No. 14-12373

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee/Cross-Appellant,
v.

PETER E. CLAY,
Defendant-Appellant,
AND

TODD S. FARHA, PAUL L. BEHRENS, AND WILLIAM L. KALE,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, No. 8:11-cr-00115-JSM-MAP
Before the Honorable James S. Moody, Jr.

BRIEF FOR DEFENDANT-APPELLANT TODD S. FARHA

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September 19, 2014

AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned hereby certifies that the persons and entities listed below have an interest in the outcome of this case. Other than WellCare Health Plans, Inc. ("WellCare"), none of the entities listed below is publicly traded. WellCare Health Plans, Inc., is a publicly traded company, and its stock ticker is WCG. There is no parent corporation or publicly held corporation that owns 10% or more of its stock.

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America's 1st Choice California Holdings, LLC, Indirect wholly-owned subsidiary of WellCare

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Bereday, Thaddeus, Defendant

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Carroll, Catherine M.A., Counsel for Todd S. Farha[*]

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Comprehensive Health Management, Inc., Indirect wholly-owned subsidiary of WellCare

Comprehensive Reinsurance, Ltd., Indirect wholly-owned subsidiary of WellCare

Cooper, Todd J., Counsel for Paul L. Behrens

Daniel, Stephanie A., Counsel for Florida Agency for Health Care Administration

Donahue, Patrick M., Counsel for William L. Kale

Easy Choice Health Plan, Inc., Indirect wholly-owned subsidiary of WellCare

Exactus Pharmacy Solutions, Inc., Indirect wholly-owned subsidiary of WellCare

Farha, Todd S., Defendant-Appellant

Fernandez, Jr., Jack E., Counsel for Thaddeus Bereday

Fisher, Jeffrey L., Amicus Curiae

Florida Agency for Health Care Administration, Victim

Florida Healthy Kids Corp.[†]

[*] Parties listed for the first time on this Amended Certificate of Interested Persons and Corporate Disclosure Statement are italicized.

[†] The government's Certificate of Interested Persons (filed July 11, 2014) identifies Florida Healthy Kids Corp. as a "victim." There was no claim or finding

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Harmony Health Management, Inc., Indirect wholly-owned subsidiary of WellCare

Harmony Health Plan of Illinois, Inc., Indirect wholly-owned subsidiary of WellCare

Harmony Health Systems, Inc., Indirect wholly-owned subsidiary of WellCare

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Kehoe, Gregory W., Counsel for WellCare Health Plans, Inc.

Kian, Sina, Counsel for Todd S. Farha

Krigsman, Cherie L., Counsel for United States of America

Lamken, Jeffrey A., Counsel for Paul L. Behrens

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below that Florida Healthy Kids Corp. was a victim of any crime charged in this case.

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Missouri Care, Incorporated, Indirect wholly-owned subsidiary of Well Care

Moody Jr., James S., United States District Court Judge

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Olympic Health Management Services, Inc., Indirect wholly-owned subsidiary of WellCare

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The WellCare Management Group, Inc., Indirect wholly-owned subsidiary of WellCare

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WellCare Health Insurance Company of Kentucky, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Insurance of Arizona, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Insurance of New York, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Plans, Inc., (NYSE ticker symbol: WCG), Petitioner and Movant below

Well Care Health Plans of California, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Plans of New Jersey, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Plans of Tennessee, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Connecticut, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Florida, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Georgia, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Kansas, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Louisiana, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Nevada, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of New York, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Ohio, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of South Carolina, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Texas, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Pharmacy Benefits Management, Inc., Indirect wholly-owned subsidiary of Well Care

WellCare Prescription Insurance, Inc., Indirect wholly-owned subsidiary of WellCare

Windsor Health Group, Inc., Indirect wholly-owned subsidiary of WellCare

Windsor Health Plan, Inc., Indirect wholly-owned subsidiary of WellCare

Windsor Management Services, Inc., Indirect wholly-owned subsidiary of WellCare

Wisotsky, Steven, Amicus Curiae

/s/ Seth P. Waxman
SETH P. WAXMAN
September 19, 2014

STATEMENT REGARDING ORAL ARGUMENT

Todd Farha requests oral argument. This appeal presents significant legal questions about errors committed over the course of a three-month criminal trial. Farha believes that oral argument will assist the Court in understanding the legal issues as well as the regulatory and factual context in which they arise.

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STATEMENT REGARDING ADOPTION OF BRIEFS

Pursuant to Federal Rule of Appellate Procedure 28(i) and Eleventh Circuit Rule 28-1(f), Todd Farha hereby adopts by reference these parts of the Brief for Defendant-Appellant Paul Behrens: Statement of the Case, Argument I (Defendants' Convictions Should Be Reversed For Lack Of Falsity Under *Whiteside*), Argument II (The Government's Use Of WellCare's Financial Restatement Constitutes Prejudicial Error), and Argument V (Defendants Farha, Behrens, And Kale Preserve Their Sentencing Objections In The Event Of Cross-Appeal).

PRELIMINARY STATEMENT

Todd Farha became CEO of WellCare Health Plans, Inc. in 2002, at the age of 34. He oversaw the operations of a rapidly growing, multi-billion dollar enterprise in numerous States, including Florida, where the provision of behavioral healthcare represented a small fraction of the company's operations. Confronted with a brand-new and untested statutory regime in Florida, Farha turned to outside counsel—an experienced Florida Medicaid lawyer—and the company's internal lawyers to guide WellCare's implementation of the newly enacted 80/20 Statute. One option, which counsel said a competitor was using, was to form an affiliated behavioral health organization (BHO) to deliver services for its Florida participants and report the Plans' payments to that BHO as their 80/20 expenditures. WellCare followed suit, formed the Harmony BHO, and reported the Plans' payments to Harmony on the 80/20 expense reports.[1]

The government charged Farha and his codefendants with a broad, multi-year conspiracy to defraud Florida's Medicaid Program through the submission of false and fraudulent behavioral health expenditure information. The evidence against Farha was weak and related almost entirely to the urgency with which he pushed forward the creation of Harmony in 2003, once counsel had advised it was an available option. The jury acquitted on six of the nine charges against him,

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[1] This brief assumes familiarity with the detailed background provided in the Brief for Defendant-Appellant Paul Behrens (the "Behrens Brief").

failed to reach a verdict on one, and convicted on only two—after an *Allen* charge and deliberations spread over twenty-six days. The guilty verdicts on two counts of healthcare fraud were based on the Plans' submissions filed in 2007 (for CY2006), submissions that formed only a minor part of the government's case and in which Farha played no role. Farha was simultaneously acquitted of making false statements in those same submissions.

Farha's convictions are foreclosed by *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002). *See* Behrens Br. 48-81. In addition, Farha's convictions must be reversed because the evidence at trial established that he had *no role* in preparing, reviewing, or approving the Plans' CY2006 submissions. In post-trial motions, the government advanced aiding-and-abetting and co-schemer theories to support the verdict. But the co-schemer theory was never presented to the jury. And neither theory relieves the government of its obligation to identify some criminal act of the defendant that contributed to the offense, which the government failed to do.

The convictions also must be reversed because there was insufficient evidence of criminal mens rea. No reasonable juror could conclude that Farha acted knowingly, willfully, and with the intent to deceive AHCA. There was no evidence that Farha harbored any doubt concerning the legality or reasonableness of the Plans' 80/20 submissions. Nor was there any evidence that anyone ever indicated to Farha that the Plans' reporting methodology was unlawful or

unreasonable or that the expenditure information being reported was "false." To the contrary, Farha had been assured by counsel that the Plans' reporting approach was reasonable and fully compliant with governing law and industry practice. The government's highly speculative inferences from conduct consistent with ordinary business motives are insufficient to carry its burden of proving knowledge, willfulness, and intent beyond a reasonable doubt.

At a minimum, two legal errors require a new trial:

First, over defense objection, the district court charged the jury that it need not find that any defendant *knew* the submissions were false in order to convict on the healthcare-fraud counts. Rather, it was enough if Defendants acted with "deliberate indifference as to the[ir] truth." But *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011), held that "deliberate indifference … is not the appropriate standard" even for civil statutes requiring proof of knowledge. That holding applies *a fortiori* to criminal statutes. This error prejudiced the outcome, as the jury acquitted Farha on the false-statement counts (to which this lowered mens rea instruction did not apply), while convicting on the fraud counts (to which it did).

