24-259

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

TREVOR MILTON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

ALEXANDRA A.E. SHAPIRO
DANIEL J. O'NEILL
AVERY D. MEDJUCK
SHAPIRO ARATO BACH LLP
1140 Avenue of the Americas,
17th Floor
New York, New York 10036
(212) 257-4881

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

INTRODUCTION

The jury at Trevor Milton's trial believed he lacked "criminal intent." But it convicted him of three fraud counts anyway, because it was misled by serious instructional and evidentiary errors.

The government lacks any persuasive responses to Milton's appellate claims. Its brief therefore ignores or misconstrues the controlling precedents and distorts the trial record.

The government's defense of the scienter instructions conflicts with Supreme Court and Second Circuit precedent. It ignores that this was an exceedingly close case in which accurate instructions could have changed the outcome. The government doesn't even try to defend the district court's rationale for admitting the prosecution expert's testimony, because that rationale was legally indefensible. Instead, the government downplays the testimony and makes arguments that, if accepted, would effectively dispense with *Daubert* gatekeeping. The government concedes instructional error on venue but tries to salvage Count Four by misstating the record, venturing new theories it never argued to the jury, and ignoring controlling caselaw on "essential conduct" and "substantial contacts." The government's defense of the legality of the forfeiture order is equally flawed.

The judgment should be reversed.

ARGUMENT

I. THE ERRONEOUS AND CONFUSING SCIENTER INSTRUCTIONS REQUIRE A NEW TRIAL

The government attempts to salvage the intent instructions through exactly the "grammatical parsing, subtle exegesis, rhetorical deconstruction, and editing for harmlessness" that "a jury composed of laypersons cannot be expected to perform." *United States v. Kopstein*, 759 F.3d 168, 183 (2d Cir. 2014). It claims even if "the particular words and phrases" were wrong, the instructions conveyed the "general concept" required. G.Br.28, 33. But jury instructions must be "clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime." *United States v. Clark*, 475 F.2d 240, 248 (2d Cir. 1973); *see also United States v. Rossomando*, 144 F.3d 197, 202 (2d Cir. 1999) (charge requiring jury to reconcile "ambiguous and obscure" instructions is plain error). This Court should reject the government's argument that the instructions were *close enough*.

A. The "Willfulness" Instruction Misstated The Law

The government claims 15 U.S.C. § 78ff requires only "a wrongful purpose" and not "knowledge of the unlawfulness of [the defendant's] actions." G.Br.29. That defies binding precedent from the Supreme Court and this Court.

1. The Supreme Court has repeatedly held that "to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with

knowledge that his conduct was unlawful.'" *United States v. Bryan*, 524 U.S. 184, 191-92 (1998) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)).

The government has no viable response to this binding authority. It says *Bryan* endorsed "with a bad purpose" as one of several accurate definitions for willfulness. G.Br.31. But *Bryan* used "bad purpose" as shorthand for "bad purpose *to disobey or to disregard the law*," which was the instruction at issue. *Bryan*, 524 U.S. at 190 (emphasis added). The Court found the instruction accurate only because it conveyed that "willfulness" requires "knowledge that the conduct is *unlawful*." *Id.* at 196 (emphasis added). The instruction here, by contrast, failed to convey that requirement.

The government mentions *Ratzlaf* in passing (G.Br.31) but has no answer for its holding that to establish "willfulness" "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." 510 U.S. at 137. And the government simply ignores the other Supreme Court authorities cited in Milton's opening brief (at 25-26), which are fatal to the government's position.

2. The government's treatment of this Court's precedents is equally unsound. It dismisses *United States v. Kosinski*, 976 F.3d 135 (2d Cir. 2020)—the Second Circuit's most recent precedential decision defining "willfully" in § 78ff—as relevant to insider trading cases but not any other Title 15 securities fraud. G.Br.32. But *Kosinski* was clear that the meaning of "willfully" does not turn on

what type of securities fraud is alleged—an atextual and legally indefensible proposition, as the meaning of a statutory term does not change depending on the facts of the case. The *Kosinski* court clarified that older cases suggesting "willfulness" requires knowledge that one is violating *the securities laws* "did not depart from precedent to require a securities defendant's awareness of more than the general unlawfulness of his conduct." 976 F.3d at 154 (citing *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010)). In other words, *Kosinski* rejected an even stricter standard and instead reaffirmed the "generally applicable" definition of "willfulness" set forth in *Bryan*, *Ratzlaf*, and Judge Raggi's *Cassese* dissent. *See* Br.26. That standard requires "knowledge that the conduct is *unlawful*." *Id.* at 154 (emphasis added); *see also id.* at 154 n.14.

