UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

MICHAEL CASTILLERO, et al.,

Defendants.

23 Cr. 622 (JMF)

THE GOVERNMENT'S MOTIONS *IN LIMINE*

JAY CLAYTON
United States Attorney for the
Southern District of New York
26 Federal Plaza
New York, New York 10278

Adam S. Hobson
Allison Nichols
Matthew R. Shahabian
Assistant United States Attorneys
Of Counsel

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PRELIMINARY STATEMENT

In advance of the trial of defendants Michael Castillero, Francine Lanaia, and Brian Martinsen, the Government respectfully submits the following motions *in limine*. *First*, the Government moves to admit evidence regarding the examination of StraightPath conducted by the Securities and Exchange Commission's Division of Examinations in 2018 and 2019. *Second*, the Government moves to preclude irrelevant and improper evidence and argument, including that (a) Regulation D is a defense to the charges; (b) regulators are to blame; (c) FINRA lacks authority to investigate or request on-the-record testimony; (d) other actors in the pre-IPO securities space engaged in similar conduct; (e) the victims were negligent or failed to conduct due diligence; (f) the defendants intended to repay investor money; (g) the presence of counsel; and (h) the defendants' good acts and personal circumstances. *Third*, the Government moves to limit the scope of certain cross-examinations.

FACTUAL BACKGROUND

From 2017 through April 2022, the defendants engaged in a scheme to defraud investors through their control of the nine StraightPath Venture Partners Funds and related managerial and advisory entities (collectively, "StraightPath").

Nature of the Investment

The defendants marketed StraightPath as an opportunity for individual, non-professional investors to acquire shares in so-called "pre-IPO" companies—successful private companies expected to list their shares publicly in the future—at favorable prices, with the promise of significant returns upon the companies going public. StraightPath's offering documents (Private Placement Memoranda or "PPMs") described the relevant investment as an interest in one of the StraightPath funds, which would in turn establish various "Series" to hold investments in different portfolio companies or baskets of portfolio companies. By contrast, the defendants' marketing

materials and telephone sales pitches described the investment differently. The defendants and their promotional callers told StraightPath investors that they were acquiring a specific number of shares of a particular pre-IPO company at a specified price per share. Investors understood that they would receive the shares, or the cash equivalent, after the pre-IPO company became publicly traded. The defendants confirmed the details of each investor's interest in shares of a particular pre-IPO company in "Welcome Letters," which, in addition to noting the number of shares and the price per share, also in most cases told the investors that various fees otherwise authorized by the PPMs had been waived.

Exorbitant Markups

Acting as broker-dealers, and overseeing other broker-dealers, the defendants had a duty of honest services to StraightPath investors, including a duty to disclose all material facts concerning the transactions entrusted to them. And, acting as investment advisers, the defendants had duties to the StraightPath funds, including a duty of utmost good faith and full and candid disclosure, and, with that, a duty not to make false or misleading statements to the investors in the funds, *see* 17 C.F.R. § 275.206(4)-8. But the defendants' disclosures to investors were false or deficient in a number of respects. The evidence will show that the defendants charged investors exorbitantly high markups on the pre-IPO shares—the defendants routinely charged investors more than 30 percent higher than what they had paid to acquire the same shares, and in many cases the markup was greater than 50 percent. These markups were not disclosed to investors, who were unaware that the defendants were using the markups to make an upfront profit on investors' contributions. Even worse, the defendants and their salespeople or "referral agents" often falsely claimed the exact opposite. In sales pitches to investors, which the defendants were aware of and directed, referral agents often represented that StraightPath took no upfront fees and would only

take 20 percent of the investors' carried interest on the back end; in other words, the defendants and their agents falsely claimed that StraightPath's interests and the investors' interests were aligned and that StraightPath would only make money if and when the investor turned a profit.

Share Mismatches, Commingling, and Misappropriation

The defendants also marketed and "sold" to investors interests in a greater number of shares of pre-IPO companies than StraightPath actually owned or had access to. The defendants acquired interests in the pre-IPO companies by purchasing them from company insiders, from exchanges, and by acquiring interests in other funds. At times, however, they took investor money for interests in shares before they had acquired the shares or without regard to whether their inventory had been depleted. This mismatch between what investors believed they had acquired and what StraightPath actually had available amounts to millions of dollars' worth of shares. The evidence will show that the defendants at times acted deliberately in marketing to investors interests in shares that StraightPath did not own and that at times, rather than spending the money to acquire shares, the defendants diverted investor money to pay themselves. Over the course of the fraud, the defendants pocketed collectively more than $75 million—all while telling investors that they only made money when the investors made money.

The defendants' misappropriation of investor money was facilitated by their practice of commingling investor funds contrary to representations in the PPMs about how investor money would be segregated. The PPMs stated, falsely, that each Series would remain segregated from all other Series. In actuality, the defendants treated investor money as fungible, recording more than 1,600 transfers between and among the StraightPath bank accounts during StraightPath's operation.

Deception about Ownership and Control

When StraightPath launched in 2017, all three defendants had lengthy and public records of disciplinary history and history of customer complaints, as catalogued by the Financial Industry Regulatory Authority ("FINRA"). In whole or in part because of concern that investors or counterparties would hesitate to do business with StraightPath because of these complaints against the defendants, the defendants recruited Martinsen's childhood friend, Fund Manager-1, to serve as a public face of StraightPath and obscure their own involvement. While Fund Manager-1 performed various tasks supporting StraightPath's operation, he reported and answered to the defendants, who collectively performed the tasks and undertook the judgment calls and decision-making ascribed to the Fund Manager in StraightPath's offering documents. Further, the defendants operated an email account in Fund Manager-1's name and used a literal rubber stamp with his signature to sign Fund documents. As StraightPath came under increased regulatory scrutiny, the defendants at times tasked Fund Manger-1 with meeting with and calling regulators.

In January 2018 Lanaia was suspended by FINRA for three months for failure to timely disclose judgments against her on her Uniform Application for Securities Industry Registration or Transfer (Form U4). In October 2018 this suspension was extended into a permanent bar from acting as a broker or otherwise associating with any FINRA member in any capacity. In February 2019 Castillero was permanently barred by FINRA from acting as a broker or otherwise associating with any FINRA member in any capacity for failure to appear for on-the-record testimony requested by FINRA in connection with its investigation into allegations that he engaged in unauthorized trading, made payments in an attempt to settle the customer's complaint regarding the trades without notifying the firm, and made false statements regarding this conduct to FINRA.

Regulatory Scrutiny and Obstruction

In 2018 and 2019 the SEC's Division of Examinations conducted a voluntary examination of StraightPath, which included routine requests for documents and information, as well as interviews of some of the StraightPath principals. The defendants misrepresented aspects of StraightPath's operations, including downplaying the role of Lanaia, who was suspended and then barred while the examination was ongoing. In or about September 2019, the SEC delineated in writing a set of issues at StraightPath that warranted "immediate corrective action," including its failure to accurately disclose Lanaia's and Castillero's ownership and control of the Funds. The SEC also flagged the impropriety of StraightPath paying its salespeople, or "referral agents" transaction-based upfront commissions that were not disclosed to investors and violated the Exchange Act's prohibition on unregistered broker-dealers receiving transaction-based compensation. The defendants did not correct these or the other issues raised by the SEC.

The Division of Examinations referred StraightPath to the SEC's Enforcement Division, which opened an investigation. The defendants continued, as before, to falsely hold out Fund Manager-1 as a true fund manager and openly discussed with each other the need to deceive the SEC and to scapegoat Fund Manager-1 should the SEC identify any problems. As part of its investigation, the SEC issued subpoenas to StraightPath calling for, among other things, relevant email communications concerning StraightPath's referral agents. In or about April 2021, the SEC clarified the scope of the pending subpoena by specifically requesting StraightPath provide its emails for a specified list of individuals and entities that had worked as referral agents. Rather than provide the emails, Martinsen directed Castillero to delete the StraightPath-domain email accounts for the referral agents, which Castillero did. Martinsen then wrote a letter to the SEC stating that

the emails "no longer exist" without revealing that the reason the emails could not be produced was they had just been deleted at his direction while the subpoena was pending.

