No. 19-10168

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SUSHOVAN TAREQUE HUSSAIN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES AS APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 3:16-CR-00462 CRB

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Corporate executive Sushovan Hussain and others carried out a multibillion-dollar fraud scheme against a U.S. company and investors. After a two-month trial, a jury convicted Hussain on all 16 counts of conspiracy, wire fraud, and securities fraud. This Court should affirm.

JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court (Hon. Charles R. Breyer) had jurisdiction under 18 U.S.C. § 3231 and filed the judgment on May 14, 2019. ER4.[1] Hussain timely noticed his

[1] "ER" refers to the excerpts of record; "SER" to the government's supplemental excerpts; "AOB" to Hussain's opening brief; "CR" to the district court record; and "PSR" to the Presentence Investigation Report (filed under seal).

appeal. ER1. This Court has jurisdiction under 28 U.S.C. § 1291. Hussain is on bail pending appeal. Dkt. 18.

ISSUES PRESENTED

1. Whether Hussain waived his challenge to the sufficiency of the jurisdictional-nexus evidence on Counts 1 through 15 for wire fraud and conspiracy; if not waived, whether the evidence sufficed for a rational juror to find domestic applications of these statutes; or whether they apply extraterritorially.

2. Whether the evidence sufficed to prove the intent and "in connection with" elements of securities fraud on Count 16.

3. Whether the district court plainly erred by giving aiding-and-abetting jury instructions for Count 16 that tracked this Court's model instructions.

4. Whether the district court abused its discretion in evidentiary rulings by admitting a financial restatement under Federal Rule of Evidence 803(6) or by excluding certain post-fraud evidence under Federal Rule of Evidence 403.

5. Whether the district court erred by ordering a $6.1 million forfeiture money judgment based on Hussain's actual personal gain from the fraud scheme.

STATEMENT OF THE CASE

A. Charges

A grand jury in the Northern District of California returned a 16-count superseding indictment against Hussain, the chief financial officer (CFO) of

Autonomy Corporation—a company with "dual headquarters" in San Francisco and England. ER2656–72. The superseding indictment alleged that Hussain participated in a multiyear scheme to misrepresent Autonomy's finances in the run-up to its acquisition by U.S. corporation Hewlett-Packard (HP) for billions of dollars. Hussain was charged with conspiracy to commit wire fraud under 18 U.S.C. § 1349 (Count 1), wire fraud under 18 U.S.C. § 1343 (Counts 2–15), and securities fraud under 18 U.S.C. § 1348 (Count 16).[2]

B. Pretrial

Hussain moved to dismiss the superseding indictment on extraterritoriality and vagueness grounds. CR113. The United States opposed. CR115. The district court denied Hussain's motion, ruling that the charges constituted permissible domestic applications of these statutes. ER2640–55.

C. Trial

Over 29 trial days, the government called 37 witnesses and introduced hundreds of exhibits. In its post-trial order, the district court gave a 34-page account of the evidence, ER13–47, including evidence of Hussain's extensive personal involvement in the fraud scheme, ER39–47.

[2] Contrary to Hussain's suggestion, AOB7–8, the government obtained the superseding indictment to add the securities-fraud count (Count 16) and did not significantly alter the other counts. *Compare* ER2656–72 *with* ER2682–95.

1. The government's case

Hussain was Autonomy's CFO and a board member. He was also a U.K. chartered accountant—comparable to a U.S. certified public accountant. Ex. 1352 at 26; *see* SER3051–52. Hussain's duties included preparing Autonomy's quarterly and annual financial reports, certifying that they had been independently reviewed or audited, and certifying that they complied with U.K. regulations for publicly traded companies. Ex. 1352 at 43; ER12; SER3059. Hussain played a "very active role" in Autonomy's day-to-day operations, SER2004, and "was very engaged with every deal," SER264.

As CFO, Hussain systematically falsified Autonomy's publicly filed financial statements. ER13. For ten quarters from 2009 to 2011, he used his accounting knowledge and expertise to fraudulently recognize revenue. ER13–30, 40–42. And he repeatedly signed false management representation letters to auditors. *E.g.*, ER43–44; Exs. 37, 159, 1561. In the process, Hussain and his coconspirators—several of them based in the United States—deceived Autonomy's shareholders, regulators, analysts who covered the company, the investing public, and HP. ER11, 15–20, 34–35, 61.

Hussain's coconspirators included, among others, Autonomy CEO Michael Lynch; vice president of finance Stephen Chamberlain, who worked for Hussain (SER1751); and Stouffer Egan, Autonomy's CEO of the Americas, who testified at

trial (SER2075–2158, 2163–2368, 2400–2572). Quarter after quarter, Hussain and his coconspirators fraudulently inflated Autonomy's revenue and income to make Autonomy shares more attractive and create the false appearance of "extraordinary growth during the Great Recession, a time when most of its peers' revenues were either flat or shrinking." ER13.

To pull this off, Hussain and his coconspirators backdated agreements to appear as if they had occurred in earlier periods; "stuffed" Autonomy's distribution channel by selling product to resellers that the resellers did not need and could not resell; engaged in "roundtrip" or "circular" transactions where Autonomy and a counterparty bought and sold product or services at inflated prices; executed contracts with undisclosed side agreements; and more. ER11–36, 41–42.

Hussain and his coconspirators also touted Autonomy as a "pure software" company with high gross margins. ER29–30, 36–72; *see*, *e.g.*, Ex. 428 at 11; Ex. 592. In reality, Autonomy created the illusion of revenue growth by reselling standalone computer hardware at a loss—a fact Hussain hid from HP, analysts, and investors. ER13–15, 18, 29–39. Hiding hardware sales and restating revenue in other ways allowed Autonomy to significantly inflate its revenue from 2009 to 2011. ER31–36.

To further the fraud scheme, Hussain and his coconspirators retaliated against U.S. employees who raised questions. ER45–46; SER2792–93, 3033,

4639. When a U.K. regulator investigated a U.S. whistleblower's allegations after his termination, Hussain lied to the regulator. ER84; SER5054; Ex. 3061.

Hussain also lied in the due-diligence process in the run-up to HP's acquisition of Autonomy, creating false lists of Autonomy's top agreements and customers, and making direct misrepresentations to HP during diligence calls. ER32, 36–39; *see, e.g.*, Exs. 2144, 2626–27, 2984.

In 2011, based on these misrepresentations, HP offered about $11.7 billion for Autonomy's shares. Exs. 2008, 2307, 6566; SER4972. Because of the fraud, HP vastly overpaid. *E.g.*, ER 34–39, 73; SER1043, 1096, 3076, 3695–96, 3908–11, 4433. If HP had known the truth about Autonomy, "we wouldn't have done the deal." SER5685.

Hussain and his coconspirators reaped huge profits. From 2009 through October 2011, when the HP deal closed, Hussain earned nearly $16 million in salary, bonuses, and equity compensation, including a gain of about $3.9 million on the sale of Autonomy shares from 2009 to July 2011, plus a gain of $9.3 million on the sale of Autonomy shares in the HP acquisition. SER5391–95; Ex. 3040.

2. Hussain's defense

Hussain called one hostile witness—HP's CFO, who testified that HP would not have acquired Autonomy had it known of the fraud. SER5684–85.

Hussain argued two main defenses: that government witnesses were lying and that some of Autonomy's actions had innocuous explanations. ER48–58. Hussain also made "a veiled case for jury nullification," ER48, 58–59, warning the jury not to "become part of the HP machine." SER6062; *see* SER6057.

The jury found Hussain guilty on all 16 counts. ER96–98; SER6152–55.

D. Post-trial

Hussain moved for acquittal (CR408) and for a new trial (CR409).

In an 81-page order, the district court rejected Hussain's claims. ER11–91. The court found the evidence more than sufficient to support his convictions on all counts. ER60–62. The court then considered and rejected each of Hussain's new-trial arguments, ER62–91, most of which he abandons on appeal. While the court stood by each of its evidentiary rulings, ER67–85, the court also found that regardless of those rulings, the jury's verdict would have been the same. ER85.

E. Sentencing

The district court emphasized that "I firmly agree with the jury's verdict. Had it been presented to me without a jury, I would have made the same findings." SER6264. The evidence "amply support[ed]" the verdict. *Id.*

The court found that HP's acquisition of Autonomy "wouldn't have occurred" but for the fraud. SER6263–64; *see* SER6173. Hussain engaged in "a methodical, long-term pattern or practice" to falsify financial transactions and

violated "all general accepted accounting practices." SER6264–65. He was an "orchestrator" of the conspiracy who "corrupted a number of innocent people" and "employed a series of subterfuges" involving "innocent customers"—actions the court found "seriously blameworthy." SER6265–66. Hussain directed subordinates to commit crimes and was "more blameworthy" than coconspirators who had appeared before the court. As CFO, Hussain could have stopped the fraud scheme but did not. *Id*.

The court calculated Hussain's Sentencing Guidelines range as 87 to 108 months. SER6268; CR521; *cf.* PSR ¶ 89. The court imposed a 60-month sentence, a $4 million fine, and a $6.1 million forfeiture order. ER4–10; SER6269–71.

SUMMARY OF ARGUMENT

1. Hussain waived his lead claim: an extraterritoriality challenge to the sufficiency of the trial evidence supporting his wire-fraud and conspiracy convictions under 18 U.S.C. §§ 1343 and 1349 (Counts 1–15). Although Hussain asserted other sufficiency claims in his Rule 29 motions, he never claimed that the trial evidence was insufficient to establish a domestic application of these statutes.

If not waived, Hussain's claim fails on the merits. Section 1343's focus is misuse of the wires. But even if its focus were the scheme to defraud, here the evidence easily sufficed for a rational juror to find domestic wire fraud and conspiracy. Hussain carried out this multibillion-dollar scheme by using his

company's U.S. headquarters, working with U.S. coconspirators and agents, exploiting U.S. wires, and targeting a U.S. victim.

2. The evidence also sufficed to support Hussain's securities-fraud conviction under 18 U.S.C. § 1348 (Count 16). Hussain challenges the evidence on two elements—intent and whether the fraud was "in connection with" U.S. securities—but the evidence more than sufficed on both.

