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September 15, 2024

VIA ECF & ELECTRONIC MAIL

The Honorable Eric R. Komitee
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: U.S. v. Watson, 23-cr-82 (E.D.N.Y.)

Dear Judge Komitee:

Defendant Carlos Watson, by and through his undersigned counsel, respectfully submits this letter in support of his renewed motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and, in the alternative, his motion for a new trial under Rule 33. The Court erred in instructing the jury that it could find Mr. Watson guilty of wire fraud absent any evidence that he intended to cause financial or property loss to Ozy's investors. The Court's error resulted in Mr. Watson's conviction on Counts Two and Three of the indictment. Because this error infected the entire trial, acquittal or a new trial on Count One is also warranted. Therefore, the conviction should be reversed, and Mr. Watson should be acquitted of all counts or, in the alternative, granted a new trial.

I. Background

On February 22, 2023, Mr. Watson was indicted by a grand jury in the Eastern District of New York. Count Two of the indictment charged Mr. Watson with conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 1349 and 3551 *et seq*. Dkt. No. 1 at 39–40. The Government alleged that:

> In or about and between January 2018 and October 2021, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants CARLOS WATSON and OZY MEDIA, INC., together with others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud one or more investors, and potential investors in and lenders and potential lenders to, OZY MEDIA, INC., and to obtain money and property from them by means of one or more materially false and fraudulent pretenses, representations and promises, all affecting financial institutions and others, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by

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> means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, contrary to Title 18, United States Code, Section 1343.

Id.

Count Three charged Mr. Watson with aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(I), 1028A(b), 1028A(c)(5), 2 and 3551 *et seq*. *Id.* at 40. The Government alleged that:

> In or about and between February 2020 and February 2021, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant CARLOS WATSON, together with others, during and in relation to the crime charged in Count Two, did knowingly and intentionally transfer, possess and use, without lawful authority, one or more means of identification of one or more persons, knowing that the means of identification belonged to other persons.

Id.

At trial, the Court instructed the jury on the first element of the wire fraud charge, existence of a "scheme to defraud," as follows:

> As with securities fraud, it does not matter whether the alleged unlawful conduct was successful or not, whether any victims were deceived by the defendant, or whether the defendant profited or received any benefits as a result of the alleged scheme. Success is not an element of wire fraud; the focus is the existence of a scheme or artifice, whether it worked or not. … As with securities fraud, even if you conclude that the defendant believed that ultimately everything would work out, so that no one would lose any money, that does not require a finding by you that the defendant acted in good faith. Again, no amount of honest belief on the part of a defendant that the scheme will ultimately make a profit for the investors will excuse fraudulent actions or false representations by him.

Tr. at 4505–07.

With respect to the aggravated identity theft count, the Court gave the jury the following instructions regarding the second element of the charge, commission of a predicate offense:

> The second element that the government must prove beyond a reasonable doubt is that the defendant used, transferred or possessed the means of identification during and in relation to the offense charged in Count Two of the indictment—namely, conspiracy to commit wire fraud. A means of identification is used "during and in relation to" a crime when that means of identification is used in a manner that is fraudulent or deceptive and is at the crux of what makes the conduct criminal.

> A person uses, transfers, or possesses a means of identification in relation to a crime if the means of identification had a purpose, role, or effect with respect to the crime. If you find defendant Watson not guilty on Count Two, it means that the government has not proved this second element of Count Three, and you must find also find him not guilty on Count Three. In other words, if you find that the government did not prove beyond a reasonable doubt that the defendant committed conspiracy to commit wire fraud as charged in Count Two, you must also find him not guilty on Count Three.

Id. at 4512.