PROCEDURAL HISTORY

In accordance with the Court's individual rules of practice, on August 15, 2025, the Government sent defense counsel a list of sixteen motions *in limine* it was considering, including each of the motions discussed in this motion, and on August 20, 2025, the parties conferred by telephone. Counsel for the defendants indicated at the outset of the call and in discussion of each proposed motion individually that they could not agree with the Government's position and that the Government would need to brief the issue for the Court. However, based on the specifics of the ensuing discussion, the Government believes that there was in fact sufficient agreement as to at least one of the issues, such that the Court's intervention is not needed at this time.

The issue of agreement concerned the propriety of argument or evidence as to the defendants' character, prior good acts, and potential punishment. The parties disagree about whether and under what circumstances the defendants may offer positive character or good acts evidence, and this issue is briefed below in the Argument Section, Part IX. However, the defendants generally agreed that evidence and argument about their potential punishment is not permissible. *See, e.g.*, *Shannon v. United States*, 512 U.S. 573, 579 (1994) (Where the jury has no role at sentencing—such as in this case—it "should be admonished to reach its verdict without regard to what sentence might be imposed.").[1] Counsel for Castillero agreed that argument about the defendants' potential punishment is improper. Counsel for Lanaia and Martinsen noted their understanding that this principle would not limit cross-examination of a cooperating witness.

[1] Unless otherwise indicated, all quotations omit internal quotation marks, citations, and previous alterations.

Accordingly, the Government understands based on the meet-and-confer that the defendants will not raise the prospect of punishment in their opening statements or otherwise make improper arguments to the jury about punishment.

ARGUMENT

I. THE 2019 SEC EXAMINIATION LETTERS ARE ADMISSIBLE AS EVIDENCE THAT THE DEFENDANTS KNEW THEY WERE VIOLATING THE SECURITIES LAWS AND INTENTIONALLY CHOSE NOT TO CORRECT THEIR ACTIONS

The Government anticipates proving, through documents, communications, and witness testimony, that the SEC's Division of Examinations conducted a voluntary examination of StraightPath in 2018 and 2019 that culminated in the SEC delineating in writing a set of issues at StraightPath that warranted "immediate corrective action." The proof will show, however, that the defendants did not take the corrective action. This evidence is relevant and admissible to show that the defendants were "on notice of [the] potential illegality" of certain business practices and "continued to operate [the] business despite this notice" which is "probative of [their] intent to violate the law." *United States v. Moseley*, 980 F.3d 9, 27 (2d Cir. 2020).

An SEC staff accountant ("SEC Staff-1") is expected to testify about the SEC's examination of StraightPath, including the documents the SEC gathered pursuant to voluntary requests and the information about StraightPath's operations provided by the defendants and Fund Manager-1 during two in-person interviews he conducted in 2018 and 2019. SEC Staff-1 is also expected to testify that, at the conclusion of the voluntary examination in approximately September 2019, he had a telephone conversation with Martinsen, Lanaia and one of their attorneys enumerating regulatory problems the SEC had identified with StraightPath's operation. This call was followed by two formal letters from the SEC addressed to Martinsen conveying the same information. The testimony and letters are admissible to establish the defendants knew as early as September 2019 that they were violating the securities laws and thus that the defendants'

subsequent violations were knowing and willful. The Government anticipates that other evidence, including text message communications, will establish that Castillero likewise received notice of the SEC letters.

The first SEC letter (attached here as GX 400) cited the following findings, among others, for "immediate corrective action" with respect to StraightPath Management Inc. (later StraightPath Management LLC), the entity that served as the investment adviser to each of the nine StraightPath funds:

- StraightPath's sale of membership interests after January 16, 2018 may be deemed unregistered securities offerings in violation of Section 5 of the Securities Act, because Lanaia's role at StraightPath was consistent with that of an "officer" or "promoter" while her FINRA suspension and then bar made her a "Bad Actor" causing StraightPath to lose its eligibility for the safe harbor exemption for unregistered securities provided by Rule 506(c) of Regulation D of the Securities Act.

- StraightPath appears to have violated Rule 206(4)-8 of the Investment Advisers Act through the following misrepresentations and omissions of material facts made to investors through the Funds' PPMs:

    - StraightPath failed to disclose Castillero's ownership and control;

    - StraightPath failed to disclose Lanaia's apparent ownership;

    - StraightPath failed to disclose Lanaia's FINRA suspension;

    - StraightPath commingled investor monies despite a representation in the PPMs that such monies would be segregated by investment Series;

    - StraightPath made a series of misrepresentations in various delineated Welcome Letters sent to investors regarding the number of shares actually held by StraightPath, including at least 27 instances where Welcome Letters were sent representing a particular beneficial interest before StraightPath had acquired any shares; and

    - Welcome Letters to investors failed to disclose StraightPath's payments of referral fees to their referral agents and that the fee was based on investors' capital contribution into the Funds.

- Various misstatements on and omissions to StraightPath's Form ADV, including a failure to promptly report Lanaia's FINRA suspension and subsequent bar and Castillero's FINRA bar.

The second SEC letter, sent the same day and addressed to Martinsen and StraightPath Venture Partners, LLC (GX 401), noted that the finders ("referral agents"), who were being paid transaction-based referral compensation, may be required to register as "brokers" under Section 15(a) of the Exchange Act and that StraightPath may therefore have facilitated the finders' unregistered broker conduct and violations of the Exchange Act.

Approximately two months later, Martinsen sent SEC Staff-1 a responsive letter disagreeing with the Commission's conclusions. *See* Martinsen Letter, attached here as Exhibit A.

A. Applicable Law

The Federal Rules of Evidence define hearsay as a declarant's out-of-court statement "offer[ed] in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Hearsay is admissible only if it falls within an enumerated exception. Fed. R. Evid. 802. However, "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Fed. R. Evid. 801(c) advisory committee's note. Thus, a statement offered to show its effect on the listener is not hearsay. *Id.*; *see also United States v. Dupree*, 706 F.3d 131, 137 (2d Cir. 2013) ("We have repeatedly held that a statement is not hearsay where, as here, it is offered, not for its truth, but to show that a listener was put on notice."); *George v. Celotex Corp.*, 914 F.2d 26, 30 (2d Cir. 1990) ("To be sure, an out of court statement offered not for the truth of the matter asserted, but merely to show that the defendant was on notice of a danger, is not hearsay.").

B. Discussion

The two SEC letters to Martinsen, GX 400 and 401, as well as expected testimony by SEC Staff-1, constitute relevant, non-hearsay evidence that the defendants were on notice as to

StraightPath's potential violations of various securities laws and regulations but continued to operate in the same way, which is highly probative of scienter.

There is no legal basis to exclude the evidence. During the meet-and-confer, the defendants indicated that they opposed the admission of the SEC letters but would not explain why until after the Government's exhibits and 3500 are produced.[2] Whether the defendants plan to raise a relevance objection or a hearsay objection, either would be meritless.

The Second Circuit has "repeatedly held that a statement is not hearsay where, as here, it is offered, not for its truth, but to show that a listener was put on notice." *Dupree*, 706 F.3d at 137. In one such case, the Second Circuit upheld the District Court's admission of email messages sent by a group of investors to the defendants demanding more information on a project they claimed was fraud and involved the misappropriation of investor funds. The investors also threatened to seek legal recourse if their concerns were not addressed. *United States v. Dupre*, 462 F.3d 131, 137 (2d Cir. 2006). The Court held that the messages were admissible not for their truth but to "rebut defendants' argument that they had no reason to know the [project] was fraudulent" and because "[t]he messages demonstrated that defendants had received communications detailing the project's likely bogus nature." *Id.*

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[2] According to the schedule set by the Court, the Government's exhibit list is due on September 22, 2025, and its 3500 will be produced in two batches on September 22 and September 29, 2025.