3. The district court did not plainly err in its aiding-and-abetting jury instructions on Count 16, which tracked this Court's model instructions. Nor is there a reasonable probability that the jury would have acquitted Hussain on this count under his proposed formulation.

4. The district court's evidentiary rulings involved no abuse of discretion. Under Federal Rule of Evidence 803(6), the court properly admitted a restatement that revealed Autonomy's true financial state before its acquisition by HP—highly probative evidence. And the court rightly excluded certain defense evidence about HP's post-fraud conduct—collateral evidence that had little or no probative value but posed severe Rule 403 dangers.

5. Under binding precedent, the district court properly ordered $6.1 million in forfeiture based on Hussain's actual personal gain from the fraud. Hussain's conclusory attacks on the court's math are unsupported by any authority.

ARGUMENT

I. THE EVIDENCE SUFFICED TO ESTABLISH DOMESTIC WIRE FRAUD AND CONSPIRACY—AND HUSSAIN WAIVED ANY CONTRARY CLAIM

A. Standard of review

If, as here, a defendant challenged the sufficiency of the trial evidence on different grounds below, unpreserved sufficiency claims are waived. *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010).

The Court reviews preserved sufficiency claims de novo, viewing the evidence in the light most favorable to the government, then asking whether any rational juror could find each offense element beyond a reasonable doubt. *United States v. Nevils*, 598 F.3d 1158, 1165–66 (9th Cir. 2010) (en banc).

These deferential standards apply to jurisdictional-nexus claims. *E.g.*, *United States v. Valenzuela*, 849 F.3d 477, 483–87 (1st Cir. 2017); *United States v. Sumeru*, 449 F. App'x 617, 621 (9th Cir. 2011); *see* AOB30 n.4 (citing *Sumeru*).

B. Applicable law

1. Extraterritoriality generally

The Supreme Court has developed a two-step framework to assess the extraterritorial reach of federal statutes. *See RJR Nabisco, Inc. v. European Comm.*, 136 S. Ct. 2090, 2101 (2016). First, courts determine "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* at 2101.

If so, the extraterritorial application's scope turns on any limits Congress imposed on the statute's foreign application. *Id.*

Second, if the statute is not extraterritorial, courts "determine whether the case involves a domestic application of the statute." *Id.* Courts make this determination by identifying "the statute's 'focus'"—the "'focus' of congressional concern"—and asking whether conduct relevant to that focus occurred in the United States. *Id.* at 2100–01. A statute's focus "is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (cleaned up).

Under this second step, if "the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco*, 136 S. Ct. at 2101. But "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible application regardless of any other conduct that occurred in U.S. territory." *Id.*

This two-step framework derives from *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). At issue in *Morrison* was whether Section 10(b) of the Securities Exchange Act applied extraterritorially to provide a cause of action to

foreign plaintiffs suing foreign and American defendants for misconduct in connection with foreigners' purchases of securities traded on foreign exchanges.

After finding that Section 10(b) gave no clear indication of extraterritorial effect, *id.* at 262–65, *Morrison* considered whether the case involved a permissible domestic application of that statute. *Morrison* held that Section 10(b)'s "focus" was "not upon the place where the deception originated, but upon the purchases and sale of securities in the United States," so the statute did not apply to purchases outside the United States of securities not listed on a domestic exchange. *Id.* at 266–74.

Morrison distinguished Section 10(b) from 18 U.S.C. § 1343, the wire-fraud statute here. *Id.* at 272; *see also id.* at 273–74 (Breyer, J., concurring).

Courts need not conduct *Morrison*'s two-step inquiry in sequence; they may start at step two. *RJR Nabisco*, 136 S. Ct. at 2101 n.5.

2. Wire fraud and extraterritoriality

The wire-fraud statute penalizes a person who, "having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings, signs, signals . . . for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343. The conspiracy statute makes it a crime to "attempt[] or conspire[] to commit any offense under this chapter," including the wire-fraud statute. 18 U.S.C. § 1349.

This Court has not decided whether these statutes apply extraterritorially under *Morrison*'s step one. But that question is irrelevant here, since Hussain's claim is waived and fails under *Morrison*'s step two in any event.

C. Hussain waived his challenge to the sufficiency of the jurisdictional-nexus evidence on Counts 1 through 15

On appeal, Hussain disputes whether the trial evidence sufficed to establish domestic wire fraud and conspiracy (Counts 1 through 15). AOB18–33. But he never pressed this sufficiency claim below. "[W]hen a Rule 29 motion is made on a specific ground," as here, "other grounds not raised are waived." *Graf*, 610 F.3d at 1166; *see Valenzuela*, 849 F.3d at 483 (waiver of jurisdictional-nexus claim).

Before trial, Hussain moved to dismiss the superseding indictment on extraterritoriality and vagueness grounds. CR113, 118. The district court denied his motion. ER2640–55. Hussain mentions this pretrial order (AOB 9, 26–27) but does not appeal it.[3]

Instead, Hussain now "challenge[s] the sufficiency of evidence of domestic contacts . . . based on the evidence presented *at trial*." AOB30 n.4 (quotation

[3] Hussain does not include this pretrial order among "the orders to be reviewed" in the first volume of his ER. 9th Cir. R. 30-1.6(a). His ER also does not include the pretrial motion hearing transcript (SER6488–6525), as required if he were appealing the order. 9th Cir. R. 30-1.4(a)(viii). In any event, the superseding indictment and the government's proffers (SER6499, 6526–30) described domestic applications of these statutes and sufficed for the case to proceed to trial. ER2643–50; *see United States v. Ballestas*, 795 F.3d 138, 148–49 (D.C. Cir. 2015).

marks omitted). But Hussain never asserted this claim in his Rule 29 motions when challenging the sufficiency of the evidence on Counts 1 through 15.

After the close of the government's evidence, Hussain filed a Rule 29 motion that said nothing about the sufficiency of the jurisdictional-nexus evidence. CR354; *see* SER5627, 5672. Hussain did not renew the motion at the close of the defense case. SER5685, 5689, 5804.

Post-verdict, Hussain filed a renewed Rule 29 motion (CR408) much like the pre-verdict motion (CR354). Neither Hussain's Rule 29 motions nor his Rule 33 motion for a new trial (CR409) used the word "extraterritorial."

In a footnote to his Rule 29 motions, Hussain purported to "preserve[], without repeating here, his arguments for dismissal. *See* Dkt. Nos. 113, 118." CR354 at 3 n.1; CR408 at 3 n.1. Hussain's docket citations were to pretrial filings that challenged the adequacy of the superseding indictment—not the sufficiency of the trial evidence.

Nor did Hussain request jury instructions on the jurisdictional-nexus test he now proposes. And he made no extraterritoriality objection to the district court's wire-fraud or conspiracy instructions. CR184, 364; SER5627–5793. He thus never asked the jury or the district court to determine whether the trial evidence sufficed to establish domestic wire fraud and conspiracy. *See United States v. Hui*

Hsiung, 778 F.3d 738, 747 (9th Cir. 2015); *United States v. Napout*, 332 F. Supp. 3d 533, 552–55 (E.D.N.Y. 2018).

Because Hussain asserted other grounds for acquittal in his Rule 29 motions, his present sufficiency claim is "waived" and "may be reviewed only to prevent a manifest miscarriage of justice." *United States v. Hong*, 938 F.3d 1040, 1047 (9th Cir. 2019) (citing *Graf*, 610 F.3d at 1166). Affirming Hussain's convictions will create no injustice, manifest or otherwise. The evidence more than sufficed for a rational juror to find domestic applications of 18 U.S.C. §§ 1343 and 1348. The Court should therefore decline to consider Hussain's extraterritoriality claim.

D. The evidence sufficed to prove domestic wire fraud (Counts 2–15)

If not waived, Hussain's claim is reviewed only for plain error—a "stringent standard." *United States v. Benamor*, 937 F.3d 1182, 1188 (9th Cir. 2019). Even on de novo review, the claim would fail. Viewed in the light most favorable to the government, the evidence easily sufficed for a rational juror to find domestic wire fraud and conspiracy. The Court thus need not "address whether these statutes have extraterritorial application." *United States v. Kazzaz*, 592 F. App'x 553, 554–55 (9th Cir. 2014).

1. Section 1343's focus is misuse of the wires

Under *Morrison*'s second step, if "the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic

application even if other conduct occurred abroad." *RJR Nabisco*, 136 S. Ct. at 2101. This is such a case.

The Court has long recognized that "the focus of the mail and wire fraud statutes is upon the misuse of the instrumentality of communication," not the overall fraud scheme. *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001) (cleaned up). These statutes "'do not penalize the victimization of specific persons; rather, they are directed at the instrumentalities of fraud.'" *Id.* at 793 (citation omitted).

Thus, when defendants execute a wire-fraud scheme by domestic interstate wires, as Hussain and his coconspirators did, prosecuting the scheme does not involve extraterritorial application of the statute—even if the scheme involved some foreign conduct.

Hussain tries to sidestep precedent but fails. He notes that *Garlick* "pre-dated" *Morrison*. AOB26. He also cites *Bridge v. Phoneix Bond & Indem. Co.*, 553 U.S. 639 (2008), a civil RICO decision holding that the plaintiffs did not have to show they relied on the alleged misrepresentations. *Id.* at 648–49; AOB21, 27. Nothing in *Morrison* or *Bridge* overruled *Garlick*. And while *Garlick* did not involve foreign contacts, its "focus" holding was not limited to a specific context.

Indeed, after *Morrison* and *Bridge*, this Court has relied on *Garlick* to reject extraterritoriality challenges to wire-fraud convictions. *United States v. Driver*,

692 F. App'x 448, 449 (9th Cir. 2017); *Kazzaz*, 592 F. App'x at 554–55. Sister circuits, too, have upheld wire- and mail-fraud convictions in cases involving foreign defendants or foreign activity where the fraud schemes involved domestic interstate wires or mailings. *United States v. Georgiou*, 777 F.3d 125, 138 (3d Cir. 2015); *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *United States v. Coffman*, 574 F. App'x 541, 557 (6th Cir. 2014).[4] Hussain ignores these cases.

