

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID WEIMERT,

Defendant.

ORDER

14-cr-22-jdp

On October 23, 2014, the court held the final pretrial conference. Defendant David Weimert was present along with his attorney, Stephen Meyer. The government was represented by Assistant U.S. Attorneys Daniel Graber and Antonio Trillo.

First we discussed the voir dire questions. Both side proposed changes and additions, which the court adopted. A copy of the revised voir dire is attached to this order.

Next we discussed the jury instructions. The parties are fine with the introductory instructions, which we subjected to minor changes and cleanup. The post-trial instruction present some disputes. Apart from the usual culling and tailoring at the post-evidence Rule 30(d) conference, the parties dispute whether the court should accept some of the government's proposed additions the substantive instructions (elements and definitions). At this juncture, I have included in the court's amended jury instruction packet the contested instructions, set off with brackets with a short-hand citation to the case authority for each request. The government also voiced pique at the court's decision to list the choice of a "not guilty" verdict before the choice of "guilty" on the verdict form, a switch from the court's routine for the past three decades or so.

Third on the agenda was our discussion of the parties' motions in limine. I will start by identifying what's *not* in dispute: in the government's motion in limine No. 3 (**dk. 51**) , Weimert does not dispute and does not need to be heard on Items 1 through 4 (Weimert has made his record on wishing to define reasonable doubt in the face of clear circuit law, *see* **dk. 55**, so he does not need

to be heard further on Item 3). Weimert does wish to be heard on Item 5 (whether he may offer evidence that Anchor Bank or IDI were negligent) and on Item 6 (whether he may put in evidence that he was a good employee who generated a lot of profits for IDI and Anchor and got bonuses for doing so).

The parties do not dispute that if the government calls William Burke as a rebuttal witness, he may appear by video due to his ill health. (**Dkt. 45**). It is the government's obligation to keep the court timely apprised about this matter so that appropriate and timely preparations are made to receive live video testimony during trial.

As for Weimert's second motion in limine (**dkt. 48**), Item 2, the government has proffered that it does not intend to call an overview witness. The government *does* oppose Item 1, Weimert's motion to preclude the government from questioning him (if he takes the stand) about the credibility of other witnesses. The government's memorandum in opposition is **dkt. 56**.

Every other in limine issue is in dispute and will need to be resolved at the final hearing with Judge Peterson on October 28, 2014. The court gave the parties until Friday, October 24 (midnight, if necessary) to file supplemental briefs (letter or captioned) on these issues; the government has proffered that it intends to do so.

A one-issue dispute is presented in the government's supplemental notice of intent to use evidence (**dkt. 34**), in which the government seeks the court's imprimatur to present evidence regarding a 2008 IDI sale to Nachum Kalka that Weimert brokered. Weimert presents his opposition in **dkt. 41**.

The government's first-filed notice of intent to offer evidence (**dkt. 29**) launches the most contentious disputes, solely in Section B regarding potential other acts evidence under Rule 404(b). (Weimert does not need to be heard separately on the issues fronted in Sections E, I or J). A discrete

dispute is presented by Section B.2. regarding the government's use at trial of the SEC's \$100,000 fine against Weimert, which Weimert opposes in his "Second Response," **dk. 40**.

The most tangled dispute is launched by Section B.1. of **dk. 29**, in which the government announces its intent to offer specified excerpts of Weimert's April 5, 2012 SEC deposition. Weimert responds by invoking F.R. Ev. 106's rule of completeness to request that additional portions of the deposition be included in any presentation to the jury. *See dk. 37*. The government characterizes its two-brief reply as its motions in limine, No. 1. and No. 2, **dk. 49 & 50**. It is likely that any additional input filed on October 24, 2014 will supplement and amplify the parties' positions on these issues.

Our fourth agenda item was housekeeping. With a Tuesday start on November 4, 2014, the parties predict that they will be done and the jury will have the case by Friday, November 7, 2014. Both sides asked the court to seat two alternate jurors. Both sides asked that this case be tried in Courtroom 250 for evidence presentation reasons. The government reported its intent to use a folding screen and projector to present evidence, along with the court's ELMO. The government should bring its equipment to the final hearing so that everyone can get a visual handle on its proposal. Finally, Weimert, by counsel, advised that he is partially deaf, so it is important that everyone uses a microphone when speaking. The parties had no other matters to bring to the court's attention on the record.