It should also be noted that approximately 18 months ago, on March 5, 2024, the Government produced to the defendants its then-existing 3500 for SEC Staff-1, which consisted of notes and reports of the Government's interviews of SEC Staff-1, as well as SEC Staff-1's notes of his own interviews of the StraightPath principals during the voluntary examination, which SEC Staff-1 had sent to the Government. These materials, along with other 3500 material that may have been acquired or generated since, will be timely re-produced according to the Court's 3500 deadlines.

Similarly, in *United States v. Mosely*, the Second Circuit affirmed the District Court's admission of borrower complaints about the illegal practices by the defendant's business, as they served to put the defendant on notice of potential illegality because "[t]hat he continued to operate his business despite this notice makes the complaints probative of his intent to violate the law." 980 F.3d at 27; *see also United States v. Press*, 336 F.2d 1003, 1011 (2d Cir. 1964) (evidence that complaints had been received and brought to appellants' attention, though not admissible to show the truth of the information complained of, "was relevant on the issue of appellants' intent and good faith. The inference might readily be drawn that, since appellants knew . . . that there was general dissatisfaction with the manner in which Buy-Rite conducted its affairs, continued operation despite this knowledge showed the existence of a scheme to defraud."). Nor is this principle limited to *customer* complaints. In *United States v. Denkberg*, the complaints that were admitted not for their truth "but instead to show Defendants' notice of the existence of complaints about their mailers and other similar schemes" originated from "several attorneys general." 139 F.4th 147, 163 (2d Cir. 2025).

Just as in those cases, the SEC letters to Martinsen and testimony regarding the SEC's telephone call to Martinsen and Lanaia summarizing the substance of the letters is admissible to show that the defendants were on notice of the "potential illegality" of their actions. *Moseley*, 980 F.3d at 27. Indeed, the language of the SEC letters themselves is consistent with the purpose for which they would be received. The letters, rather than advancing strident conclusions, contain warnings and caution about the ways StraightPath may be violating the law, for example: "Lanaia's total payments appear significant and similar to compensation paid to other officers of SPM" (GX 400 at 1); "The following email examples . . . appear to evidence Lanaia's role as an 'officer'" (GX 400 at 2); "appears to substantiate" (GX 400 at 2); "would be deemed" (GX 400 at 2); "SPM

appears to have violated the Rule due to the following potential misrepresentations" (GX 400 at 3); and "StraightPath may have facilitated the Finders potential unregistered broker conduct" and "may have facilitated the Finders operating in an unregistered broker capacity." (GX 401 at 2). The fact that, having received this notice of the potential illegality of their actions, the defendants did not change their operation is relevant to their "intent and good faith," *Press*, 336 F.2d at 1011, central issues to the fraud charges here.

The same evidentiary principles do not, however, permit the defendants to offer Martinsen's rebuttal letter disputing the facts, conclusions, and suggestions in the SEC's letter. Martinsen's letter is a self-serving characterization of StraightPath's historical operations, much of which was not in fact true, and it is precluded from admission by the rule against hearsay. Unlike the SEC's letters, Martinsen's letter does not show that the defendants were on notice of a relevant fact or issue. Nor does it demonstrate an effect on the listener, because Martinsen was the declarant, not the listener.

Although the defendants have not elaborated on why they believe Martinsen's letter should be admitted, on reading, it appears plain that they would be offering the contents of the letter for their truth. For example, Martinsen wrote in response to the SEC's concern that Lanaia's emails showed that she was acting as an officer: "As for the emails, all emails sent by Lanaia were and are under the directive and control of either Mr. Castillero and or Mr. Lachow." (Ex. A at 5).

Nor can Martinsen's letter be admitted pursuant to Rule 803(3), which allows a statement of the declarant's then existing state of mind but not a statement of memory or belief to prove the fact remembered or believed. As the Second Circuit has noted, exclusion of backwards-looking statements of memory or belief proffered to prove the fact remembered or believed "is necessary to prevent the exception from swallowing the hearsay rule." *United States v. Cardascia*, 951 F.2d

474, 487 (2d Cir. 1991); *see also United States v. Harwood*, 998 F.2d 91, 98 (2d Cir. 1993) (Rule 803(3) requires "the statement must face forward, rather than backward"). Here, in order for the statements in Martinsen's letter to reflect his state of mind, the statements in the letter would need to be true, which further establishes that the letter is inadmissible hearsay.

II. THE COURT SHOULD PRECLUDE EVIDENCE AND ARGUMENT THAT REGULATION D PROVIDES A DEFENSE TO THE CHARGES

The Indictment does not charge the defendants with offering unregistered securities. Based on the parties' meet and confer and the defendants' expert notice, however, it appears that the defendants intend to offer evidence and argument that they took steps to comply with Regulation D, which allows for the sale of qualifying unregistered securities. But the defendants' compliance or noncompliance with Regulation D is irrelevant to the charged crimes; at best, the defendants are offering improper character evidence in the form of specific acts of good conduct. Moreover, introduction of this evidence is a waste of time, will confuse the jury about the relevant issues, and will create a mini trial on whether the defendants in fact complied with the Regulation D exemption, which they did not. Accordingly, the Court should preclude the defendants from offering this evidence or making an argument that their attempt to qualify under Regulation D somehow shows good faith with respect to the charged conduct.

The Securities Act of 1933 makes it unlawful for any person to offer or sell securities before filing a registration statement with the Securities and Exchange Commission. 15 U.S.C. § 77e. Rule 506(c) of Regulation D, however, creates a registration exemption for qualifying private offerings. To qualify under Regulation D, all purchasers of the securities sold must be "accredited investors," such as investors who had a net worth of more than $1 million or annual income exceeding $200,000 or joint income with their spouse exceeding $300,000. 17 C.F.R. §§ 230.501(a)(5), (a)(6). In addition, the issuer of the securities must take reasonable steps to verify

that the purchasers of the securities are accredited investors, which may include reviewing documentation such as tax records and brokerage or bank account statements. 17 C.F.R. § 230.506(c)(2)(ii). No more than 35 accredited investors can purchase securities under the exemption in any 90-day period. § 230.506(b)(2).[3] As described *supra*, Regulation D also includes a "Bad Actor" bar, meaning the exemption is not available if a person who acts as an investment manager or is paid directly or indirectly for soliciting investors has been, among other things, barred from associating with a broker-dealer. 17.C.F.R. § 230.506(d)(1)(vi). The Regulation D exemption also does not apply to broker-dealers who "sold securities through a nationwide cold-calling campaign" because "a nationwide cold-calling campaign constitutes a form of general solicitation for purposes of Rule 502(c)." *S.E.C. v. Tecumseh Holdings Corp.*, No. 03 Civ. 5490 (SAS), 2009 WL 4975263, at *4 (S.D.N.Y. Dec. 22, 2009).

The Indictment charges the defendants with defrauding their clients and StraightPath investors by misrepresenting what they were selling to investors, the fees charged, the inventory of Pre-IPO shares they had available, and commingling and misappropriating money held in the various StraightPath funds. Unlike the SEC's civil complaint, however, it does not charge the defendants with selling unregistered securities, nor does it allege that part of their fraud was violating Regulation D's requirements to qualify for an exemption from registration. *See SEC v. StraightPath Venture Partners LLC*, 22 Civ. 3897 (LAK), Complaint ¶¶ 118-128 ("SEC Complaint").

Accordingly, it is entirely irrelevant to the charged crimes whether the defendants complied with Regulation D. It does not make it more or less likely that the defendants committed fraud

[3] Related, an investment fund must register under the Investment Company Act of 1930 if the fund is owned by more than 100 investors. 15 U.S.C. § 80a-3(c)(1).

through specific misrepresentations or violations of their fiduciary duties whether the defendants qualified as exempt from registration under Regulation D or not. Indeed, Regulation D could not be clearer on this point: the introduction to the regulation states that even exempt securities offerings "are not exempt from the antifraud … provisions of the federal securities laws." 17 C.F.R. § 230.500(a). Issuers are still "obligat[ed] to provide such further material information, if any, as may be necessary to make the information required under Regulation D, in light of the circumstances under which it is furnished, not misleading." *Id.* Any evidence regarding Regulation D will not assist the jury in determining whether the defendants are guilty of the charges.