Hussain also ignores *Pasquantino v. United States*, 544 U.S. 349 (2005), where the Supreme Court upheld the use of the wire-fraud statute to prosecute defendants for defrauding the Canadian government. The defendants made interstate phone calls within the United States to order discounted alcohol and hired drivers to smuggle it over the border into Canada, defrauding the Canadian government of excise taxes on imported liquor. *Id.* at 353. There was no extraterritorial application of the wire-fraud statute because the defendants executed the scheme by using "U.S. interstate wires" (phone calls). *Id.* at 371. It was this "domestic element" that Section 1343 prohibited. *Id.*; *see United States v. Hayes*, 99 F. Supp. 3d 409, 421 (S.D.N.Y. 2015) (*Pasquantino* "confirmed that

[4] District courts have reached similar conclusions. *E.g.*, *United States v. Hayes*, 99 F. Supp. 3d 409, 421–28 (S.D.N.Y. 2015); *United States v. Singhal*, 876 F. Supp. 2d 82, 97–98 (D.D.C. 2012); *cf. United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1127, 1131 (N.D. Cal. 2015) (Breyer, J.) (dismissing indictment that concerned "wholly foreign conduct and wholly foreign actors" whose use of wires did not reach or pass through United States).

prosecuting frauds that allege use of domestic wires does not constitute extraterritorial application of the wire fraud statute").

A defendant's misuse of the wires is not merely a "jurisdictional hook." AOB22–23. While "the interstate requirement in 18 U.S.C. § 1343 is jurisdictional," *United States v. Jinian*, 725 F.3d 954, 965 (9th Cir. 2013), misuse of the wires is the statute's actus reus. *Pasquantino*, 544 U.S. at 358; *United States v. Jefferson*, 674 F.3d 332, 366–67 (4th Cir. 2012); *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002). To sustain a conviction under the wire- or mail-fraud statutes, the wire or mailing must be "part of the execution of the fraud," a requirement further distinguishing it from a "purely" jurisdictional element. *Schmuck v. United States*, 489 U.S. 705, 710 (1989). And "each use of the wires constitutes a separate offense," *Garlick*, 240 F.3d at 792—a concept incompatible with a purely jurisdictional element.

In trying to sidestep this Court's *Garlick* decision, Hussain relies on *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019). But far from undermining *Garlick*, the Second Circuit cited it approvingly in holding that the "regulated conduct" under Section 1343 is "not merely a 'scheme to defraud,' but more precisely *the use of the mail or wires in furtherance of a scheme to defraud*.'" *Bascuñán*, 927 F.3d at 122 & n.18. The Second Circuit held that "a claim predicated on mail or wire fraud involves sufficient domestic conduct when (1) the

defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme to defraud." *Id.* at 122. Even under the Second Circuit's "core component" test, the evidence here easily sufficed to establish domestic wire fraud and conspiracy.

2. Hussain and coconspirators relied on U.S. wires to advance the fraud scheme

Every wire charged here originated or terminated in the Northern District of California between January and October 2011, when HP acquired Autonomy. Far from "incidental" to the fraud scheme (AOB16, 20), these wires advanced it:

- An email from Joel Scott, Autonomy's U.S.-based general counsel, to a U.K. coconspirator transmitting a backdated contract on which Hussain recognized revenue (Count 2).
- Press releases with Autonomy's fraudulent financial statements wired from the U.K. to HP executives in Palo Alto (Counts 3, 7–8).
- Video conference calls between HP executives in Palo Alto and Autonomy executives in the United Kingdom—including one where Hussain was physically present in Palo Alto (Counts 4, 5).
- An email from an officer of a counterparty in Virginia to an officer of Autonomy in San Francisco (CEO of the Americas Stouffer Egan) with a backdated contract on which Hussain recognized revenue (Count 6).
- Telephone calls using a U.S. toll-free number among participants in the United Kingdom and Palo Alto in which Hussain misled HP during due diligence (Counts 9–12).
- Emails sent from the United Kingdom to HP executives in California providing false and misleading diligence information (Counts 13–14).

- Emails from an U.K. escrow agent demanding that HP executives in California cause a payment for the Autonomy acquisition (Count 15).

ER2668–69; SER5927–43.

Along with the charged wires, the jury considered other wires that furthered the scheme, including more than a hundred emails between Hussain and U.S. contacts. SER149–75. Autonomy CEO Lynch likewise emailed contacts in the United States as part of the scheme, including emails with HP's senior management during the diligence process between June and August 2011. *E.g.*, Exs. 646, 680, 758, 1038, 1884, 2198, 2246. Autonomy employees under Hussain emailed with U.S. "value-added resellers," whose participation was essential to the fraud. *E.g.*, Exs. 622, 714, 1488, 1490, 1491, 1499, 1675, 1684, 1686, 1734, 1899, 1908, 1971, 2758; SER1710–11, 1715–16; ER13, 15–16, 23–24.

Hussain also had more than a thousand phone calls with coconspirator Egan, Autonomy's CEO of the Americas, who worked in Autonomy's San Francisco headquarters. SER2111–12. And Hussain engineered and executed more than a dozen fraudulent end-of-quarter transactions with U.S.-based companies. *E.g.*, ER16–29; Exs. 32, 398, 427, 511, 615, 622, 1512. Each transaction required emails and calls to, from, and within the United States; each involved transfers to or from U.S. bank accounts. *E.g.*, Exs. 512, 1358, 1684, 1902, 1923, 2068, 2263.

In sum, Hussain and his coconspirators repeatedly exploited domestic wires to advance this fraud scheme. The trial evidence thus established "a permissible domestic application" of Section 1343. *RJR Nabisco*, 136 S. Ct. at 2101.

3. Even if Section 1343's focus were the scheme to defraud, the evidence sufficed

Hussain argues that the conduct relevant to Section 1343's "focus" is the fraud or scheme itself, not the misuse of the instrumentalities of communication. AOB21. Hussain's proposed test contravenes *Garlick* and *Pasquantino*.

Hussain claims (AOB 28) that the Second Circuit in *Bascuñán* established a test "effectively equivalent" to his own proposed "focus" test. Not so. The Second Circuit rejected the argument that Section 1343's focus is on the "scheme to defraud, which must have been planned, managed, and directed from within the United States," 927 F.3d at 123—an argument much like Hussain's. Such a rule "would effectively immunize offshore fraudsters from mail or wire fraud." *Id.* (quotation marks omitted); *see also Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012) ("[T]he transactional test announced in *Morrison* does not require that each defendant alleged to be involved in a fraudulent scheme engage in conduct in the United States.").

Hussain relies on out-of-circuit cases involving fraud schemes "perpetrated by foreigners against other foreigners, with no U.S. nexus other than the incidental

use of U.S. wires"—unlike here. *United States v. Elbaz*, 332 F. Supp. 3d 960, 974–75 (D. Md. 2018) (distinguishing several of Hussain's cited cases).

But the evidence here sufficed even under the tests in Hussain's out-of-circuit cases—mostly civil RICO and forfeiture decisions by district courts holding that a domestic application of the wire-fraud statute involves a defendant or coconspirator committing substantial conduct in the United States to further the scheme, where at least some conduct involves use of U.S. wires. *E.g.*, *United States v. All Assets Held at Bank Julius, Baer & Co.*, 251 F. Supp. 3d 82, 103 (D.D.C. 2017).

Whether the focus of the wire-fraud and conspiracy statutes is the use of the wires, the scheme to defraud, or some combination of the two, the evidence of domestic conduct by Hussain and his coconspirators more than sufficed to prove that Hussain's offenses were domestic.

Along with the evidence of domestic wires already discussed, the jury considered substantial evidence of other U.S. fraud-related conduct by Hussain and his coconspirators, several of whom were based in the United States. Indeed, "this case has the United States written all over it." *RJR Nabisco*, 136 S. Ct. at 2115 (Ginsburg, J., concurring in part). In describing the "domestic conduct" in this scheme as "negligible," AOB29, Hussain ignores and distorts the trial record.

Autonomy maintained what it described as "dual headquarters" in San Francisco, California, and Cambridge, England. Ex. 1352 at 15; SER2084–85. Its San Francisco headquarters were at One Market Street, not far from the federal courthouse where Hussain stood trial. SER1345, 1435–36, 2084–85, 2088–89. Autonomy bragged about its San Francisco headquarters. *E.g.*, SER2085 ("We touted the fact that we were dual headquartered in Cambridge and San Francisco . . . . San Francisco or the Bay Area was kind of where . . . most of the best or biggest software companies were headquartered[.]"); Ex. 1352 at 15. Autonomy's major subsidiaries also included several Bay Area software companies. *E.g.*, SER265, 2723, 2797–98; Ex. 1352 at 88.

In his opening brief, Hussain never mentions Autonomy's San Francisco headquarters. And he dismisses his "business dealings with Autonomy's U.S. offices" as irrelevant and "routine." AOB30. But a jury could find that Hussain used Autonomy's San Francisco headquarters and other U.S. offices to carry out the fraud scheme. *E.g.*, SER1435–38; ER40.

Hussain dismisses the relevance of Autonomy's U.S. offices by citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). AOB30. But *Kiobel* concerned jurisdiction for private civil claims under the Alien Tort Statute where—unlike here—"*all the relevant conduct took place outside the United States*." 569 U.S. at 124 (emphasis added). *Kiobel* has nothing to say about a

fraud prosecution involving a criminal defendant's U.S. headquarters, U.S. subsidiaries, U.S. coconspirators, U.S. wires, and U.S. victim.

Besides its San Francisco headquarters and other U.S. offices, Autonomy had U.S. shareholders, including TIAA-CREF, Fidelity Investments, and Vanguard Group. Ex. 1519. And Autonomy had many U.S. customers, ranging from Bank of America to federal government agencies like the U.S. Department of the Interior. *E.g.*, ER24–25; Ex. 2307 at 16. As part of the fraud, Autonomy acquired MicroLink, a U.S. "federally cleared business . . . [that] would enable Autonomy to sell more effectively into the U.S. Government." SER1098.