Entered this 24th day of October, 2014.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge

Voir Dire: United States v. Weimert, 14-cr-22-jdp

Statement of the case: This is a criminal case, in which the defendant, David Weimert, is charged with wire fraud by engaging in a scheme to defraud a subsidiary of Anchor Bank named Investment Directions, Inc. (called “IDI”), a company that engaged in commercial real estate transactions. The charges are that defendant, while he was President of IDI, unlawfully misled IDI’s board of directors and officers at Anchor Bank in order to benefit personally from a particular real estate transaction. The defendant has entered a plea of not guilty to the charges against him, contending that everything he did was lawful.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: this case will begin today [*Tuesday*] and continue until this Friday, November 7. The trial will ordinarily run from 8:30 am to 5:30 pm with a morning break, one hour lunch and an afternoon break. Are any of you actually unable to sit as jurors because of this schedule?

2. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

3. The court reads Pattern Jury Instructions of the Seventh Circuit:

The defendant is presumed to be innocent of the charges against him. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendant and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to rise, and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you, your family or close friends ever have worked for any bank or other financial institution, and if so, when and in what position.

Whether you regularly listen to talk radio, and if so, to which programs.

Whether you regularly use the internet to visit sites other than e-mail or personal business, and if so, what types of sites you visit most often.

Whether you have bumper stickers on your vehicle and what they say.

6. Do any of you in the jury box know each other from before today?

7. Other than what you already may have told us, have any of you, your family or close friends ever worked for or had any banking or business relations with Anchor Bank or a company you know to be associated with Anchor Bank? Would this affect your ability to be impartial in this case?

8. Have any of you, your family or close friends ever owned stock in AnchorbanCorp or in any other bank? [*Sidebar to drill down: Still own the stock? Losses?*] Would this affect your ability to be impartial in this case?

9. Are any of you aware of any media reports that involve Anchor Bank in any capacity? [*Sidebar to drill down*]. Would this affect your ability to be impartial in this case?

10. Do any of you have any strong opinions or feelings about the 2007-08 financial crisis and the role that banks played in it? [*Sidebar*] Would this affect your ability to be impartial in a case involving a bank?

11. Do any of you have any strong opinions or feelings about the role that banks have played in real estate transactions, either during the 2007-08 financial crisis or otherwise, that would affect your ability to be impartial in a case of this nature? [*Sidebar*]

12. You may hear evidence in this case from employees of the United States Special Inspector General for Troubled Asset Relief Program, also called U.S. SIGTARP. Do any of you have strong feelings or opinions about the U.S. SIGTARP that would affect your ability to be impartial in this case?

13. Have any of you, your family or close friends ever been involved in a foreclosure of a home or business? Would this affect your ability to be impartial in a case involving a bank?

14. Have any of you or members of your family ever worked for a company that went out of business due to financial problems? Would this affect your ability to be impartial in a case involving a case like this one?

15. Have any of you, your family or close friends ever sat on a board of directors for any company or corporation? Would this affect your ability to be impartial in this case?

16. Are any of you or your spouses or partners self-employed business owners? Would this affect your ability to be impartial in this case?

17. Have any of you, your family or close friends ever worked in the field of commercial real estate development in any capacity? Would this affect your ability to be impartial in this case?

18. Have any of you, your family or close friends ever worked in the field sales, or in the office of a salesperson? Would this affect your ability to be impartial in this case?

19. Have any of you or your partners or spouses negotiated for a performance bonus at work with the past two years?

20. Have any of you, your family or close friends ever been the victim of any sort of a fraud or attempted fraud? Would this affect your ability to be impartial in this case?

21. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense? [*Sidebar if necessary*]. Would this affect your ability to be impartial in this case?

22. Do any of you, by virtue of past dealings with the United States government, or for any other reason, have any bias for or against the government in a criminal case?

23. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

24. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement, investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?

25. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

26. Would any of you judge the credibility of a witness who was an officer or an executive at a bank or other financial institution differently from other witnesses solely because of his or her job?

27. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was the defendant who was testifying?

28. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

29. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

30. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

31. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

32. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

33. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

34. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

JUROR BACKGROUND INFORMATION

When asked to do so, please stand and provide this information about yourself:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you, your family or close friends ever have worked for any bank or other financial institution, and if so, when and in what position.

Whether you regularly listen to talk radio, and if so, to which programs.

Whether you regularly use the internet to visit sites other than e-mail or personal business, and if so, what types of sites you visit most often.

Whether you have any bumper stickers on your vehicle and what they say.