Moreover, the introduction of evidence and argument regarding Regulation D risks confusing the jury as to what the charged fraud is here. The defendants should not be able to argue that their attempt to comply with Regulation D demonstrates their good faith and lack of intent to commit the offenses charged in the Indictment. This is, at best, impermissible character evidence or so-called "reverse 404(b)"—specific good acts that the defendants would be offering to prove their good character to defeat the charges. *See United States v. Menendez*, 759 F. Supp. 3d 460, 530-32 (S.D.N.Y. 2024) (collecting cases and precluding evidence of defendant's gift-giving as defense to bribery charges as improper character evidence and not admissible under Rule 404(b)).

Moreover, because the defendants in fact did *not* comply with Regulation D, introduction of evidence and argument regarding Regulation D would waste the jury's time by leading to a mini-trial about whether the defendants actually complied with Regulation D, or even intended to do so. To respond to the Regulation D arguments, the Government would introduce evidence that, for example, the defendants could not use Regulation D's exemption given Lanaia and Castillero's FINRA bars and their managing roles in the StraightPath funds. *See* SEC Complaint ¶¶ 126-128. In addition, the Government would introduce evidence that StraightPath did not take reasonable

steps to ensure that they were selling to accredited investors and instead improperly relied on self-certifications from those investors, and that their nationwide cold-calling campaign constituted a general solicitation. *Id.* ¶¶ 123-125. And the Government would introduce evidence that the defendants' use of multiple StraightPath funds to stay under the 35-investor-in-90-days limitation and the 100-investor limitation in the Investment Company Act was a sham that was vitiated by their commingling of assets between the purportedly separate and segregated funds.

None of this evidence or argument will advance the resolution of the charges here; it should be precluded.

III. THE COURT SHOULD PRECLUDE EVIDENCE AND ARGUMENT THAT REGULATORS OR THE LACK OF REGULATION ARE TO BLAME

The defendants have indicated that they intend to offer evidence and argument that actions by regulators—or the lack of action by regulators—are to blame for StraightPath's share shortfalls or otherwise negate culpability for their fraud. Arguments attempting to shift the blame for the investors' injuries from the defendants to the regulators are improper and should be excluded because a supposed absence of sufficient regulatory protections does not excuse the defendants' fraud.

The Second Circuit has recognized that a defendant may not argue for acquittal "on the basis of extraneous public policy considerations." *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1074 (2d Cir. 1977); *see id.* at 1073 (affirming instruction to jury that "law enforcement policy was not its concern," and that it should "focus its attention on the real issue, namely, whether the government had proved the facts alleged in the indictment beyond a reasonable doubt"); *see also United States v. Josephberg*, 562 F.3d 478, 497 (2d Cir. 2009) (affirming district court's finding that it was improper for defendant to argue in summation "that the Internal Revenue Service was 'arrogant,' … and that because of this, Defendant should be acquitted"). This evidence

would not only be irrelevant to the defendants' criminal intent, it would also be confusing to the jury to turn the trial into a referendum on the role of regulatory agencies in responding to recent pre-IPO market events. *See Abu Dhabi Comm. Bank v. Morgan Stanley & Co.*, No. 08 Civ. 7508 (SAS), 2013 WL 1155420, at *7 (S.D.N.Y. Mar. 20, 2013) (precluding evidence about general failures by credit rating agencies leading up to financial crisis and noting that court will not "let this trial become an inquiry into the role of the Rating Agencies in the financial crisis"). Because such evidence and argument would have no probative value and would serve only to create a danger of undue prejudice, confusion of the issues, and misleading the jury, it should be precluded.

Likewise, the defendants should not be permitted to shift blame from themselves onto regulators by arguing that the laws and regulatory regime that apply to the securities industry or to private funds is somehow unclear. Such argument risks improperly usurping the role of the Court in explaining the law and usurping the role of the jury in applying the law to the facts of the case.

IV. THE COURT SHOULD PRECLUDE EVIDENCE AND ARGUMENT THAT FINRA LACKS AUTHORITY TO INVESTIGATE OR REQUEST ON-THE-RECORD TESTIMONY

FINRA Rule 8210 grants FINRA the authority to inspect and copy the books, records and accounts of member firms, associated persons and other persons over whom FINRA has jurisdiction relating to investigations, complaints, examinations or proceedings. Rule 8210 also gives FINRA the authority to request that a person testify under oath with respect to any such matter. FINRA's authority, however, generally extends only to entities and people within its jurisdiction, typically registered broker-dealers.

Each of the defendants was, at one point, a registered broker-dealer. The Indictment alleges that, as part of the scheme to obstruct regulatory investigations of StraightPath, on December 10, 2019, Martinsen provided false sworn testimony to FINRA regarding StraightPath's operations. (Indictment ¶ 9(b)). In particular, Martinsen pretended not to know the answers to questions on

numerous topics related to his work at StraightPath, stated that Fund Manager-1 in charge of, and the only one with knowledge of, many aspects StraightPath's operations. Martinsen also said that (i) he was not truly a "managing director" of StraightPath, and that the titles in his StraightPath email signature referring to him as "Managing Director/Founder" appeared there due to an error in setting up Martinsen's email account; (ii) that Castillero's role at SPVP was "clerical" following his FINRA ban and that Castillero's ownership rights had been terminated; (iii) that Fund Manager-1 made all decisions about which pre-IPO companies the StraightPath Funds should acquire; and (iv) that Lanaia was a contractor recruited and overseen by Fund Manager-1, but that Martinsen did not know what her role at StraightPath was, work with her, interact with her in a professional capacity, or even know whether she was at the time still conducting consulting services for StraightPath.

Further, as previously discussed in the factual background, Lanaia was suspended and then barred by FINRA from working in the securities industry for issues stemming from her failure to make timely disclosures on her Form U4, and Castillero was permanently barred by FINRA for failure to appear for on-the-record testimony requested by FINRA in connection with its investigation into allegations related to unauthorized trading and making false statements to FINRA.

Based on the parties' meet and confer, the Government understands that the defendants may wish to argue that FINRA somehow lacked authority to take one or more of the actions that impacted the defendants during or prior to the defendants' operation of the StraightPath funds. For the same reasons set forth above in Section III concerning "extraneous public policy considerations," *Cheung Kin Ping*, 555 F.2d 1069, regarding regulators, any argument that FINRA lacks authority to inspect member firms, associated persons and broker-dealers, to initiate or

pursue investigations and complaints, to request that a person testify under oath, or to sanction persons within its jurisdiction who fail to comply with its rules or submit to its investigations is improper and should be precluded.

Even if true, any argument that FINRA lacked the authority to require Martinsen to sit for testimony should be precluded as irrelevant, confusing to the jury, and a waste of time. Whether FINRA acted within the scope of its authority has nothing to do with the fact that Martinsen sat for testimony and lied about StraightPath, his own role, and the roles of his co-conspirators, which is relevant and direct evidence of Martinsen's role in the charged fraud scheme. Similarly, Castillero and Lanaia should not be heard to argue that FINRA's sanction of them was improper, disproportionate, unfair, or exceeded its authority, as these arguments are irrelevant to the charges and run a high risk of confusing the jury and wasting time.

V. THE COURT SHOULD PRECLUDE EVIDENCE AND ARGUMENT THAT OTHER ACTORS IN THE PRE-IPO SPACE ENGAGED IN SIMILAR CONDUCT

Prior to and since the defendants' indictment, individuals and brokerage firms in the pre-IPO space have been subject to civil and criminal enforcement for some of the same tactics that StraightPath used to solicit investors, including undisclosed markups, undisclosed fees, strawman fund managers, and misuse of investor funds. The defendants should be precluded from arguing or adducing evidence that other firms or individuals were also using these tactics or otherwise engaging in misconduct, either to argue that the instant prosecution is selective or to argue that the supposedly widespread misconduct provides a defense to the charges. Such evidence is irrelevant, is unduly prejudicial, and would confuse the jury.