Second, the district court's admission of highly prejudicial evidence of Farha's and his codefendants' wealth also requires a new trial. Although the district court acknowledged that this highly prejudicial evidence bore

"infinitesimal" relation to "incentive" or motive, it nonetheless allowed the government to put on *days* of trial evidence about Defendants' wealth. This evidence served no purpose other than to inflame the jury. This made all the difference in a case short on evidence and close enough to require lengthy deliberations and an *Allen* charge.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. On May 29, 2014, Farha filed a timely notice of appeal from a final judgment of conviction entered on May 19, 2014. A908.[2]

STATEMENT OF THE ISSUES

Farha adopts the Statement of the Issues set forth in the Brief of Paul Behrens as to the arguments he adopts from that brief. *See* Behrens Br. 5-6. As to the issues addressed in this brief:

I. Whether Farha's convictions must be reversed for insufficiency of the evidence, where the government failed to demonstrate that (A) Farha had any role in the CY2006 submissions or (B) he possessed the requisite mens rea.

II. Whether Defendants' convictions must be reversed and remanded for a new trial because of the district court's erroneous jury instruction on the

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[2] Record materials cited in this brief are included in the Defendants' Joint Appendix. Citations are to the district court docket number, prefaced by "A." Trial-court briefs cited herein are not included in the Appendix and are referenced by their district court docket numbers ("Dkt.").

healthcare-fraud counts, which impermissibly lowered the prosecution's mens rea burden in contravention of the Supreme Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).

III. Whether Defendants' convictions must be reversed and remanded for a new trial because of the district court's admission of minimally probative and highly prejudicial wealth evidence.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

The indictment charged Farha with one count of conspiracy, 18 U.S.C. § 371, four counts of making false statements to AHCA on the templates for calendar years 2005 and 2006, *id.* § 1035, and four counts of healthcare fraud for calendar years 2005 and 2006, *id.* § 1347. On June 13, 2013, the jury convicted Farha on the two healthcare-fraud counts relating to CY2006, acquitted on all of the remaining substantive counts, and did not return a verdict on the conspiracy count. On May 19, 2014, the court sentenced Farha to three years' imprisonment and a $50,000 fine. A884. The court granted Farha continued release pending appeal.

II. STATEMENT OF FACTS

In 2002, Todd Farha was a newly minted CEO confronted with the regulatory "quagmire" created by AHCA's failure to issue regulations defining the scope of the brand-new 80/20 Statute. *See* A563 (43:21 (Rainer)). He turned to his

general counsel, Thad Bereday, and his trusted outside counsel, former Florida Medicaid director Gary Clarke, to steer the process. Farha directed his team to "stay[] very closely connected with Gary Clarke," WellCare's "resident expert on these issues," whom Farha understood to be "in frequent (more than daily) contact with AHCA." A700 (D_0393.1 ("Regarding [Medicare and Medicaid] issues" Farha instructed his team to contact Clarke "at each material decision point if you have questions.")).[3]

As set forth in detail in Paul Behrens's Statement of Facts, WellCare established its behavioral health organization (Harmony) in 2003, in part to address the Plans' reporting under the 80/20 Statute. *See* Behrens SOF 16-22. It was undisputed at trial that BHOs were common in the industry and a perfectly lawful way of delivering behavioral healthcare under the Statute and Medicaid contracts. A584 (92:13-25 (Clarke)); A648 (75:24-76:1 ("very common … the dominant practice") (Miller)). Accordingly, Clarke advised that the basic method that would eventually be used to calculate the refund for CY2006—reporting an appropriate portion of the subcapitation amount paid to Harmony—was an available option that others in the industry were using. *See* A584 (94:17-95:9 (discussing United Health Plans); *id.* at 95:10-23 (discussing Florida Health Partners)); *see also* A699

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[3] Trial exhibits are included in the Defendants' Joint Appendix following the district court docket numbers for the parties' final trial exhibit lists. Accordingly, all government exhibits ("GX") follow Dkt. 699; all defense exhibits ("D") follow Dkt. 700.

(GX-8506 (Clarke schematic from a WellCare meeting showing the relationship between United and United Behavioral Health)); A700 (D_1165 (email from Clarke to Farha and others referencing the use of a behavioral health organization by United Health Plans)); A699 (GX-1131a (memo from Clarke to Farha identifying use of payments to Harmony as one approach that the Plans could take to 80/20 reporting)); A700 (D_1953.2 (letter drafted by Clarke (*see* A664 (5:7-7:14)) to AHCA's Bureau of Managed Care emphasizing that AHCA's Division of Medicaid had concluded that reporting subcapitated payments to wholly owned subsidiaries was consistent with the 80/20 Statute)).

The process of forming Harmony began in mid-2003. In July 2003, Bill Kale reported by email to Farha that he had "talked with Gary, and he is all set to move forward with this separate BH [*i.e.*, behavioral health] corp at your direction." A699 (GX-1019). Farha responded, forwarding the email about "how to set up a BH subsidiary, that will be capped at 80% of premium" to Clarke and asking Clarke to "brainstorm" to "determine the appropriate contract between HMO and BH sub." *Id.* Yet by September 2003, much remained to be done.

Dr. Kale emailed Farha on September 17 that Clarke and WellCare general counsel Bereday were on the matter, helping prepare a "more detailed work plan" for Harmony's establishment. *See* A699 (GX-1024.0001-.0002). The next day, Farha emailed Kale, copying Bereday and Clarke: "Given the stakes involved

(potentially 400k/Month of giveback), the pace of this project is not acceptable. We must execute these intercompany contracts asap, and get this subsidiary operating by 10/1. Why would we delay and increase the amount of our potential giveback?" A699 (GX-1023.0001). By separate email to Bereday, Farha repeated (in more colorful language) that the delay was "costing us 400K/Month." A699 (GX-1024.0001). Farha then directed Bereday to "OUTSOURCE: Get it done, GT/OTher/Spend $$." *Id.* That is, Farha directed Bereday to spend money and hire the respected international healthcare law firm Greenberg Traurig ("GT") to expedite the establishment of the company. By November 2003, Harmony was up and running.

Farha continued to receive information on the 80/20 issue, but also continued to outsource the issue to others. In June 2004, when Farha was copied on an internal routing form enclosing the cover letters and expense reports from AHCA for half of 2002 and CY2003, A699 (GX-0319), he forwarded them to the lawyers, Bereday and Clarke, A699 (GX-0315a). Bereday promptly responded that "our team [*i.e.*, WellCare's legal team] has been activated on the BH expenditures." A700 (D_1558). Two weeks later, Clarke sent Farha a legal memorandum regarding 80/20 reporting. Among the "various options" for CY2003 reporting, Clarke opined that the Plans could report their payments to "WellCare Behavioral" (Harmony's former name) as their expenses on the 80/20 expense reports. *See*

A700 (D_0429.4).[4] In July 2004, WellCare general counsel Bereday emailed Farha and assured him that the Plans' submissions for 2002 and CY2003 were as "aggressive as possible while still defensible." A699 (GX-0346.4). Thereafter, Farha's already limited engagement with the 80/20 issue diminished over time.

The little Farha heard or saw in 2005, 2006, and 2007 about the 80/20 issue confirmed what he had previously been told: The formation of Harmony, and the reporting of the Plans' payments to Harmony for 80/20 purposes, were entirely lawful under the Statute and the contracts. Internal lawyers and WellCare's head of government relations advised Farha that the WellCare Plans were using "reasonable" and "accurate[]" approaches to the 80/20 submissions. *See* A699 (GX-1433 ("Our approach [to the 80/20 requirement] appears to be the reasonable one on calculation and filing so far."); GX-1359 (the Plans had "reported accurately" based on "a capitated arrangement with a BH subcontractor")). One of those lawyers, WellCare's Vice President of Regulatory Affairs for Florida and government witness Michael Turrell, testified that WellCare's Legal Department "was aware of how the company was handling the 80/20 calculations" and never indicated "that there was anything inappropriate" about the Plans' submissions. A559 (29:3-9).