Mr. Watson objected to the Court's "scheme to defraud" instruction at trial. He proposed revised jury instructions that made clear that he could not be guilty of wire fraud unless he intended to harm Ozy's investors. *See* Dkt. No. 135 at 27 ("In addition to proving that a statement was false or fraudulent and related to a material fact, in order to establish a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property."). However, the Court rejected these instructions. Mr. Watson moved for a new trial pursuant to Rule 29 motion on June 27, 2024, and the Court "reserve[d] judgment on that motion." Tr. at 2684. Mr. Watson was ultimately convicted by the jury on all three counts: conspiracy to commit securities fraud, conspiracy to commit wire fraud, and aggravated identity theft.

II. Argument

A. Rule 29

Rule 29(a) provides that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." "[A] district court will grant a motion to enter a judgment of acquittal on grounds of insufficient evidence if it concludes that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *see also United States v. Hoskins*, 44 F.4th 140, 149 (2d Cir. 2022).

Mr. Watson objected to the Court's wire fraud jury instruction at trial via his submission of revised instructions laying out the proper standard for wire fraud. The Court rejected Mr. Watson's revisions and preserved the issue. *See Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994) (holding that "address[ing a] charge in the proposed jury instruction" "adequately aprise[s] the district court of [a party's] position that the jury should be instructed" in a particular manner and that trial court's rejection of such proposed instructions makes "apparent that further efforts to object would be unavailing").

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Mr. Watson renews his motion for acquittal because the Court erred in instructing the jury regarding the "scheme to defraud" element of wire fraud. A jury instruction is "erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017). When such an erroneous jury instruction prejudices the defendant, it requires acquittal. *See U.S. v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016). "[A]n error is prejudicial where there is a reasonable probability that the error affected the outcome of the trial." *Id.* at 102 (internal quotation marks omitted).

The error in the Court's jury instructions directly affected the jury's decision to convict Mr. Watson on Counts Two and Three of the indictment. As this Court noted in its jury instructions at trial, in order to establish the commission of wire fraud, the Government must demonstrate the existence of a "scheme to defraud." Tr. at 4504. A "scheme to defraud" requires, in turn, that the Government prove that Mr. Watson "possessed a fraudulent intent." *U.S. v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987). And "fraudulent intent" requires a showing of intended or contemplated harm to the victims. *See id.*; *see also id.* at 98 ("Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim.");[1] *United States v. Jabar*, 19 F.4th 66, 76 (2d Cir. 2021) ("Because an intent to deceive alone is insufficient to sustain a wire fraud conviction, misrepresentations amounting only to a deceit must be coupled with a contemplated harm to the victim." (internal quotation marks omitted)); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970) (concluding "that the evidence was insufficient to demonstrate a fraudulent intent" because there was no "evidence of an intent to harm the victims"). Indeed, because contemplation of harm to the victim is a critical element of a wire fraud charge, in another wire fraud case before this Court, this Court properly noted in its instructions to the jury that, "in order to establish a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property." *United States v. Zhukov*, 18-cr-633-EK-1 (E.D.N.Y.), Dkt. No. 368 at 20.

However, in this case, the Court instructed the jury that "even if you conclude that the defendant believed that ultimately everything would work out, so that no one would lose any money, that does not require a finding by you that the defendant acted in good faith. Again, no amount of honest belief on the part of a defendant that the scheme ultimately will make a profit for the investors will excuse fraudulent action or false representations by him." Tr. at 4507. This instruction is erroneous because it does away with the requirement that the Government must demonstrate the defendant's intent to harm the victims of the crime. If the defendant "believed that ultimately everything would work out, so that no one would lose any money," *id.*, then there can be no evidence of contemplated harm to the victims. The Court's jury instruction in this case only required the jury to find that Mr. Watson's representations amounted to deceit, thereby absolving the Government of its duty to show contemplated harm *in addition to* deceit.

[1] In the context of fraudulent intent, to "contemplate" harm means to "have [it] in view as a purpose"—in other words, to intend it. *United States v. Gatto*, 986 F.3d 104, 113 (2d Cir. 2021).

