shivers. (A.51.) The government objected, claiming that Cole's acknowledgement of his prior statement on the stand meant that it was no

longer a prior inconsistent statement:

> **MR. WARDEN**: Your Honor, he admitted he made the statement, so it's not inconsistent.

(A.53.) The district court agreed. (A.58) ("There's nothing inconsistent to attack, so you may not examine – call the witness on that issue."). Yet the district court's ruling directly contravened decades of this Court's precedent, which expressly allows a party to not only cross-examine a witness about his prior inconsistent statements, *see* FED. R. EVID. 608, but also to introduce extrinsic evidence in order to perfect that impeachment with the defense's best evidence of choice, *see* FED. R. EVID. 613(b); *Lashmett*, 965 F.2d at 182. In short, Agent Shivers's testimony would have provided "far more convincing evidence" of Cole's "flimsy recollection of events, or worse, his propensity to lie," *Lashmett*, 965 F.2d at 182, because of the forceful nature of a federal agent's testimony that he had been lied to by a key witness in the case.

Finally, this error is not harmless. Lopez should have been able to perfect the impeachment of Cole—the first complaining witness to authorities and a key witness in this case—in order to reinforce three points for the jury. First, impeachment would have highlighted the fact that Cole had previously lied to investigators in an attempt to do "everything in his power" to see Lopez in jail, a threat he had previously made. (Trial Tr. 2-346.) Second, it would have bolstered the evidence in the record that these initial investments were not fraudulent, despite Cole's efforts to convince agents that he had been hoodwinked from the get-go. (Trial Tr. 2-347–48) (Cole acknowledging that the initial investment documents

did not specify where or how the funds would be invested); (Trial Tr. 2-348) (Cole testifying that Lopez remitted the monthly interest payments to him from the signing of the first loan continuing through the trial).

Finally, had the jurors been fully able to assess the extent of Cole's duplicity to the agent, they may have come to doubt other aspects of his testimony, including his post-hoc representations about where he believed Lopez was going to invest. *Compare* (Trial Tr. 2-376) (Holsworth claiming that Lopez told him his money would be used to fund the rebuilding of roads in San Francisco) *with* (Trial Tr. 2-392–93) (Holsworth admitting on cross that he wrote an email confessing that he had no idea what Lopez was going to do with the money). And with these chinks in Cole's testimony, the government's seemingly impenetrable wall of duped investors begins to crack, as other inconsistencies among witnesses gain prominence. For instance, Jerry Wilson vacillated between describing his initial investments as having all of, and only, the characteristics of basic loans, (Trial Tr. 2-201, 2-233), while also insisting that the notes represented investments in corporate bonds, (Trial Tr. 2-231), or an investment in JCL itself. (Trial Tr. 2-199.)

Similarly, as noted above, Holsworth also spoke inconsistently at trial with respect to the initial loan to Lopez. On the stand, he claimed that Lopez had told him about a project in San Francisco and about investments in companies like Costco (Trial Tr. 2-376.) The e-mail at the time he was executing the loan, however, stated he had no idea where the money was going. (Trial Tr. 2-392–93.) At a minimum, the jury could have concluded that the government had failed to prove

Lopez's intent to defraud with respect to those wire-fraud counts that emanated from the initial investments, a full eight counts of the fifteen charged in the indictment, along with the accompanying three money-laundering counts.

## CONCLUSION

For the foregoing reasons, Appellant Jaime Lopez respectfully requests that the Court vacate his convictions and remand for a new trial.

Respectfully Submitted,

Jaime Lopez
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney
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Jaime Lopez

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 11,384 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Circuit Rule 32 and FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2011 with a 12-point Century Schoolbook font and footnotes in 11-point Century Schoolbook font.

By: /s/ SARAH O'ROURKE SCHRUP
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Dated: December 6, 2016

## CERTIFICATE OF SERVICE

I, the undersigned, counsel for Defendant-Appellant, Jaime Lopez, hereby certify that I electronically filed this brief, required appendix, and separate appendix with the clerk of the Seventh Circuit Court of Appeals on December 6, 2016, which will send the filing to counsel of record in this case.

By: /s/ SARAH O'ROURKE SCHRUP
*Attorney of Record*
WYATT HONSE
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(312) 503-0063

Dated: December 6, 2016

## CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Jaime Lopez, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the proper appendices to this brief.

By: /s/ SARAH O'ROURKE SCHRUP
*Attorney of Record*

WYATT HONSE
*Senior Law Student*
PATRICK SIMONAITIS
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Dated: December 6, 2016

## RULE 30(a) APPENDIX TABLE OF CONTENTS

AO 245B (Rev. 09/13) Judgment in a Criminal Case
Sheet 1

# UNITED STATES DISTRICT COURT

Southern District of Indiana

UNITED STATES OF AMERICA
**v.**
JAIME C. LOPEZ

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 1:15CR00069-001

USM Number: 12705-028

Charles C. Hayes and Kathleen M. Sweeney
Defendant's Attorney

**THE DEFENDANT:**

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 - 15, 16 - 19, and 20 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. 1343 | Wire Fraud | 1/9/2010 | 1 |
| 18 U.S.C. 1343 | Wire Fraud | 2/11/2010 | 2 |
| 18 U.S.C. 1343 | Wire Fraud | 4/12/2010 | 3 |
| 18 U.S.C. 1343 | Wire Fraud | 4/15/2010 | 4 |
| 18 U.S.C. 1343 | Wire Fraud | 5/11/2010 | 5 |
| 18 U.S.C. 1343 | Wire Fraud | 5/11/2010 | 6 |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/19/2016
Date of Imposition of Judgment

Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

5/24/2016
Date

A CERTIFIED TRUE COPY
Laura A. Briggs, Clerk
U.S. District Court
Southern District of Indiana
By _____ Deputy Clerk

DEFENDANT: JAIME C. LOPEZ
CASE NUMBER: 1:15CR00069-001

## ADDITIONAL COUNTS OF CONVICTION
(Continual)

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. 1343 | Wire Fraud | 1/26/2011 | 7 |
| 18 U.S.C. 1343 | Wire Fraud | 1/28/2011 | 8 |
| 18 U.S.C. 1343 | Wire Fraud | 7/27/2011 | 9 |
| 18 U.S.C. 1343 | Wire Fraud | 1/9/2012 | 10 |
| 18 U.S.C. 1343 | Wire Fraud | 2/8/2012 | 11 |
| 18 U.S.C. 1343 | Wire Fraud | 3/9/2012 | 12 |
| 18 U.S.C. 1343 | Wire Fraud | 4/11/2012 | 13 |
| 18 U.S.C. 1343 | Wire Fraud | 5/11/2012 | 14 |
| 18 U.S.C. 1343 | Wire Fraud | 6/20/2012 | 15 |
| 18 U.S.C. § 1957 | Money Laundering | 4/15/2010 | 16 |
| 18 U.S.C. § 1957 | Money Laundering | 5/12/2010 | 17 |
| 18 U.S.C. § 1957 | Money Laundering | 1/27/2011 | 18 |
| 18 U.S.C. § 1957 | Money Laundering | 7/29/2011 | 19 |
| 15 U.S.C. § 78j(b) | Securities Fraud | 7/20/2012 | 20 |

AO 245B (Rev. 09/13) Judgment in Criminal Case
Sheet 2 — Imprisonment



DEFENDANT: JAIME C. LOPEZ
CASE NUMBER: 1:15CR00069-001

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 57 months per count, to be served concurrently

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JAIME C. LOPEZ
CASE NUMBER: 1:15CR00069-001

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 years per count, concurrent

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below:

## CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.

2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3. You shall permit a probation officer to visit you at a reasonable time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

4. You shall not knowingly leave the judicial district without the permission of the court or probation officer.

5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.

6. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in residence occupants, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.

7. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.

AO 245B (Rev. 09/13) Judgment in a Criminal Case
Sheet 3 — Supervised Release



DEFENDANT: JAIME C. LOPEZ
CASE NUMBER: 1:15CR00069-001

8. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.

9. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.

10. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and shall permit the probation officer to make such notifications and/or confirm your compliance with this requirement.

11. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.

12. You shall provide the probation officer access to any requested financial information and shall authorize the release of that information to the U.S. Attorney's Office for use in connection with the collection of any outstanding fines and/or restitution.

13. You shall not incur new credit charges, or open additional lines of credit without the approval of the probation officer.

14. You shall not engage in an occupation, business, profession or volunteer activity that would require or enable you to have control over the finances of others during the term of supervision without prior approval of the probation officer.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant Date

U.S. Probation Officer/Designated Witness Date

DEFENDANT: JAIME C. LOPEZ
CASE NUMBER: 1:15CR00069-001

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **TOTALS** | **$** 2,000.00 | **$** | **$** 293,171.84 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| Thomas Holsworth | $49,215.20 | $49,215.20 | |
| Jerry Wilson | $140,261.46 | $140,261.46 | |
| Colleen Wilson | $36,351.60 | $36,351.60 | |
| Danny Cole | $67,343.58 | $67,343.58 | |

| | | |
|---|---|---|
| **TOTALS** | $ 293,171.84 | $ 293,171.84 |

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/13) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments



DEFENDANT: JAIME C. LOPEZ
CASE NUMBER: 1:15CR00069-001

# SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

**A** ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C ☐ D ☐ E, or ☐ G below; or

**B** ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ G below); or

**C** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

**D** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F** ☐ If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.

**G** ☒ Special instructions regarding the payment of criminal monetary penalties:

Any unpaid restitution balance during the term of supervision shall be paid at a rate of not less than 10% of the defendant's gross monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

| Defendant Name | Case Number | Joint & Several Amount |
|---|---|---|

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s): _____

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
any property constituting or derived from gross proceeds he obtained from the offense or a sum of money equal to the total amount of money involved in the offenses.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 1**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 2**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 3**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 4**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 5**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 6**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 7**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 8**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 9**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 10**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 11**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 12**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty X

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 13**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty X

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 14**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty X

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 15**

With respect to the charge of Wire Fraud, in violation of Title 18, United States Code Section 1343, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty X

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 16**

With respect to the charge of Money Laundering, in violation of Title 18, United States Code Section 1957, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 17**

With respect to the charge of Money Laundering, in violation of Title 18, United States Code Section 1957, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

## VERDICT FORM

## COUNT 18

With respect to the charge of Money Laundering, in violation of Title 18, United States Code Section 1957, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty X

Date: 1/22/16

Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 19**

With respect to the charge of Money Laundering, in violation of Title 18, United States Code Section 1957, as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson: [redacted]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. :15-cr-00069-TWP-DML-1 |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | |
| Defendant. | ) | |

**VERDICT FORM**

**COUNT 20**

With respect to the charge of Securities Fraud, in violation of Title 15, United States Code Sections 78j(b) and 78ff(a), as described in the indictment, we, the jury, unanimously find the defendant, JAIME C. LOPEZ, as follows:

[*Check one*]

Not Guilty _____

Guilty ✓

Date: 1/22/16 Foreperson: [redacted]

# General Information

| | |
|---|---|
| **Court** | United States District Court for the Southern District of Indiana; United States District Court for the Southern District of Indiana |
| **Federal Nature of Suit** | Criminal |
| **Docket Number** | 1:15-cr-00069 |
| **Status** | Closed |

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 1:15-cr-00069-TWP-DML |
| | ) | |
| JAIME C. LOPEZ (01), | ) | |
| | ) | |
| Defendant. | ) | |

**CLERK'S NOTICE OF APPEAL**

Pursuant to Fed. R. Crim. P. 32(j)(2) and at the request of Defendant made in open court at the conclusion of the sentencing hearing, the Clerk hereby files this notice of appeal on behalf of Defendant.

Date: 5/19/2016

Laura A. Briggs, Clerk

BY: _____
Deputy Clerk, U. S. District Court

Distribution:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | CAUSE NO. 1:15-cr-00069-TWP-DML |
| | ) | |
| V. | ) | |
| | ) | |
| JAIME C. LOPEZ, | ) | |
| | ) | Counts 1 – 15: Wire Fraud (18 U.S.C. § 1343) |
| Defendant. | ) | Counts 16 – 19: Money Laundering (18 U.S.C. § 1957) |
| | ) | Count 20: Securities Fraud (15 U.S.C. §§ 78j(b) and 78ff(a)) |
| | ) | |

**REVISED INDICTMENT**

The Grand Jury charges that:

**INTRODUCTION**

At all times material to this Indictment:

1. **JAIME C. LOPEZ**, the Defendant herein, was a resident of Hamilton County, Indiana and primarily conducted his business operations from his residence.

2. As a self-described financial advisor, **JAIME C. LOPEZ** created various business entities between December 2009 and January 2012 and utilized these entities, or assumed business names thereunder, in the execution of the scheme or artifice to defraud further described herein. The entities so utilized included JCL Interest Plus, JCL Capital Inc., JCL & Company, Inc. and JCL Direct (hereinafter, the JCL Entities).

3. **JAIME C. LOPEZ** induced various investors to transfer their retirement funds to him for investment in or through the JCL Entities listed above. At the direction of **JAIME C.**

**LOPEZ**, these investors transferred their Individual Retirement Accounts (IRAs) into self-directed IRAs administered through Entrust IRA Administration, later known as Midland IRA (Midland).

4. After these investors' IRAs were moved to Midland, the investors were advised by **JAIME C. LOPEZ** that their funds had been invested in one or more of the JCL Entities and the investors were issued promissory notes.

5. At the direction of **JAIME C. LOPEZ**, the subject funds were then deposited into bank accounts held in the name of one or more of the JCL Entities or an assumed business name thereunder.