Kosinski thus refutes the government's claim that *Kaiser* requires only "wrongful" intent. G.Br.29. And since *Kosinski*, this Court has repeatedly held that willfulness requires knowledge of unlawfulness. *See* Br.27. In the last two years, this Court *thrice* reiterated the point. *See United States ex rel. Hart v. McKesson Corp.*, 96 F.4th 145, 157 (2d Cir. 2024) ("[T]he defendant must act 'with knowledge that his conduct was unlawful.'") (quoting *United States v. Kukushkin*, 61 F.4th 327, 332 (2d Cir. 2023)); *United States v. Zheng*, 113 F.4th 280, 296 n.5 (2d Cir. 2024) (citing *Bryan* and *Kukushkin* and agreeing with their definition of "willfully").

The government's other cases (G.Br.29-31) are either inapposite or non-binding, or both. For instance, it cites Second Circuit decisions holding that willfulness does not require proof the defendant knew "the specific law" he was violating. *United States v. Petit*, Nos. 21-543, 21-559, 2022 WL 3581648, at *4 (2d Cir. Aug. 22, 2022) (summary order); *see also United States v. George*, 386 F.3d 383, 393 (2d Cir. 2004) ("[T]he term 'willfully' in criminal statutes typically does not require the government to prove the defendant's specific intent to violate *the particular criminal statute* in question.") (emphasis added). And *United States v. Dixon* actually conflicts with the government's position because it required that a defendant knew his conduct was specifically "wrongful under the securities laws." 536 F.2d 1388, 1395 (2d Cir. 1976). None of these cases relieves the government of its burden of proving knowledge that the conduct is generally unlawful.[1]

3. The government's convoluted alternative argument that the instructions conveyed "the general concept…of 'unlawful purpose'" (G.Br.33) is belied by the record. The instructions said the government *contended* Milton was

[1] *United States v. Temple* is totally irrelevant. It construed a statute prohibiting IRS employees from abusing their power through "willful oppression under color of law." 447 F.3d 130, 137 (2d Cir. 2006). And the government's out-of-circuit cases (G.Br.29-30) conflict with Supreme Court and Second Circuit law and represent an anomalous position amongst the circuit courts, most of which have held that "willfully" requires knowledge of unlawfulness (*see* Br.26 n.4 (collecting other circuits' precedents requiring knowledge of unlawfulness)).

aware his actions were unlawful, not that it had to prove that to obtain a conviction on Count One. A-1415. The instructions said "willfully" meant "with a wrongful purpose" (*id.*) and that "good faith" meant "Milton honestly believed that his statements and actions were *proper and* not in furtherance of any unlawful scheme" (A-1416 (emphasis added)). Thus, the instructions gave the jury the misimpression it could convict even if Milton believed his conduct was lawful, so long as the government proved Milton knew he was doing something "wrongful" and "improper." That standard not only lowers the burden for willfulness, but also creates a due process vagueness problem. Just last term, multiple Supreme Court justices questioned whether vague, moralistic words like "wrongful" or "improper" are clear enough to define *mens rea* in a criminal statute. *See* Oral Argument Tr. at 49-52, *Snyder v. United States*, 144 S. Ct. 1947 (2024) (No. 23-108).

In any case, even if the jury charge did convey the correct standard by negative implication through the good faith instruction, this Court has "rejected the notion that incorrect statements are necessarily cured so long as the charge contains the correct standard elsewhere." *Kopstein*, 759 F.3d at 182 (cleaned up). Indeed, in *Kaiser*—on which the government heavily relies—this Court held instructions that misled the jury on *mens rea* were plain error, even though the general "good faith" faith instruction arguably conveyed the correct standard. 609 F.3d at 566. *Rossomando* similarly held that jury instructions stating the correct

intent standard in one place but a misleading standard elsewhere constituted plain error. 144 F.3d at 202 (holding "task that jurors were being asked to perform" "was simply too ambiguous and obscure to inspire confidence").

B. The Wire Fraud Instructions Were Erroneous And Highly Confusing

Milton repeatedly requested straightforward instructions stating that wire fraud requires intent to harm the alleged victims by depriving them of money or property. A-1161, A-1166-67, A-1169-70. At trial, the government conceded—as it does on appeal—that intent to harm is legally required. A-1179, A-1183, A-1186. Yet the court declined to instruct the jury such intent was required. Instead, it suggested the opposite by telling the jury "a belief by the defendant…that ultimately everything would work out so that no investors would lose any money, does not necessarily constitute good faith." A-1426.

The government cites two stray references to "harm to the victim" and "loss to another" within the lengthy wire-fraud instruction. G.Br.36-37. But as the government concedes (G.Br.28), jury instructions "must be considered as a whole," and vacatur is required "when the instructions become sufficiently confused." *Kopstein*, 759 F.3d 168 at 182. That is what happened here: The passing references to intent to harm were "seemingly contradicted" by the subsequent "no ultimate harm" instruction. *Rossomando*, 44 F.3d at 201. That confusing instruction should never have been given.