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The Court's jury instruction conflates the standards for conviction for securities fraud and wire fraud. While demonstration of intent to harm the victim is not required to establish securities fraud, it is an element of wire fraud. In an analogous case, a defendant "t[oo]k issue with the district court's instruction that '[a] defendant's honest belief that ultimately no one would lose money, or even that everyone would make a profit, is not a defense to securities fraud.'" *United States v. Gramins*, 2022 WL 6853273, at *5 (2d Cir. 2022). There, the Second Circuit held that the instruction was permissible only because "the district court expressly limited the no-ultimate-harm charge instruction to *securities* fraud. Therefore, the district court did not fail to adequately instruct the jury concerning *wire* fraud." *Id.* (emphasis in original). In fact, the Second Circuit recognized that the "scheme to defraud" element of wire fraud requires "proof that defendants possessed a fraudulent intent, meaning that defendants must either intend to harm the victim or contemplate that their victim may be harmed." *Id.* at *4 (internal quotation marks omitted). By contrast, in this case, not only did the Court not limit the no-ultimate-harm charge instruction to securities fraud, it also explicitly applied the charge to the wire fraud count as well. *See* Tr. at 4507 (discussing no-ultimate-harm charge under wire fraud instructions).

In another analogous case, *United States v. Rossomando*, the Second Circuit dealt with an identical question to the one presented here: whether a mail fraud instruction stating that "a belief by the defendant, if such a belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that he acted in good faith" was permissible. 144 F.3d 197, 199 (2d Cir. 1998). As in this case, the instruction defined intent to defraud as "to act knowingly and with the specific intent to deceive for the purpose of causing some financial or property loss to another." *Id.* at 199. The Second Circuit reversed the district court's judgment for "plain error" because, it "determined that the court's initial charge could easily have misled the jury into convicting Rossomando without finding that he intended to harm the Pension Fund." *Id.* at 203. The Court of Appeals explained that, "[t]hrough a skillful parsing of the court's charge, one might attempt to downplay the potential confusion arising from the 'no ultimate harm' instruction by arguing that, whatever the jury should have been expected to make of this instruction, it was told that it still needed to find 'specific intent.' However, at least where there was an insufficiently clear predicate for the 'no ultimate harm' instruction, the task that jurors were being asked to perform in order to reconcile this instruction with the earlier instruction requiring proof of 'specific intent to defraud' was simply too ambiguous and obscure to inspire confidence." *Id.* at 202. The Second Circuit further noted that "[t]he fact that the 'no ultimate harm' instruction came toward the end of the charge only exacerbated the problem." *Id.* (citing *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word.")). The Second Circuit held that "the court's initial charge could have utterly vitiated Rossomando's defense." *Id.* at 203.

Likewise, here, the inclusion of the no-ultimate-harm charge came after the Court's explanation of the intent to defraud standard, creating ambiguity in the minds of the jury as to the proper standard to apply. The Court provided no further clarification of the standard. Thus, the instruction "utterly vitiated" Mr. Watson's defense by falsely leading the jury to believe that they did not have to find an intent to defraud in order to convict. *See id.*

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The Court's error in administering the jury instruction was prejudicial to Mr. Watson because, without it, Mr. Watson could not have been convicted by a reasonable trier of fact. The Second Circuit has stated that, even where some evidence supports the Government's theory, if it is not sufficient to establish guilt beyond a reasonable doubt, the defendant must be acquitted. *See United States v. Hoskins*, 44 F.4th 140, 152 (2d Cir. 2022); *see also United States v. Guadagna*, 183 F.3d 122, 133 (2d Cir. 1999) (granting Rule 29 motion as to wire fraud count because "there was insufficient evidence to allow the jury verdict" to stand); *United States v. Hassan*, 578 F.3d 108, 134 (2d Cir. 2008) ("directing the district court to enter an order of acquittal" because "the evidence was insufficient to convict Hassan of the forty-one substantive counts of money laundering").