[4] Clarke confirmed in his trial testimony that he stood by this advice. *See* A584 (99:15-19 ("there is nothing in the 80/20 amendment itself that prohibits the WellCare HMOs from including those payments to Harmony in connection with the 80/20 reporting")); A760 (22:14-22 ("one reasonable interpretation of the statute and of the contract is that you could include these payments to specialty companies like CompCare" and "Harmony")).

Turrell testified that he and the other members of WellCare's legal team were "ultimately responsible for the legal interpretation of statutes and contracts," A559 (39:23-41:12), and that his job was to "manage the contract with the State of Florida for Medicaid" and "ensure that [the Plans] were in compliance with the contract," A753 (72:5-23). Turrell was intimately familiar with the details of WellCare's 80/20 reporting, *see, e.g.*, A699 (GX-1359; GX-1290; GX-1388), and he believed the Plans were "always in compliance with the contract," A559 (89:25-90:3); *see also id.* 71:19-22 (agreeing at trial that nothing in the Statute precludes managed care plans from "using the expenses for a BHO in connection with the 80/20 calculation").

This is particularly significant because Turrell was the lawyer responsible for briefing Farha on the Plans' reporting. *See, e.g.*, A830-16 (PowerPoint presentation delivered by Turrell to Farha summarizing the issue and showing the Plans' subcapitation-based reporting). Turrell testified that if, "at any time in the process," anyone at WellCare had been in danger of violating state or federal laws or regulations, he "would have warned them." A559 (96:2-22). He never had cause to do so: He never, "as a lawyer, expressed any concerns to anyone else at the company that the 80/20 calculations were being done inappropriately." *Id.* (29:3-13). In fact, Turrell testified that he "never participated in anything unlawful during the time [he was] at WellCare" and to his knowledge he, and everyone that

he interacted with, including the legal department, "acted appropriately and lawfully." *Id.* (20:7-25; 43:1-6).

Farha signed only the certifications for 2002 and CY2003. Imtiaz Sattaur took over as the President of WellCare Florida and signed the certifications for CY2004; Jim Beerman, CFO of the Florida Plans, signed them for CY2005. Sattaur also signed the CY2006 reports, certifying on behalf of each "Health Plan" that the "expenditure information reported for the provision of community mental health services and targeted case management services" was "true and correct to the best of [his] knowledge and belief." A699 (GX-0603.0002; GX-0604.0002). Sattaur, also a government witness, signed the certifications fully aware that the reported expenditures reflected the "carve-out" amount that the Plans paid Harmony "less the inpatient dollars." A588 (6:10-8:20). Sattaur had "built an exceptional team around him," including Turrell, and no one on his team "ever told [him] that the way WellCare handled the 80/20 calculations was unlawful or improper." A589 (43:18-44:11).

The government introduced no evidence that Farha was involved in the CY2006 submissions at all. Farha did not receive the expense reports and cover letters for CY2006 when they arrived from AHCA. *See* A699 (GX-0610). He had no role in preparing, reviewing, or approving the expense reports; he was not consulted on the underlying calculations; and he did not sign the submissions. He

was only copied on an email Sattaur sent to others after the fact, noting that Sattaur had signed the submissions and that WellCare's actuaries and Finance Department had signed off on the calculations. *See* A699 (GX-1456.0003).

The jury rejected nearly all of the prosecution's charges against Farha. The jury hung on the conspiracy count and acquitted Farha on all four counts relating to CY2005, as well as the two false-statement counts relating to CY2006. The jury convicted Farha only on the healthcare-fraud counts relating to CY2006, even though the sole charged "execution" of the fraud alleged in those two counts was the same 80/20 submissions for which the jury acquitted Farha of making false statements. The district court, finding the conduct of conviction to be "a complete aberration from the entire lives and careers of these individual defendants," A903 (89:10-11), sentenced Farha to three years' imprisonment and a $50,000 fine.

III. STANDARD OF REVIEW

This Court must reverse a jury verdict where "the jury could not have found the defendant guilty under any reasonable construction of the evidence." *United States v. Jimenez*, 705 F.3d 1305, 1308 (11th Cir. 2013).

This Court reviews de novo the "legal correctness" of a jury instruction, *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000), including whether the instruction "misstate[s] the law or mislead[s] the jury," *United States v. Richardson*, 233 F.3d 1285, 1292 (11th Cir. 2000).

This Court reviews for abuse of discretion a district court's determination that the "probative value [of admitted evidence] is substantially outweighed by the danger of unfair prejudice" under Fed. R. Evid. 403. *United States v. Bradley*, 644 F.3d 1213, 1272 (11th Cir. 2011).

SUMMARY OF ARGUMENT

Farha adopts the Summary of Argument set forth in the Brief of Paul Behrens as to the arguments he adopts from that brief. *See* Behrens Br. 44-48. As to the arguments in this brief:

I. Farha's conviction must be reversed for insufficient evidence that Farha participated knowingly, willfully, and with intent to defraud in the submission of the CY2006 80/20 reports. No rational juror could have found that Farha (1) executed a scheme or artifice to defraud a healthcare benefit program, because he had no role in preparing, reviewing, or approving the submissions that were the "execution" of the scheme in CY2006; much less that he (2) did so knowingly, willfully, and with the intent to defraud, in view of the assurance he received that the Plans' reporting approach was reasonable and fully compliant with governing law and industry practice.

II. The district court improperly charged the jury that it need not find that any defendant *knew* the submissions were false to convict on the healthcare-fraud counts. Rather, it was enough if the defendants acted with "deliberate indifference

as to the[ir] truth." But the Supreme Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011), holds that "deliberate indifference … is not the appropriate standard" even for civil statutes requiring proof of knowledge. That holding necessarily applies in this criminal case. The court's error was self-evidently prejudicial, as the jury declined to convict Farha on the false-statement counts (to which this lowered mens rea instruction did not apply) while convicting on the fraud counts (to which it did).

III. A new trial is likewise required because of the district court's admission of highly prejudicial evidence of Defendants' wealth, which the district court recognized bore only "infinitesimal" relation to Defendants' motive. The government's presentation of this highly prejudicial evidence over the course of several days, and its repeated invocation of Defendants' wealth in its summation, render that error particularly harmful in this case.

ARGUMENT

I. FARHA'S CONVICTIONS SHOULD BE REVERSED FOR LACK OF FALSITY UNDER *WHITESIDE*

Farha adopts Behrens's argument that reversal of the convictions is required under this Court's decision in *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002). *See* Behrens Br. 48-81.

II. REVERSAL IS REQUIRED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT FARHA'S CONVICTIONS BASED ON THE CY2006 SUBMISSIONS

A conviction must be reversed where "the record demonstrates a lack of evidence from which a jury could find guilt beyond a reasonable doubt," *United States v. Jimenez*, 705 F.3d 1305, 1308 (11th Cir. 2013), or where "the evidence is so scant that the jury could only speculate or conjecture as to the defendant's guilt," *United States v. Henderson*, 693 F.2d 1028, 1032 (11th Cir. 1982). "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982); *see also United States v. Hunt*, 526 F.3d 739, 746 (11th Cir. 2008) (where "the evidence was in equipoise … a jury could not find guilt beyond a reasonable doubt").

As to the counts of conviction, the prosecution was required to prove beyond a reasonable doubt that Farha executed a scheme or artifice to defraud a healthcare benefit program or to obtain money or property belonging to the program by means of false or fraudulent pretenses, and that he did so knowingly, willfully, and with the intent to defraud. *See* 18 U.S.C. § 1347. No rational jury could have found that Farha participated at all in the execution of a scheme as to the CY2006 submissions, much less that he did so with the required culpable mental states.

A. The Evidence Was Insufficient To Prove Beyond a Reasonable Doubt Farha's Execution Of The Fraud As To CY2006

"The health care fraud statute, § 1347, punishes executions or attempted executions of schemes to defraud, and not simply acts in furtherance of the scheme." *United States v. Hickman*, 331 F.3d 439, 446 (5th Cir. 2003). The crime is thus "complete" only "upon the execution of a scheme." *Id.* Healthcare fraud is not "committed through [merely] 'devising or intending to devise' a scheme to defraud"; instead, the defendant must have "executed" (or attempted to execute) that scheme. *United States v. Adkinson*, 135 F.3d 1363, 1375 (11th Cir. 1998) (discussing bank-fraud statute, 18 U.S.C. § 1344); *see Hickman*, 331 F.3d at 446 (relying on bank-fraud statute to interpret healthcare-fraud statute because the statutes' "language and structure are almost identical"). Like bank fraud, "[t]he unit of prosecution [for healthcare fraud] is not the scheme but the execution. If [the defendant] did not execute the scheme, he would not be guilty." *United States v. Bruce*, 89 F.3d 886, 889 (D.C. Cir. 1996).