The "fact that certain conduct may be common or general practice in an industry" is "not a defense to wire fraud" and is therefore "not relevant to the jury's consideration of the conduct of" the defendants. *United States v. Mendlowitz*, No. 17 Cr. 248 (VSB), 2019 WL 6977120, at *5

(S.D.N.Y. Dec. 20, 2019); *see also United States v. Connolly*, No. 16 Cr. 370 (CM), 2019 WL 2125044, at *13 (S.D.N.Y. May 2, 2019) (fact that conduct may be widespread in an industry—that "everyone is doing it"—is "not a defense to the crime of wire fraud or conspiracy to commit wire fraud; just as 'everyone speeds' is not a defense if your car happens to get picked up on the radar."). For that reason, whether misleading and incomplete disclosures and the misuse of investor funds were rampant in the pre-IPO industry is not relevant to the issues at trial.

Evidence or arguments about the conduct of other brokerage firms in the pre-IPO industry is also inadmissible under Rule 403 because any probative value is substantially outweighed by the prospect of undue delay, unfair prejudice, confusion of the issues, and misleading the jury. Evidence about other bad actors in the pre-IPO space would provide the jury with no proof relevant to any element or material fact at issue in the charged offenses, so the probative value is low. Moreover, to respond to a defense argument regarding the conduct of other firms, the Government would seek to demonstrate that many of those other pre-IPO firms have themselves been charged by both the SEC and the Department of Justice. This, of course, would lead to a distracting and confusing mini-trials on what happened in those other circumstances. *Cf. Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007) ("Admitting evidence about previous cases 'inevitably results in trying those cases before the jury,' and 'the merits of the other cases would become inextricably intertwined with the case at bar.'"). Because such risk of prejudice and confusion outweighs the limited to nonexistent probative value of the evidence, the defendants should be precluded from offering it.

Likewise, any argument that StraightPath was unfairly singled out for criminal prosecution should be precluded. The sole question before the jury is the guilt of the defendant, not the motivations of the prosecutors or the novelty of the legal theory. *See United States v. Rosado*, 728 F.2d 89, 93 (2d Cir. 1984) (criticizing admission of evidence about the propriety of a prosecution

"for turning the trial away from a determination of whether the elements of the offense charged had been proved beyond a reasonable doubt into a wide-ranging inquiry into matters far beyond the scope of legitimate issues in a criminal trial"); *United States v. Borrero*, No. 13 Cr. 58 (KBF), 2013 WL 6020773, at *2 (S.D.N.Y. Nov. 1, 2013) (precluding cross examination regarding a government charging decision in part because "the limited amount of probative value that the . . . charging decisions add is substantially outweighed by the risk of undue confusion and an unnecessary sideshow . . ."). Accordingly, any arguments about the motivations for the prosecution or purported evidence in support of such arguments should be precluded.

VI. THE COURT SHOULD PRECLUDE EVIDENCE THAT DEFENDANTS INTENDED TO REPAY INVESTORS

The defendants have indicated that they may argue that investors were not harmed, either because some of the investors whose shares did in fact go public made a profit from their investments, or because investors "got what they paid for"—that is, the investors received the promised number of shares for the price that they were willing to pay, even if that price was excessively marked up without their knowledge. Similarly, the defendants have indicated that they will offer evidence that they sometimes repaid investors who asked for their money back, and that they may offer more general evidence that they intended to or made efforts to repay StraightPath's overall share shortfalls. Because actual economic loss to investors is not an element of any of the charged crimes, arguments that there could be no fraud because the defendants intended to repay their victims, risks misleading and prejudicing the jury and should be precluded.

Neither Section 10b-5 securities fraud nor investment adviser fraud has economic loss as an element. *See United States v. Lange*, 834 F.3d 58, 79 (2d Cir. 2016); *United States v. Shkreli*, 779 F. App'x 38, 40 (2d Cir. 2019); *United States v. Tagliaferri*, 820 F.3d 568, 572-75 (2d Cir. 2016). And the Supreme Court recently confirmed that wire fraud also "is devoid of an economic-

loss requirement," and that a defendant "need not . . . aim to inflict economic loss" to be guilty of the offense. *Kousisis v. United States*, 606 U.S. ---, 145 S.Ct. 1382, 1391 (2025); *see also id.* at 1392 ("In short, the wire fraud statute is agnostic about economic loss. The statute does not so much as mention loss, let alone require it."). The Supreme Court in fact expressly stated that the kind of fraud at issue here—where "the transaction had proved to be less advantageous than as represented (although there was no loss)"—satisfies the elements of fraud, without any showing of economic loss. *Id.* at 1392-93 (citations and alterations omitted).

Moreover, any belief by the defendants that investors would ultimately make a profit is immaterial as a matter of law. *See United States v. Watts*, 934 F. Supp. 2d 451, 473 (E.D.N.Y. 2013) (precluding argument that defendant believed his lies to a victim lender would cause no ultimate harm because the lender would be repaid); *United States v. Okun*, Cr. No. 08-132, 2009 WL 414009 (E.D. Va. Feb. 18, 2009) (citing *United States v. Godwin*, 272 F.3d 659, 666-67 (4th Cir. 2001)) (The "well-intentioned belief that a business venture in which a defendant was involved would be successful and would allow for repayment of money taken from victims does not supply a basis for a defense that there was a good faith belief that a representation was true."). It does not matter if the defendants believed that investors would ultimately not be harmed when the companies went public and the stock price went up, and such an argument would not be a permissible one to make to the jury. Where a defendant "intended to immediately deprive investors of their capital through fraud," his belief, even if truly held, "that in the long-term [his investments] would ultimately succeed," is not a defense to securities fraud or wire fraud. *United States v. Lange*, 834 F.3d 58, 79 (2d Cir. 2016); *see also United States v. Berger*, 188 F. Supp. 2d 307, 329 (S.D.N.Y. 2002) ("Were a jury to find that [the defendant] intentionally caused others to issue materially false or misleading statements of the [company's] value to its investors . . . he properly

would be found guilty, even if he 'firmly believed' that, in the end, his strategy would 'work out.'").

Argument that there could be no fraud because defendants intended to repay investors is irrelevant and should be precluded. Wire fraud does not require that the defendant "intended to permanently deprive the victim's money or property." *United States v. Males*, 459 F.3d 154, 159 (2d Cir. 2006). Thus, "an intent to return money or property is not a defense to the charge of embezzlement." *United States v. Thomas*, 581 F. App'x 100, 102 n.3 (2d Cir. 2014) (citing *United States v. Buckley*, 101 F.3d 685, 1996 WL 282140, at *2 (2d Cir. 1996)). "Nor is it a defense to [wire fraud] that the accused voluntarily returned the funds." *United States v. Vincent*, 416 F.3d 593, 601 (7th Cir. 2005). Indeed, "it is immaterial as a matter of law whether the defendant intended to repay the misappropriated funds because the offense is 'complete' where, as alleged here, there is an 'immediate intent to misapply and defraud.'" *United States v. Bankman-Fried*, No. 22 Cr. 673 (LAK), 2023 WL 4194773, at *9 (S.D.N.Y. June 27, 2023). Moreover, "[t]he offense occurred and was complete when the misapplication took place. What might have later happened as to repayment is not material and could not be a defense." *United States v. Sindona*, 636 F.2d 792, 800 (2d Cir. 1980). Because the fraud does not depend on an investor suffering economic loss, the defendants should be precluded from arguing that there is no fraud because they repaid some of the money or because they otherwise intended to make investors whole.