Here, the Government did not present sufficient evidence at trial to establish beyond a reasonable doubt that Mr. Watson intended to deprive investors of money or property. The Government's case focused on the representations that they alleged Mr. Watson made, not his intent in making those representations. *See, e.g.*, Tr. at 662 ("Q: [W]hat do you understand Carlos to be saying he told to Maurice Werdegar? A: I understood him to be saying that he told Maurice . . . that we have about $5 million in cash currently . . . and that we are burning at 500K."). In contrast, the defense presented an abundance of evidence establishing Mr. Watson's state of mind in making representations to investors—specifically, his *lack of intent* to cause financial loss or harm to investors. *See, e.g.*, 3128–32 ("Q: Did you understand the [Discovery] investment to be coming from a Ms. Winfrey affiliate company? A: Very much so."); 3138 ("Q: Was this part of the basis for you believing that Live Nation was going to be an investor in 2019? A: Very much so, yes. Q: Did you consider this to be in the final round of discussions? A: Correct, yes."); 3301 ("My belief about what was important to early-stage investors was team, content, vision, partnerships.").

Moreover, in the prototypical fraud case, the perpetrator will pilfer the company while seeking to limit his own financial exposure. But in this case, the jury heard how much money Mr. Watson poured into Ozy, and how little he got out of it. *See, e.g.*, Tr. at 768 ("[W]e had been going without salary on and off primarily for the better part of 2018, 2019, 2020, and so, we had foregone a kind of significant amount of cash ourselves. And on top of that, we had invested a lot of our own cash. As I said, Carlos, much more than me."); *id.* at 2184 ("During my period of time at OZY, I do know that there were periods of time when Carlos . . . did not take compensation."); *id.* at 3013 ("I didn't take salary for a long time. I think I was—or I know I was the lowest paid person full time in the company for, you know, for most of the time there. . . . Q: So what, approximately, was the value of your not taken salary to OZY? A: Probably a little more than $5 million."); *id.* at 3014 ("So investors want to see you put skin in the game. . . . And so not only did I put in my own money, but they knew that when times got hard, I made sure we made payroll by not sometimes paying myself."); *id.* at 3015 ("Q: [H]ow much is that in terms of just your personal investment? A: Probably just a little under $20 million."). This evidence directly contradicts any assertion that Mr. Watson intended to harm investors. Rather, Mr. Watson's good-faith belief that Ozy would succeed is evinced by his actions. The Government presented insufficient evidence to establish an intent to defraud, and, while Mr. Watson had no obligation to do so, he presented substantial evidence to the contrary. Therefore, without the Court's erroneous

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instruction applying the no-ultimate-harm charge to the wire fraud count, no rational jury could have found Mr. Watson guilty beyond a reasonable doubt on that count.

Moreover, not only does the Court's erroneous instruction affect Count Two, but it implicates Count Three—the aggravated identity theft count—as well, because Count Three relies on Count Two as a predicate. *See* Dkt. No. 1 at 40, Count Three (aggravated identity theft charged "during and in relation to the crime charged in Count Two"). The Court stated in its jury instructions that if the Government could not prove the wire fraud count, it also could not prove the aggravated identity theft count, by definition. *See* Tr. at 4512 ("If you find defendant Watson not guilty on Count 2, it means that the government has not proved the second element of Count 3, and you must also find him not guilty on Count 3. In other words, if you find that the government did not prove beyond a reasonable doubt that the defendant committed conspiracy to commit wire fraud, as charged in Count 2, then you must also find him not guilty on Count 3."). Thus, a reversal of the wire fraud count requires reversal of the aggravated identity theft count as well.

Therefore, under Rule 29, the Court was required to enter a judgment of acquittal for Counts Two and Three. Given the lack of evidence of a "scheme to defraud," no rational trier of fact could have found Mr. Watson guilty beyond a reasonable doubt of wire fraud. The Court's error in the jury instructions directly led to Mr. Watson's convictions for wire fraud and aggravated identity theft, and the addition of two years to his mandatory minimum. The conviction must be reversed.