## THE SCHEME TO DEFRAUD

6. Beginning not later than January 2010, and continuing until at least the 20th day of June 2012, **JAIME C. LOPEZ** did knowingly and with the intent to defraud, devise and execute a scheme and artifice to defraud, and to obtain money or property by means of materially false and fraudulent pretenses, representations and promises, knowing that the pretenses, representations, and promises were false and fraudulent when made. Those false and fraudulent pretenses, representations and promises included, but are not limited to:

A. Soliciting hundreds of thousands of dollars of investment funds under false pretenses, including false representations regarding how the investment funds would be used;

B. Falsely telling investors that he had invested their money as promised, including but not limited to:

- Falsely advising investors that their funds would be loaned to outside businesses;

- Falsely advising investors that their funds would be used to purchase corporate bonds or corporate notes; and
- Falsely advising investors that their funds would be invested in real estate.

7. After the investors' funds were deposited into a JCL Entities account, a significant portion of the funds were used by **JAIME C. LOPEZ** for personal expenses, such as the purchase of automobiles, home mortgage payments, and home landscaping. Some of the personal expenses were paid for by **JAIME C. LOPEZ** directly from one of the JCL Entities bank accounts. On other occasions, **JAIME C. LOPEZ** transferred funds from a JCL Entities account into an account in the name of 413 Solutions Inc. and then paid for personal expenses from that account.

8. Additional funds from these investors deposited into the JCL Entities accounts, which had been represented by **JAIME C. LOPEZ** to the investors as funds which would be used for investment purposes, were later utilized by **JAIME C. LOPEZ** to pay interest on the promissory notes of investors and were not used for any actual investment.

9. Later, these investors were issued new promissory notes by **JAIME C. LOPEZ** from one of the JCL Entities. The new notes provided for a longer investment term and a lower rate of interest than the original promissory notes. The investors did not agree to these new terms and did not sign any documentation authorizing the new promissory notes.

10. The issuance of the unauthorized new promissory notes provided **JAIME C. LOPEZ** with access to additional funds that had accumulated in the investors' accounts and additional opportunities to divert those funds to his own use.

**EXECUTION OF THE SCHEME AS TO COUNTS 1 THROUGH 15**

On various occasions beginning not later than on or about the 9th day of January 2010, and continuing until on or about the 20th day of June 2012, in Hamilton County, in the Southern District of Indiana, and elsewhere,

**JAIME C. LOPEZ,**

Defendant herein, having devised a scheme or artifice to defraud and for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, as described in Paragraphs 1 through 10 above, did, for the purpose of executing such scheme, or artifice, knowingly cause the following wire communications of writings or signals to be transmitted in interstate commerce from Indiana to another state on or about the following dates:

| COUNT | DATE | AMOUNT | SOURCE | PAYEE | METHOD |
|---|---|---|---|---|---|
| 1 | 1/9/2010 | $5,000.00 | JCL & Company Inc. Acct. | 413 Solutions | Check |
| 2 | 2/11/2010 | $1,215.00 | JCL & Company Inc. Acct. | Entrust/Midland | Wire |
| 3 | 4/12/2010 | $20,000.00 | JCL & Company Inc. Acct. | 413 Solutions | Check |
| 4 | 4/15/2010 | $10,000.00 | JCL & Company Inc. Acct. | 413 Solutions | Check |
| 5 | 5/11/2010 | $20,000.00 | JCL & Company Inc. Acct. | 413 Solutions | Check |
| 6 | 5/11/2010 | $10,000.00 | JCL Direct Acct. | 413 Solutions | Check |
| 7 | 1/26/2011 | $25,000.00 | JCL Capital Acct. | 413 Solutions | Check |
| 8 | 1/28/2011 | $2,142.77 | 413 Solutions Acct. | Central Mortgage Company | Wire |
| 9 | 7/27/2011 | $17,000.00 | JCL Capital Acct. | 413 Solutions | Check |
| 10 | 1/9/2012 | $2,644.09 | JCL Capital Acct. | Central Mortgage Company | Wire |
| 11 | 2/8/2012 | $2,644.09 | JCL Capital Acct. | Central Mortgage Company | Wire |
| 12 | 3/9/2012 | $2,644.09 | JCL Interest Plus Acct. | Central Mortgage Company | Wire |

| | | | | | |
|---|---|---|---|---|---|
| 13 | 4/11/2012 | $2,644.09 | JCL Interest Plus Acct. | Central Mortgage Company | Wire |
| 14 | 5/11/2012 | $2,644.09 | JCL Interest Plus Acct. | Central Mortgage Company | Wire |
| 15 | 6/20/2012 | $2,644.09 | JCL Interest Plus Acct. | Central Mortgage Company | Wire |

All of which is in violation of Title 18, United States Code, Section 1343.

**COUNT 16**

On or about the 15th day of April 2010, in Hamilton County, in the Southern District of Indiana, and elsewhere,

**JAIME C. LOPEZ,**

Defendant herein, did knowingly engage in a monetary transaction in criminally derived property in the amount of $15,689.00, more or less, derived from specified unlawful activity, for the payment of his home mortgage, in that the said **JAIME C. LOPEZ** did cause to be transferred or exchanged, in and affecting interstate commerce, funds drawn on a checking account maintained at JPMorgan Chase Bank, N.A., a financial institution, said funds having been derived from the wire fraud perpetrated by **JAIME C. LOPEZ** as charged in this Indictment; in violation of Title 18, United States Code, Section 1957.

**COUNT 17**

On or about the 12th day of May 2010, in Hamilton County, in the Southern District of Indiana,

**JAIME C. LOPEZ,**

Defendant herein, did knowingly engage in a monetary transaction in criminally derived property in the amount of $33,000.00, more or less, derived from specified unlawful activity, for the payment of home landscaping services, in that the said **JAIME C. LOPEZ** did cause to be

transferred or exchanged, in and affecting interstate commerce, a check drawn on an account maintained at JPMorgan Chase Bank, N.A., a financial institution, said check having been funded with funds derived from the wire fraud perpetrated by **JAIME C. LOPEZ** as charged in this Indictment; in violation of Title 18, United States Code, Section 1957.

**COUNT 18**

The Grand Jury charges that:

On or about the 27th day of January 2011, in Hamilton County, in the Southern District of Indiana,

**JAIME C. LOPEZ,**

Defendant herein, did knowingly engage in a monetary transaction in criminally derived property in the amount of $23,210.46, more or less, derived from specified unlawful activity, for the purchase of a Mercedes-Benz automobile, in that the said **JAIME C. LOPEZ** did cause to be transferred or exchanged, in and affecting interstate commerce, a cashier's check issued by JPMorgan Chase Bank, N.A., a financial institution, said cashier's check having been purchased with funds derived from the wire fraud perpetrated by **JAIME C. LOPEZ** as charged in this Indictment; in violation of Title 18, United States Code, Section 1957.