As to the two counts of conviction, the government charged that the "[e]xecution of the [s]cheme" was the submission of "false and fraudulent" behavioral health expenditure information for CY2006 on behalf of each of the WellCare Plans. A1 (Indictment ¶¶ 29-32). But there was no evidence that Farha had any involvement with the CY2006 submissions—the "execution of the scheme" in this case. As a result, no "reasonable trier of fact could find that the

evidence established guilt beyond a reasonable doubt." *United States v. Moore*, 504 F.3d 1345, 1348 (11th Cir. 2007). As detailed above, Farha played no role in preparing, reviewing, or approving the expense reports for CY2006. *See supra* pp. 9-12. He was conspicuously absent from all evidence concerning CY2006. Government witnesses West, Turrell, and Sattaur each testified about the process for creating the CY2006 submissions. Neither their testimony nor the documents introduced by the government at trial provided any evidence of any involvement by Farha relating to the preparation of the CY2006 submissions, or even that anyone reported to Farha about them. *See, e.g.*, A505 (74:9-116:10 (West)); A559 (10:2-17:25, 83:10-16 (Turrell)); A590 (24:2-29:22 (Sattaur)); A699 (GX-0611.1, .2, .3). To the contrary, although West, the government's star witness, was asked on three different occasions to identify every person "who was involved in" the CY2006 submissions, he never named Farha. A491 (10:17-25); *see also* A504 (69:11-70:10); A533 (49:6-50:18).

Recognizing the absence of evidence tying Farha to the CY2006 submissions, the government's post-trial briefs attempted to substitute legal theory for evidence, arguing that Farha could be criminally liable for the acts of others because they were his "co-schemers" or because he was an aider and abettor. Dkt. 772 at 33-34 & n.27. But the government did not argue the co-schemer theory to the jury and sought no instruction on it, and a court "cannot affirm a criminal

conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236, 100 S. Ct. 1108, 1119 (1980); *see also McCormick v. United States*, 500 U.S. 257, 270 n.8, 111 S. Ct. 1807, 1815 n.8 (1991); *Cola v. Reardon*, 787 F.2d 681, 693 (1st Cir. 1986).[5]

And the aiding-and-abetting theory fails because the government never identified any act by Farha that helped bring about the offense of conviction—the "execution" of the CY2006 submissions. *See, e.g.*, *United States v. Hamblin*, 911 F.2d 551, 557 (11th Cir. 1990) (to prove aiding and abetting, government must prove, among other things, "that [defendant] committed some act which furthered the crime"). In support of that theory, the government pointed to acts Farha committed more than three years earlier, "press[ing]" for the creation of Harmony "through the summer and fall of 2003." Dkt. 857 at 48-49. But pushing for the creation of Harmony was not a criminal act. Harmony was created by one set of outside counsel (Greenberg Traurig) and on the advice of another, Gary Clarke. And nothing about creating Harmony in the fall of 2003 predetermined the content of the CY2006 submissions the Plans would file in the spring of 2007. Indeed, the jury rejected the prosecution's suggestion that filings in the intervening years were false, acquitting Farha of all four CY2005 counts. Farha's role in establishing the

[5] The only instruction offered and given permitting the jury to hold Farha criminally responsible for the acts of "'other schemers'" was the standard *Pinkerton* instruction, which required the jury first to find conspiracy beyond a reasonable doubt. A679 (20:16-21:11). The jury never made that finding.

concededly lawful Harmony BHO in 2003 simply does not prove he aided and abetted the "execution" of the alleged fraud—*i.e.*, the submission of false statements—in 2007.

B. The Evidence Was Insufficient To Prove Scienter As To Farha Beyond A Reasonable Doubt

Nor did the government sustain its burden of demonstrating that Farha had any—let alone all—of the three mental states required to impose criminal liability here: knowledge, willfulness, and intent to defraud. A679 (23:7-24:5).

To show that Farha "knowingly" made false or fraudulent representations, the government had to prove that he knew "the [reports] submitted [to AHCA] were, in fact, false." *United States v. Medina,* 485 F.3d 1291, 1297 (11th Cir. 2007). To establish willfulness, it had to prove that he acted with "'knowledge that his conduct was unlawful.'" *United States v. Dominguez*, 661 F.3d 1051, 1068 (11th Cir. 2011). And to prove intent to defraud, it had to demonstrate that Farha had "the specific intent to deceive or cheat." *United States v. Klopf*, 423 F.3d 1228, 1240 (11th Cir. 2005). No reasonable juror could find that the government's evidence proved any of the required mental states beyond a reasonable doubt.

In three months of trial, the prosecution introduced no evidence that Farha harbored any doubt concerning the legality or reasonableness of the Plans' 80/20 submissions—much less anything indicating an intent to act unlawfully. And there was no evidence that anyone ever indicated to Farha that the Plans' reporting

methodology was unlawful or unreasonable or that the expenditure information being reported was "false." In fact, the exhibits and evidence from the prosecution's own witnesses (namely, Turrell, Sattaur, Clarke, and Rainer) established just the opposite: As the government never disputed, Farha was told—by those better positioned to analyze this legal issue than he was—that the methodology selected was appropriate and used by other similarly situated companies and that the resulting submissions were "accurate," "reasonable," and "defensible." *See supra* pp. 9-10; *see also* Behrens Br. 30, 42.

Stuck with that undisputed evidence, the government's post-trial briefs pointed to three isolated episodes which, whether viewed alone or in combination, are not enough to support Farha's conviction.[6]

First, the government pointed out that Farha directed subordinates to create Harmony in 2003 and believed that doing so would reduce the Plans' liabilities under the 80/20 statute. *See* Dkt. 772 at 34-35; *see e.g.*, A699 (GX-1024 (email from Farha to Bereday stating that the delay in creating Harmony was "costing [the

[6] In post-trial briefing, the government cited Rainer's testimony about a conversation he had with Farha in 2002 or 2003, which the government characterized as "caution[ing]" Farha and others that "only CMH/TCM expenditures should be included in the 80/20 worksheets." Dkt. 772 at 35; *see id.* at 12. The government neglected to mention that Rainer clarified his testimony, explaining that the "Mr. Farha [] conference call" addressed "a different issue[.]" A564 (17:17-23). In any event, such advice (if given) would have been consistent with the Plans' CY 2006 80/20 filings, which included only expenditures allocable to the provision of outpatient services (*i.e*, CMH/TCM services). *See* Behrens Br. 27-32.

Plans] $400K/Month")). Yet even the government has recognized that the creation of Harmony was perfectly lawful, *see* Behrens Br. 2-3; and evidence that a CEO attempted to reduce his company's costs, without more, "is simply evidence of [his] doing his job diligently," *United States v. Goyal*, 629 F.3d 912, 919 (9th Cir. 2010); *see also United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 528 (6th Cir. 2012) ("Why a business ought to be punished solely for seeking to maximize profits escapes us.").