The jury also heard about Hussain's frequent trips to the United States to carry out the fraud. *See* SER4498 ("Most of the time he was in London or in the U.S., in San Francisco."). In 2009 and 2010, for example, Hussain participated in road shows with investors in the United States as part of the scheme. SER994–95. In October 2009, to further the scheme, Hussain traveled to San Francisco to acquire (and overpay for) a U.S. reseller whose debts he needed to erase. SER1345, 1694–95. That month, Hussain met with Egan in San Francisco to approve payments related to the scheme. SER2726. In the fourth quarter of 2009, as part of the scheme, Hussain met in the United States with Morgan Stanley, a key counterparty, hardware purchaser, and investor. SER1060–62.

In November 2010, Hussain met in the Bay Area with Joel Scott, Autonomy's U.S.-based general counsel, and discussed the pressure Hussain was under to hit revenue numbers at the expense of Autonomy's long-term planning. SER2797–98. The same month, Hussain met with Scott and a U.S. value-added reseller in New York to discuss the scheme. SER2799–800. In December 2010, Hussain—together with Scott and Egan—met in New York with Bank of America about a deal on which Hussain wrongly recognized revenue. SER4745.

While in New York in February 2011, Hussain ordered that a false management representation letter be signed and sent to Autonomy's outside auditors.[5] SER2031; Exs. 1560, 1561. The next month, Hussain traveled to Palo Alto, California, and touted Autonomy's false financial performance to senior HP executives. SER3883–84, 4951–52; Exs. 1588, 2709; *see also* SER4956, 4963. In April 2011, he traveled to San Francisco to calm down a counterparty who feared consequences from a backdated agreement. SER1435–38; ER40. In August 2011, Hussain and Scott had another fraud-related meeting in San Francisco. SER2877–80; *see also, e.g.*, SER1105–07, 1564, 1570 (other U.S. meetings).[6]

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[5] Management letters like this are necessary to successful completion of an audit. SER3074–75, 4084–85; Ex. 1561. They are not "incidental." AOB16, 20.

[6] Although not admitted at trial, travel records undisputedly show that Hussain was in the United States for 54 days in 2010 and for 50 days in 2011. CR515 at 14–15; CR542 at 2; SER6286. These records support the conclusion that Hussain's waived sufficiency claim involves no manifest injustice.

To further this scheme, Hussain and his coconspirators retaliated against U.S. employees who raised questions. ER45–46. Hussain and his coconspirators directed Scott, Autonomy's U.S.-based general counsel, to fire a U.S. employee named Brent Hogenson, who Hussain thought was a whistleblower. ER39–40, 44–46. SER2782, 2792–96. Hussain personally ordered the firing of two lower-level accountants in the United States who appeared to be affiliated with Hogenson. ER45–46; SER2792–93, 3033, 4639.

Hussain and his coconspirators hired prominent Silicon Valley investment banker Frank Quattrone to help sell Autonomy. ER1508–09; SER1025, 3875–76; Exs. 1519, 1588. And Hussain engaged a U.S. public-relations firm to distribute his false statements to U.S. media organizations. SER5115–16, 5930.

From January to August 2011, Hussain and his coconspirators emailed presentations, conducted video conferences, traveled to the United States, and, as the deal accelerated, held daily diligence calls with HP executives in the Bay Area, all using U.S. wires. ER36–39, 44; SER3875–93. In these communications and meetings, Hussain misrepresented Autonomy's financial performance and its top customers and contracts.

While in San Francisco on August 18, 2011, Hussain signed a letter committing to sell his shares in the contemplated HP acquisition. SER4973–74; Ex. 2309. Hussain represented and warranted that "any information provided by

me for inclusion in the Press Announcement, the Offer Document, and any other announcement made or document issued in connection to the Offer, is and will be true and accurate in all respects and not misleading in any respect." Ex. 2309. That day, HP announced its offer to acquire Autonomy. Ex. 2295.

E. The evidence sufficed to prove domestic conspiracy (Count 1)

Just as the evidence established domestic wire fraud under 18 U.S.C. § 1343, it established domestic wire-fraud conspiracy under 18 U.S.C. § 1349. Hussain and his coconspirators, including U.S.-based executives like Egan, repeatedly relied on U.S. wires to further the conspiracy. And Hussain personally committed overt acts while in California. *E.g.*, Exs. 1769, 2309. The jurisdictional-nexus evidence on Count 1 more than sufficed. *See* ER2649 (pretrial order); *Elbaz*, 332 F. Supp. 3d at 975–78 (citing *United States v. Ballestas*, 795 F.3d 138, 144–45 (D.C. Cir. 2015); *United States v. Kim*, 246 F.3d 186, 191 n.2 (2d Cir. 2001)).

Despite challenging his conspiracy conviction under Count 1, Hussain barely mentions it. Instead, he treats this conspiracy count as indistinguishable from the substantive wire-fraud counts (Counts 2 through 15). AOB19 n.2 (citing *United States v. Ali*, 718 F.3d 929, 940 (D.C. Cir. 2013); *United States v. Hoskins*, 902 F.3d 69, 96 (2d Cir. 2018)).

Neither of Hussain's out-of-circuit cases concerns Section 1349, the statute here. *Ali* affirmed a conviction for conspiracy to commit piracy, 718 F.3d at 941–

42, while *Hoskins* held that the defendant could not be liable for conspiring to violate the Foreign Corrupt Practices Act (FCPA) because he fell outside the FCPA's statutorily defined categories. 902 F.3d at 96–97. Here, the conspiracy and wire-fraud statutes impose no such restriction.

F. Hussain's other arguments fail

1. "Inherently local"

For his assertion that "criminal jurisdiction" is "inherently 'local'" in "nature," Hussain cites dicta from a civil case concerning state law decided in 1892. AOB20 (citing *Huntington v. Attrill*, 146 U.S. 657, 669 (1892)). That was before the invention of airplanes, mass-produced automobiles, or transatlantic phone calls—let alone computers, videoconferencing, email, or the internet. That case has no bearing here.

2. Comity

Hussain invokes vague concerns about "international comity" and U.S.-U.K. relations. AOB23. Hussain's argument turns comity on its head, asking this Court to favor a purported foreign interest—and a private rather than sovereign interest at that—over Congress's power to prohibit misuse of these instrumentalities of interstate commerce. *See United States v. All Assets Held in Account Number XXXXXXXX*, 83 F. Supp. 3d 360, 371 (D.D.C. 2015) (discussing comity).

In support of his comity argument, Hussain asserts that in *Morrison* and *RJR Nabisco*, "the Supreme Court expressly credited numerous amicus briefs filed by foreign countries—including the U.K.—describing those sovereigns' nuanced regulation of securities and vigorously urging against the extraterritorial application of U.S. fraud laws." AOB24.

One might think from Hussain's argument that the United Kingdom objected to his prosecution or raised concerns about U.S. efforts to "bypass" U.K. law. AOB25. On the contrary, U.S. prosecutors collaborated with U.K. partners, including from the Serious Fraud Office and the Financial Reporting Council. SER6294, 6299. The United Kingdom viewed both countries as having "jurisdiction" over Hussain and publicly announced that it would defer to the United States' prosecution. SER6294. Far from straining U.S.-U.K. relations, this case represents transatlantic cooperation.

At any rate, how the United States conducts its foreign relations is "'not open to judicial review.'" *Mingtai Fire & Marine Ins. Co., Ltd. v. United Parcel Service*, 177 F.3d 1142, 1144 (9th Cir. 1999) (citation omitted).

3. HP's payment logistics

Hussain claims (AOB32–33) that this case is extraterritorial because of how victim HP paid for Autonomy after being misled. This claim fails.

HP, a U.S. corporation, paid Autonomy the $11.7 billion acquisition price through a Dutch subsidiary called HP Vision BV—a company HP owned and "set up to handle [this] transaction." SER4971–72; SER4981–82; Ex. 2637.

Hussain asserts that HP paid in this way for tax reasons. AOB33; SER6501. But the government is not "bound by" HP's tax-planning strategies (AOB33) when enforcing U.S. criminal law. And a victim's method of payment after being misled cannot absolve the fraudster. So HP's payment decisions—decisions it made after Hussain and his coconspirators misled it—cannot retroactively convert Hussain's crimes into "foreign fraud." AOB16, 30, 33.

HP is the ultimate victim here. SER6235–43; ER90. But even if HP's Dutch subsidiary were the only victim, this would not change the analysis. The wire-fraud statute prohibits use of the wires by persons "having devised or intending to devise any scheme or artifice to defraud" to further the scheme. 18 U.S.C. § 1343. There is no support for the notion that the statute protects only U.S.-based victims. Congress surely did not mean to make the United States a haven for massive frauds so long as victims are foreign.

To the contrary, Congress's "policy choice" in enacting the wire-fraud statute was "to free the interstate wires from fraudulent use, irrespective of the object of the fraud." *Pasquantino*, 544 U.S. at 370. The Supreme Court in

Pasquantino thus had no trouble affirming convictions of defendants who "scheme[d] to defraud a foreign sovereign of tax revenue." *Id.* at 370–71.

Other courts interpreting Section 1343 have likewise recognized that "[t]he identity and location of the victim, and the success of the scheme, are irrelevant." *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997); *see also, e.g.*, *United States v. Mandell*, 752 F.3d 544, 551 (2d Cir. 2014).

Hussain again relies on inapt civil caselaw. AOB32–33 (citing *Carnero v. Boston Sci. Corp.*, 433 F.3d 1 (1st Cir. 2006); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015)). *Carnero* addressed the extraterritorial reach of a federal whistleblower law that has no relevance here. *Motorola Mobility* concerned a U.S. company's civil antitrust claims against a foreign competitor. And while Hussain relies on the Seventh Circuit's *civil* antitrust decision, he ignores this Court's "closely related" decision affirming the same foreign parties' *criminal* convictions. *Hui Hsiung*, 778 F.3d at 760.