First, recent Supreme Court caselaw casts doubt on whether such a "no ultimate harm" instruction is *ever* permissible. This Court originally endorsed the instruction in right-to-control cases because, under that doctrine, a temporary deprivation of money constituted a sufficient "loss of control" of property. *See United States v. Dinome*, 86 F.3d 277, 281 (2d Cir. 1996). But the Supreme Court has since invalidated the right-to-control doctrine on which the "no ultimate harm" concept was based. *See Ciminelli v. United States*, 598 U.S. 306 (2023).

Second, the "no ultimate harm" instruction here is on all fours with *Rossomando*. *See* Br.29, 31. The government suggests *Rossomando* has been quietly overruled by this Court. G.Br.38-39. But that cannot be true. It is well-settled that one panel of this Court cannot overrule another. *See, e.g.*, *In re Picard*, 917 F.3d 85, 102 n.13 (2d Cir. 2019) (rejecting as "a nonstarter" argument that subsequent cases "silently superseded" earlier precedent). And as the government's own cases make clear, post-*Rossomando* this Court has repeatedly held that a "no ultimate harm" instruction is permissible only "where (1) there was sufficient factual predicate to necessitate the instruction, (2) the instruction required the jury to find intent to defraud to convict, and (3) there was no evidence that the instruction caused confusion." *United States v. Lange*, 834 F.3d 58, 79 (2d Cir. 2016). Those conditions were not met here.

Indeed, the government's claim of a sufficient "factual predicate" (G.Br.38) is based on a misunderstanding of the law. The distinction between intent to cause *contemporaneous* harm and intent to cause *ultimate* harm was at the heart of this Court's decision to reverse in *Rossomando*, but the government ignores that distinction. It says Milton argued "investors were not harmed because they received valuable stock." G.Br.38. That's true, but also irrelevant. Milton's defense was not that he expected Nikola would *eventually* become a success and that investors' stock would therefore "ultimately" be valuable, even if the stock's value was inflated in the short term. Rather, Milton argued the value of Nikola stock was *never* inflated because his statements were—at worst—puffery on topics fully disclosed in Nikola's SEC filings. *See* Br.30. Thus, his statements weren't material to the "overall mix" of public information and did not affect the stock's value.

Nor did Milton argue that Hicks wasn't defrauded because he "ultimately profited." G.Br.38. There was no need to argue about "ultimate" loss or gain on Count Four, because it was undisputed that Hicks made a multi-million dollar profit the moment he sold the Ranch, even though he had owned the property for only a few months. Br.13. Milton argued Hicks was never harmed *at all* because Milton's statements were immaterial to the Ranch transaction and the options were

mere "icing on the cake" (A-1359) because the cash Milton paid alone exceeded Hicks's target sale price, and *far* exceeded his original purchase price (A-923).

C. The Government Cannot Show The Errors Were Harmless Beyond A Reasonable Doubt

The government's harmlessness argument depends on its false claim that *Milton* has the burden to prove correct instructions would have changed the outcome. G.Br.28, 34, 40. That flips the burden on its head: "The *Government* bears the burden of establishing harmlessness." *United States v. Silver*, 864 F.3d 102, 119 (2d Cir. 2017) (emphasis added). Thus, an instructional error is not harmless unless the government shows "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *see also Silver*, 864 F.3d at 122 (reversal required if "conceivable that a properly instructed rational jury" would not have convicted). Where jury instructions fail to accurately instruct on an element, the error is not harmless so long as "the defendant contested the omitted element and raised sufficient evidence to support a contrary finding." *Neder*, 527 U.S. at 19; *see also United States v. Quattrone*, 441 F.3d 153, 179-81 (2d Cir. 2006).

The government cannot meet the high burden to show harmlessness here.

1. The government pretends it didn't rely on the erroneous willfulness instruction. G.Br.34. But it told the jury that all counts had three "not that complicated" elements: "[D]id he engage in a scheme to defraud, a pattern of

lying? That's one. Did he do it intentionally? That's two. And depending on the count, did he use a wire or facility of interstate commerce?" A-1398. It repeatedly told the jury the key question was whether "the defendant did all of this intentionally with the intent to deceive." A-1295.

The defense highlighted the willfulness requirement in summation (A-1311, A-1317), but the government responded by insisting deception alone was sufficient: "[T]his idea that someone has to warn you that it's a *bad thing* to lie or else you can't have committed fraud, I mean, it's unbelievable. You wouldn't accept that in your everyday life. *It's not a defense here*." A-1389 (emphasis added). That rhetoric would have fallen flat if the jury had known "willfulness" required proof that Milton knew his conduct was not just wrongful but *unlawful*.