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JURY INSTRUCTIONS

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I. INTRODUCTORY INSTRUCTIONS

Members of the jury, we are about to begin the trial of the case. Before it begins, I want to tell you how the trial will proceed and how you should conduct yourselves during the trial.

Your Duties as Jurors

As jurors, you have two duties. Your first duty is to decide the facts from the evidence that you will see and hear in this court. This is your job, not my job or anyone else's.

Your second duty will be to take the law that I will give you at the end of the case and apply it to the facts to decide if the government has proved the defendant guilty beyond a reasonable doubt.

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear or public opinion influence you. Do not let any person's race, color, religion, national ancestry or gender influence you.

Nothing that I say or do during the trial is meant to indicate any opinion by me about what the facts are or about what your verdict should be.

The Criminal Charges

The charges against the defendant are in a document called an indictment. You will have a copy of the indictment during your deliberations.

The indictment in this case charges that the defendant, David Weimert, committed wire fraud by engaging in a scheme to defraud a subsidiary of Anchor Bank named Investment Directions, Inc. (called “IDI”), a company that engaged in commercial real estate transactions. The charges are that defendant, while he was President of IDI, unlawfully misled IDI’s board of directors and officers at Anchor Bank in order to benefit personally from a particular real estate transaction. The indictment is simply the formal way of stating what crimes the defendant is accused of committing. It is not evidence that the defendant is guilty and it should not raise even a suspicion of guilt.

The Defendant is Presumed Innocent

The defendant is presumed innocent of each of the charges. This presumption continues throughout this case, including during your deliberations. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant’s guilt beyond a reasonable doubt. This burden stays with the government throughout the case. The defendant is never required to prove his innocence. He is not required to produce any evidence at all.

How the Trial Will Proceed

First, the Assistant United States Attorney will make an opening statement outlining the government's case. Immediately after, defendant's attorney will make an opening statement outlining defendant's case. Keep in mind that what is said in opening statements is not evidence; it is simply a guide to help you understand what each party expects the evidence to show.

Second, after the opening statements, the government will introduce evidence in support of the charges. At the conclusion of the government's case, the defendant may introduce evidence. The defendant is not required to introduce any evidence or to call any witnesses. If the defendant introduces evidence, the government may then introduce rebuttal evidence.

Third, after the evidence is presented, the lawyers will make closing arguments explaining what they believe the evidence has shown and what inferences you should draw from the evidence. What is said in closing argument is not evidence. Because the government has the burden of proof, the Assistant United States Attorney has the right to give the first closing argument and to make a short rebuttal argument after the defendant's closing argument.

Fourth, I will instruct you on the law that you are to apply in reaching your verdict.

Fifth, you will retire to the jury room and begin your deliberations.

The trial day will run from 9:00 a.m. until 5:30 p.m. You will have at least an hour for lunch and two additional short breaks, one in the morning and one in the afternoon.

Notetaking

The clerk will give each of you a notepad and pencil for taking notes. This does not mean you have to take notes; take them only if you want to and if you think that they will help you remember the evidence when you are deliberating. Do not let notetaking interfere with your important duties of listening carefully to all of the evidence and of evaluating the credibility of the witnesses. Just because someone has written something down, this does not mean that the written note is more accurate than another juror's mental recollection of the same thing. No one of you is the "secretary" for the jury, responsible for recording evidence. Each of you is responsible for recalling the testimony and the other evidence.

Although you can see that this trial is being recorded by a court reporter, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.

No Communication During the Trial

During recesses you should keep in mind the following instructions:

First, do not discuss the case either among yourselves or with anyone else during the course of the trial. The parties have a right to expect that you will keep an open mind throughout the trial. You should not reach any conclusions about this case until you have heard all of the evidence, you have heard the lawyers' closing arguments, you have received my instructions on the law, and you have retired to deliberate with the other members of the jury about your verdict.

I must warn you, in particular, against commenting about the trial in an e-mail or a blog or Twitter. There have been news accounts recently about cases that have had to be re-tried because a member of the jury communicated electronically about the case during the trial. You can imagine what this would mean in the cost of a re-trial, the

inconvenience to your fellow jurors whose work would have gone for nothing and the stress experienced by the defendant.

Second, do not permit any third person to discuss the case in your presence. If anyone tries to talk to you despite your telling him not to, report that fact to the court as soon as you are able. Do not discuss the event with your fellow jurors or discuss with them any other fact that you believe you should bring to the attention of the court.