As for Hussain's claim that HP and its Dutch subsidiary could not "have sued Hussain in the U.S.," AOB25, that assertion—even if accurate—is irrelevant. The United States' enforcement of its criminal laws is independent of a private party's civil claims.

G. Alternatively, the wire-fraud and conspiracy statutes apply extraterritorially

If the Court reaches *Morrison*'s step one—which it need not—it should hold that the wire-fraud and conspiracy statutes apply extraterritorially. The wire-fraud statute extends to "foreign commerce," 18 U.S.C. § 1343, and in "context" reflects Congress's extraterritorial intent. *RJR Nabisco*, 136 S. Ct. at 2102.[7]

In arguing otherwise (AOB19–20), Hussain relies on *Morrison*. But after *Morrison*, the First and Third Circuits have held that Section 1343 and similar statutes apply to extraterritorial conduct. *Georgiou*, 777 F.3d at 137–38; *Lyons*, 740 F.3d at 718.

Citing only the Second Circuit, along with two district court decisions, Hussain claims that "most courts agree" with him that the wire-fraud statute does not have any extraterritorial reach. AOB19. But in *Bascuñán*, 927 F.3d at 121, the Second Circuit relied on *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129, 141 (2d Cir. 2014), which the Supreme Court reversed on other grounds, *RJR Nabisco*, 136 S. Ct. 2090.

The Second Circuit's reading of Section 1343 under *Morrison*'s step one is unpersuasive. The Second Circuit resolved the "complicated question" of Section

[7] In its pretrial order denying Hussain's motion to dismiss, the district court, citing its own decision in a prior case, held that Section 1343 "does not apply extraterritorially." ER2643 (citing *Sidorenko*, 102 F. Supp. 3d at 1127).

1343's extraterritorial reach in a single sentence—ruling without further analysis that "the references to foreign commerce [in Section 1343 and the Travel Act], deriving from the Commerce Clause's specification of Congress's authority to regulate, do not indicate a congressional intent that the statutes apply extraterritorially." *European Cmty.*, 764 F.3d at 140.

The Second Circuit failed to address the Supreme Court's conflicting holding in *Pasquantino* beyond dismissing it in a footnote as "dictum" and asserting—again without elaboration—that *Morrison* "explicitly rejects the reasoning on which it relies." *Id.* at 141 n.11. But *Morrison* did no such thing. Instead, *Morrison* reaffirmed *Pasquantino* and distinguished Section 1343 from Section 10(b). 561 U.S. at 271–72.

Even if this Court were to follow the Second Circuit, Hussain's claim fails. An extraterritorial application of the wire-fraud statute, according to the Second Circuit, is one involving "*wholly* foreign . . . communication[s]." *European Cmty.*, 764 F.3d at 141 (emphasis added). That is not this case. And wherever the precise line is "between domestic and extraterritorial applications of the wire fraud statute," *id.* at 142, the Second Circuit found domestic applications in both *European Community* and *Bascuñán*, 927 F.3d at 121–23. So too here.

II. THE EVIDENCE SUFFICED TO PROVE SECURITIES FRAUD

A. Standard of review and applicable law

The Court views the evidence in the light most favorable to the verdict, then asks whether any rational juror could find the crime's essential elements beyond a reasonable doubt. *Nevils*, 598 F.3d at 1164–66; *see* p. 10, *supra*.

To convict Hussain on Count 16, the jury had to find that (1) he knowingly executed or attempted to execute a scheme or plan to defraud or a scheme or plan for obtaining money or property with false or fraudulent pretenses, representations, or promises; (2) the statements or omissions were material; (3) he acted with fraudulent intent, meaning the intent to deceive or cheat; and (4) the scheme was "in connection with" the purchase or sale of HP securities. SER5817; 18 U.S.C. § 1348. Hussain challenges the evidence on the third and fourth elements.

B. The evidence sufficed to prove that Hussain acted with the intent to deceive or cheat

Hussain claims that there was "no evidence" that he willfully sought to "deceive Hewlett-Packard shareholders" and that "transactions in Hewlett-Packard securities played no role in the alleged scheme." AOB41. This claim fails.

First, Hussain did not challenge the sufficiency of the intent evidence on Count 16 in his post-trial Rule 29 motion. He disputed the evidence on Section 1348's "in connection with" element but said nothing about the intent evidence—

only a one-line conclusory assertion that "the government also failed to prove the other elements." CR408 at 10.

Second, if not waived, this claim fails because Hussain misstates what the government had to prove. As the district court ruled before trial, Section 1348, "unlike Exchange Act § 10(b), does not require purpose or willfulness" but "premises liability on mere knowledge that one is executing a scheme to defraud" and "does not apply to one who makes a misrepresentation to a public company without such knowledge." ER2653 (citing 18 U.S.C. § 1348; 15 U.S.C. § 78ff).

Third, the evidence sufficed for a rational juror to find that Hussain possessed this knowledge—and, indeed, that he intended to deceive HP, its shareholders, and the public about Autonomy. ER62. Hussain knew that HP was a publicly traded company. He knew that upon acquiring Autonomy, HP would tout Autonomy's value to the investing public. *Id.* And he signed a letter directed to HP's subsidiary specifically warranting information to be included in HP's announcements—information he knew was false. ER62; Exs. 2309, 2295.

C. The evidence sufficed to prove misstatements "in connection with" HP securities

Hussain claims that the evidence did not suffice to prove that he made any misrepresentation "in connection with" HP securities because the lies he told HP—which HP repeated in a press release—were "too attenuated from U.S. securities." AOB35–40. The district court rightly rejected this claim.

Before trial, the court noted that Hussain "d[id] not challenge the premise that a securities fraud charge can be based on the public dissemination of misinformation in a communication such as a press release." ER2652. And after trial, the court found that trial evidence sufficed for the jury "to find that Hussain caused HP to make misleading statements to its investors by deceiving HP regarding the nature of Autonomy's business"; that Hussain "should have known the statements would reach investors, given that HP is a publicly traded company"; and that "the government introduced evidence that Hussain specifically warranted that the information to be included in HP's public announcements was correct." ER62. Hussain cites no authority that undermines the district court's analysis.

This Court has long held—in the analogous context of Section 10(b)—that "[w]here the fraud alleged involves public dissemination in a document such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely, the 'in connection with' requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation or omission." *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993); *see McGann v. Ernst & Young*, 102 F.3d 390, 397 (9th Cir. 1996) ("[A]n accounting firm acts 'in connection with' securities trading when it produces an audit report that it knows its client will include in a Form 10-K.").

Consistent with this authority, the government established the "in connection with" element by proving that HP issued a press release on August 18, 2011, announcing its acquisition of Autonomy. ER62; SER540–46; Ex. 2295. The press release included false and misleading information about Autonomy's historical financial performance—information Hussain had guaranteed as true and accurate in all respects, and not misleading in any respect, for inclusion in any announcement about the HP acquisition. Ex. 2309; SER4973–74; ER62.

Hussain's lies affected investors, two of whom testified that they bought HP shares relying on the press release's specific false and misleading information about Autonomy. ER39; SER539–46, 4289–92. Likewise, an analyst testified that he recommended HP securities based partly on the false and misleading press release and on misinformation about Autonomy. SER3287–90, 3566.

Hussain claims (AOB39) that his misrepresentations lacked a sufficient nexus to HP securities because he did not personally draft or publish the press release that incorporated them. But this Court has found in the Section 10(b) context that "substantial participation or intricate involvement in the preparation of fraudulent schemes" suffices for liability. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000) (citation omitted); *see* ER2653. And sister circuits confronted with "facts analogous to those here—that is, where the defendant is alleged to have made misrepresentations that a third party incorporated into a

public statement"—have held that defendants can be held liable for violating securities laws if they "'can fairly be said to have caused [the speaker] to make the relevant statements,' and 'knew or should have known that the statements would reach investors.'" ER62 (quoting *SEC v. Wolfson*, 539 F.3d 1249, 1261 (10th Cir. 2008)); *see McConville v. SEC*, 465 F.3d 780, 786–87 (7th Cir. 2006).

Those decisions accord with Ninth Circuit and Supreme Court precedent. *See Howard*, 228 F.3d at 1061 n.5 ("substantial participation or intricate involvement in the preparation of fraudulent statements" suffices for liability under Section 10(b)). To constitute securities fraud, a misstatement need only "'coincide' with a securities transaction." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006).

As the Supreme Court recently held in *Lorenzo v. SEC*, those who disseminate false or misleading statements to potential investors with the intent to defraud can be found to have violated SEC rules and related securities laws even if they did not "make" the statements. 139 S. Ct. 1094, 1100–01 (2019). Hussain relegates *Lorenzo* to a footnote and tries to distinguish it because "Hussain neither made nor disseminated the release to Hewlett-Packard investors." AOB39 n.7. But nothing in *Lorenzo* suggests that a fraudster can escape liability by lying through a third party. *See* 139 S. Ct. at 1100–01. On the contrary, *Lorenzo* emphasized Congress's goal of encouraging ethical conduct. *Id.* at 1103.

Finally, Hussain's claim that "Congress did not intend § 1348 to apply to foreign securities frauds" (AOB16) rests on the false premise that his fraud was "foreign." It was not. Hussain was in San Francisco when he induced HP—a U.S. public company—to issue the false press release. SER4973–74; Exs. 2302, 2309.

III. THE DISTRICT COURT DID NOT PLAINLY ERR IN ITS AIDING-AND-ABETTING INSTRUCTIONS FOR COUNT 16

A. Standard of review

As a fallback to his sufficiency challenge, Hussain briefly attacks Count 16's aiding-and-abetting jury instructions as lacking scienter. AOB43–44.[8]

Hussain concedes that plain-error review applies. AOB43. He must show (1) an error or defect (2) that was "clear or obvious," (3) affected his substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 734, 736 (1993). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citation omitted).

"'A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *United States v. Reed*, 575 F.3d 900, 926 (9th Cir. 2009) (citation omitted).

[8] The district court gave aiding-and-abetting instructions for Counts 2 through 16, SER5817–19, yet Hussain attacks them only as to Count 16.