**COUNT 19**

On or about the 29th day of July 2011, in Hamilton County, in the Southern District of Indiana,

**JAIME C. LOPEZ,**

Defendant herein, did knowingly engage in a monetary transaction in criminally derived property in the amount of $17,998.00, more or less, derived from specified unlawful activity, for the purchase of a Mercedes-Benz automobile, in that the said **JAIME C. LOPEZ** did cause to be

transferred or exchanged, in and affecting interstate commerce, funds drawn on a checking account maintained at JPMorgan Chase Bank, N.A., a financial institution, said funds having been derived from the wire fraud perpetrated by **JAIME C. LOPEZ** as charged in this Indictment; in violation of Title 18, United States Code, Section 1957.

**COUNT 20**

Beginning not later than January 2010, and continuing until at least on or about the 20th day of July 2012, in Hamilton County, in the Southern District of Indiana, and elsewhere,

**JAIME C. LOPEZ,**

Defendant herein, did unlawfully, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, and of facilities of national securities exchanges, in connection with the purchase and sale of securities, use and employ manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by: (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon investors in and through the JCL Entities, in that **JAIME C. LOPEZ** made false and misleading representations to investors about the terms of investment in the JCL Entities and about how the JCL Entities was using investor money;

in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a); Title 17, Code of Federal Regulations, Section 240.10b-5

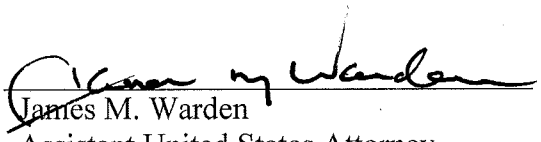
**FORFEITURE**

1. Pursuant to Federal Rule of Criminal Procedure 32.2, the United States hereby gives the Defendant notice that it will seek forfeiture of property pursuant to Title 18, United States Code, Section 982 as part of any sentence imposed.

2. Pursuant to Title 18, United States Code, Section 982 and Federal Rule of Criminal Procedure 32.2, if convicted of any of the offenses set forth in Counts 1 - 15 of the Revised Indictment, the Defendant shall forfeit to the United States:

a. any property, real or personal, constituting or derived from gross proceeds the Defendant obtained as the result of the offense; or
b. a sum of money equal to the total amount of money involved in the offense(s) of which he is convicted.

JOSH J. MINKLER
United States Attorney

By: 
James M. Warden
Assistant United States Attorney

alleged fraud occurred. Moreover, none of the alleged victims relied on this website.

D. Opinion testimony

1. Any testimony from Agent Delancey or any other witness that

a. "self directed IRAs is (sic) an area where you see a lot of fraud because there's lack of control or the investors have the control of it and there is substantial fraud in the self-directed IRA industry";

b. "there is no reason you would change 12% at 5 years to 6% at 10 years";

c. "the money wired from (defendant's) account into E*TRADE is the only transaction that on its face could be called an investment."

2. Any testimony from Danny Cole that he believes his heart problems is due to Lopez's actions.

E. Inflammatory statements

1. Any references that Lopez's actions constitute a "Ponzi scheme" or drawing any similarity to other infamous fraud prosecutions such as "Bernie Madoff."

2. Referring to JCL as a "cover" company rather than a parent or umbrella company.

These types of references are without relevance to the essential elements of the charged crimes and meant only to inflame the passions and prejudice of the jury. Federal Rules of Evidence 401, 403.

F. Allowing agents to recite the content of conversations which occurred during the investigation of Mr. Lopez.

Agents conducted numerous interviews during the course of its investigation. Agents should be precluded from reciting the content of those interviews because the statements are hearsay. Federal Rules of Evidence 801. Additionally, if agents are

*States v. Duvall*, 272 F.3d 825, 829 (7th Cir. 2001), the Seventh Circuit rejected an expert witness notice of the government's for failing to adequately summarize or describe the expert's testimony. The notice in *Duvall*, is substantially similar to Lopez' notice here. It merely provided "a list of topics" of testimony, instead of a summary of the actual testimony as required by the rule.

From a policy perspective, presumably part of the rationale for requiring some explanation of the substance of the expert testimony in a notice is to provide the opposing party and the court an opportunity to test whether the expert testimony is appropriate under Fed. R. Evid. 702 (expert may testify in form of opinion when prerequisites are met; *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993)), and to allow the opposing part sufficient information to prepare for the unusual testimony of an expert (see, Fed. R. Crim. P. 701, 702 and 703, allowing for opinion testimony from an expert not allowed from a lay witness). The notice Lopez provided provides no information that would allow the government or the court to determine whether the proffered expert testimony is appropriate under the rules, and it does not provide any detail that would allow the government to prepare for Alderding's testimony.

Lopez likens Aldering's anticipated testimony to that of the case agent, IRS Special Agent Janet DeLancey. But the government is not proffering Ms. DeLancey as an expert. She is merely a lay witness who will summarize facts pursuant to Fed. R. Evid. 1006. The government of course has no objection to Lopez using Aldering as a summary witness, but as it stands, Lopez is proffering Aldering in a completely open ended manner where he could provide expert opinion testimony, without providing any explanation of why expert testimony is appropriate, and what that expert testimony would be.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | **CAUSE NO.: 1:15-cr-069-TWP-DML** |
| **vs.** | ) | |
| | ) | |
| **JAIME LOPEZ,** | ) | |
| | ) | |
| | ) | |
| **Defendant.** | ) | |

**DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSITION TO EXPERT TESTIMONY**

Defendant, by counsel Kathleen M. Sweeney and Charles C. Hayes, replies to the Government's opposition to his proffered expert, Michael Alerding, CPA.

**Proposed expert and testimony**

Pursuant to Fed. Rule of Evid 702, Defendant seeks to call Michael Alerding as an expert witness based upon his education and standing as a certified public accountant, his experience in 43 years of providing auditing and accounting services, his 25 years in litigation support including performing expert witness services both as a consultant and as a testifying expert, and his experience in forensic accounting and auditing. Alerding would be called to testify to his opinions that

1. In the course of operating his businesses between 2010 and October 31, 2015, the Defendant essentially operated a family-owned, closely-held businesses in a manner not atypical of most businesses of this size and nature, including the payment of personal expenses through the business;

2. The Defendant has operated for profit businesses that have economic substance, have generated significant revenues, paid significant salaries and wages to

employees and contractors and have performed services for a wide variety of clients in the non-profit and for-profit segments that resulted in value to those clients; and

3. JCL Company is currently a profitable business that has the potential to generate a viable and consistent revenue stream in the future if the Defendant has the ability to operate the business going forward.

**Government's Theory of the Case**

The Government's theory of the case is that Lopez made misrepresentations to investors in order to obtain money. To that end, Agent Delancey is expected to testify that money went into Lopez's corporate accounts- (various JCL entities) and instead of being invested in outside companies; Lopez spent the money on personal expenses. In its opposition, the Government states that "Lopez did not invest their funds as represented, but instead used the money for other purposes. As a result the investors lost most of their investments." [Docket 42, pg. 4]

**Defendant's Theory of the Case and Rebuttal of Government's Theory**

The Government has repeatedly referred to Defendant's conduct as a Ponzi scheme. A Ponzi scheme is defined "is a fraudulent investment operation where the operator, an individual or organization, pays returns to its investors from new capital paid to the operators by new investors, rather than from profit earned by the operator." https://en.wikipedia.org/wiki/**Ponzi_scheme**

Defendant's intends to show that he did not make any misrepresentations, he had valid promissory notes and that the investors have not lost most of their investments. To rebut the Ponzi scheme allegations, Defendant should be allowed to show that his business is viable and can repay the promissory notes.

The Government's own evidence will show that JCL Company transferred the

pleadings, the actual report with CV?

THE COURT: You may.

MS. SWEENEY: Preadmit that as Defense Exhibit 1?

THE COURT: Do you have any objection?

MR. WARDEN: No, Your Honor.

THE COURT: All right. Defendant's Exhibit 1 is admitted into evidence for the purpose of this hearing.

*(Defendant's Exhibit 1 was received in evidence.)*

THE COURT: All right. And, Mr. Warden, what is your -- I know you filed your written documents, but, in a nutshell, what is your objection?

MR. WARDEN: Judge, it's in two ways, and I hope I've addressed this clearly, but I anticipated the Court would want some more detail this afternoon. And these objections overlap to some degree.

There's no dispute that the proposed witness is an expert professionally. The dispute of the United States is that the testimony that's been proposed through the pleadings we've received do not require expert testimony. And I cited a couple of Seventh Circuit cases that Your Honor saw. The risk factor is that it gives us sort of a taste that that makes him a more significant witness or a more important witness because the Court called him an expert.

In the earlier pleadings, the defense compared their

witness' testimony on an even level with that of our case agent, Agent DeLancey. Agent DeLancey is not testifying as an expert witness. She's testifying as a summary witness who received voluminous records pertinent to this case, has reviewed those records, analyzed them, and will summarize them in her testimony as it's pertinent to the charges in the indictment. That is not -- under Rule 702, that is not expert testimony.

So what we see as his proposed testimony, that of which at least would be relevant under 401 and 403, does not require expertise. It's an overlap, so it's a little complicated, but let me reference the defendant's pleading, the last pleading, which is the defendant's reply to our opposition. And that really focuses more on why the United States -- in a sense, this is a motion in limine in that this proposed testimony, under particularly 403, because it could create confusion and mislead the jury; and, really, to some degree, at least under 401, because it doesn't respond to any of the issues in this case. And, again, that's going to create some confusion for the jury, in the United States' belief.

For example, in the proposed testimony in the pleading, item number 1 says in the course of operating his businesses between 2010 and October 31, 2015, the defendant essentially operated family-owned, closely-held businesses in

## II. DISCUSSION

### A. Opposition to Expert Report and Testimony

In its opposition to the expert report, the Government objects to the proposed testimony of Defendant's witness, Michael P. Alerding, C.P.A. ("Mr. Alerding"), on two bases. First, the Government argues the proposed testimony is not expert testimony. Second, whether or not it is expert testimony, the Government asserts that much of the proposed testimony is not admissible under the evidentiary rules regarding relevance.

Federal Rule of Evidence 702 allows the admission of expert testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The district court must act as the gatekeeper to ensure that the proffered testimony is both relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *U.S. v. Pansier*, 576 F.3d 726, 737 (7th Cir. 2009).

The Government does not challenge whether Mr. Alerding is an expert in his field. Instead, the Government seeks exclusion of Mr. Alerding's testimony as "expert testimony", arguing that the expert designation has the potential to "inappropriately elevate", what the Government considers to be, irrelevant evidence. (*See* Filing No. 42 at 2.) The Court agrees that an expert determination by the Court is not warranted. Characterizing Mr. Alerding's testimony as that of an "expert" may unduly confuse the jury, given the anticipated nature of Mr. Alerding's testimony. In fact, the Courtroom Procedures and Trial Practice before this Court explain that regarding experts, "Counsel may establish qualifications; the Court will not declare a witness to be "an expert".[1] This practice is typical amongst the judges in this district.

[1] See *Courtroom Procedures and Trial Practices Before the Honorable Tanya Walton Pratt*, Dec. 2015, page 11.

On the second issue, the Government asserts that much of the proposed testimony of Mr. Alerding is not admissible under the evidentiary rules regarding relevance. As explained in their brief and at the hearing, the Government will seek to demonstrate that Defendant did not invest money in the manner represented to his investors, instead depositing the money in the accounts of businesses owned by him and his wife and using the money for personal reasons. (*See* Filing No. 42 at 4-5) ("[t]he government expects that the victim-investors will testify unanimously and unequivocally that Lopez operated a business that made loans to large businesses and municipalities, and purchased real estate, which generated significant profits for his investors, and the investors' principle would always be safe. Never did Lopez tell them that their money would be invested in his wife's business. If he had, they all would have refused to invest with him.".) In support, IRS Agent DeLancey, who is designated as a Government lay witness, will show the flow of money in and out of the Defendant's bank accounts.

In his report, Mr. Alerding opines that: (1) Mr. Lopez operated closely-held businesses and that his payment of personal expenses through the business is not atypical for such businesses; and (2) that Mr. Lopez operated profitable businesses, including JCLC, one of the businesses in which Mr. Lopez deposited the investors' funds. (*See* Filing No. 42-1 at 8.)

Given its theory of liability, the Government argues that the opinion that Defendant's businesses were profitable is irrelevant. In particular, the Government argues that Defendant never told his investors that he would invest their money in his own businesses or those of his wife, and instead promised to invest the funds elsewhere. According to the Government, the fact that Defendant's business may ultimately be able to pay back his investors is irrelevant to the issue whether Defendant did, in fact, make misrepresentations to his investors.

Defendant argues that Mr. Alerding's testimony is necessary to present a full defense. Defendant notes that the Government will rely heavily on the fact that Defendant's businesses and those of his wife failed to make payments to his investors and is not capable of do so going forward. As a result, Defendant argues that Mr. Alerding's testimony, which suggests a contrary conclusion of the economic viability of his businesses, is necessary to rebut the Government's evidence of "loss" to his investors.

Given the heavy presumption in favor of admissibility and the Defendant's right to present a full defense, the Court is persuaded that Mr. Alerding's testimony is at least minimally relevant and should be admitted. *Gayton*, 593 F.3d at 616 (noting the preference for cross-examination rather than exclusion of expert testimony); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (noting that the right to call witnesses on one's own behalf is essential to due process and the right to a fair opportunity to defend against the government's accusations).

Accordingly, Mr. Alerding will be permitted to testify, but only as a lay witness. In this regard, the Court notes no objection from the Government to this conclusion. (*See* Filing No. 39 at 2.) As a result, while Mr. Alerding's testimony may be discussed as "opinion" testimony, the Court and the parties are prohibited from referring to Mr. Alerding as an "expert" during trial. *See U.S. v. Jones*, 488 F.3d 690, 697 (6th Cir. 2007) (quoting ABA Civil Trial Practice Standard 17 (Feb. 1998)) ("[e]xcept in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so"); *U.S. v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988).

**B. Motion *in Limine***

The Court excludes evidence on a motion *in limine* only if the evidence clearly is not admissible for any purpose. *See Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398,

1400 (N.D. Ill. 1993). Unless evidence meets this exacting standard, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* at 1400-01. Moreover, denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion is admissible; rather, it only means that, at the pretrial stage, the court is unable to determine whether the evidence should be excluded. *Id.* at 1401.

**1. Use of the term "lulling payments" in the Government's summary reports**

Defendant first seeks to exclude the term "lulling payments" from the Government's summary exhibits. Defendant contends that the term does not appear on any of the documents summarized by the Government and asserts that the term is argumentative.

To begin, the Court notes that the term "lulling payments" is frequently used in fraud cases to describe payments made by a defendant from one investor's investment to pay "interest" on another investor's investment. *See, e.g.*, *U.S. v. Moskop*, 499 Fed. App'x 592, 594 (7th Cir. 2013) (unpublished opinion) (however, this is the only Seventh Circuit case that uses the term); *U.S. v. Dejong*, 42 Fed. App'x 5, 5-7 (9th Cir. 2002) (unpublished opinion) (concluding that such payments were properly considered "lulling payments" when the Defendant admitted that the "payments were designed to prevent discovery of the scheme to defraud").

However, the Court agrees that the term is, indeed, argumentative and has the potential to prejudicially influence the jury when used to summarize bank accounts that do not otherwise include the term. *See, e.g.*, *U.S. v. Plato*, 593 Fed. App'x 364, 375 (5th Cir. 2015) (evaluating the potentially prejudicial effect of the terms "Ponzi scheme" and "lulling payments" when attributed to the actions of the defendant). The Court finds the term "lulling payment" to have a potentially

prejudicial impact, particularly when presented as a summary exhibit depicting numerous bank transactions. Accordingly, the Court grants this portion of Defendant's motion[2].

**2. Investment Records of Stevie Brown**

Defendant also seeks to exclude the investment records of Stevie Brown ("Mr. Brown"). Defendant asserts that the records are not relevant since Mr. Brown is not alleged to be a victim and because the Government has not designated Mr. Brown as a witness. The Government asserts that Mr. Brown's investment records are relevant because they will be used to show that Defendant used a portion of Mr. Brown's investment to pay "interest" on another investor's account. The Court concludes that this evidence is relevant, as the Government suggests, but solely for the limited purpose asserted by the Government. Accordingly, the Court denies this portion of Defendant's motion, allowing the submission of the records, solely for the narrow purpose identified by the Government.

**3. Use of a Highlighted Exhibits**

Finally, Defendant seeks to exclude the Government's use of a highlighter on several of its documentary exhibits. Defendant asserts that the use of a highlighter might prejudice the jury's perception of certain exhibits. The Government asserts that in preparing exhibits from the IRA management company that it will offer for trial, it has highlighted some pages of documents concerning conversations with the victims who are going to testify and the highlights are simply for the purpose of focus on those entries. This case is likely to involve a significant amount of documentary evidence, and the Court is, therefore, persuaded that some highlighting might assist the jury in its deliberation without creating a miscarriage of justice. Accordingly, the motion *in*

[2] The Court notes that during the Court's hearing on the motion, Mr. Lopez did not object to the use of the term "lulling statement" at trial for the purposes of argument. As such, the Government is only prohibited from using the term "lulling payment" in its summary exhibits, consistent with the scope of Mr. Lopez's objection.

A. Yes.
Q. I mean, right, if you were at a bank, you want them to be able to verify your signature, don't you?
A. Yes.
Q. So you think that signature is important, that it be accurate, isn't it?
A. Yes.
Q. Now, do you remember on February 12, 2014, speaking with Special Agent Jeremy Shivers?
A. Yes.
Q. Did he come to your house to talk to you?
A. Yes.
Q. You understood all of his questions?
A. Yes.
Q. You gave thoughtful answers to his questions?
A. I hope so, yes.
Q. You gave truthful answers to his questions?
A. Yes.
Q. He showed you the Midland account application dated December 10th, 2010, didn't he?
A. I'm sure he did.
Q. And you told him it was not your signature because you always use your middle initial L., correct?
A. On legal --
Q. Right? That's what you told him?

A. Yes.
Q. You never told him, "Oh, I let Jaime sign this for me," did you?
A. No.
Q. He also showed you a buy-direct letter that you said, again, was not your signature because you always use your middle initial L., correct?
A. Correct.
Q. And you never said, oh, and by the way, I didn't sign it, but I let Jaime sign it for me. You never said that to him, did you?
A. No.
Q. It's kind of important, don't you think?
A. I trusted Jaime.
Q. Sir, if you tell someone "I didn't sign this," it makes you think somebody else signed it without your permission, right?
A. Correct.
Q. And that's what -- and now you're telling us for the first time that he actually had your permission, right?
A. On the initial investment.
Q. Oh, but it's for the first time, because you didn't tell the agent?
A. I guess, no.
Q. Right. So today is the first time?

**No. 16-2269**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAIME C. LOPEZ,
Defendant-Appellant.

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On Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
The Honorable Tanya Walton Pratt
Case No. 15-cr-00069

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# RULE 30(b) APPENDIX OF DEFENDANT-APPELLANT JAIME LOPEZ

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evidence?

MS. SWEENEY: Yes.

THE COURT: Who will be your first witness?

MS. SWEENEY: Special Agent Shivers.

THE COURT: Okay. And then who?

MS. SWEENEY: Stevie Brown.

THE COURT: And then?

MS. SWEENEY: Amanda Lopez.

THE COURT: And then?

MS. SWEENEY: Mike Alerding.

THE COURT: Do you think we can do all that today?

MS. SWEENEY: I do.

THE COURT: Okay.

MS. SWEENEY: It depends on Mr. Warden, I think.

MR. WARDEN: Your Honor, in that regard, Judge, since she brought that up now, if the Court wants to take this up now, the United States has an objection with respect to the testimony of Agent Shivers.

THE COURT: All right. What is that objection?

MR. WARDEN: My understanding, Your Honor, from talking with Ms. Sweeney, is that she intends to ask him questions about an interview he participated in with Mr. Cole. The subject matter of that has to do with the failure of Mr. Cole in his statement previously to tell the investigators that Mr. Lopez -- that he had orally consented to Mr. Lopez

creating certain documents, including even putting Mr. Cole's name on it. That was Mr. Cole's testimony yesterday, and so the government hears this as inappropriate in that it's not trying to raise a prior inconsistent statement; it's trying to bolster a prior consistent statement that the defendant thinks is helpful to his case. And that is not admissible evidence.

I mean, she can't call Shivers and say, yeah, that -- yeah, Cole didn't say this, didn't he? You can't do that, because it's not -- it's not relevant to any issue before this Court.

THE COURT: Okay. So he's arguing that it's not admissible because it's not --

MR. WARDEN: It's not a prior inconsistent statement.

MS. SWEENEY: What rule is he going to --

MR. WARDEN: It's a rule about prior, I mean, I have to look up --

THE COURT: Get your book out, because I've got mine out, too. Prior inconsistent statements.

MR. WARDEN: I'll ask, if the defense is offering it, Your Honor, I think the defendant ought to be able to say what rule supports this testimony.

THE COURT: All right. Tell me what rule supports your testimony. Prior statement inadmissible was 609. Prior inconsistent statement inadmissible is 613.

MS. SWEENEY: Your Honor, it's also a declarant witness' prior statement that's not considered hearsay under 801. Additionally, Your Honor, this is part of proper impeachment. He specifically has said, I didn't tell the agent these things, and the agent is needed to complete the impeachment to say, yeah, he didn't. For it to be substantive evidence, yes, he did not tell me these things; and yes, I was led to believe that they were then forgeries, so that that's part of the completing the impeachment process. That's how you always impeach somebody on a prior inconsistent statement.

THE COURT: Well, he admitted that he made the prior inconsistent statement.

MR. WARDEN: Your Honor, he admitted he made the statement, so it's not inconsistent.

MS. SWEENEY: It is inconsistent, because it's an inconsistency of omission. It doesn't always have to be a covert statement. Omission is also a statement, and it's also inconsistent.

THE COURT: And you're looking at which rule? 801, you said?

MS. SWEENEY: 801, and I think that it's also just case law, common law of impeachment, Your Honor.

THE COURT: Okay. I'll look at it over the break.

MS. SWEENEY: And it's 613(b).

THE COURT: 613(b), okay. We'll look at it over

the break. Extrinsic evidence of prior inconsistent statement of witness -- prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon or the interest of justice requires otherwise.

MS. SWEENEY: Your Honor, I'm sorry. I think you inserted the word "not." That is not there. It says extrinsic evidence of a witness's prior inconsistent statement is admissible.

MR. WARDEN: Your Honor, the problem is, it is not --

MS. SWEENEY: 613(b).

THE COURT: I am reading it. A prior inconsistent statement by a witness is not admissible is what it says in here, unless I have a misprint.

MS. SWEENEY: Are you looking at the actual rule?

THE COURT: No, I'm looking at the little --

MS. SWEENEY: If I might approach? Here is the actual rule.

THE COURT: Hand it to me while you go get your mic.

MS. SWEENEY: 613(b).

THE COURT: And it does not apply to an opposing party statement under 801(d)(2). Okay.

MR. WARDEN: Your Honor, the government's response

is, this is not a prior inconsistent statement. Mr. Cole testified that he did not tell the agent that the defendant received his oral authorization. There is no inconsistent statement for them to challenge. They just want to bolster a statement they think is helpful to them, and they can't do that by calling Shivers and say, isn't this what happened?

MS. SWEENEY: Again, Your Honor, he's assuming that omission can never constitute an inconsistent statement. And it's a glaring omission, and omissions are always -- have been always considered statements, just like behavior.

MR. WARDEN: It is, Your Honor, except he admitted it. I mean, Mr. Cole said, I didn't tell Agent Shivers that. So an omission is something that could be challenged if it's inconsistent. There's nothing that is inconsistent.

THE COURT: Okay. I'll take it under advisement. Let's take our break, and then I'll make a ruling when we return.

THE COURTROOM DEPUTY: All rise.

(Recess at 1:40, until 2:06.)

THE COURT: We are back on the record. All right. Did you want to add anything to your objection, the government's objecting to the witness testimony?

MR. WARDEN: Judge, I don't think it's adding unless the Court thinks otherwise. Again, to summarize this very quickly, what I hear the defendant saying, it's not attacking

a prior inconsistent statement because Mr. Cole testified that, in fact, he had given the defendant orally permission to process certain documents. And he's already admitted that, so to bring that -- bring something about that up again is not going to be dealing with a prior inconsistent statement.

THE COURT: Okay.

MS. SWEENEY: Your Honor, I guess if, to make an offer to prove, the investigator showed Mr. Cole one, two, three, four, five, six, seven documents that had -- is purported to have his signature during a time period of December 10th, 2010, through July 13th, 2011.

THE COURT: Okay.

MS. SWEENEY: I'm sorry, July 13th, 2011. And what he told the investigator was that he was sure none of the other signatures were his, because he always signs his name with his middle initial L. There is no middle initial on any of the documents that Cole denied having signed. Cole advised the signature on these documents were forged. So it's absolutely impeachment to have the agent say he told me they were forged, because that was an untrue statement.

THE COURT: And your response?

MR. WARDEN: Judge, he testified yesterday that he did not sign those documents. I don't know whether he said the word "forged" or the agent said the word "forged." He said he didn't sign the documents, and he told the jury on

cross-examination that he had not told the agent that he had orally given authorization to the defendant to sign his name for him. And so he's already admitted that. To bring that up again is not attacking a prior inconsistent statement.

THE COURT: So you're saying that he's already agreed and admitted that the agent, the information that the agent has is different than his testimony in court? Is that what you're saying?

MR. WARDEN: No. The agent --

THE COURT: And this is Agent Shivers?

MR. WARDEN: Yes. And he is here.

THE COURT: All right.

MR. WARDEN: The agent never asked him nor did Mr. Cole volunteer that he had given any sort of other authority to the defendant to sign his name.

MS. SWEENEY: Well, Judge, when you say -- when the agent says they were forged, that means an absence of consent. So it's a direct impeachment that we are allowed to complete by having the agent say that. It's in his report. That's verbatim.

MR. WARDEN: Judge, my response is, that on -- he admitted everything.

THE COURT: Mr. Cole?

MR. WARDEN: Mr. Cole on cross-examination admitted everything that Ms. DeLancey wants to elicit, and so --

Ms. Sweeney. I'm sorry. Wants to elicit. And so there's nothing inconsistent to deal with.

MS. SWEENEY: And he never said I told him they were forged. He just said, yeah, I just didn't tell him.

MR. WARDEN: But nobody asked him that question, did he use the word forged. You didn't ask him that. Nobody asked him that, so there's nothing inconsistent to attack.

THE COURT: All right. The Court agrees. There's nothing inconsistent to attack, so you may not examine -- call the witness on that issue. Do you have other matters for this witness?

MS. SWEENEY: No.

THE COURT: Okay. And your objections and record have been made.

Who will be your next witness? Is it the -- let's see, who did you say would be next?

MS. SWEENEY: Stevie Brown.

THE COURT: Okay. Well, bring Stevie Brown in.

MS. SWEENEY: Go ahead.

THE COURT: Mr. Hayes, you have to go get the witnesses if she's going to examine them. Take turns. Are you ready for the jury, Ms. Sweeney?

MS. SWEENEY: I am.

THE COURT: Oh, we're going to let the government rest. You may bring in the panel, and we'll let the

MR. ONG: Objection, Your Honor. Relevance.

THE COURT: Why don't you come up.

(Bench conference on the record.)

MR. ONG: Your Honor, this is gold-plated expert testimony. He is arguing the government's case as an expert CPA what -- opining about what a promissory note is now. He's talking about what an unsecured note is. What relevance does this have to this case unless they're just trying to get in a back-door argument about their case?

MR. HAYES: Judge, I don't know why it's wrong for the jury to understand what these words mean. These are technical financial terms.

THE COURT: Those two terms are fine. What else are you going to ask him to define, because they may be helpful to them.

MR. HAYES: I can grab my notes real quick. There are only two more questions.

THE COURT: Go get that so we can talk about them now. Promissory notes.

MR. HAYES: Promissory notes, subordinated debt, unsecured, accruing, and commence. Those are words that were in the documents that I thought would be helpful for the jury to understand.

MR. ONG: Your Honor, I'm going to just make my objection that we object to this person's testimony as worse

A. Commence?
Q. Yeah.
A. To begin.
Q. One of the things you talked about a few minutes ago is that you have experience with the start-up small businesses?
A. Yes.
Q. Okay. What are some of the ways that small businesses typically get funded to start?
A. Well, there are a lot of different ways. They are all over the place. Most closely held businesses and family-owned businesses fund it through friends and family primarily, and in some cases, they will fund it through the Small Business Administration loans, some of the Low-Doc provisions of the Small Business Administration. And where they are incapable of that, some of them will raise private equity through nonunrelated individuals.
Q. So it's not uncommon to see start-up companies resort to loans in order to generate capital to start their business?
A. Actually, it's preferable if you're the small business owner to receive a loan, because you still have control and ownership of the company, even though you do have an obligation to pay it back.
Q. You also mentioned that giving equity in a company can mean something, as well?
A. Yes. Having equity in a company, if you give up that

equity --

MR. ONG: Objection. Relevance again, Your Honor.

THE COURT: I'll sustain.

MR. HAYES: I'll move on, Judge.

BY MR. HAYES:

Q. Mr. Alerding, have you had the opportunity to review any -- or are you familiar with the company JCL & Company, Incorporated?

A. Yes.

Q. Have you had this opportunity to review any documents associated with that company?

A. Yes.

Q. Can you tell the jury what documents you've reviewed?

A. We've looked at the documents that were received from the government through you, as well as documents received from Bench Accounting, which is the on-line accounting company that JCL & Company uses to provide its bookkeeping and accounting services.

Q. And you mentioned earlier you're a certified public accountant; is that right?

A. I am.

Q. When you prepare -- have you ever prepared financial statements, cash reports, revenue reports, have you done that before?

A. Under certain circumstances, we will be engaged to do

one of these expenditures. You can see Counts 1 through 15 are all the wire fraud counts, and those are wires, then, in furtherance of the fraud scheme, things that Jaime Lopez was spending the victims' money on. Counts 16 through 19, expenditures of $10,000 or more of the victims' money from the fraud scheme. And, again, all the exhibits that show where -- tracing the money and where they come from.

Now, these exhibits are not going to go back with you. You saw these. Agent DeLancey talked about these exhibits. They are demonstrative exhibits, so they're just illustrations, but I would suggest to you they are not controversial. This is a straightforward explanation of the summary of financial records that Agent DeLancey talked about. There were a bunch of these.

Here's one that's very indicative of all of them. You can see Jerry Wilson's money going in, being removed shortly thereafter by Jaime Lopez into JCL, into other JCL entities, and then $4,000 going back into his own account as if it is some kind of interest payment. Now, let's make no mistake.

You heard Agent DeLancey talking over and over about the lulling payment. In the fraud world, just like I talked about at Potemkin village, a little fake camp is not really a camp. It's a ruse. It's designed to mislead. These are not interest payments. Interest payments clearly connote that

some sort of return on capital. This is not interest. This is just lulling. It's, in the fraud scheme, it's a way of making sure you don't get caught. Just like, again, Bernie Madoff paid people for 15, 20 years or more, hundreds of thousands of people --

MR. HAYES: I object. This was covered in the motion in limine.

THE COURT: Overruled, Counsel, he can argue what he wants in closing. We'll give him another minute.

MR. ONG: -- paid people back doesn't mean they were getting interest on their capital or returns on their capital. They were getting lulling payments designed to keep this from being revealed, and that's exactly what these payments are.

THE COURT: You have about five, plus the two.

MR. ONG: Thank you, Your Honor.

So then $30,000, the same thing. That's not what Jerry Wilson bargained for. So to review with the fraud counts, interstate wire transfers, you're going to hear the instructions that the interstate wire must be in interstate wire transfer and that that is, in fact, stipulated to by the parties that this money did go in interstate commerce.

The question is, was there a scheme to defraud, and were these expenditures in furtherance of a scheme to defraud? Every movement of this money after he got his hands on it is in furtherance of his scheme to defraud. The money laundering

testimony here in court.

You may consider an inconsistent statement made before the trial to help you decide how believable a witness' testimony was here in court.

If you have taken notes during the trial, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

The defendant has been accused of more than one crime. The number of charges is not evidence of guilt and should not influence your decision.

You must consider each charge and the evidence concerning each charge separately. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any other charge.

You have heard a witness who gave opinions and testimony based on their scientific, technical, or otherwise specialized knowledge. You do not have to accept this witness' opinions or testimony. You should judge this witness' opinions and testimony the same way you judge the testimony of any other witness. In deciding how much weight

**JURY INSTRUCTION NO. 13**

You have heard a witness who gave opinions and testimony based on their scientific, technical, or otherwise specialized knowledge. You do not have to accept this witness' opinions or testimony. You should judge this witness' opinions and testimony the same way you judge the testimony of any other witness. In deciding how much weight to give to these opinions and testimony, you should consider the witness' qualifications, how he reached his or her opinions or conclusions, and the factors I have described for determining the believability of testimony.

**CERTIFICATE OF SERVICE**

I, the undersigned, counsel for Defendant-Appellant, Jaime Lopez, hereby certify that I electronically filed this brief, required appendix, and separate appendix with the clerk of the Seventh Circuit Court of Appeals on December 6, 2016, which will send the filing to counsel of record in this case.

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Dated: December 6, 2016

**CIRCUIT RULE 30(d) STATEMENT**

I, the undersigned, counsel for the Defendant-Appellant, Jaime Lopez, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

/s/ SARAH O'ROURKE SCHRUP
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Dated: December 6, 2016