Third, although it is a normal human tendency to talk with people with whom one is thrown in contact, please do not talk to any of the parties or their attorneys or the witnesses. By this I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. This is the only way the parties can be sure of the absolute fairness and impartiality they are entitled to expect from you as jurors.

Fourth, do not read about the case on the Internet, in newspapers, or listen to radio or television broadcasts about the trial. If a headline catches your eye, do not examine the article further. Media accounts may be inaccurate and may contain matters that are not proper for your consideration. You must base your verdict solely on the evidence produced in court.

Fifth, no matter how interested you may become in the facts of the case, you must not do any independent research, investigation or experimentation. Don't look up materials on the Internet or in other sources.

How To Consider the Evidence

You must make your decision in this case based only on the evidence that you see and hear in this court. Do not consider anything you may see or hear outside of court.

The evidence consists the testimony of the witnesses, the exhibits admitted in evidence and stipulations. A stipulation is an agreement between both sides that certain facts are true.

Sometimes during a trial I take judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer says is different from the evidence, the evidence is what counts. The lawyers' questions and objections likewise are not evidence. A lawyer has a duty to object if he thinks a question is improper. If I sustain an objection to a question asked by a lawyer, then you must not speculate on what the answer might have been.

If during the trial I strike a witness's answer to a question or strike an exhibit from the record, or If I tell you to disregard something, then these things are not evidence and you may not consider them.

It is proper for a lawyer to interview any witness in preparation for trial.

Part of your job as jurors is to decide how believable each witness is, and how much weight to give each witness's testimony. Some factors you may consider are: the witness's age, intelligence, and memory; the witness's ability and opportunity to see, hear or know the things that the witness testified about; the witness's demeanor while testifying; whether the witness had any bias, prejudice or other reason to lie or to slant his or her testimony; inconsistent statements or conduct by the witness; and the believability of the

witness's testimony in light of the other evidence presented. You may also consider any other factors that shed light on the believability of each witness's testimony.

The defendant has an absolute right not to testify during this trial. You must not consider in any way the fact that he may choose not to testify. You should not even discuss it in your deliberations.

Give the evidence whatever weight you believe it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own every day experience. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

You may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is evidence that, if you believe it, directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

For example, direct evidence that it rained last Friday would be testimony from a witness who tells you that she walked through the rainstorm. Circumstantial evidence that it rained last Friday would be testimony from a witness who saw other people's wet umbrellas drying in the foyer that day.

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID WEIMERT,

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JURY INSTRUCTIONS

14-cr-22-jdp

II. POST TRIAL JURY INSTRUCTIONS

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

CONSIDERATION OF THE EVIDENCE

All of the introductory instructions that I gave you at the beginning of this trial still are in effect. I will give you copies of those instructions to take back to the jury room with you.

You have received evidence of a statement said to be made by the defendant to _____. You must decide whether the defendant did make the statement. If you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself, and the circumstances under which the statement was made.

In deciding the believability of witnesses, you should judge defendant's testimony in the same way as you judge the testimony of any other witness.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

You have heard evidence that the defendant committed acts other than the ones charged in the indictment. Specifically, _____. Before using this evidence, you must decide whether it is more likely than not that the defendant did the acts that are not charged in the indictment. If you decide that he did, then you may consider this evidence to help you decide _____. You may not consider this evidence for any other purpose. Keep in mind that the defendant in all trial here for wire fraud, not for these other acts.

You may not use this evidence to infer that the accused has a certain character trait and that the accused acted in conformity with that trait with respect to the offenses charged in this case. The issue is not whether the accused is of good or bad character but whether the government has proven the charges beyond a reasonable doubt.

You have heard evidence that _____ have been convicted of crimes. You may consider this evidence only in deciding whether the testimony of any of these witnesses is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard evidence that the defendant has been convicted of crimes. You may consider this evidence only in deciding whether the defendant's testimony is truthful in whole, in part, or not at all. You may not consider it for any other purpose. A conviction of another crime is not evidence of the defendant's guilt of the crime for which the defendant now is charged.

You have heard [reputation/opinion] evidence about the character trait of _____ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to _____'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc]. You should consider character evidence together with all the other evidence in the case and in the same way.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of the defendant's testimony in this trial.

_____ has admitted lying under oath. You may give his testimony such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony that _____ have received benefits from the government in connection with this case. Specifically, _____. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony from _____ who each stated that he or she was involved in the commission of the alleged crime charged against the defendant. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

The witnesses _____ have pleaded guilty to a crime arising out of the same allegations for which the defendant is now on trial. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care. Moreover, the guilty pleas of these defendants cannot to be considered as evidence against the defendant[s] on trial now.