In the emails invoked by the government, Farha included outside counsel Clarke in the discussions about cost reduction. And he separately instructed his general counsel to hire Greenberg Traurig, a major international law firm, to help the company accelerate Harmony's launch—hardly the direction Farha would have given if he believed that his conduct was unlawful. *See* A699 (GX-1019; GX-1023; GX-1024 (Bereday: "We need more lawyers!" Farha: "OUTSOURCE: Get it done, GT/OTher/Spend $$.")).[7]

Second, the government cited Sattaur's testimony that he suggested Farha contact AHCA directly to discuss the Plans' use of the subcapitation methodology. But Sattaur explained that he had offered the suggestion as a matter of negotiating

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[7] In post-trial briefing, the government invoked Turrell's statement that "the buck stopped" with Farha on the 80/20 issue, *see* A561 (96:11-23), as if it proved something about Farha's execution of the scheme as to CY2006. It does not: Of course the buck nominally stopped with Farha on this issue, as it did with every issue, given his role as CEO.

advice. Because AHCA and other health plans had been engaged in a "long, drawn-out" negotiation over the scope of services to be included in 80/20 reporting, Sattaur testified he believed that waiting to raise another potential issue, wholly apart from scope of services, "would have upset the Florida Association of Health Plans[,] … our competitors, and most importantly, … the Agency." A588 (84:20-85:6). This advice hardly undermined the assurances Farha received that the submissions themselves were legally proper. Sattaur's testimony established only that Sattaur believed the subcapitation issue should be raised with AHCA for *business* and *strategic* reasons, not because Sattaur had any concern that the Plans' conduct was unlawful or that the 80/20 submissions he signed were inaccurate. To the contrary, Sattaur underscored that "[n]o one … ever told me that the way WellCare handled the 80/20 calculation was unlawful or improper." A589 (44:8-11, 53:23-25).[8] And he personally certified the accuracy of the Plans' CY2006 submissions several months after allegedly providing that advice to Farha, even though he believed it had not yet been acted on. *Id.* (44:8-11, 53:23-25); A590 (22:19-23:7).

Sattaur's business advice reflected only one of many ways to approach the ongoing negotiations, and there were good reasons why an executive who had

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8 Sattaur testified that he was not a lawyer, never read the Contracts, never offered any legal advice, and instead deferred to the company's lawyers for legal advice. A589 (57:3-59:3).

repeatedly been assured that WellCare's subcapitation approach was lawful would nonetheless hesitate to raise the issue directly with AHCA's senior leadership. Pressing the issue when AHCA was not might have led AHCA—which had enormous bargaining powers as WellCare's largest customer—to take a tougher line on one of the many other issues relevant to WellCare over which AHCA had authority, or seek to reopen this one.

Third, the government hypothesized that Farha's expressed desire to pay *some* refund for CY2005, rather than no refund at all, evidenced an intent to defraud. *See* Dkt. 772 at 19, 20-22. But this evidence, applicable to CY2005—a reporting year for which Farha was acquitted of all charges—shows only that Farha preferred for the Plans to adopt something less than the most aggressive approach to 80/20 reporting from among the range of permissible options. *See, e.g.*, A699 (GX-1131-A, GX-0346-04); A830-16. That conservatism is the *opposite* of intent to defraud, not evidence of it. That is particularly true where, as here, the issue concerns a payment to the company's "largest customer," A560 (102:7-8 (Turrell))—and all the more so when that customer has made clear that it expected a refund of some amount, *see* A760 (60:1-16 (Clarke) (AHCA "expected something back every year")); A561 (67:5-17 (Turrell) (describing June 2006 meeting with Clarke and others from the industry in which "Farha took away from the meeting that AHCA wanted some kind of payback")). The government's

evidence showed only that Farha had legitimate business reasons for preferring an option that resulted in some refund to AHCA. The government introduced no evidence that he ever suggested or directed that any repayment be made to AHCA without a reasonable legal and financial basis or that he ever thought anyone merely made up numbers to achieve a desired result.[9]

What is missing from the government's case is any evidence Farha had even the slightest reason to believe—contrary to the assurances he received from inside and outside counsel—that the Plans were reporting figures that were "false" or otherwise violated any law or contract. Tellingly, when at the loss hearing the prosecution enumerated the "best" evidence it had of the Defendants' culpability in the alleged fraudulent scheme, it did not even mention Farha. *See* A824 (7:11-15, 7:23-8:19). Without evidence that Farha knew the CY2006 submissions were false

[9] The government introduced West's tape-recorded speculation that Farha wanted to see "several options … [r]egardless of what's legal." A539 (16:4-8). This statement is entitled to no weight. West repeatedly stated that he never had any conversations with Farha on this subject and confirmed he "never" heard Farha say that he wanted illegal calculations. A541 (98:7-15); *see also* Behrens Br. 36-38. West also did not testify that anyone else told him that Farha wanted to see options without regard to their legality. To the contrary, in reference to this specific statement, West testified that he did not "know one way or the other what Mr. Farha wanted." A541 (98:16-21); *see also* A504 (97:3-9 (ruling by the Court admitting this statement as "the witness' own opinion")). And West admitted that he "speculate[d]" and "embellish[ed] information" on the tapes, A533 (21:17-23:7; 24:22-25:3), and would give "almost any answer … just to shut [relator Sean Hellein] up," A541 (98:13-99:23). This sort of "[b]aseless speculation by a cooperating witness is not proof of fraudulent intent." *Goyal*, 629 F.3d at 921.

and that his conduct was unlawful, the government cannot sustain a conviction for criminal fraud.[10]

III. THE DISTRICT COURT'S ERRONEOUS JURY INSTRUCTION REQUIRES A NEW TRIAL ON THE HEALTHCARE-FRAUD COUNTS

This Court reviews de novo the "legal correctness" of a jury instruction, *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000), including whether the instruction "misstate[s] the law or mislead[s] the jury," *United States v. Richardson*, 233 F.3d 1285, 1292 (11th Cir. 2000). Where "the issues of law were presented inaccurately," this Court will vacate the conviction and order a new trial. *Prather*, 205 F.3d at 1270.

A. The District Court Erroneously Equated "Deliberate Indifference" With Knowledge

The healthcare-fraud statute, 18 U.S.C. § 1347(a), makes it a crime to "knowingly and willfully execute[]" a "scheme … to defraud any health care benefit program." Applying that clear statutory language, this Court has held that "in a health care fraud case, the defendant must be shown to have known that the claims submitted were, in fact, false." *Medina*, 485 F.3d at 1297.

The district court's instructions to the jury on the healthcare-fraud counts improperly relieved the prosecution of that burden. Rather than requiring the jury

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[10] That is true whether viewed under the proper mens rea standards or under the diluted knowledge instruction improperly given by the district court. *See infra* Part III.

to find that Defendants *knew* the CY2006 80/20 submissions were false, the district court told the jury that it could convict if it found that Defendants acted "with deliberate indifference as to the[ir] truth." A679 (24:16-19).

That instruction requires reversal. As Defendants repeatedly urged the trial court, *see* A664 (52:9-78:23), that "deliberate indifference" instruction cannot be reconciled with *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011), where the Supreme Court held that "deliberate indifference to a known risk … is not the appropriate standard" for statutes that, like the healthcare-fraud statute, require proof of knowledge.[11] In *Global-Tech*, the court of appeals had held that a plaintiff could prove induced patent infringement—which requires knowledge that the induced acts constituted infringement—by showing that the defendant had "'deliberately disregarded a known risk'" of infringement. *Id.* at 2065. The Court rejected that standard and held that knowledge can be established only by a showing of actual knowledge or "willful blindness," which requires that

[11] This Court's model instructions state that a defendant may be convicted of healthcare fraud if he makes a statement "with reckless indifference as to [its] truth." Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 326 (2010). But model instructions are not law. Moreover, although the district court substituted "deliberate indifference" for "reckless indifference," neither formulation is proper under *Global-Tech*, which was decided after the model instructions were published. *See* 131 S. Ct. at 2065, 2071 (equating "deliberate indifference" with criminal recklessness and holding that neither suffices to prove actual knowledge).

a defendant took "deliberate actions to avoid confirming a high probability of wrongdoing." *Id.* at 2070.

As the Court explained, a "deliberate indifference" instruction impermissibly reduces the statutory mens rea standard and falls short of establishing knowledge. *See* 131 S. Ct. at 2068-2070. The phrase "knowingly and willfully" requires the government to show that an act was done voluntarily and intentionally and not because of a mistake or carelessness; it signifies culpability beyond mere negligence, gross negligence, or recklessness. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 621-623, 114 S. Ct. 1793, 1805-1806 (1994). "[D]eliberate indifference," by contrast, although not "self-defining," is typically considered "equivalent [to] reckless[ness]." *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 1978 (1994).