B. The aiding-and-abetting instructions were not plainly erroneous

The district court's aiding-and-abetting instructions—which Hussain fails to quote in full—tracked this Court's current model instructions. *Compare* SER5817–19 *with* 9th Cir. Model Crim. J. Instr. §§ 5.1, 5.1A (Sept. 2019). Any error could thus not be "'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468 (1997).

There was no error, let alone plain error. Hussain challenges only a portion of the aiding-and-abetting instructions on Count 16. But "when read as a whole," these instructions "did not lower the *mens rea*, and were not misleading or inadequate to guide the jury's deliberations." *Reed*, 575 F.3d at 927. While Hussain "prefer[red]" his own formulation, SER5760, "'[a] defendant is not entitled to any particular form of instruction.'" *United States v. Kaplan*, 836 F.3d 1199, 1215 (9th Cir. 2016) (citation omitted).

Hussain asserts that "the jury could easily have found [him] guilty" on Count 16 as an aider/abettor without the requisite scienter. AOB44. In fact, the district court instructed the jury that it could convict Hussain of aiding and abetting only if he "willfully caused an act to be done which, if directly performed by him or another, would be an offense against the United States," and only if the evidence proved "beyond a reasonable doubt" that he "acted with the knowledge and intention of helping that person commit the crime charged." SER5817–19.

Even if Hussain could show plain error, the district court's formulation of the aiding-and-abetting instructions on Count 16 did not affect his substantial rights. *See United States v. Conti*, 804 F.3d 977, 981–82 (9th Cir. 2015). There is no reasonable probability that the jury would have acquitted him on Count 16 if the court had used Hussain's similar proposed instructions (CR184 at 92–93, 98).

The record gives no reason to think that the jury convicted Hussain as an aider/abettor or without the requisite scienter. Substantial evidence proved his guilt as a principal, ER62, and he does not challenge the jury instruction for principal liability under Count 16. SER5817. Contrary to Hussain's suggestion (AOB44), the government never mentioned aiding and abetting in closing arguments. SER5822–5947, 6063–93; *see United States v. Muhammad*, 740 F. App'x 887, 889–90 (9th Cir. 2018) ("In determining the likelihood that an erroneous instruction affected the outcome, we review the arguments made by the parties"); *cf. Chapman v. California*, 386 U.S. 18, 25 (1967) (noting that prosecutor's argument repeatedly relied on an error of law). The district court's post-trial order likewise says nothing about aiding and abetting. ER11–91.

Nor did the district court's formulation of these aiding-and-abetting instructions on Count 16 seriously affect the trial's fairness, integrity, or public reputation. *See Olano*, 507 U.S. at 737. Hussain's instructional-error claim thus fails all four prongs of plain-error review.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS

A. Standard of review

The Court reviews for abuse of discretion a district court's admission of evidence under Rule 803(6), *United States v. Johnson*, 297 F.3d 845, 862–63 (9th Cir. 2002), and its balancing of probative value against prejudicial effect under Rule 403, *United States v. Barragan*, 871 F.3d 689, 702 (9th Cir. 2017); *United States v. Murillo*, 288 F.3d 1126, 1139 (9th Cir. 2002).

This Court will uphold a district court's evidentiary rulings "unless they are 'illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *United States v. Gadson*, 763 F.3d 1189, 1199 (9th Cir. 2014) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

B. The restatement

To prove the falsity and materiality of Autonomy's public filings, the government presented testimony from Chris Yelland, who became CFO when Hussain left in May 2012, and Antonia Anderson, who worked first for Autonomy's outside auditor on the Autonomy engagement, then under Hussain at Autonomy, and then under Yelland. SER3048–51, 5135, 5140–42.

After May 2012, Yelland and Anderson conducted an extensive review of the books and records of Autonomy Systems Limited (ASL), the Autonomy subsidiary through which most of Autonomy's revenue flowed. ER33, 57;

SER3291–92, 5144–66. This review established that ASL's prior publicly filed financial statements were wrong, and U.K. law required Yelland and Anderson to restate them. ER33, 57; SER5144–66.

In January 2014, ASL filed the restatement with the U.K. Registrar of Companies for the ten months that ended October 31, 2011, restating ASL's publicly reported revenue and retained earnings for 2010 and 2009. SER3291–92, 5152; Ex. 2445. "Yelland certified under penalty of legal sanction that the group's work was accurate." ER33.

The district court admitted the restatement subject to a motion to strike. SER34–35, 2973–74. The court explained the restatement's admissibility and probative value. *E.g.*, SER2974–78; ER67, 71. And although the court invited Hussain to propose a limiting instruction to accompany the restatement, SER2978, Hussain never proposed one.

Yelland and Anderson testified at length about how the changes in the restatement affected Autonomy's financial statements. ER32–34; SER3045–3115, 3219–3375. Hussain cross-examined each witness in great depth: his cross-examination of Yelland fills some 80 pages of transcript (SER5258–5308, 5314–44), while his cross-examination of Anderson fills 90 pages (SER3283–3374).

C. The district court properly admitted the restatement

The district court found that the restatement was admissible as a business record under Rule 803(6), that it had high probative value, and that Hussain's contrary arguments went to the weight of the evidence, not admissibility. ER67–82; *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999). Nothing about the court's ruling was illogical, implausible, or lacking support in inferences that may be drawn from the record. *Gadson*, 763 F.3d at 1200.

1. The district court did not abuse its discretion under Rule 803(6)

In admitting the restatement under Rule 803(6), the business-records exception to the hearsay rule, the district court faithfully applied binding precedent. A business record may include a "record of an act, event, condition, opinion, or diagnosis." Fed. R. Evid. 803(6).

The restatement was "'(1) made or based on information transmitted by a person with knowledge at or near the time of the transaction; (2) made in the ordinary course of business; and (3) trustworthy, with neither the source of information nor method or circumstances of preparation indicating a lack of trustworthiness.'" *SEC v. Jasper*, 678 F.3d 1116, 1122 n.2 (9th Cir. 2012) (quoting *United States v. Bonallo*, 858 F.2d 1427, 1435 (9th Cir. 1988)). *Jasper* held that a restatement of financial statements, in the form of an annual report on

Form 10-K filed with the SEC, is admissible as a business record so long as it is properly authenticated. *Id.* at 1122–23.

The district court found that "the restatements here and in *Jasper* were prepared as part of an ongoing duty by the company to correctly state its financials," and that "[l]ike the 10-K in *Jasper*," the restatement here "was a paradigmatic 'financial statement audit.'" ER68 (quoting *Jasper*, 678 F.3d at 1123). These findings were not clearly erroneous.

Hussain's complaints about the restatement—"provenance," bias, and the like—all go to weight, not admissibility. Hussain had ample opportunity to press these arguments at trial. The district court "gave the defense every opportunity to impeach Yelland and the circumstances under which the restatement was prepared, to put on expert testimony criticizing the methods used in the restatement, and to offer its own evidence suggesting alternative accounting treatments of the transactions at issue. It did not do so." ER78; *see* ER69.

The district court rightly rejected Hussain's argument that the restatement lacked trustworthiness because HP prepared it "with litigation in mind." ER68–69; *see* AOB48. "[T]his does not differentiate this case from *Jasper*, where the restatement was prepared 'in a context of tremendous liability risk.'" ER69 (quoting *Jasper*, 678 F.3d at 1122–23). U.K. law required Yelland to prepare and publicly file true and fair financial statements in conformity with U.K. accounting

standards. ER33, 57. And this Court in *Jasper* rejected the argument that the annual report was unreliable because it was prepared after an internal investigation and under the cloud of litigation, noting that public companies in the U.S. must file accurate annual reports. 678 F.3d at 1122–24.

Hussain relies on *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984), which predates *Jasper* by three decades. AOB45–48. The district court explained why *Paddack* is distinguishable. ER68–69. *Paddack* involved a report prepared by a forensic investigator hired to "audit the Employer's contributions for shop employees" and "determine the extent of the Employer's compliance with collective bargaining agreements." 745 F.2d at 1257. This Court found that this sort of "compliance audit" or "special audit" was not prepared during regularly conducted activity, unlike the financial statements that businesses typically prepare, *id.* at 1257–58, and unlike the restatement here. ER68.

Hussain also notes that Ernst & Young, an outside auditor retained by HP, did not render a separate opinion about the restatement. AOB46–47. The district court considered and correctly rejected this argument. ER69. Nothing in the business-records exception requires a separate opinion. And *Jasper*'s holding did not depend on a separate opinion.

To the contrary, when describing how the annual report in *Jasper* was a "paradigmatic 'financial statement audit,'" this Court pointed to the testimony of

the company's CFO—not the outside auditor—and reasoned that "because the financial statements in the 2006 10-K had to comply with GAAP [the applicable accounting standard], that document falls into the category of admissible 'financial statement audits' under *Paddack*, not inadmissible 'special audits.'" 678 F.3d at 1123. In *Jasper*, it was the duty to prepare financial statements in accordance with applicable accounting standards—not an outside auditor's separate opinion—that brought the restatement within the business-records exception. Requiring an audit for the admissibility of financial statements would render many private company financial statements inadmissible and add another element to the business-records exception that does not exist.

If Hussain means to suggest that the restatement was inadmissible because Ernst & Young rejected it as inaccurate (AOB46–47), then Hussain is wrong. As the district court found, "E&Y only said it did not express an opinion one way or another regarding the restatement's accuracy—not that it was not accurate." ER69; *see* SER5160–61; Ex. 2445 at 11–12.

2. The district court did not abuse its discretion under Rule 403

Hussain next argues that even if the restatement were admissible as a business record, the district court should have excluded it under Rule 403. AOB49–52. But the district court's Rule 403 balancing deserves "considerable deference." *Barragan*, 871 F.3d at 702. The court acted well within its discretion.

Hussain disputes the restatement's probative value by noting that it concerned an Autonomy subsidiary. AOB49–50. But Hussain cannot deny that, as the district court found, "most of Autonomy's revenue flowed through the subsidiary," and thus errors in the subsidiary's financial statements flowed through to the parent company. ER33, 67. Hussain also asserts that the restatement included adjustments "unrelated to any supposed fraud," such as a change in accounting policy. AOB49 (citing ER261–62, 1811). But this Court rejected the same argument in *Jasper*, 678 F.3d at 1124.