VII. THE COURT SHOULD PRECLUDE EVIDENCE AND ARGUMENT THAT VICTIMS OF THE FRAUDULENT SCHEMES WERE NEGLIGENT OR FAILED TO CONDUCT DUE DILIGENCE

The defendants should be precluded from arguing or introducing evidence that StraightPath's investor victims were negligent, gullible, insufficiently vigilant, or otherwise at fault for not detecting or preventing StraightPath's fraud. "Such evidence routinely is excluded from trials on wire and mail fraud charges because 'reliance is not an element of criminal fraud,'

and 'the unreasonableness of a fraud victim in relying (or not) on a misrepresentation does not bear on a defendant's criminal intent.'" *United States v. Bankman-Fried*, No. 22 Cr. 673 (LAK), 2023 WL 6283509, at *3 (S.D.N.Y. Sept. 26, 2023) (quoting *United States v. Weaver*, 860 F.3d 90, 95 (2d Cir. 2017)). Indeed, "[t]he Court of Appeals routinely has rejected a gullible victim defense for wire-fraud charges." *United States v. Adelekan*, 567 F. Supp. 3d 459, 470 (S.D.N.Y. 2021) (citing *United States v. Amico*, 486 F.3d 764, 780 (2d Cir. 2007), and *Weaver*, 860 F.3d at 96). Accordingly, the defendant may not argue that StraightPath's investors were to blame for a lack of due diligence.

In particular, the defendants should be precluded from cross-examining victim witnesses about whether they did adequate diligence on StraightPath or the pre-IPO securities that StraightPath was offering, or whether they were reckless, negligent, or irresponsible in continuing to engage in transactions with StraightPath. Because a defendant may not assert a victim's negligent failure to discover the fraud, *see United States v. Thomas*, 377 F.3d 232, 243 (2d Cir. 2004), the defendants here should not be permitted to cross-examine victim witnesses in a manner that implies that their due diligence was inadequate.

Nor should the defendants be heard to contend that evidence or argument regarding alleged inadequacies in the victims' investment decisions is intended only to cast doubt on the materiality of the misrepresentations StraightPath and the defendants made to the investors. *See, e.g.*, *United States v. June*, No. 10 Cr. 30021 (MAP), 2012 WL 245243, at *2 (D. Mass. Jan. 25, 2012) ("Defendant's argument that these documents would be helpful to the defense in demonstrating that the alleged misrepresentations made by Defendant were not 'material,' in the sense that they lacked the natural tendency to influence the lender's decisions merely re-clothes the forbidden 'blame the victim' defense in a slightly different costume." (citations omitted)); *see also United*

States v. Benchick, No. 13 Cr. 20453 (RHC), 2014 WL 4181970, at *3 (E.D. Mich. Aug. 21, 2014) ("Defendant has not successfully shown that evidence relating to Washington Mutual's and National City's lending practices is relevant to the materiality of his alleged misrepresentations (and hence his guilt). . . . Because Defendant's allegedly false statements could influence a bank's decision whether to approve a loan, Defendant's argument on materiality and his 'blame-the-victim' approach fails."). The materiality of the misrepresentations alleged in this case is measured by an objective standard, and any suggestion that a particular victim was foolish, conducted insufficient diligence, or was too eager to credit StraightPath's representations goes, not to objective materiality, but rather to subjective reliance, which is not an element of the charged offenses.

Accordingly, the Court should exclude evidence, including cross-examination of victim witnesses, about the victims' failure to consider risks or appropriately investigate the representations StraightPath was making, including about its fees, or to investigate the value of the underlying pre-IPO securities. Such evidence or claim could serve only to invite the jury to blame the victims for the crimes of the defendants. *United States v. Carton*, No. 17 Cr. 680 (CM), 2018 WL 5818107, at *4, *6 (S.D.N.Y. Oct. 19, 2018) (evidence that victim hedge fund did not exercise sufficient oversight of its investment inadmissible; "[w]hether the Hedge Fund performed due diligence or is a sophisticated investor in the ticket market is wholly irrelevant to these charges, and is merely a facile attempt to blame the victim—which is an impermissible strategy in a fraud case"); *United States v. Nekritin*, No. 10 Cr. 491 (KAM), 2011 WL 2462744, at *7 (E.D.N.Y. June 17, 2021) ("It is well settled that a fraud victim's negligence in failing to discover the fraudulent scheme is not a defense to a defendant's criminal conduct.").

Even if there were any relevance to evidence of the victims' failure to conduct additional investment diligence—which there is not—the probative value of that evidence would be far outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, and undue delay. Fed. R. Evid. 403. Such evidence would invite the jury wrongly to believe that it is their task to evaluate the investment acumen of a victim in this case and would risk suggesting to the jury that whether a victim could have avoided loss or detected fraud has any bearing on the guilt or innocence of the defendants. This evidence, which has no probative value and brings great risk of unfair prejudice, confusion, and delay, should be precluded. *See Bankman-Fried*, 2023 WL 6283509, at *3 (granting motion to preclude such evidence "because such evidence is not relevant to the claims at issue at trial and any limited probative value would be outweighed substantially by the risk of unfair prejudice and jury confusion").

VIII. THE COURT SHOULD PRECLUDE EVIDENCE AND ARGUMENT ABOUT THE PRESENCE OF ATTORNEYS IN THE ABSENCE OF AN ADVICE OF COUNSEL DEFENSE

On August 4, 2025, the Court ordered that by August 13, 2025, the defendants inform the Court whether they intend to raise an advice-of-counsel defense. *See* Dkt. 102. On August 13, 2025, the defendants submitted a letter stated that "the defendants currently do not intend to press at trial a defense of reliance on the advice of counsel." *See* Dkt. 103. But even though the defendants have disavowed an advice-of-counsel defense, they have informed counsel for the Government that they believe they may nonetheless present evidence about the presence of attorneys or the involvement of attorneys in certain decision-making—although they have not disclosed the specific instances for which they intend to elicit evidence about the presence of counsel. Courts regularly preclude such a backdoor advice-of-counsel defense through the so-called "presence-of-counsel" defense, and the Court should do so here.

"In a fraud case . . . the advice-of-counsel defense is not an affirmative defense that defeats liability even if the jury accepts the government's allegations as true," but rather "is evidence that, if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved the required element of the offense that the defendant had an 'unlawful intent.'" *United States v. Scully*, 877 F.3d 464, 476 (2d Cir. 2017). "That said, defendants are entitled to an advice-of-counsel instruction only if there are sufficient facts in the record to support the defense." *Id.* (citing *United States v. Evangelista*, 122 F.3d 112, 117 (2d Cir. 1997)). Specifically, "[t]here must be evidence such that a reasonable juror could find that the defendant 'honestly and in good faith sought the advice of counsel,' 'fully and honestly laid all the facts before his counsel,' and 'in good faith and honestly followed counsel's advice.'" *Id.* (quoting *United States v. Colasuonno*, 697 F.3d 164, 181 (2d Cir. 2012)).

In the absence of evidence to support an advice-of-counsel instruction, defendants have sometimes sought to offer evidence of lawyers' involvement in allegedly inculpatory events to support an argument that the defendant lacked intent to defraud. As judges have observed, however, such evidence "can pose a substantial risk of misleading the jury." *United States v. Bankman-Fried*, No. 22 Cr. 673 (LAK), 2024 WL 477043, at *3 (S.D.N.Y. Feb. 7, 2024). A "jury could easily believe that the fact that a lawyer is present at a meeting means that he or she must have implicitly or explicitly 'blessed' the legality of all aspects of a transaction." *SEC v. Tourre*, 950 F. Supp. 2d 666, 684 (S.D.N.Y. 2013). Such a misunderstanding would unfairly prejudice the Government because it would "give the defendant all of the essential benefits of an advice of counsel defense without having to bear the burden of proving any of the elements of the defense." *Id.*

Accordingly, even those courts that have permitted such evidence have required detailed pretrial disclosures and, consistent with Rules 401 and 403, carefully policed references to counsel

in testimony and argument to ensure that the defendant does not unfairly attempt to mount a "disguised reliance argument." *SEC v. Stoker*, No. 11 Civ. 7388 (JSR) (S.D.N.Y. July 23, 2012), Trial Tr. at 973; *see also Bankman-Fried*, 2024 WL 477043, at *2 (permitting certain lines of evidence and argument and precluding others after hearing testimony outside the presence of the jury); *United States v. Tagliaferri*, No. 13 Cr. 115 (RA) (S.D.N.Y. 2014), Trial Tr. (Dkt. 63) at 83-85 (limiting defendant's testimony regarding the presence of counsel to avoid the "misleading impression" that the defendant relied upon the advice of counsel).