2. For similar reasons, the government's closings demonstrate the prejudice caused by the erroneous wire fraud instructions. The prosecutors told the jury an intent to defraud consists of an "intentional" "pattern of lying," regardless of intent to harm. A-1398; *see also, e.g.*, A-1295.[2] It equated a "scheme to defraud" with a "pattern of lying." A-1398. And then it hammered the point,

[2] The government exacerbated the problem by arguing—over objection—that lying merely to induce a transaction was sufficient for fraud, even if the exchange was fair. A-1399. That is not the law of this Circuit. *See, e.g.*, *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970). The Supreme Court recently granted certiorari to review a conflicting Third Circuit decision endorsing the "fraudulent inducement" theory this Court has repeatedly rejected. *See Kousisis v. United States*, 144 S. Ct. 2655 (2024).

arguing the only questions for the jury were: "Did he engage in a scheme to defraud? Did he do it intentionally?" *Id.*

3. The government's efforts to scrounge up evidence of willfulness under the correct standard only highlight the non-existence of its proof of this element. For example, it claims Nikola's CFO emailed Milton "to warn him that falsely inflating the company's accomplishments could lead to legal exposure." G.Br.35. What it conceals, however, is that the email in question was sent to Milton and the general counsel roughly *two years* before Nikola went public and was merely a link to "An Interesting article" about Theranos with a recommendation to make "absolutely certain that our trucks / stations meet performance specs." SA-337.[3] Claiming this email proves *beyond a reasonable doubt* that Milton acted willfully is, to put it mildly, a stretch.

And the government doesn't point to *any* trial evidence showing the erroneous wire fraud instructions were harmless. G.Br.40-43. Its entire argument is that Rule 606(b) precludes consideration of the jurors' post-verdict statements. But it is the *government's* burden to establish harmlessness, and there was ample evidence—beyond the jury statements—demonstrating that the erroneous instructions mattered. *See* Br.36-37. Moreover, the government ignores Milton's

[3] The version of GX-212 in the government's supplemental appendix contains details about Theranos that were excluded at trial; the version of the exhibit shown to the jury was heavily redacted. *See* Tr.1753.

argument that the policies underlying Rule 606(b) are not implicated here. Br.33-35.

The record contradicts the government's contention that the jurors' statements show the "jury simply decided to show leniency toward the defendant on Count Two" (G.Br.43) or incorrectly "added additional burdens to the Government" (G.Br.42). *All* the jurors who made public statements following the verdict explained that the jury acquitted on Count Two because the government failed to prove the requisite intent—not because of "leniency." *E.g.*, A-1945-46, A-1958-59, A-1979, A-1985, A-1987, A-1997, A-2000.[4]

4. This was a marginal case in which accurate instructions would have made the difference. As the district judge acknowledged at sentencing, "there are substantial issues that were raised throughout this case, both on the facts and on the law." A-2018. The acquittal on Count Two—the only count on which the jury was properly instructed on scienter—makes that much clear, even putting aside the jurors' post-trial statements. *See* Br.32. There was no valid reason to use the straightforward "intent to harm" language for Count Two (A-1418) but not Counts Three and Four. Count Two was based on the same facts and had the same

[4] The government's argument is based on a single out-of-context statement by one juror who wrote on Twitter, "TM is lucky we found him innocent on one count." A-1984. But that same juror repeatedly said the jury acquitted on Count Two because Milton lacked "intent to harm" (*e.g.*, A-1987), and convicted on the remaining counts "because intent was not required" (A-1958).

substantive elements. The contrast between the clear instruction on Count Two and the muddled instruction on Counts Three and Four left the jury confused about the *mens rea* required to convict. Br.32. That alone requires reversal. *See, e.g.*, *Kopstein*, 759 F.3d at 172 ("A charge that appears likely to have left the jury 'highly confused' may, on that ground alone, be reversed.").

The faulty intent instructions were particularly prejudicial because many of the alleged misstatements were classic "puffery," like the claim the Badger pickup truck was "built from the ground up" (*see* G.Br.13) and could "whoop a Ford F150" (A-1258). The jury could have easily concluded that Milton believed these sorts of enthusiastic statements were legally permissible and wouldn't cause anyone economic harm. These are exactly the sorts of statements that, for better or for worse, founders and executives make all the time. But the erroneous instructions took that question from the jury.

II. THE ERRONEOUS ADMISSION OF DR. MAYZLIN'S TESTIMONY REQUIRES A NEW TRIAL

Dina Mayzlin's testimony was excludable on multiple grounds. The defense repeatedly objected, but the district court let the jury hear her "expert" testimony anyway. By the time of sentencing, the district judge seemed to recognize he had improperly abdicated his gatekeeping role: He granted bail pending appeal while remarking, "I have come to learn, to my chagrin, that experts are frequently challenged and experts are sometimes wrong. And just because an expert says

something doesn't mean that a jury has to accept it certainly. But expert testimony can sometimes affect and frequently does affect the weight of the evidence." A-2018.

The government's arguments misconstrue the law and grossly distort Dr. Mayzlin's highly prejudicial testimony.

A. The Government Misstates The Legal Standards Governing Admissibility

The government devotes pages and pages to misleading claims about the rules governing admission of expert testimony. It says Rule 702 imposes a "permissive" standard and that all but the most "unrealistic and contradictory" expert testimony is admissible. G.Br.49-50. It implies expert testimony is admissible so long as it meets the low bar for establishing *relevance* under Rule 401. G.Br.49.