Of course, as the Court explained in *Global-Tech*, a defendant cannot evade criminal responsibility by willfully blinding himself to "clear evidence of critical facts that are strongly suggested by the circumstances" and disclaiming actual knowledge. 131 S. Ct. at 2068-2069. Defendants who act in this manner "are just as culpable as those who have actual knowledge," because those "who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts." *Id.* But establishing willful blindness requires that "(1) the defendant must subjectively believe that there is a high probability that a

fact exists and (2) the defendant must take deliberate actions to avoid learning of the fact." *Id.* at 2070. These requirements are critical, the Court explained, because they "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* In contrast, the "deliberate indifference" instruction allows "a finding of knowledge when there is merely a 'known risk'" and does "not require active efforts by an inducer to avoid knowing about the infringing nature of the activities." *Id.* at 2071.

Global-Tech dictates the outcome here. The district court instructed the jury that it could convict Defendants of "knowingly and willfully" committing healthcare fraud "by means of false and fraudulent pretenses and representations" if it found that they were "deliberately indifferent" as to the false or fraudulent nature of their statements. Under *Global-Tech*, deliberate indifference is not enough to show knowledge.

The district court relied on *United States v. Simon*, 839 F.2d 1461, 1465, 1470 (11th Cir. 1988), which held that "a reckless indifference to the truth … supplies the criminal intent necessary to convict the appellants" where "[t]he indictment charge[d] the appellants with either mail or wire fraud under 18 U.S.C. sections 1341 and 1343." But that decision long predates *Global-Tech*, and neither of the statutes at issue required that a defendant *knowingly* committed fraud. *See* 18 U.S.C. § 1341 (no mention of knowledge except requiring that a defendant

"knowingly causes [the scheme] to be delivered by mail"), *id.* § 1343 (no mention of knowledge); *see also United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986) (differentiating between "knowingly making false representations, or concealing facts," and making statements "with reckless indifference to their truth or falsity," and explaining that either suffices to establish mail or wire fraud (internal citations omitted)). This Court has never held that standard to apply in the context of healthcare fraud—an offense that expressly requires that a defendant "*knowingly* and willfully execute" a scheme to defraud. 18 U.S.C. § 1347(a) (emphasis added).

The government offered two ways to distinguish *Global-Tech*, neither of which is persuasive. First, it contended that *Global-Tech* was a patent case, not a criminal case, and thus had no bearing on the knowledge standard here. But, as the Supreme Court made clear in *Global-Tech*, its discussion of the knowledge requirement—and its explicit rejection of the "deliberate indifference" standard applied by the Federal Circuit in that case—was imported from doctrines "well established in criminal law"; its discussion drew almost exclusively from criminal cases. 131 S. Ct. at 2068-2069. Every court to consider the question, including this one (in an unpublished opinion), has accordingly had no trouble applying *Global-Tech* to criminal law. *See United States v. Galimah*, 758 F.3d 928, 931 (8th Cir. 2014); *United States v. Grant*, 521 F. App'x 841, 848 (11th Cir. 2013);

United States v. Yi, 704 F.3d 800, 804-805 (9th Cir. 2013); *United States v. Brooks*, 681 F.3d 678, 702 n.19 (5th Cir. 2012).

Next, the government argued that the healthcare-fraud statute's "intent to defraud" element makes *Global-Tech* inapplicable. But *Global-Tech* addressed what is required to find "knowledge," which is a distinct element of healthcare fraud. And as the district court explained to the jury—without any objection from the government—intent to defraud is a separate element. *See* A679 (23:21-24:5). The government's argument would rewrite a statute that requires knowledge *and* intent to defraud to require knowledge *or* intent to defraud. As this Court has explained in other contexts, a jury can find an "intent to defraud" without necessarily finding that the defendant knew it was providing false information. *See, e.g.*, *Huycke v. Greenway*, 876 F.2d 94, 95 (11th Cir. 1989) (under the federal Odometer Act "a buyer does not have to establish that the seller had actual knowledge of the violation to show intent to deceive"); *see also Simon*, 839 F.2d at 1470 (finding "reckless indifference to the truth" supplies "the criminal intent necessary" for mail and wire fraud). Thus, knowledge of falsehood is a separate element that must be proven in addition to intent to defraud; proof of intent to defraud does not substitute for proof of knowledge of falsity. The inclusion of this separate element thus provides no basis for failing to apply *Global-Tech*.

B. The Error Was Not Harmless

An error in defining the elements of the offense is harmless only if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837 (1999); *see also Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir. 1985) (per curiam). Here the district court's mistake went to one of the central and most hotly contested issues in the case—Defendants' mens rea. Such errors are rarely harmless. *See, e.g.*, *Carter v. Montgomery*, 769 F.2d 1537, 1541 (11th Cir. 1985) (unconstitutional jury instruction on criminal intent not harmless where defendant put mens rea at issue and evidence of intent was not overwhelming); *United States v. Jones*, 664 F.3d 966, 981 (5th Cir. 2011) (instruction permitting conviction with mental state less than actual knowledge in healthcare false-statement case was reversible error); *United States v. Adamson*, 700 F.2d 953, 967-968 (5th Cir. 1983) (en banc) (reversing conviction for crime requiring knowledge where jury was instructed that "recklessness" would suffice).

The unusual pattern of the jury's verdicts in this case strongly suggests that the deliberate-indifference instruction made the difference between acquittal and conviction. As the district court acknowledged, the fraud counts in this case "just focus[ed] on the false statements"—the same statements that formed the predicate of the false-statement counts. A253 (6:22-24); *see also* A1 at 20 (Indictment,

defining the execution of the scheme to include only the "submission of false and fraudulent … expenditure information"); A677 (86:7-9 (closing argument) ("bogus" and "false" numbers constituted "fraud on the Florida Medicaid program")).

The jury, however, convicted Farha and Kale of fraud in connection with the CY2006 submissions (Counts 8 and 9) but acquitted Farha of the corresponding false-statement charges (Counts 4 and 5) and hung on those false-statement charges for Kale. Similarly, the jury hung on the CY2005 fraud charges for Behrens and Clay, while acquitting them of the false-statement charges for that year. Those results are puzzling: In most respects, the jury had to find *more* to convict Defendants of executing a healthcare fraud by making false submissions than it did to convict them of just making those same false submissions. The fraud counts required a finding of intent to defraud, while the false-statement counts did not. Yet the jury consistently found it easier to convict on the fraud counts than on the false-statement counts.

The one place where the fraud counts required *less* than the false-statement counts was on the knowledge element. When the court instructed the jury on the false-statement charges, it explained that "[a] statement or representation is false, fictitious, or fraudulent when made if it is untrue when made and the person making it *knows it is untrue*." A679 (22:14-16 (emphasis added)). And it

incorporated its general instructions on mens rea, which permitted conviction only upon a finding of actual knowledge or willful blindness, as defined in *Global-Tech*. *See id.* at 15:18-23, 16:3-7. In contrast, the court's instructions on the execution of the healthcare-fraud charges merely required deliberate indifference to the truth. *Id.* at 24:16-19.

Thus, where the jury was instructed that it could convict only upon a finding that Defendants knew the information they submitted was false or were willfully blind to the statements' falsity (as they were instructed with respect to the false-statement charges), the jury acquitted or hung. But where the jury received the improper "deliberate indifference" instruction (as it did with the healthcare-fraud charges), it convicted. (To be sure, Farha disputes that there was sufficient evidence to convict even under that diluted standard. *See supra* Part II.) Especially in view of the lack of evidence that Defendants acted knowingly, willfully, and with an intent to defraud, it is hard to imagine a more direct demonstration of the prejudicial impact of this instructional error.

IV. THE ADMISSION AND USE OF WEALTH EVIDENCE WAS REVERSIBLE ERROR

A new trial is also necessary because the district court permitted the prosecution to offer, over multiple days and through no fewer than nineteen exhibits, highly prejudicial details about the nature of Defendants' wealth.

A. The Government's Introduction Of Wealth Evidence

As executives who led WellCare's transition from a struggling, privately held firm to a publicly traded, rapidly growing, multi-billion dollar enterprise, Defendants created enormous value for shareholders and were well compensated for doing so. The prosecution sought to introduce evidence of this compensation—including equity Defendants received well in advance of the alleged fraud or the creation of Harmony—theorizing that the alleged fraud "artificially inflated the price of WellCare stock" and that Defendants had "monetize[d] the scheme[] by taking WellCare public, exercising options and selling shares at prices inflated by the excess profits generated by the scheme." Dkt. 547 at 2, 21.