The defendants have not informed the Government of what evidence of attorney involvement they intend to offer, but based on the Government's investigation, it is highly likely that any such evidence would be misleading to the jury. For example, if the defendants were to argue that attorneys were involved in the drafting of the written disclosures made to investors, it could suggest to jurors that attorneys approved of the way the defendants disclosed the fees and markups. But because there has been no privilege waiver, as there would be with a formal advice-of-counsel defense, the Government would not be able to present evidence about whether the defendants had disclosed to these attorneys their actual practice with regards to fees and markups, or whether the attorneys were informed that the referral agents were separately making representations to investors over the phone that were inconsistent with some of the language in the written disclosures. By offering evidence of attorneys' involvement, the defendants would be using the privilege as both a sword and a shield, on the one hand suggesting that attorneys had approved of their practices while on the other hand blocking discovery about what the attorneys did in fact know and say. Having elected not to assert an advice-of-counsel defense—and having avoided the discovery that such a defense would have triggered—the defendants should not be allowed to raise the same defense through the back door.

If the Court ultimately concludes that the defendants may introduce at trial some evidence or argument regarding the involvement of attorneys, the Court should provide a cautioning instruction as has been done in other cases in this District. *See, e.g.*, *United States v. Shea*, No. 20 Cr. 412 (AT) (S.D.N.Y.), May 31, 2022 Tr. (Dkt. 245) at 787 ("A lawyer's involvement with an individual or entity does not itself constitute a defense to any charge in this case. The defense has not claimed, and cannot claim, that the defendant's conduct was lawful because he acted in good faith on the advice of a lawyer."); *United States v. Petit*, No. 19 Cr. 850 (JSR) (S.D.N.Y.), Oct. 26, 2020 Tr. at 2402 ("there is no defense in this case of so-called reliance on counsel").

IX. THE COURT SHOULD PRECLUDE EVIDENCE AND ARGUMENT ABOUT THE DEFENDANTS' "GOOD ACTS" AND PERSONAL CIRCUMSTANCES

The defendants should be precluded from presenting evidence or argument concerning their prior commissions of "good acts" or to offer evidence of their noncriminal activities to disprove their guilt of the crimes charged. Specific-act propensity evidence is no more admissible to refute a criminal charge than it is to establish one.

It is settled law that "[a] defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on [other] specific occasions." *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990). Similarly, while a defendant may offer general testimony from a character witness about his reputation for a "pertinent trait" of character, or the witness's opinion of the defendant as regards that trait, *see* Fed. R. Evid. 404(a)(2)(A) & 405(a), a defendant can neither testify nor offer other proof to establish specific acts in conformity with that trait that are not an element of the offense. *See, e.g.*, *United States v. Benedetto*, 571 F.2d 1246, 1249-50 (2d Cir. 1978) (evidence of defendant's specific acts improperly admitted because "character evidence has long been admissible only in the form of reputation and not in the form of a recitation of good or bad acts"); *United States v. Fazio*, No. 11 Cr. 873 (KBF), 2012 WL 1203943, at *5 (S.D.N.Y.

Apr. 11, 2012) ("[A] defendant may not affirmatively try to prove his innocence by reference to specific instances of good conduct; character is to be proven by reputation or opinion evidence."), *aff'd*, 770 F.3d 160 (2d Cir. 2014).

Furthermore, pursuant to Federal Rule of Evidence 403, "a district court may exclude evidence of a defendant's prior good acts if it finds that any minimal probative value of such evidence is outweighed by the likelihood of jury confusion and the risk of jury nullification." *United States v. Rivera*, No. 13 Cr. 149 (KAM), 2015 WL 1725991, at *2 (E.D.N.Y. Apr. 15, 2015) (citing *United States v. Al Kassar*, 660 F.3d 108, 124 (2d Cir. 2011) ("And the trial judge was rightly concerned that, to the extent any of the evidence [of prior good acts] could be construed to relate to the charged conspiracies, the jury would find it extremely confusing, if not incomprehensible.")).

The defendants should accordingly be precluded from offering evidence or argument, including in their opening statements, regarding their prior good deeds, including charity and philanthropy, or the lack of commission of other bad acts.

Similarly, the Government is unaware of any lawful basis for the defendants to offer evidence or argument concerning their family background, health, age, or any other personal characteristics. They should be precluded from doing so, and from mentioning such subjects in their opening statements, absent a showing that such a factor bears on guilt. *See, e.g.*, *United States v. Paccione*, 949 F.2d 1183, 1201 (2d Cir. 1991) (affirming preclusion of evidence that defendant had son with cerebral palsy whom defendant had devoted his life to care for); *United States v. Battaglia*, No. 05 Cr. 774 (KMW), 2008 WL 144826, at *3 (S.D.N.Y. Jan. 15, 2008) (precluding "evidence of Defendant's family and personal status" as not "relevant to the issue of whether Defendant committed the crimes charged"); *see also United States v. Harris*, 491 F.3d 440, 447-

48 (D.C. Cir. 2007) (affirming preclusion of evidence designed "mainly to cast [the defendant] in the sympathetic light of a dedicated family man").

The defendants should likewise be precluded from seeking to establish their good faith by introducing evidence of occasions in which they were honest and forthcoming to investors in a way that is not the subject of this case. *Cf. supra* Section II (discussing Regulation D's irrelevance). Whether analyzed under the rubric of relevance, pursuant to Rule 401, or character propensity evidence, under Rule 404(b), courts uniformly hold that evidence that a defendant engaged in legal, honest business conduct on some occasions may not be introduced to rebut allegations that the defendant engaged in charged offenses involving fraud on other occasions. *See, e.g.*, *United States v. Chambers*, 800 F. App'x 43, 46 (2d Cir. 2020) ("Chambers's argument that his running of a legitimate law practice makes it less likely that he had corrupt intent to bribe Villanueva is precisely the type of propensity inference that Rule 404(b)(1) is intended to prohibit."); *United States v. Walker*, 191 F.3d 326, 336 (2d Cir. 1999) (affirming the district court's refusal to allow defendant accused of preparing false asylum applications to admit evidence of truthful applications he had allegedly submitted, because whether the defendant "had prepared other, non-fraudulent applications was simply irrelevant to whether the applications charged as false statements were fraudulent"); *United States v. O'Connor*, 580 F.2d 38, 43 (2d Cir. 1978) (affirming district court's exclusion of testimony that witnesses did not pay defendant any bribes "because such testimony would in effect be an attempt to demonstrate appellant's good character by proof of specific good acts"); *see also United States v. Boykoff*, 67 F. App'x 15, 20-21 (2d Cir. 2003) ("[E]vidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." (quoting *United States v. Grimm*, 568 F.2d 1136, 1138 (5th Cir. 1978))).

Thus, for example, in *Levine v. SEC*, 436 F.2d 88 (2d Cir. 1971), the Second Circuit rejected a broker-dealer defendant's claim that he was entitled to offer testimony by certain of his clients that they had not been lied to, as such testimony would not negate the testimony of the customers who testified that false and misleading statements had been made to them. *Id.* at 91; *see also, e.g.*, *United States v. Fiumano*, No. 14 Cr. 518 (JFK), 2016 WL 1629356, at *7 (S.D.N.Y. Apr. 25, 2016) ("A defendant charged with robbing a bank in Manhattan on April 22 cannot offer as evidence to disprove the charged crime that he did not rob the bank's branches in Brooklyn or the Bronx on April 22 or that he did not rob the Manhattan branch on April 20, 21, 23, and 24, because this evidence is irrelevant to the charge that he robbed the Manhattan bank on April 22.").

So too here, any evidence or argument that there were occasions in which the defendants were was candid with prospective investors, is irrelevant to the question of whether the defendants committed the acts charged in the Indictment.