That is not the law. The government's own cases establish that *Daubert* and Rule 702 "require the district court to fulfill the 'gatekeeping' function of making certain that an expert…employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (cleaned up). This Court has emphasized the need to scrutinize expert testimony "given the unique weight such evidence may have in a jury's deliberations." *Id.* at 397. And although expert testimony—like all evidence—must be relevant under Rule 401, expert testimony

must *also* have "a sufficiently 'reliable foundation' to permit it to be considered." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002). Even after an expert is properly qualified, the district court still has "a duty to ensure" that her testimony does "not exceed its proper scope." *United States v. Zhong*, 26 F.4th 536, 556 (2d Cir. 2022) (reversing).

The government's argument that methodological flaws in an expert's analysis "go to the weight, not the admissibility" (G.Br.50) has been rejected by the rulemakers. They recently amended Rule 702 to emphasize that (1) "the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology" go to admissibility, not weight; and (2) "each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Fed. R. Evid. 702 advisory committee note (2023).[5]

These stringent standards provide safeguards to "ensure that the courtroom door remains closed to junk science." *Amorgianos*, 303 F.3d at 266. The district court abused its discretion by declining to apply them.

[5] Although Rule 702 was amended after Milton's trial, the advisory committee notes explain that the amendment does not substantively change the law. Rather, the amendment is intended to correct widespread misapplication of the prior version by district courts that ignored the text of the rule and failed to carry out the gatekeeping required under *Daubert* and its progeny.

B. Mayzlin's Analysis Lacked Reliability

The government's perfunctory defense of the reliability of Mayzlin's analysis (G.Br.51) ignores the requirements of Rule 702 and the *Daubert* factors (*see* Br.40). Rather than engage with *Daubert* or Rule 702, the government simply declares Mayzlin's analysis reliable because she "appl[ied] her research and expertise" to "data from various website and social media platforms." G.Br.51. What's missing from the government's brief is exactly what was missing at trial—namely, any explanation of *how* Mayzlin analyzed the numbers to reach her conclusion that Milton influenced investors. The government's statement that Mayzlin "applied her research and expertise"[6] is vacuous—it could be said in any case. Rule 702 and *Daubert* require much more. That the government isn't able—even on appeal—to describe, much less actually *defend*, Mayzlin's methodology is highly telling.

The government also doesn't address Mayzlin's reliance on patently dubious data. Br.42. Mayzlin could not discern whether the social media posts she analyzed were written by actual investors—or even humans. And she relied on publicly available online resources like the "podcast search engine" Listen Notes without doing anything to confirm whether those sources were accurate. A-685.

[6] The government's assertion that Mayzlin has researched investor behavior is incorrect. G.Br.51. Although her work had been *cited* in research about investors, she has conducted no such research herself. Br.42.

The government says—inaccurately—that Mayzlin determined Milton was "a mid-range influencer" based on having "analyzed data." G.Br.48. In reality, Mayzlin analyzed no data at all. Her characterization of Milton as a "macro influencer" was based on what she described as "one classification that I found." A-681. If that qualifies as reliable expert testimony, just about anything will.

Again and again, the government falls back on the district court's "discretion." *E.g.*, G.Br.51. But as explained (Br.43), the trial judge's stated reasons for admitting Mayzlin's testimony over objection appear to be based on the misguided assumption that once an expert is qualified, she can say whatever she pleases, without any scrutiny of her basis or methodology. That is not the law, and errors of law are "by definition" an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

C. Mayzlin's Opinion Was Not Helpful To The Jury

The government's arguments about Rule 702's helpfulness prong misread the law and the record. It claims (without citations) that Mayzlin was better equipped than the jury to create summaries of the "voluminous data," to "analyze" that data, and to "compare that activity to other activity she has analyzed in her academic career." G.Br.51-52. But nothing in the record suggests Mayzlin compared the data to *any* other information she had previously reviewed. She had never previously testified as an expert. And, as discussed, her analysis consisted of

little more than showing the jury a bunch of numbers while parroting the supposed "literature." The government presented Mayzlin—absurdly—as an expert on internet "buzz," but the substance of her analysis didn't involve anything beyond the ken of the jury.

Most of the data Mayzlin showed the jury wasn't even particularly complex—it was exactly the sort of information the government often has a case agent or paralegal present as a "summary witness" under Rule 1006. Expert testimony is not permitted just because the subject involves big numbers or lots of facts. The question is whether the case "concerns matters that the average juror is not capable of *understanding* on his or her own." *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008) (emphasis added); *see also* Fed. R. Evid. 702. Put differently, the question is whether, *having been presented with the facts*, "the jury could have 'intelligently' interpreted and understood [them]." *Mejia*, 545 F.3d at 195. Here, once the arithmetic was complete, the jury was just as capable as Mayzlin to interpret what the numbers meant.