The witnesses _____ have received immunity; that is, a promise from the government that any testimony or other information he or she provided would not be used against him in a criminal case. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You must consider with caution and great care the testimony of any witness who is currently addicted to drugs. It is up to you to determine whether the testimony of a drug addict has been affect by drug use or the need for drugs.

You have heard [a witness / witnesses], namely _____, who gave opinions and testimony about [_____]. You do not have to accept [this witness's /these witnesses'] opinions or testimony. You should judge [this witness's /these witnesses'] 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's / witnesses'] qualifications, how [s/he /they] reached these [opinions / conclusions] and the factors I have described for determining the believability of testimony.

You have been presented with transcripts of the sworn testimony of the defendant. This is proper evidence that you should consider together with and in the same way you consider the other evidence.

Certain summaries/charges were admitted in evidence. [You may used these summaries/charges as evidence {even though the underlying documents are not/evidence is not here.}]

[The accuracy of the summaries/charges has been challenged . [The underlying documents have /evidence has been admitted so that you may determine whether the summaries are accurate.] [It is up to you to decide how much weight to give to the summaries.]

Certain summaries/charges were shown to you to help explain other evidence that was admitted, specifically, _____. These summaries/charts are not themselves evidence or proof of any facts [so you will not have these particular summaries/charts during your deliberations.] If these summaries/charges

do not correctly reflect the facts shown by the evidence, then you should disregard the summaries/charts and determine the facts from the underlying evidence.

THE INDICTMENT

The indictment in this case is the formal method of accusing the defendant of offenses and placing the defendant on trial. It is not evidence against the defendant and it does not create any inference of guilt.

The defendant is charged in the indictment as follows:

*[Court reads the indictment—**or not**, see defendant's objection, dkt. 42]*

The defendant has entered a plea of not guilty to these charges.

The defendant is not on trial for any act or any conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges against him. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

The indictment charges that the offenses were committed "on or about" certain dates. The government must prove that the offenses happened reasonably close to those

dates but it is not required to prove that the alleged offenses happened on those exact dates.

THE ELEMENTS OF WIRE FRAUD

The defendant is charged in each of Counts 1 through 6 with wire fraud. In order for you to find the defendant guilty of any of these charges, the government must prove each of the following elements beyond a reasonable doubt:

(1) The defendant knowingly devised or participated in a scheme to defraud as described in Paragraphs 2 through 9 of Counts 1-6;

(2) The defendant did so with the intent to defraud;

(3) The scheme to defraud involved a materially false or fraudulent pretense, representation or promise; and

(4) For the purpose of carrying out the scheme or attempting to do so, the defendant caused interstate wire communications to take place in the manner charged in the count that you are considering.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt as to a particular count, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to a particular count, then you must find the defendant not guilty of that count.

DEFINITIONS

The word **knowingly** means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. In

deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.

[You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he had a strong suspicion that _____ and that he deliberately avoided the truth. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discover the truth.]

A **scheme** is a plan or course of action formed with the intent to accomplish some purpose. A **scheme to defraud** is a scheme that is intended to deceive or cheat another and to obtain money or property, or cause the potential loss of money or property to another by means of materially false or fraudulent pretenses, representations or promises. A materially false or fraudulent pretense, representation or promise may be accomplished by **omissions** or by the **concealment** of material information.

In considering whether the government has proven a scheme to defraud, the government must prove beyond a reasonable doubt one or more of the false or fraudulent pretenses, representations or promises charged in the indictment at Paragraphs 2 through 9. The government, however, is not required to prove all of them.

A false or fraudulent pretense, representation, promise, omission or concealment is **material** if it is capable of influencing, the decision of the person to whom it is addressed. [It is not necessary that this person is the actual or intended victim of the charged scheme to defraud—*Seidling*, 737 F.3d at 1160-61] It is not necessary that the false or fraudulent representation promise, omission or concealment actually have that influence or be relied on by the alleged victim, as long as it is capable of doing so.

The wire fraud statute can be violated whether or not there is any loss to the victim or gain to the defendant. [The government need not prove that the scheme to defraud actually succeeded.]