Had that been true, it might well have provided a plausible basis for admitting evidence of Defendants' stock sales. But there was no evidence that the charged fraud—which never related to more than a tiny portion of WellCare's annual revenues—had any impact on the company's stock price. Indeed, the prosecution repeatedly made clear that it had no intention of backing up this theory with evidence. *See, e.g.*, Dkt. 374 at 17 ("The government will not attempt to prove that the WellCare stock price fluctuated based on the defendants' fraudulent conduct."); A565 (53:23-24 ("we do not need to put on evidence that this fraud inflated the stock price")). And with good reason: During the period at issue, for reasons having nothing to do with the alleged fraud, "the company grew [to] more

than three times its [original] size in the space of three years." A539 (63:18-19). "[A]t the end of 2003 … WellCare was just about a billion-dollar company," but by mid-2006 it had "grown into Medicare," "added Part D pharmacy, which was just ungodly huge," and projected "over a 3 billion-dollar revenue." *Id.* at 63:9-10, 14-18. These unrelated developments dwarfed the approximately $23 million in refunds—spread over five years—the government claims went unpaid as a result of the alleged scheme. *See* Dkt. No. 819 at 27 (estimating actual loss to AHCA at $22,773,446). As the district court put it at sentencing, that amount was "not a significant number" even relative to "the amount of money paid to WellCare by AHCA for those years." A903 (90:5-14, 90:25-91:3).

The district court should therefore have excluded the stock sale evidence as misleading and unduly prejudicial. Instead, the district court struck a bizarre "compromise." It did not allow the government to show directly that Defendants realized $75 million (collectively) by selling shares they received as part of their compensation. But it permitted the government to introduce all the stock each Defendant received and the total number of shares each sold, while restricting the government to proving up the price of just two stock sales per Defendant, for no more than $20 million in aggregate. Defense counsel objected that this was no compromise at all, because the jury could easily extrapolate from the share and sale price information that Defendants made far more than the $20 million that

could be explicitly calculated. A565 (54:25-55:8). The district court overruled the objection. The district court also permitted the government to prove up all the other forms of compensation Defendants received—base salary, cash bonuses, and stock options—again without any testimony that the alleged fraud had any impact on any of these amounts.

The prosecution spent days presenting this evidence at the end of its case. The jury thus learned that:

- Todd Farha received roughly $1.7 million in base salary between 2003 and 2007; $2 million in cash bonuses; 601,315 stock options; and 2,111,727 shares of WellCare stock, of which he sold 1,069,506 shares. *See* A699 (GX-4064-R-4; GX-4090-R-3). In one transaction in 2004, Farha sold 165,000 shares at $30.40 per share for a total of $5,016,000. In another transaction in 2007, he sold 16,798 shares at $112.75 per share for a total of $1,893,912. *See* A699 (GX-4090-R-3).

- Paul Behrens received roughly $1.2 million in base salary between 2003 and 2007; $715,000 in cash bonuses; 65,728 stock options; and 473,781 shares of WellCare stock, of which he sold 268,726 shares. *See* A699 (GX-4064-R-4; GX-4090-R-3). In one transaction in 2005, Behrens sold 64,000 shares at $33.81 per share for a total of $2,164,077. In another transaction in 2006, he sold 49,000 shares at $37.88 per share for a total of $1,856,056. *See* A699 (GX-4090-R-3).

- William Kale received over $700,000 in base salary between 2003 and 2007; $160,000 in cash bonuses; 3,472 options; and 17,100 shares of WellCare stock, of which he sold 15,749. *See* A699 (GX-4089-R-2; GX-4090-R-3). In one transaction in 2006, Kale sold 2000 shares at $47.54 per share for a total of $87,700. In another transaction in 2007, Kale sold 2,000 shares at $78.92 per share for a total of $150,460. *See* A699 (GX-4090-R-3).

- Peter Clay received over half a million dollars in base salary from his start in 2005 until 2007, $145,000 in cash bonuses, 20,334 options, and 19,740 shares of WellCare stock. *See* A699 (GX-4089-R-2; GX-4090-R-3). In two separate transactions in 2007, he sold 2,000 shares and 1,763 shares, both at $85.53 per share, for a total of $87,580 and $62,321, respectively. *See* A699 (GX-4090-R-3).

It was highly and unfairly prejudicial to admit any of these figures, much less all of them, and in such detail. And it was manifestly unjust, warranting a new trial, that the government turned this information—otherwise so easily summarized—into a subject of attention in the last days of its case.

B. Wealth Evidence Was Not Probative Of Defendants' Motive And Incentive

As this Court explained in *United States v. Bradley*, admitting evidence of a defendant's wealth creates a risk "that the jury might find the [defendants] guilty not because the evidence established guilt beyond a reasonable doubt, but because [they] had lots of money." 644 F.3d 1213, 1271 (11th Cir. 2011). Accordingly, courts must "be careful" not to "permit[] the introduction of evidence that is probative of nothing more than the defendant's financial success." *Id.*

Under *Bradley* and Federal Rules of Evidence 401 and 403, a trial court must make a fact-specific determination as to whether proffered wealth evidence is relevant "to establish a fact in issue" and whether the prejudicial impact of a defendant's wealth substantially outweighs the evidence's probative value. *Bradley*, 644 F.3d at 1271. Where the district court abuses its discretion in that

calculus and the introduction of the evidence prejudices the defendant, the conviction must be vacated and the defendant must be granted a new trial. *See United States v. Merrill*, 513 F.3d 1293, 1300 (11th Cir. 2008); *see also United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 896-897 (D.C. Cir. 2010) (vacating jury verdict and remanding for new trial because of district court's admission of wealth evidence).

Here, the district court concluded that both the stock sale and compensation evidence were relevant to "motive and incentive." A565 (41:24-42:2). By this the court appears to have meant that because Defendants held stock and might be entitled to incentive compensation, they had a reason to boost WellCare's bottom line. *See id.* at 12:2-5 ("THE COURT: Well, I don't know the government has to show that the shares were connected to the gain from the alleged fraud. I think what they're trying to show is that the individuals had an incentive to maximize profits."); *id*. at 12:16-21("THE COURT: Let's say you and I both get hired by Humana and they really like you because you're really special. So, they give you a hundred thousand shares of Humana stock. Me, they don't give any stock; they just agree that I can sweep the floors. Who has the most incentive to make sure Humana makes a profit? You or me?").

That kind of general incentive to see their employer do well—common to all corporate executives—hardly implies a motive to commit fraud. Rather, "[s]uch a

general financial incentive merely reinforces [the defendant's] preexisting duty to maximize [the company's] performance, and his seeking to meet expectations cannot be inherently probative of fraud." *Goyal*, 629 F.3d at 919. Indeed, in a range of contexts, this Court has recognized the minimally probative value of such evidence, holding, for example, that "the motive created by stock or option ownership is insufficient to create a strong inference of scienter" in the civil fraud context. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1256 (11th Cir. 2008); *see also ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 198, 201 (2d Cir. 2009) ("Motives that are common to most corporate officers, such as the desire for the corporation to appear profitable," or "bonuses based on corporate earnings and higher stock prices," do "not strengthen the inference of fraudulent intent.").

Defendants' supposed "incentive" was far too thin a reed to permit the prosecution to spend days dwelling on Defendants' ample, but entirely legitimate, earnings. "[B]ecause financial gain is the motive for committing almost all financial crimes, we must be careful not to ignore the 'real possibility that the extreme or extravagant wealth or spending was [merely] made possible by legitimate means.' Otherwise, we run the risk of permitting the introduction of evidence that is probative of nothing more than the defendant's financial success." *Bradley*, 644 F.3d at 1271 (internal citation omitted; alteration in original); *see also*

United States v. Terzado-Madruga, 897 F.2d 1099, 1120 (11th Cir. 1990) ("[T]he mere fact that a defendant wears gold jewelry, boasts of his financial worth and drives a luxurious automobile, *without a showing that those possessions were not derived from legitimate sources*, is at best marginally probative of his involvement in drug trafficking." (emphasis added)).