D. Mayzlin Was A Mouthpiece For Inadmissible Hearsay

The government says all Mayzlin did was "testify to opinions *based on* hearsay." G.Br.52 (emphasis added). That is not what happened. Over and over, Mayzlin repeated—without any analysis of her own—what "the literature" supposedly said. Br.45. Her testimony was utterly devoid of reasoned analysis

based on the facts. The hearsay itself—not Mayzlin's analysis—was the crux of her direct examination. There is a critical difference between *relying* on hearsay to form an opinion, which is indeed what experts do "all the time" (A-741), and "repeating hearsay evidence without applying any expertise whatsoever." *United States v. Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2003). The latter—what Mayzlin did here—is an impermissible end-run of the Rules of Evidence. *See* Br.45-46. The government has no answer.

Nor is it able to refute that Mayzlin's slides included inadmissible, prejudicial hearsay suggesting Milton's statements moved the price of NKLA. Br.46-49. It focuses entirely on the tweets and posts of individuals, which it says came in under the state-of-mind exception. G.Br.52-53. But as explained (Br.48-49), many of these posts contained assertions of fact and hearsay-within-hearsay that fell within no exception. And the government completely ignores the extremely prejudicial media articles about Nikola. Br.47. The government offers no reason why these hearsay articles should have been presented to the jury over Milton's objection. Indeed, the government relies heavily on the court's limiting instruction, but that instruction addressed only "postings by…individuals," not the hearsay in the articles in Mayzlin's slides. A-700.

E. The Errors Were Not Harmless

The government's perfunctory harmlessness argument consists of a one-sided recitation of the record that fails to acknowledge the contrary evidence or the arguments in Milton's opening brief (at 49-50). The government fails to acknowledge that the jury had good reasons to question the motivations of each of the government's materiality witnesses—except for Dr. Mayzlin. The government also ignores the *defense's* materiality evidence, which showed that none of Milton's supposedly false statements moved the price of the stock. Br.16-17. Mayzlin's testimony was a key counterweight—she told the jury that even if the stock price didn't move, investors were influenced.

The government also brushes past the trial court's implicit acknowledgement that Mayzlin's testimony likely affected "the weight of the evidence." Br.49 (quoting A-2018). And it ignores this Court's caselaw acknowledging the severe impact expert testimony can have, "given the unique weight such evidence may have in a jury's deliberations." *Nimely*, 414 F.3d at 397; *see* Br.44.

True, the government didn't reference Mayzlin's testimony in summation. G.Br.53. But it cites no authority allowing it to present highly prejudicial and inadmissible evidence to the jury and then cure the error by declining to mention it again. That's because there is—unsurprisingly—no such authority. In any case, the government didn't need to mention Mayzlin again. The damage was done, and

her prejudicial, hearsay PowerPoint presentation was available to the jury during deliberations. Its erroneous admission requires a new trial.

III. THE VENUE INSTRUCTION WAS ERRONEOUS AND VENUE WAS INSUFFICIENT AS TO COUNT FOUR

A. The Erroneous Venue Instruction Was Not Harmless

The government does not dispute venue for Count Four was improper if Milton could not reasonably foresee that an act associated with the Utah Ranch deal would touch the SDNY. Nor does the government dispute that the jury instructions were erroneous because they omitted the critical element of foreseeability. Instead, the government argues the instructional error was harmless. Its arguments all fail.

1. The government argues that as a "savvy businessman," Milton should have foreseen that some wire associated with the Ranch deal might touch the SDNY. G.Br.44 (citing *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003)). But such logic, if accepted, would automatically confer venue in the SDNY over nearly *every* financial crime. Neither *Svoboda* nor any other case supports such expansive notions of venue and foreseeability, untethered to the particular defendant or the specific facts of his case.

In *Svoboda*, for example, the defendant traded securities on New York-based exchanges and received confirmations showing *where* each trade was executed. 347 F.3d at 482. As a result, this Court held the defendant "either knew, or could

reasonably foresee, that his trades would be executed in the [SDNY]." *Id.* at 483. Count Four, by contrast, concerned a real estate transaction for Utah property negotiated by parties in Utah and Massachusetts. No one—no matter how "savvy"—could reasonably foresee that transaction would lead to a criminal trial in Manhattan.

The government attempts to scrounge together some geographic nexus, because Milton merged Nikola with a New York-based SPAC, once broadcast a video of himself into Times Square, and occasionally traveled to New York. G.Br.44. But none of those isolated interactions with New York had anything to do with the Ranch deal, nor does the government contend otherwise. The government also attempts to liken this case to the non-precedential decision in *United States v. Shepard*, 500 F. App'x 20 (2d Cir. 2012) (summary order), which found it foreseeable that acts in furtherance of a conspiracy would occur in districts *adjacent* to the conspiracy's headquarters. G.Br.44. Milton, however, negotiated and finalized the Ranch deal while in *Utah* with a *Massachusetts* seller. *E.g.*, A-912, A-1544. Neither party was at any time adjacent to the SDNY.