Hussain disputes Yelland's expertise and claims that the restatement testimony risked confusing the jury because "synthesizing and comparing complex U.S. and U.K. accounting guidelines" is difficult. AOB51.[9] But on appeal, as below, Hussain "fail[s] to explain why the distinction among accounting rules mattered in terms of revenue recognition; the restatement indicated that the change principally affected the expensing of research and development costs." ER69; *see*

[9] Hussain incorrectly claims that the district court "precluded" Yelland and Anderson "from testifying about accounting norms or standards because they were not experts." AOB51 (citing ER1810). Although Yelland and Anderson were experienced U.K. chartered accountants (SER114–19, 3047, 3051–53), the government did not move to qualify them as experts because no expert opinion testimony was needed. The court denied Hussain's *Daubert* motion. SER119. The court made no across-the-board finding that either witness lacked expertise. The court merely precluded inquiry during Anderson's testimony about whether Ernst & Young's disclaimer (*see* ER69) was usual or unusual.

SER5346–47. Moreover, Hussain and Autonomy purported to comply with *both* U.S. and U.K. guidelines. *E.g.*, SER1057–58, 1175, 4425, 5477.

Hussain attacks the credibility of HP witnesses and claims that they "had a clear incentive to scapegoat Autonomy for Hewlett-Packard's continued struggles post-acquisition, which benefitted Hewlett-Packard's civil litigation strategy." AOB11. But these witnesses—Manish Sarin, Andrew Johnson, and Leo Apotheker—were *former* HP employees, not current ones, and lacked the incentive to lie that Hussain suggests. Indeed, HP fired Apotheker shortly after the disastrous Autonomy acquisition. SER3942. And again, Hussain had ample opportunity on cross-examination to challenge witnesses' credibility.

D. The district court properly excluded certain post-fraud evidence

Hussain claims that the district court "compounded" its supposedly erroneous admission of the restatement by excluding certain defense evidence about actions that HP took or failed to take after Hussain defrauded it, resulting in "unbalanced" evidentiary rulings. AOB 52–57. The court rightly rejected this argument. ER70–85. The court had "no doubt that its final evidentiary rulings" were "justified and equitable." ER82.

First, Hussain's "unbalanced" argument rests on a false premise: that the restatement and the excluded defense evidence both constituted "post-closing evidence." AOB52. They did not. Although the restatement was completed after

the HP deal closed, it was not "post-closing" evidence at all. Rather, it accurately described Autonomy's *pre-closing* financial state; this is what makes it a restatement. ER32–33; *see, e.g.*, SER5173.

Second, as the district court found, Hussain's excluded post-fraud evidence was not "of equal probative value to the restatement." ER70. While "[t]he restatement went directly to the question of falsity," the defense's excluded post-fraud evidence "consisted largely of impeachment on collateral or irrelevant issues." *Id.* Each piece of excluded evidence was irrelevant or only marginally relevant to any offense element; represented impeachment on collateral issues; and would have been unduly prejudicial, confusing, and time consuming. ER69–82. Hussain focuses on two categories of evidence.

1. Autonomy's hardware sales

Part of Hussain's defense concerned whether and when HP knew about Autonomy's reselling of standalone computer hardware made by other companies.

To appeal to investors and potential acquirers, and to make Autonomy appear like it was growing, Hussain and Lynch touted it as a "pure software" company. ER29–30, 36–72; *e.g.*, Ex. 428 at 11; Ex. 592; SER3144 (Autonomy "very frequently" called itself a "pure software company," including in analyst calls).

But in reality, Autonomy resold standalone computer hardware at a loss, "solely for the purpose of padding revenue," to create the illusion of growth. ER29–31. Hussain concealed from HP, analysts, and investors the fact that substantial portions of Autonomy's revenue came from these low-margin hardware sales, which investors devalue, and not from high-margin software sales, which investors covet. ER29–39. Four market analysts testified uniformly that they were unaware of standalone hardware sales, and that the undisclosed amounts mattered to their analyses of Autonomy. ER29, 34–36.

Hussain's defense was that HP knew all about Autonomy's hardware business but "didn't care in the slightest." SER244. To support this argument, Hussain elicited testimony that, before the acquisition, Autonomy sold small amounts of HP hardware. SER1929. And Hussain elicited testimony from an HP advisor that during the diligence process, the advisor learned that certain Autonomy software contracts included a hardware element, although he did not know the extent. This advisor then concluded—like the market analysts (ER31–32) and like CEO Leo Apotheker (ER36)—that the information he received at the time was entirely consistent with Autonomy's disclosure that "appliances" (software and hardware sold together) were a "small part of Autonomy's business" with a margin profile in line with its software-license business. SER1095–97, 3159–61, 3828, 3902–09, 4683, 4785, 4810–12, 5375–78; Ex. 1352.

The district court did not preclude this evidence or Hussain's related arguments. Instead, the court limited certain evidence about what HP did or did not do *after* Hussain and his coconspirators misled it.

Hussain highlights two pieces of excluded post-fraud evidence: an email sent by HP employee Kathryn Harvey to Manish Sarin, a member of the HP diligence team, on November 15, 2011, more than a month after the acquisition, in which Harvey referred to $100 million in hardware sales (Ex. 2451); and an Ernst & Young PowerPoint presentation shown to HP CFO Catherine Lesjak, which in a column on page 7 described hardware sales as making up 11% of Autonomy's portfolio (Ex. 8220). AOB53. The district court rightly excluded the post-fraud evidence. ER69–85.

(i) Harvey email

Hussain sought to introduce the Harvey email to impeach Sarin's testimony that he was unaware during diligence of standalone hardware and that these hardware sales would have mattered to him. ER73. This email was hearsay and would have been admissible only to show the effect on Sarin—not for the email's truth. And Hussain had no interest in examining Harvey—the email's sender—about what *she* knew and was told. *See* ER1847 (offering Ex. 2451 but expressing no interest in calling Harvey); CR342 at 1–2 (same); *see also* ER1364–70.

Instead, Hussain sought only to undercut Sarin's insistence that he was unaware of $100 million in hardware sales. ER73. The district court permitted Hussain to do this. Hussain cross-examined Sarin about the email's effect on him; Sarin testified that he "thought [Harvey] had her facts wrong." SER3847; ER73.

As the court found, this evidence "did not actually tend to rebut government witnesses' contention that HP did not learn until months after the acquisition that Autonomy was selling hardware, separate and apart from any software sales." ER73. The email "does not suggest that Sarin 'knew the truth' about the hardware sales—indeed, it suggests the contrary. And in any event, the Court allowed the defense to inquire into Sarin's response to Harvey's e-mail, further reducing the probative value of additional investigations of the topic." ER73 (citing SER3847).

(ii) PowerPoint

The district court rightly excluded the PowerPoint. Hussain's proffer of Lesjak's testimony said nothing about her receipt of the PowerPoint, her reading of it, or her comprehension of the chart on page 7 that 11% of Autonomy's portfolio was hardware sales. Hussain wanted to offer a document for the effect on the hearer (Lesjak) without any testimony she heard it. ER1367–69. Exclusion of this hearsay evidence was proper.

The PowerPoint also would have been cumulative of the parties' stipulation that "Hewlett-Packard had access to Autonomy's books and records, as well as

Deloitte's work papers, shortly after the acquisition closed on October 3rd, 2011," and that Hussain kept working at HP through May 2012. SER5803; Ex. 6990. Hussain thus had the evidence he needed to argue that HP did nothing *after* learning of the nature and extent of Autonomy's hardware sales. *E.g.*, SER6043.

But even if Hussain were correct that HP knew *before* the acquisition all the details of Autonomy's hardware sales, the analysts who testified at trial—objective observers—did not know. And knowing the truth about Autonomy's hardware sales would have dramatically transformed their assessment of the company pre-acquisition. ER34–36.

Hussain's excluded evidence went to whether HP had in fact relied on Autonomy's lies. But materiality is an objective standard; actual reliance by HP was not an element of any of the charges the government brought. *United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017); ER71.[10]

2. HP's post-fraud valuation of Autonomy

Hussain incorrectly asserts that the district court "prevented" him from presenting evidence about HP's post-fraud tax and purchase-price accounting valuations of Autonomy. AOB56–57. In fact, "the defense brought out many of

[10] Hussain also fails to show that admission of this evidence could have had any bearing on his securities-fraud conviction (Count 16), which hinged on whether statements in the August 2011 press release were material to purchasers and sellers of HP securities.

the write-down-related issues on which it sought to introduce extrinsic evidence during cross-examination." ER75–76 (citing examples). Additional evidence would have been irrelevant, cumulative, and unhelpful to the jury. ER76–78. How HP assessed Autonomy's value for tax and accounting purposes *post-acquisition* does not affect the information that was available to the relevant decisionmakers and analysts *pre-acquisition*. ER77–78.

Hussain sought to present reports prepared by outside entities. But as the district court rightly recognized, ER77–78, these post-fraud reports were not probative of any offense element and did not tend to contradict or impeach the restatement. But "[e]ven if these reports did have some relevance to the issues in this case," the court found that "they were highly confusing, needlessly introducing new accounting standards into the case," and were thus "also properly excluded under Rule 403." ER78.

E. Hussain presented a meaningful defense

This Court should "reject [Hussain's] attempts to 'constitutionalize' his evidentiary claims." *United States v. Waters*, 627 F.3d 345, 352–53 (9th Cir. 2010); *see* AOB45, 57–58.

The Constitution allows trial judges to exclude evidence that—as here—is "repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues." *Holmes v. South Carolina*, 547 U.S. 319,

326–27 (2006). Trial judges have "'wide latitude.'" *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986) (citation omitted).

The district court did not deprive Hussain of his right to present a meaningful defense. *See Gadson*, 763 F.3d at 1200–01. He introduced scores of exhibits, vigorously cross-examined witnesses, and argued several defense theories to the jury. He also retained an expert to attempt to rebut the restatement, *see* SER401, although he ultimately chose not to call him. ER78.