A person acts with **intent to defraud** if he acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant or another or the potential loss of money or property to another. [Intent to defraud may be proved by circumstantial evidence and by inferences drawn from the evidence that demonstrate a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension. –*Stephens*, 421 F.3d at 509]

[The government is not required to prove that the defendant intended to obtain money or property from the same persons he deceived. A scheme to defraud does not require the defendant to communicate directly with his victim. *Seidling*, 737 F.3d at 760]

A statement is **false** if untrue when made and known at that time to be untrue by the person making the statement. A statement is **fraudulent** if it is made or caused to be made with intent to deceive. [A half-truth or a misleading omission is fraudulent if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled. The mere failure to disclose information will not always constitute fraud, but an omission accompanied by acts of concealment or affirmative misrepresentations can constitute fraud.– *Stephens*, 421 F.3d at 507]

Facsimiles, emails, and wire transfers of funds all constitute **wire communications**. Each separate interstate wire communication in furtherance of the charged scheme to defraud constitutes a separate offense.

The government must prove that interstate communication facilities were used to carry out the scheme, or were incidental to an essential part of the scheme. In order to cause **interstate wire communications** to take place, [*the defendant must cause such a communication to occur as part of the scheme—Committee Comment at 510—but*] the defendant need not actually or personally use interstate communication facilities, and the defendant need not actually intend that this use take place; however, you must find that the defendant knew that this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts from which this use could reasonably have been foreseen. However the government need not prove that the defendant knew that the wire communication was of an interstate nature. In connection with whether a wire transmission was made, you may consider evidence of the habit or routine practice of a person or organization.

Although an item communicated interstate need not itself contain a fraudulent representation, it must carry out or attempt to carry out the scheme. Each separate use of interstate communications facilities in furtherance of the scheme to defraud constitutes a separate offense.

INSTRUCTIONS ON RESPONSIBILITY

If the defendant acted in **good faith**, then he lacked the intent to defraud required to prove the charges of mail fraud. The defendant acted in good faith if, at the time, he honestly believed the truthfulness of the matters that the government has charged as being false and fraudulent. The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with intent to defraud as charged in Counts 1-6.

[*A defendant's honest and genuine belief that his actions would work out to the good of the victim is not a defense to fraud if the defendant also knowingly made false and fraudulent representations. Caputo, 517 F.3d 935*]

[A victim's negligence is not a defense to criminal conduct. Put another way, the negligence of the victim in failing to discover a fraudulent scheme is not a defense to criminal conduct.— Coyle, 63 F.3d at 144 (3rd Cir.), Kreimer, 609 F.3d at 132 (5th Cir.).

By themselves, the defendant's presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish the defendant's guilt.

If the defendant performed acts that advanced the crime but had no knowledge that a crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt.

An offense may be committed by more than one person. The defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

If the defendant knowingly caused the acts of another, then the defendant is responsible for those acts as though he personally committed them.

The defendant need not personally perform every act constituting the crime charged. Every person who willfully participates in the commission of a crime may be found guilty.

Whatever a person is legally capable of doing he can do through another person by causing that person to perform the act. If the defendant willfully ordered, directed or authorized the acts of another, then he is responsible for such acts as though he personally committed them.

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of an offense is guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed.

DELIBERATIONS

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court.

A verdict form has been prepared for you. [*Court reads verdict form.*] Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign the form.

Although you have seen that the trial is being recorded by a court reporter, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.

Each count of the indictment charges the defendant with having committed a separate offense. You must consider each count and the evidence relating to it separate and apart from the other counts. You should return a separate verdict as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to the defendant as to any other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence

solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court. You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. You must not reveal to any person, including the court, your numerical split on any verdict question until you have reached a unanimous verdict on every count.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID WEIMERT,

Defendant.

VERDICT

14-cr-22-jdp

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, David Weimert,

("Not Guilty" or "Guilty")

of the offense charged in Count 1 of the indictment.

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, David Weimert,

("Not Guilty" or "Guilty")

of the offense charged in Count 2 of the indictment.

COUNT 3

We, the Jury in the above-entitled cause, find the defendant, David Weimert,

("Not Guilty" or "Guilty")

of the offense charged in Count 3 of the indictment.

COUNT 4

We, the Jury in the above-entitled cause, find the defendant, David Weimert,

("Not Guilty" or "Guilty")

of the offense charged in Count 4 of the indictment.

COUNT 5

We, the Jury in the above-entitled cause, find the defendant, David Weimert,

("Not Guilty" or "Guilty")

of the offense charged in Count 5 of the indictment.

COUNT 6

We, the Jury in the above-entitled cause, find the defendant, David Weimert,

("Not Guilty" or "Guilty")

of the offense charged in Count 6 of the indictment.

Presiding Juror

Madison, Wisconsin

Date: _____