Finally, Mr. Watson also moves for a judgment of acquittal under Rule 29 on Count One of the indictment because the Court's erroneous instruction was a miscarriage of justice that pervaded the entirety of the jury verdict. "A trial may be unfair to the moving party if substantial errors were made in admitting or excluding evidence, or in charging the jury, or if misconduct by counsel during the course of the trial causes unfair prejudice to the moving part." *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 573 (S.D.N.Y. 2011). When such an "instructional error compromise[s] the reliability of the verdict," a defendant's Rule 33 motion must be granted. *United States v. Small*, 2023 WL 4373392, at *21 (E.D.N.Y. Jul. 6, 2023). In this case, the Court's erroneous jury charge created a manifest unfairness to Mr. Watson by misleading the jury about the mens rea necessary for conviction. The Court's "ailing instruction by itself [] infected the entire trial," affecting the jury's understanding and deliberations on all counts. *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001). Therefore, acquittal on Count One is warranted.

B. Rule 33

In the alternative, Mr. Watson moves for a new trial under Rule 33. Rule 33(a) states that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." "The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. . . . The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (internal quotation marks omitted). Rule 33 "gives the trial court broad

discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *Id.* at 133 (internal quotation marks omitted).

In *United States v. Scotti*, 47 F.3d 1237 (2d Cir. 1995), the Second Circuit affirmed the district court's grant of the defendant's Rule 33 motion for a new trial. *Id.* at 1247. The district court granted the motion "because it feared that its jury instructions misstated an element of the substantive offense." *Id.* at 1241. An element of the offense was "knowing participation," and the district court gave a "conscious avoidance" charge on that element over the defendant's objection. *Id.* at 1242. The district court's instruction was as follows: "If you find beyond a reasonable doubt that Robert Rodriguez was aware that there was a high probability that the purpose of the mortgage he had been brokering was *to facilitate the collection, through extortionate means*, of an extension of credit, but that he deliberately and consciously avoided confirming this fact so that he could deny knowledge if apprehended, then you may treat this deliberate avoidance as the equivalent of knowledge . . . ." *Id.* However, in granting the defendant's motion for a new trial, "the district court decided that its instruction was erroneous" because "mere facilitation of collection cannot amount to participation within the ambit of the extortionate collection statute." *Id.*; *see also Hassan*, 578 F.3d at 134 (vacating Hassan's conviction on certain counts and remanding to the district court for a new trial because "there was a fundamental error in the jury instructions that was not harmless").

Likewise, the interest of justice requires that Mr. Watson be granted a new trial. As discussed above, the Court's erroneous "scheme to defraud" jury instruction misled the jury into believing that they could convict Mr. Watson of wire fraud even in the absence of any evidence demonstrating Mr. Watson's intent to deprive investors of money or property. That is not the law. Rather, there must be "competent, satisfactory and sufficient evidence in the record" that supports the jury's finding that Mr. Watson intended to deprive investors of money or property. As explained in the previous section, the Government has presented no such evidence to this effect, and Mr. Watson has presented evidence on several occasions disproving his intent to harm investors. Given the dearth of evidence supporting the existence of a "scheme to defraud" in this case, the jury did not have sufficient grounds to convict Mr. Watson of wire fraud. Not only did the jury instruction error directly result in Mr. Watson's conviction for wire fraud, but it also caused his conviction for aggravated identity theft, which was predicated on the wire fraud count. This Court must set aside the unfounded jury verdict and order a new trial to avert a miscarriage of justice.

Finally, Mr. Watson also alternatively moves for a new under Rule 33 on Count One of the indictment for the same arguments discussed in Section II.A, *supra*.

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III. Conclusion

For these reasons, Mr. Watson respectfully requests that the Court grant his renewed motion for a judgment of acquittal under Rule 29 or, in the alternative, his motion for a new trial under Rule 33.

Sincerely,



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Counsel for Mr. Watson

cc: Counsel of Record (by email and ECF)

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