Precedent thus forecloses Hussain's efforts to "transform the exclusion of this evidence into constitutional error." *Waters*, 627 F.3d at 353–54. Hussain could still "present the substance" of his defense. *United States v. Spangler*, 810 F.3d 702, 708 (9th Cir. 2016). And "the excluded evidence" was not "significantly probative," so "no constitutional error occurred." *United States v. Lindsay*, 931 F.3d 852, 867 (9th Cir. 2019).

F. Any evidentiary error was harmless

The Court will reverse a nonconstitutional evidentiary error only if it more likely than not affected the verdict. *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004). Normal harmless-error review applies here. Even if the district court erred in evidentiary rulings, these were not constitutional errors: they did not "significantly undermine[] fundamental elements of [Hussain's] defense." *United States v. Scheffer*, 523 U.S. 303, 315 (1998). But even if constitutional error

occurred, it was harmless beyond a reasonable doubt. *See United States v. Larson*, 495 F.3d 1094, 1107–08 (9th Cir. 2007) (en banc). The Court thus "need not determine" which harmlessness standard applies. *United States v. Markevich*, 775 F. App'x 287, 290 n.1 (9th Cir. 2019).

The district court found that even if it had admitted every single piece of post-fraud evidence that Hussain sought to introduce, and "even if the jury had adopted all the inferences the defense hoped it would from that evidence," this evidence "still would not have negated the government's evidence *on any element of any of the charged offenses*." ER85 (emphasis added).

The court emphasized that the government presented "exhaustive" evidence "from multiple witnesses to support each element of the charged conduct" and "had multiple sources of corroboration for a great number of facts." *Id.* The jury "would all but certainly have reached the same verdict no matter the Court's evidentiary rulings." *Id.* Hussain thus "cannot demonstrate prejudice." *Id.*

Indeed, even without the restatement, the government proved more than $215 million in wrongly recognized revenue. SER5832–5922, 6484. Analysts also uniformly testified that Autonomy's hardware sales were unknown to the market and were material. ER34–35; *e.g.*, SER1043, 1094–95, 1173, 5824, 3144–46, 3214–16, 4797–4806, 4810.

Plus, Autonomy's hardware reselling was just one of many subjects Hussain and his coconspirators lied about. The scheme included many forms of accounting fraud—backdating, side deals, "roundtrips," and more—unrelated to hardware sales. ER11–36. For Hussain to suggest that HP would have bought Autonomy for $11.7 billion even knowing about all these lies is "simply ludicrous." SER6241 (sentencing testimony); *see* ER34–39, 71–73.

Hussain ignores the district court's no-prejudice findings. But the court was "in the best position to assess" how evidentiary rulings affected the trial's outcome. *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995). Any evidentiary error was undoubtedly harmless.[11]

V. THE DISTRICT COURT PROPERLY CALCULATED THE FORFEITURE MONEY JUDGMENT

A. Standard of review

This Court generally reviews a district court's interpretation of federal forfeiture law de novo and reviews factual findings for clear error. *United States v. Hernandez-Escobar*, 911 F.3d 952, 955 (9th Cir. 2018); *United States v. Casey*, 444 F.3d 1071, 1073 (9th Cir. 2006). Unpreserved claims are reviewed for plain error. *United States v. Beecroft*, 825 F.3d 991, 995 (9th Cir. 2016). Invited errors are unreviewable. *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015).

[11] Hussain's cumulative-error claim (AOB57–58) fails for the same reasons.

B. As Hussain concedes, precedent forecloses his main claim

Although Hussain argues that "no statutory basis" exists for in personam forfeiture money judgments, he concedes that binding precedent forecloses this claim. AOB58–62; *see, e.g.*, *United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019); *United States v. Lo*, 839 F.3d 777, 792–94 (9th Cir. 2016).

Hussain still purports to preserve "for further review" his theory that Ninth Circuit precedent contravenes *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). AOB59. But as he admits, the Court rejected his argument as recently as this year. *Nejad*, 933 F.3d at 1165.

C. Hussain's two fallback claims are waived and meritless

Hussain next argues that even if the district court had statutory authority to impose a forfeiture money judgment, the court incorrectly calculated the $6.1 million figure by including money that he never received. AOB62–64.

Hussain is wrong. The court found that the $6.1 million figure represented Hussain's actual personal gain from the HP acquisition. SER6222–23, 6271. So even if *Honeycutt* applies here, this forfeiture order satisfies it because Hussain personally "obtained" this $6.1 million—that is, he procured, gained, or acquired it directly from his "participation in the crime." *Honeycutt*, 137 S. Ct. at 1632–33; *see United States v. Anthony*, 747 F. App'x 628, 629 (9th Cir. 2019) (declining to

"resolve whether *Honeycutt* extends to forfeiture under 18 U.S.C. § 981(a)(1)(C)" because forfeiture order was "consistent with *Honeycutt* regardless").

Hussain attacks the $6.1 million calculation in two ways, AOB63–64, both meritless.

1. Hussain had no right to an offset for his foreign tax obligations

Hussain argues that the district court should have reduced the $6.1 million forfeiture order to refund him for U.K. tax and National Insurance withholdings that he claims he paid after the Autonomy acquisition. AOB63.

Hussain cites no authority for this undeveloped claim. The Court should decline to consider it. *See United States v. Alonso*, 48 F.3d 1536, 1544–55 (9th Cir. 1995) (declining to consider undeveloped claim that defendant failed to support with "any authority").

Hussain's tax-offset claim also fails on the merits. Unlike a fine, which a district court can reduce or eliminate, a court lacks any discretion to reduce or eliminate "mandatory criminal forfeiture," so when "the government has met the requirements for criminal forfeiture, the district court must impose [it], subject only to statutory and constitutional limits." *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012) (quotation marks omitted).

No such limits apply here. The government sought forfeiture under 28 U.S.C. § 2461(c) and 18 U.S.C. §§ 981(a)(2)(C) and 982(a). ER2669–70; CR519.

As the district court recognized, U.S. forfeiture law does not entitle Hussain to refunds for his foreign tax obligations. SER6222. The court would have lacked authority to grant Hussain's requested offset.

In a footnote, Hussain tries to distinguish Section 981(a)(2)(B) by claiming that since he is not an "entity," the statute does not prohibit his proposed tax offset. AOB63 n.13. Hussain cites no case for this theory. Courts have rejected similar arguments. *E.g.*, *United States v. Gorski*, 880 F.3d 27, 42–43 & n.13 (1st Cir. 2018). But even if Section 981(a)(2) does not *prohibit* Hussain's proposed offset, he identifies no authority *authorizing* it. Congress "clearly kn[ows] how to provide for offset in other situations," *United States v. Davis*, 706 F.3d 1081, 1084 (9th Cir. 2013), and did not provide for this one.[12]

2. The district court did not plainly err by using the October 2011 exchange rate to calculate Hussain's October 2011 gains

Finally, Hussain faults the district court for using the pound-to-dollar exchange rate that applied in October 2011 when the HP acquisition of Autonomy closed. AOB63–64. Hussain thinks the court should have used a 2019 exchange

[12] Hussain's remissions also earned him valuable U.K. benefits, including National Insurance. *See, e.g.*, U.K. Government, *What National Insurance is for*, https://www.gov.uk/national-insurance/what-national-insurance-is-for. Reducing the district court's forfeiture order to refund Hussain for U.K. tax obligations would give him an unjustified windfall.

rate that applied at the time of his sentencing, since he purportedly "did not convert his pounds to dollars in October 2011." AOB63.

Again, Hussain fails to cite any authority supporting his undeveloped claim. The Court should not consider it. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) ("[A] bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.").

Hussain also waived this claim below by endorsing the same October 2011 exchange rate that he now attacks the district court for using. Before sentencing, when calculating the "amount of money" that he "actually acquired as a result of the offense," Hussain himself used the October 2011 exchange rate (1.5432)—the rate that applied on "the day the deal closed." CR527 at 2 & n.4. In a footnote, Hussain added that if "the government wants him to forfeit his gain in dollars *today*," then Hussain thought it would be "more appropriate to apply the *current* exchange rate of 1.3038," because he "was paid in pounds and has always held the money in pounds." *Id.* Hussain cited no authority supporting his request.

Hussain then abandoned his request. At an April 2019 hearing about the Sentencing Guidelines, Hussain calculated his gain by using the October 2011 exchange rate from "the day the deal closed." SER6175. Using that same exchange rate, the district court determined a gain of $6,112,000. SER6176.

At the May 2019 sentencing hearing, when the court explained its reasons for the $6.1 million forfeiture order, Hussain did not object to using the October 2011 exchange rate. SER6222–23. Nor did he object to this exchange rate when discussing forfeiture later in the hearing. SER6253–54.

To the contrary, Hussain proposed a forfeiture amount ($2,628,290) based on the same October 2011 exchange rate he now attacks. SER6254.[13] The invited-error doctrine therefore bars Hussain's claim. *See United States v. Lynch*, 903 F.3d 1061, 1080 (9th Cir. 2018); *Myers*, 804 F.3d at 1254.

At most, the claim is reviewed for plain error. *Beecroft*, 825 F.3d at 995. But since no authority supports Hussain's theory, the district court's alleged error cannot be "clear or obvious under current law." *Olano*, 507 U.S. at 734; *see Beecroft*, 825 F.3d at 996. Forfeiture law concerns itself not with what "the defendant owns at the time of sentencing" but with what he obtained from his crime; otherwise, he could "escape the mandatory forfeiture penalty Congress has imposed simply by spending or otherwise disposing of his criminal proceeds before sentencing." *Nejad*, 933 F.3d at 1165.

Nor did the district court's use of an October 2011 exchange rate (1.5432) rather than a 2019 exchange rate (1.3038) affect Hussain's substantial rights, or

[13] Under Hussain's calculation, the 2019 exchange rate resulted in a forfeiture figure of $2,220,554.46. CR527 at 2 n.4.

seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003).

CONCLUSION

The Court should affirm Hussain's convictions and sentence.

Dated: November 15, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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