X. THE COURT SHOULD PRECLUDE CROSS-EXAMINATION ON TOPICS THAT DO NOT BEAR ON CREDIBILITY AND ARE HIGHLY PREJUDICIAL

The defendants have informed Government counsel that they reserve the right to examine two of the Government's anticipated witness about recreational drug use and the solicitation of prostitutes. While this conduct will embarrass the witnesses to speak about publicly, these matters have no bearing on their credibility, do not relate on any fact of consequence to the trial, and should be precluded.

A. Relevant Factual Background

The Government proffered the following information about two of the witnesses expected to testify at trial:

Cooperating Witness-1 ("CW-1") used drugs recreationally between approximately 1997 and 2022, and at times CW-1 also sold drugs. The type and extent of this drug use varied over

time. Between approximately 1997 and 2007, CW-1 used and sometimes sold drugs, specifically marijuana, ketamine, oxycodone, and cocaine. CW-1's drug sales during this period were to support CW-1's drug habit. During this same period, CW-1 also used (but did not sell) ecstasy and psilocybin. Then, between approximately 2013 and 2022, CW-1 used marijuana. CW-1 has prior DUI and DWAI arrests, which were criminally discharged; a 1999 marijuana possession arrest, which was dismissed; and a 2005 arrest for possession of cocaine, for which CW-1 received a criminal discharge. CW-1 has no drug convictions. In addition, between approximately 1997 and approximately 2007, CW-1 solicited prostitutes on multiple occasions.

Cooperating Witness-2 ("CW-2") used drugs recreationally in college approximately 30 years ago. CW-2 used marijuana, LSD, ketamine, mushrooms, and cocaine on a handful of occasions. In approximately 2019, CW-2 used MDMA on one occasion. In approximately 2022, at a college reunion, CW-1 used ketamine. Approximately 20 years ago, CW-2 patronized a prostitute at a bachelor party in Montreal. The following year, CW-2 returned to Montreal and patronized a second prostitute. Additionally, CW-2 disclosed that in approximately 2014, in an argument with CW-2's wife, CW-2 grabbed his wife's wrist and told her not to leave the room; she then scratched CW-2's face and called the police. CW-2 recalls that he was charged with simple assault but that the charges were dismissed; the incident is not, however, reflected on CW-2's rap sheet. CW-2 is currently involved in a divorce proceeding and custody dispute. In that proceeding, CW-2's wife has repeated the allegation about the 2014 assault described above, and has alleged that CW-2 committed "parental kidnapping" when he brought his son from the republic of Georgia to the United States.

B. Applicable Law

Rule 608(b) of the Federal Rules of Evidence limits cross-examination regarding "specific instances of a witness's conduct" to situations where the conduct of the witness was "probative of

the [witness's] character for truthfulness or untruthfulness." Fed. R. Evid. 608(b). Conversely, Rule 608(b) "'does not authorize inquiry on cross-examination into instances of conduct that do *not* actually indicate a lack of truthfulness.'" *United States v. Schlussel*, 08 Cr. 694 (JFK), 2009 WL 536066, at *3 (S.D.N.Y. Feb. 27, 2009) (emphasis added) (quoting *United States v. Nelson*, 365 F. Supp. 2d 381, 386 (S.D.N.Y. 2005)). Moreover, "Fed. R. Evid. 608(b) prohibits a party from presenting 'extrinsic evidence' of '[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility' unless that conduct was the subject of a criminal conviction." *United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003) (quoting Fed. R. Evid. 608(b)). And "under [Federal Rule of Evidence] 403, the district court may exclude even relevant evidence if it finds that the 'probative value [of the testimony] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Id.* (internal quotation marks and citations omitted).

Rule 611 provides that "[c]ross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility," and that the Court should "avoid wasting time" and "protect witnesses from harassment or undue embarrassment." It is well settled that "[t]he scope and extent of cross-examination lies within the discretion of the trial judge." *Scarpa*, 913 F.2d at 1018 (internal quotation marks omitted).

C. Discussion

Courts have repeatedly held that past crimes related to drugs, sex, and violence do not go to truthfulness and therefore have no bearing on a defendant's credibility. *See, e.g.*, *United States v. Urena*, No. 11 Cr. 1032 (PAE), 2014 WL 1303114, at *3 (S.D.N.Y. Apr. 1, 2014) (precluding cross-examination of witness who was twice convicted of misdemeanor marijuana possession because "[t]he mere fact of engaging in such conduct, which by its nature is not inherently

indicative of dishonesty, would not bear on [the witness'] credibility in this trial."); *United States v. Wagner*, No. 20 Cr. 410 (NSR), 2022 WL 19179, at *5 (S.D.N.Y. Jan. 3, 2022) ("It is well established that a witness's use of drugs or alcohol, in and of itself, is not probative of their character for truthfulness."); *United States v. Pena*, 978 F. Supp. 2d 254, 266 (S.D.N.Y. 2013) ("[E]vidence of past crimes relating to sex and violence are properly excluded as having insufficient bearing on a witness' credibility."); *United States v. Jeffers*, 402 F. App'x 601, 603 (2d Cir. 2010) (affirming preclusion of cross-examination of cooperating witness regarding prior acts of domestic violence based on "determination that the purported prior acts of violence were not probative of [the witness's] credibility"). Because such acts have no bearing on credibility, they do not by themselves provide a proper basis for cross examination.

Nor is there any other conceivable purpose for examining witnesses on these facts other than harassment or embarrassment. Most of the proffered conduct preceded the relevant events at StraightPath by years if not decades. The only acts that temporally coincide with the events charged in the Indictment are CW-1's use of marijuana and CW-2's use of MDMA and ketamine on two occasions. The defendants are not charged with drug crimes, the StraightPath operation is not alleged to have involved drugs, and the witnesses' participation in the StraightPath operation did not involve drugs. The introduction of such evidence would have no probative value, and certainly not sufficient probative value to outweigh the significant prejudice that such evidence could create.

XI. THE COURT SHOULD LIMIT THE CROSS-EXAMINATION OF RECORDS CUSTODIANS PURSUANT TO RULE 611(B)

In several meet-and-confer conferences the defendants have expressed an openness to agreeing to time-saving authenticity and chain-of-custody stipulations, but have not yet committed to the authentication of routine business records by stipulation. If the defendants will not agree to stipulate to the authenticity of records, the Government will call custodians of records to provide

the necessary authentication. In such cases, the Court should preclude cross-examination that exceeds the scope of direct examination pursuant to Federal Rule of Evidence 611(b).

For example, the Government may, in the absence of an appropriate stipulation, call as a witness a custodian of records for the StraightPath Receiver.[4] If the custodian provided by the Receiver is an attorney or contractor, the Court should preclude cross-examination concerning unrelated responsibilities of the witness, the Receivership proceedings, or other topics unrelated to authenticating records. Given the limited nature of the witness's testimony, broad cross-examination would "go beyond the subject matter of the direct examination," without relating to the specific "witness's credibility." *See* Fed. R. Evid. 611(b); *see also United States v. Wagner*, No. 20 Cr. 410 (NSR), 2022 WL 19179, at *4 (S.D.N.Y. Jan. 3, 2022) ("The fact that a witness is a law enforcement agent who had a broader involvement in an investigation of the defendant does not expand the scope of permissible cross-examination." (collecting cases)).

To the extent the defendants wish to question records custodians about topics other than authenticating records, and the Court permits such inquiry, the defendants must disclose the name of the custodian on their witness list, ask questions that will call for admissible evidence, and conduct their examination in a non-leading manner as if on direct examination, as required by Federal Rules of Evidence 611(b) and (c).

[4] Many of these records were produced initially by the defendants themselves to the SEC. Later, the defendants produced other records to the SEC through counsel. Other records were produced by the defendants, through counsel, directly to the Government pursuant to grand jury subpoenas.

CONCLUSION

For the reasons set forth above, the Government's motions *in limine* should be granted.

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Respectfully submitted,

JAY CLAYTON
United States Attorney

By: 

Adam S. Hobson
Allison Nichols
Matthew R. Shahabian
Assistant United States Attorneys
Tel.: 212-637-2484 / 2366 / 1046