2. The government asserts "Milton had a New York City bank account that he used to wire a payment for the ranch." G.Br.44. But one scours the record in vain to find any reference to any such account. That is because Milton's JPM-issued checks bore an Arizona address and routing numbers associated with

Arizona or Utah. A-1591, A-1597-98. Unsurprisingly, none of the evidence the government cites supports its assertion of a New York City account. The government cites text messages between Milton and his assistant, but in those messages Milton merely said "JP Morgan" was wiring the payment to Hicks; neither Milton nor his assistant associated any particular location with the bank. SA-335-36. Other documents list JPM's domestic headquarters in New York, but JPM uses that headquarters address (and the associated routing number) for all domestic wire transfers, regardless of the location of the customer's account. SA-571-72, SA-740. Even if these documents suggest Milton should have known the location of JPM's headquarters, they do not establish his account was in New York City, nor did the government attempt to prove that at trial. And JPM's New York headquarters does not make it reasonably foreseeable to Milton that wire transfers from Utah and Arizona to Massachusetts would be routed through the SDNY—if that is what occurred, which was never proven. In short, a reasonable person could not foresee that a Utah land deal with a Massachusetts-based seller and a Utah choice-of-law provision (A-1540, A-1560) could lead to a prosecution in the SDNY based on the technical inner workings of JPM's national banking network.

3. The government also points to a few communications months after the Ranch deal closed, related to the subsequent SPA. The government contends the SPA was an effort by Milton to "lull" Hicks into "a false sense of security," and

that SPA-related wires can be the sole basis for venue, even though Milton had already acquired the Ranch—the object of the supposed fraud. G.Br.45-46. But the SPA was distinct—temporally and qualitatively—from the Ranch deal and does not constitute "lulling" conduct. Consequently, SPA-related communications cannot support venue in the SDNY.

In certain limited circumstances, wires "designed to lull the victim[] into a false sense of security" may be part of an alleged fraudulent scheme, even if the defendant already obtained the fraud's object. *United States v. Lane*, 474 U.S. 438, 451 (1986). But to qualify, such conduct must occur "*prior* to the scheme's completion." *Id.* at 453 (emphasis added); *accord United States v. Tanke*, 743 F.3d 1296, 1301 (9th Cir. 2014). Determining when a scheme is "complete," in turn, depends on "the scope of the scheme as devised by the perpetrator"; "[i]f the scheme, as conceived by the perpetrator, has been fully executed, then the [wire], even if sent to facilitate concealment of the scheme, falls outside." *Tanke*, 743 F.3d at 1303; *see United States v. Rogers*, 9 F.3d 1025, 1030 (2d Cir. 1993) (in loan fraud scheme, "jury could have properly found that the conspiracy to commit wire fraud…*was not complete* until after" borrower sent lender certain telexes after receipt of funds (emphasis added)); *see also Grunewald v. United States*, 353 U.S. 397, 405 (1957) (acts of concealment after crime's "central objectives" are completed do not extend a conspiracy's duration).

Thus, in *Lane*, which the government cites, the mailing "intended…to lull the [insurer] into a false sense of security" was considered part of the mail fraud scheme because it was sent *before* the scheme was completed. 474 U.S. at 451-53. The same is true in *United States v. Rutigliano*, 790 F.3d 389 (2d Cir. 2015). There, this Court held that "re-certification forms" submitted to an insurer were part of the insurance fraud because they were sent *before* the scheme was over and "to ensure continued benefits." *Id.* at 396.

Here, however, Milton's alleged scheme was already complete well before the SPA, when he and Hicks closed the Utah Ranch transaction. There was no evidence that, as part of that scheme, Milton intended to "lull" Hicks; there was no need to do so because the objective of the supposed scheme—acquiring the Ranch—had already been attained.

In any event, neither the SPA nor the communications the government cites constitute "lulling" conduct. The SPA was not Milton's effort to conceal anything; it was initiated by Hicks. After the Hindenburg Report was released, *Hicks* realized he had leverage over Milton, so *Hicks* approached Milton, threatened him, and sought to extract further concessions from him—a process that culminated in the SPA. A-905-06, SA-277-84. Indeed, Hicks made clear that if Milton refused, he would sue him. A-905-06, SA-284. And even after the SPA, Hicks continued to try to extract more money from Milton, asking Milton to sell him more

discounted stock (A-898-99), and then suggesting Milton purchase additional land from him at a *$35 million* mark-up (A-908). That is very different from *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988) (cited at G.Br.46), where the defendant told "nervous customers" to hold onto their stock to "reassur[e]" them. *Id.* at 138-39. Hicks was not "nervous" and required no "reassurance[]." Hicks leveraged Milton's legal exposure for his own economic gain.