The wealth evidence here, which established only that Defendants had well-paying jobs and held an equity stake in a hugely successful company, stands in stark contrast to other cases in which the government demonstrated an actual nexus between the charged crimes and the defendant's wealth. *See, e.g.*, *United States v. Gonzalez*, 940 F.2d 1413, 1423 (11th Cir. 1991) (government entitled to present evidence of sudden or unexplained wealth to prove income was received from a criminal enterprise); *see also United States v. Densmore*, 210 F. App'x 965, 970 (11th Cir. 2006) (permitting "testimony regarding Densmore's purchases with large sums of cash and their timing to support an inference that those purchases were funded by the cash withdrawals from the trucking company's bank account").

The government's theory—that anyone with stock has an incentive to commit fraud—would toss aside the "careful" consideration required by *Bradley*, 644 F.3d at 1271, and almost categorically permit the introduction of wealth evidence, even when, as here, there is no plausible connection between the fraud and the stock price. It absolves the government of showing any real relationship

between a defendant's compensation and an alleged fraud, and instead permits the government to suggest, without substantiation, that a defendant was doing something illegal because he made a lot of money. Such evidence is not just minimally probative; it is affirmatively misleading.

C. Admission Of Wealth Evidence Was Highly Prejudicial

The unduly prejudicial value of this wealth evidence substantially outweighed any minimal probative value it had. The district court essentially found as much, agreeing both that the evidence showed only "an infinitesimal amount of incentive" and that the jury's "hearing $75 million" would cause "undue prejudice." A565 (44:13-16, 49:3-6). In light of these assessments, the proper course was clear: highly prejudicial evidence of the defendant's wealth that has only "infinitesimal" probative value should not come into evidence in a criminal trial. *See Bradley*, 644 F.3d at 1271-1272. But the court instead decided that limiting the prosecution to proving two stock sales per Defendant totaling no more than $20 million would ameliorate the prejudice.

That did not solve the problem. The information the prosecution introduced gave the jury all the tools necessary to infer that Defendants had reaped much more than the $75 million the court recognized would be unduly prejudicial. The jury heard that WellCare's stock price was $112 per share in October 2007 and that Farha alone held more than a million shares at that time. *See* A699 (GX-4090-R-

3). The jury thus could have calculated that Farha, to take a stark example, held stock worth more than $100 million. As to the stock sold prior to October 2007, it required only simple math for the jury to approximate, based on the total stock sales and the prices provided, how much each Defendant made from selling stock. For Farha alone, a calculation based on the larger sale price proven would have yielded proceeds of $120,506,801, and an average of the two sale prices proven as to him would have generated $76,549,891. Both figures are substantially more than Farha actually realized from his stock sales—and more than the district court recognized would be unduly prejudicial to Defendants. (Similar calculations for Behrens would have revealed that he earned more than $16 million.)

Moreover, the district court's basic premise—that while $75 million was too much for the jury to hear, $20 million would not be unduly prejudicial—was misguided. Twenty million dollars dwarfs the lifetime earnings of the average juror by several orders of magnitude and was more than enough to foment bias. *See, e.g.*, *United States v. Mitchell*, 172 F.3d 1104, 1108-1109 (9th Cir. 1999) ("A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value.").[12] In short, having correctly identified the severe prejudice

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[12] The median annual income in Tampa, Florida, where the case was tried, is approximately $40,000.

threatened by the prosecution's desire to introduce substantial wealth evidence and the "infinitesimal" probative value of that evidence, the district court crafted a solution that was at best ineffectual and in all likelihood made matters worse.[13]

The prosecution exploited the wealth evidence in summation, with precisely the sort of appeal to class prejudice that "can deprive [a] defendant of a fair trial." *Bradley*, 644 F.3d at 1271. The prosecution told the jury that Defendants' compensation arrangements were "incredible" and then contrasted what Defendants earned with the financial status of "most people"—including, presumably, the jury:

> You get your salary, that's all good and well. *Big salary, living well.* But, members of the jury, they're compensated based on the company's performance…. *Farha did just two of his sales. Just two equals $6.8 million.* Behrens, $4 million. Kale, over a quarter million dollars. Clay, 150,000. Now, that may not sound like a lot, but *to most people, that's a good bit of money.*

[13] The district court instructed the jury that "[t]he defendants' wealth has nothing to do with whether they are guilty or innocent of the charges against them. You may not consider evidence of defendants' wealth in your deliberations, and you may not allow bias based on someone's economic circumstances to affect your decision[making]." A637 (52:23-53:12). But the district court negated that limitation by telling the jury that it was "up to the[m] to decide whether or not this evidence establishes such a motive." A637 (52:23-53:12). In any event, once the jury heard that Defendants together had made tens if not hundreds of millions from their service at WellCare, no instruction could adequately protect against the inevitable prejudice. *See United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (not a case where "curative instructions by the trial court were sufficient to eliminate the taint" of wealth evidence).

A678 (24:1-20 (emphasis added)). That kind of focus on how much Defendants made from their legitimate work at WellCare and contrasting them with "most people" was "highly improper," *Bradley*, 644 F.3d at 1271, and had "no place" in a criminal trial, *Stahl*, 616 F.2d at 33; *Adams Labs., Inc. v. Jacobs Eng'g Co.*, 761 F.2d 1218, 1226 (7th Cir. 1985) ("appealing to the sympathy of jurors through references to the relative wealth of the defendants … is improper and may be cause for reversal").

This wealth evidence was not a run-of-the-mill evidentiary mishap or a fleeting reference to something improper. It was a substantial part of the government's case, spanning three days near the end of trial, filling nineteen exhibits, and receiving inappropriate rhetorical emphasis in the government's concluding remarks. *See, e.g.*, *Bill Harbert*, 608 F.3d at 898 ("Evidence need not be reinforced and reiterated again and again for it to be prejudicial enough to warrant a new trial."); *United States v. Waters*, 627 F.3d 345, 358-59 (9th Cir. 2010) (erroneously admitted evidence not harmless where it was "highly prejudicial" and "the prosecutor emphasized th[e] prejudicial interpretation … during his closing argument"); *United States v. Murray*, 103 F.3d 310, 322 (3d Cir. 1997) (improperly admitted testimony was not harmless in light of "the emphasis placed by the government on [the] testimony in its closing argument"); *cf. United States v. Miller*, 255 F.3d 1282, 1286 (11th Cir. 2001) (improperly admitted

evidence harmless where it "took only moments of the trial" and "[t]he prosecutor did not focus on or emphasize [it] at any point in the trial, including closing arguments").

The introduction of wealth evidence late in this case, untethered to the charged conduct, was a game changer. It shifted the emphasis from the real and enormously complex issues—*i.e.*, what expenses counted for 80/20 purposes and whether Defendants acted in good faith—to questions about whether any executive could legitimately make so much money. The prosecution invited the jury to conclude that Defendants received unfair amounts of pay during their time at WellCare. And once a juror concludes that a defendant benefitted from unfair pay, it becomes all too easy to conclude the defendant should be punished for that, without regard to guilt or innocence of the crime actually charged. As this Court noted in *Bradley*, these concerns are precisely the reason wealth evidence must be treated delicately. Here it was not. That error warrants reversal.

V. THE GOVERNMENT'S USE OF WELLCARE'S FINANCIAL RESTATEMENT CONSTITUTES PREJUDICIAL ERROR

Farha adopts Behrens's argument that the district court's erroneous admission of WellCare's financial restatement requires reversal of the convictions and a new trial. *See* Behrens Br. 81-97.

VI. FARHA PRESERVES HIS OBJECTIONS TO SENTENCING ISSUES IN THE EVENT OF CROSS-APPEAL

Farha adopts Behrens's sentencing arguments concerning the district court's loss calculation and the imposition of the sophisticated-means enhancement. *See* Behrens Br. 103-106.

CONCLUSION

In addition to the reasons set forth in the Brief of Paul Behrens, which Farha adopts, the Court should reverse Farha's convictions for insufficiency of the evidence. At the very least, the Court should vacate Farha's convictions and remand for a new trial due to the district court's improper "deliberate indifference" instruction and its erroneous admission of wealth evidence.

Respectfully submitted,

/s/ Seth P. Waxman

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September 19, 2014

STATUTORY ADDENDUM

18 U.S.C. § 1347

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.