Regardless, the emails involving Milton's attorney in Orange County were sent after the material terms of the SPA had already been agreed on. They did not involve substantive negotiations (G.Br.46), but purely ministerial aspects of closing the deal (SA-732-37). Such emails cannot plausibly qualify as "lulling" conduct sufficient to confer venue in the SDNY. Br.56.

And the government never argued at trial that the other two categories of communications it now cites—with Hicks's lawyer and stockbroker—were relevant to venue. For good reason: Hicks's attorney was in *Boston*, not the SDNY, as is clear from the address in his signature block. SA-732. And there was no evidence Milton ever caused any wire to be sent to Hicks's broker. The SPA required Milton to send the discounted stock directly to Hicks's brokerage account. A-1581. The government introduced no evidence of where that account was located—but most likely it would have been in Massachusetts, where Hicks resides, or perhaps in Missouri, where Wells Fargo Advisors is headquartered.

Hicks's broker worked in White Plains, but that is irrelevant, because there was no evidence Milton ever caused a wire—much less a foreseeable wire—to be sent to him there.

B. The Government Failed To Prove Venue

The evidence was also legally insufficient to establish venue. Neither JPM's incidental routing of a wire through Manhattan nor the ministerial SPA-related emails involving Milton's lawyer are "essential conduct" of wire fraud sufficient to confer venue. Br.56-58. Moreover, such contacts are *de minimis* and fall well short of the "substantial contacts" required to support venue under this Court's precedents. Br.58-59. The government does not address either point and thus effectively concedes that venue was lacking for Count Four.

IV. THE FORFEITURE ORDER WAS UNLAWFUL

The order forfeiting the Ranch was barred by binding precedent.

1. In *United States v. Contorinis*, this Court held "that § 981(a)(2)(B) supplies the definition of 'proceeds' in cases involving fraud in the purchase or sale of securities." 692 F.3d 136, 145 n.3 (2d Cir. 2012); *see also United States v. Mahaffy*, 693 F.3d 113, 138 (2d Cir. 2012). Contrary to the government's argument (G.Br.56), nothing in *Contorinis* suggests its holding is limited to insider trading. Nor does the government's distinction make sense. The critical question in determining which subsection of 18 U.S.C. § 981(a)(2) applies is whether the

crime involves *inherently* "illegal goods" (like drugs), or legal goods sold in an illegal "manner." Stock options simply are not *inherently* illegal goods—even if their value is inflated.

2. The government's Ponzi scheme cases (G.Br.56) are inapposite and non-binding. *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205 (11th Cir. 2013), says nothing about the dichotomy between §§ 981(a)(2)(A) and (a)(2)(B). And *United States v. Bonventre* involved co-conspirators of Bernie Madoff who provided nothing *at all* to the victims in connection with the fraud. 646 F. App'x 73, 90 (2d Cir. 2016) (summary order). They just took the victims' money and falsely claimed it was used to buy securities. *Id.* at 90. Accordingly, *Bonventre* provides no guidance on the question presented here.

The analogy to a Ponzi scheme is also inapt. When a Ponzi schemer makes payments to victims, that money is not a "cost" to the schemer—it is just a different victim's money being moved to extend the scheme. Here, by contrast, the $8.5 million in cash Milton paid Hicks was untainted. Nonetheless, the practical effect of the forfeiture order is to make Milton forfeit the value of those untainted assets *in addition to* the supposedly inflated options.

3. Contrary to the government's argument (G.Br.57), if § 981(a)(2)(B)'s definition of "proceeds" is correctly applied, only Milton's *profits* in connection with the Ranch deal are forfeitable. In construing "direct costs incurred in

providing the goods or services," § 981(a)(2)(B), this Court has sought to measure the defendant's "net, not gross, gain" from the entire transaction resulting in the acquisition of forfeitable property. *Mahaffy*, 693 F.3d at 137-38. This mode of analysis is consistent with the Supreme Court's ruling that § 981(a)(2)(B)'s "proceeds" refers to "profits," not "receipts," *United States v. Santos*, 553 U.S. 507, 511-12 (2008), as well as forfeiture's focus on disgorgement of ill-gotten *gains*. Thus, at minimum the roughly $8.5 million in cash Milton paid Hicks should be deducted from any forfeiture order.

CONCLUSION

For the foregoing reasons, the Court should vacate Milton's convictions and either enter a judgment of acquittal on Count Four and grant a new trial on Counts One and Three, or grant a new trial on all counts, and vacate the forfeiture order.

Dated: New York, New York
October 4, 2024

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Daniel J. O'Neill
Avery D. Medjuck
SHAPIRO ARATO BACH LLP
1140 Avenue of the Americas,
17th Floor
New York, New York 10036
(212) 257-4880

Attorneys for Defendant-Appellant
Trevor Milton

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(g) and Local Rule 32.1 because it contains 6,907 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.89 in 14-point font.

Date: October 4, 2024

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro