JRS/GK/DAS
F. #2021R00900

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against - No. 23-CR-82 (EK)

CARLOS WATSON and
OZY MEDIA, INC.,

Defendants.

----------X

THE GOVERNMENT'S OPPOSITION TO THE DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

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The government respectfully submits this letter in response to the defendants' post-trial motions. See ECF Nos. 314 ("Mot."), 315. The motions are procedurally improper, time barred, and totally without merit. They should be denied in their entirety.

BACKGROUND

A. The Evidence at Trial

As proven at trial through the testimony of Samir Rao and Suzee Han — defendant Carlos Watson's two top deputies at defendant Ozy Media, Inc. — Watson, Rao and Han engaged in a multi-year scheme to "lie[] to investors, a number of them, providing them false information with the intent of getting them to invest money in" Ozy. Trial Transcript ("Tr.") 192 (testimony of Rao); see also Tr. 1871 (testimony of Han) ("We lied to investors about how well the business was performing and how well the business had performed to get -- to secure money from them."). These lies included "lies about the amount of money that [Ozy was] earning, so [its] revenue . . . [and] lies about how much money [Ozy] ultimately earned, [its] profit. So, in general, lies about [Ozy's] financial performance." Tr. 192-93 (testimony of Rao). The conspirators agreed to "lie[] about those things because [they] wanted to give those investors a sense that [the] company was doing better than it actually was and that it was a more valuable company than it actually was and that it, therefore, was more deserving of their investment. [The conspirators] did that because [they] needed their investment because [Ozy was] running out of cash and . . . didn't have enough cash to continue to operate the company successfully." Tr. 193 (testimony of Rao); see also Tr. 1871 (testimony of Han) ("If we told investors the truth of how OZY was doing at the time, then no investor would invest in a company was not performing well.").

Watson was the leader and driver of the scheme. See Tr. 194 (testimony of Rao) ("[I]n the scheme, [Watson] was the person that I committed these crimes with. He was the one

who either suggested or in other cases approved the actions that we took, and he's the person that I did these crimes with, along with Suzee Han."); Tr. 195 (testimony of Rao) ("[A]ll the elements of the scheme were ultimately taken -- undertaken either with [Watson] directly or with his approval and general knowledge."); Tr. 1872 (testimony of Han) ("[Carlos] was the one who told us, meaning me and Samir what to do and what he wanted done. And, so, I ultimately reported up to Carlos during my time at OZY and he was the one that for the most part led our investor conversations and told us what on do, 'us' meaning me and Samir."); Tr. 1909 (testimony of Han) ("A: [Watson] gave me some top line revenue numbers that he wanted to show in the deck. Q: What do you mean by that? A: He said he wanted to see revenue be X, Y, and Z in the deck and told me to update the deck to reflect that. Q: Were those the real revenue numbers? A: No."); Tr. 1919 (testimony of Han) ("I would not sen[d] information to investors or potential [acquirors] without approval from Carlos or Samir, or Carlos and Samir, and I wanted to get Carlos's input on this document before -- I wanted to get his input as well as approval on this document before it went out to anybody else.").

In particular, Watson repeatedly directed Rao and Han to fabricate financial results with a goal of telling investors what Watson thought they "need[ed] to hear." Tr. 374 (testimony of Rao) ("But invariably, one of the core questions that Carlos repeatedly asked of me and of us in those conversations that was a motivating factor in what numbers we actually showed to investors was what do these investors need to hear in order to invest, which is obviously different than what was true, or asking what was true, and therefore what should we show."); Tr. 1941-42 (testimony of Han) ("The top -- the top line number was determined with Samir and Carlos. So, for example, at the end of 2019 when we were drafting our year-end note to investors, the three of us determined what numbers we wanted to say we did, the company did

for 2019. And we determined between the three of us what number we wanted to say the company was going to do for 2020. . . . The numbers were generated in a way that were made up, but still could rationally make sense to someone looking at it."); Tr. 2189 (testimony of Han) ("We lied about the numbers to present OZY's financials in a way that investors would be excited about.").

Rao and Han's testimony was corroborated by communications to investors containing false statements directly sent by Watson, sent with Watson copied on the email, or sent after approval by Watson of a draft. Compare GX 5002 (email from Watson claiming $12 million of 2017 revenue), and GX 6423A (Ozy deck sent by Han to Watson and an investor claiming $22 million in 2018 revenue), with GX 5033D (internal Ozy document showing true 2017 revenue of $6.7 million and true 2018 revenue of $10 million); compare GX 6103 (letter from Watson to Abbas Maniar on January 4, 2020 falsely claiming Ozy earned $35 million in revenue in 2019), and GX 5045 (letter from Watson to Thomas Franco on January 6, 2020 falsely claiming Ozy earned $30 million in revenue in 2019), with GXs 2016 and 5126-A (internal Ozy documents showing true 2019 revenue of $13 million); compare GX 6109 (email from Han to Watson proposing to tell Marc Lasry Ozy earned $35 million in revenue in 2019), with GX 3003 (text message from Watson to Han stating that $35 million "seem[ed] too high" for Lasry); see also, e.g., GX 5091 (draft of communication containing false information sent to Watson for approval), GX 6230 (same), GX 5071 (same), GX 5025 (same), GX 5046 (same), GX 5076 (same), GX 3556 (same)

Rao and Han's testimony was further corroborated by testimony from investors, potential investors, and others recounting lies Watson had told them directly. See, e.g., Tr. 1349 (testimony of Thomas Franco that Watson told him that an investment with Goldman Sachs had

not gone through because "Goldman was being tough on the valuation"); Tr. 1421 (testimony of Abbas Maniar that Watson told him that Oprah Winfrey and Live Nation would each be investing $10 million in Ozy's Series D); Tr. 1746 (testimony by Hillel Moerman that Watson told him that Ozy was selling episodes of the Carlos Watson Show to YouTube for $50,000 an episode); Tr. 2374 (testimony of Joseph O'Hara that Watson told him that an investment with Goldman Sachs had not gone through because Ozy "was performing ahead of plan"); Tr. 2528 (testimony of Chetan Bansal that Watson told him that Google was leading Ozy's Series D fundraising round); Tr. 2558 (testimony of Bansal that Watson told him that Google's CEO, Sundar Pichai, wanted Google to buy Ozy for $600 million).

In addition, Rao and Han's testimony was corroborated by dozens of text messages among the conspirators discussing or furthering the fraudulent scheme. See, e.g., GX 3542 (message from Rao to Watson: "Remember Allison is on and YouTube is paying us."); GX 3539 (messages from Watson to Rao requesting updates on the fabrication of the general ledger); GX 3506 (messages from Watson to Rao: "Oprah . . . Leads the D"); GX 3512 (message from Watson to Rao and Han: "FYI – told Abbas that BF offered $300M to buy us. Helped to justify the $350M pre-valuation."); GXs 3006 and 3010 (messages among the conspirators discussing the need to conceal real financial numbers from Maurice Werdegar's daughter); GX 3005 (messages from Watson to Rao and Han to determine what fake numbers were shared with Harry Hawks); GX 3545 (messages from Watson to Rao coaching him on how to impersonate Alex Piper).

B. Procedural Background

The government rested its case on June 26, 2024. See Tr. 2611:11-12. The following day, before the defendants called their first defense witness, the defendants both

moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(a). See Tr. 2684:18-2685:3. The Court reserved judgment. See id.

On July 16, 2024, the jury convicted the defendants on all counts, and the jury was discharged that same day. See ECF No. 256; see also Tr. 4585:12-13. The defendants did not renew their motion at that time. Watson filed the instant motion 61 days later, on September 15, 2024. See ECF No. 314. Ozy Media joined the motion on September 16, 2024. See ECF No. 315.

LEGAL PRINCIPLES

A. Rule 29

Federal Rule of Criminal Procedure 29 allows for motions for "a judgment of acquittal." See Fed. R. Crim. P. 29(a), (c)(1). Such motions may be brought under either Rule 29(a) or 29(c). A motion under Rule 29(a) may be brought "[a]fter the government closes its evidence or after the close of all the evidence." Fed. R. Crim. P. 29(a). If the court reserves decision on a Rule 29(a) motion, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b); see United States v. Truman, 688 F.3d 129, 139 (2d Cir. 2012) ("Under Rule 29(b), when a district court reserves decision on a defendant's Rule 29 motion at the close of the Government's evidence, 'it must decide the motion on the basis of the evidence at the time the ruling was reserved.'").

A motion under Rule 29(c) may be brought "within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c). A district court must deny an untimely motion under Rule 29(c) — i.e., one made more than 14 days after a jury is discharged — unless the defendant demonstrates that the failure to act was the result of "excusable neglect." Fed. R. Crim. P. 45(b)(1)(B); see also United States v. Berry, No. 20-CR-84 (AJN), 2022 WL 17336512, at *5-6 (S.D.N.Y. Nov. 30, 2022) (holding arguments could not

be raised under Rules 29 or 33 where defendant did not comply with deadlines and could not show excusable neglect), aff'd, No. 22-3207-CR, 2024 WL 2232465 (2d Cir. May 17, 2024); United States v. Sabir, 628 F. Supp. 2d 414, 417 (S.D.N.Y. 2007) (dismissing as untimely Rule 29 and Rule 33 motions filed approximately 43 days after extended deadline).

Under either form of Rule 29 motion, "[t]here is only one ground for a motion for a judgment of acquittal[:] . . . [T]hat the evidence is insufficient to sustain a conviction of one or more of the offenses charged in the indictment or information." Wright & Miller, Federal Practice & Procedure § 466. The Second Circuit has been clear that "a defendant bears a heavy burden" in bringing such a motion:

> In considering such a challenge, we must credit every inference that could have been drawn in the government's favor and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt. We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence. Pieces of evidence must be viewed not in isolation but in conjunction, and the conviction must be upheld if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

United States v. Reifler, 446 F.3d 65, 94-95 (2d Cir. 2006). Indeed, a Court "may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." United States v. Raniere, 55 F.4th 354, 364 (2d Cir. 2022); accord United States v. Khamrokulov, No. 22-3153, 2024 WL 2207056, at *1 (2d Cir. May 16, 2024).

The "high degree of deference" given to the jury's verdict "is especially important when reviewing a conviction of conspiracy." United States v. Landesman, 17 F.4th 298, 320 (2d Cir. 2021). "'This is so because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a

surgeon's scalpel.'" Id. (quoting United States v. Anderson, 747 F.3d 51, 73 (2d Cir. 2014)). "The 'agreement to participate in the conspiracy may be inferred from the facts and circumstances of the case,' and 'both the existence of the conspiracy and the defendant's participation in it with the requisite criminal intent may be established through circumstantial evidence.'" Id. (quoting United States v. Wexler, 522 F.3d 194, 207-08 (2d Cir. 2008)). "Moreover, 'seemingly innocent acts taken individually may indicate complicity when viewed collectively and with reference to the circumstances in general.'" Id. (quoting United States v. Mariani, 725 F.2d 862, 865-66 (2d Cir. 1984)).

B. Rule 33

Federal Rule of Criminal Procedure 33 permits motions for a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). Unless such motions are based on newly discovered evidence, they "must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). As with Rule 29(c) motions, untimely motions must be denied unless the defendant demonstrates that the failure to act was the result of "excusable neglect." Fed. R. Crim. P. 45(b)(1)(B); Berry, 2022 WL 17336512, at *5-6; Sabir, 628 F. Supp. 2d at 417.

Ordering a new trial is an extraordinary remedy that is "disfavored in this Circuit," and, as a result, "the standard for granting such a motion is strict." United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995). "The defendant bears the burden of proving that he is entitled to a new trial under Rule 33, and before ordering a new trial pursuant to Rule 33, a district court must find that there is a real concern that an innocent person may have been convicted." United States v. McCourty, 562 F.3d 458, 475 (2d Cir. 2009); see also, e.g., United States v. Walker, 974 F.3d 193, 208 (2d Cir. 2020); United States v. Canova, 412 F.3d 331, 349 (2d Cir. 2005).

Within the past several years, the Second Circuit has twice reaffirmed that "a district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be 'manifest injustice' to let the verdict stand." United States v. Archer, 977 F.3d 181, 188 (2d Cir. 2020); see also Landesman, 17 F.4th at 330-31.

C. Plain Error

"To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements." Greer v. United States, 593 U.S. 503, 507 (2021). "First, there must be an error. Second, the error must be plain. Third, the error must affect 'substantial rights,' which generally means that there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Id. at 507-08. "If those three requirements are met, [a] court may grant relief if it concludes that the error had a serious effect on the fairness, integrity or public reputation of judicial proceedings." Id. at 508.

The plain error standard imposes a "heavy burden." United States v. Mitchell, 328 F.3d 77, 82 (2d Cir. 2003). "In general, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." United States v. Weintraub, 273 F.3d 139, 145 (2d Cir. 2001).

ARGUMENT

I. Jury Instruction Arguments

The defendants primarily argue that a judgment of acquittal or a new trial should be granted because of purported errors in the Court's jury instructions. These arguments are procedurally improper under Rule 29 and untimely under both Rule 29 and Rule 33. They are also meritless. The defendants' jury instruction arguments should therefore be rejected.

A. Jury Instruction Arguments Are Not Cognizable Under Rule 29

Because the sole proper basis for a Rule 29 motion is insufficiency of the evidence, Rule 29 "is not an open-ended opportunity to relitigate unfavorable rulings, contest jury instructions, or advance new legal theories." United States v. Goklu, No. 19-CR-386 (PKC), 2023 WL 184254, at *4 (E.D.N.Y. Jan. 13, 2023). "Specifically, a Rule 29 motion is not the proper vehicle for raising an objection to jury instructions." Id. Courts faced with Rule 29 motions challenging jury instructions thus regularly deny such challenges as "procedurally improper." Id. at *6; see United States v. Rivers, 108 F.4th 973, 987 (7th Cir. 2024) ("[A] purely legal challenge to a definition contained in a pattern jury instruction . . . does not qualify as a sufficiency of the evidence challenge under Rule 29."); United States v. Crowe, 563 F.3d 969, 972 n.5 (9th Cir. 2009) ("A Rule 29 motion for judgment of acquittal, however, is not the proper vehicle for raising an objection to jury instructions."); United States v. Patterson, No. 21-CR-103 (VAB), 2023 WL 4996742, at *3 (D. Conn. Aug. 4, 2023) (denying Rule 29 motion for lack of "factual or legal basis"; "Although Mr. Patterson asserts that he is entitled to a judgment of acquittal under Rule 29, his brief is largely focused on an allegedly erroneous jury instruction . . . [and] provides no legal authority for the proposition that an erroneous jury instruction provides a basis for a judgment of acquittal under Rule 29."), aff'd, No. 24-905, 2024 WL 3594321 (2d Cir. July 31, 2024); United States v. Levy, No. 11-CR-62 (PAC), 2013 WL 3832718, at *3 n.2 (S.D.N.Y. July 15, 2013) (rejecting Rule 29 arguments that "do not address the sufficiency of the evidence presented, but rather rehash certain jury instruction arguments"); United States v. Rabbani, No. 08-CR-118, 2009 WL 1272276, at *2 n.1 (W.D.N.Y. May 7, 2009) (declining "to address [a jury instruction] argument because it is not a proper basis for granting a Rule 29 motion").

The defendants' motion for a judgment of acquittal based on purportedly erroneous jury instructions should thus be denied as procedurally improper.

B. The Jury Instruction Arguments Are Untimely

The defendants' jury instruction arguments were raised for the first time on September 15, 2024, 61 days after the jury convicted the defendants. That is well beyond the 14-day deadline in Rule 29(c) and Rule 33(b)(2). Accordingly, absent a showing of "excusable neglect," such challenges are untimely and must be denied. See Eberhart v. United States, 546 U.S. 12, 17 (2005) ("[D]istrict courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked.").

Here, the defendants have made no attempt to meet their high burden of demonstrating excusable neglect. See Berry, 2022 WL 17336512, at *5 ("[E]xcusable neglect is not easily demonstrated, nor was it intended to be."). And it is difficult to believe that the experienced and committed counsel in this case could have an appropriate excuse for missing the clear deadlines of Rules 29 and 33. See Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 397 (1993) ("[I]n determining whether respondents' failure . . . was excusable, the proper focus is upon whether the neglect of respondents and their counsel was excusable." (emphasis in original)). Rather, in light of history of this case, it appears that the violation of these deadlines is just another instance of the defense team's complete disregard for deadlines and rules. See ECF No. 257 at 2-31 (discussing defense counsel's prior conduct). An ongoing refusal to abide by the rules applicable to everyone else is neither excusable nor neglect.

Accordingly, the defendants' challenges to the jury instructions under both Rule 29 and Rule 33 should be denied as untimely.

C. The Jury Instruction Arguments Are Meritless

Even if the defendants could overcome the procedural obstacles to their arguments, the arguments are without merit. The defendants make two claims of error regarding the Court's jury instructions. First, the defendants claim that the Court failed to instruct the jury that "the government must prove that the alleged scheme contemplated depriving another of money or property." Mot. 3, 8. Second, the defendants claim that the Court erred by including a "no ultimate harm" jury instruction as to wire fraud. See Mot. 4-5. These unpreserved arguments fail under any standard, especially the plain error standard that applies here.

1. Plain Error Review Applies

Pursuant to Rule 30(d), the requirements to preserve an objection "to any portion of the [jury] instructions or to a failure to give a requested instruction" are strict: the party "must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). "Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)," that is, plain error review. Id.; see United States v. Grote, 961 F.3d 105, 114 (2d Cir. 2020). The defendants make no claim that they complied with these requirements, nor could they.

As to the defendants' deprivation-of-money-or-property claim, the defendants nevertheless assert that they preserved this argument "via [Watson's] submission of revised instructions laying out the proper standard for wire fraud." Mot. 3. This appears to be a reference to the proposed jury instructions that the defendants submitted on May 6, 2024, before the beginning of trial. See Mot. 3 (citing ECF No. 135). Both the Supreme Court and the Second Circuit, however, have been clear that a "mere 'request for an instruction before the jury retires' does not 'preserve an objection to the instruction actually given by the court.'" United States v. Solano, 966 F.3d 184, 193 (2d Cir. 2020) (quoting Jones v. United States, 527 U.S. 373,

388 (1999)); see also United States v. Crowley, 318 F.3d 401, 412 (2d Cir. 2003) (applying plain error where district court rejected defendant's proposed jury instruction; "this Court has repeatedly held that a party who has requested an instruction that has not been given is not relieved of the requirement that he state distinctly his objection to the instruction that is given"). This claim was therefore not properly preserved and is reviewable only for plain error.

The sole authority cited by the defendants for the proposition that plain error would not apply is Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994). See Mot. 3. But the facts of that case — which was a civil case, not subject to Fed. R. Crim. P. 30(d)'s stringent requirements — bear no relationship to the facts here. In Anderson, in addition to the plaintiffs raising the issue in their proposed jury instructions, the "issue was expressly raised and discussed at length" during the charge conference. Anderson, 17 F.3d at 557. "At that time the district court agreed that it would give such an instruction. The following morning, however, just prior to summation, the district court retracted and refused to include the instruction. Significantly, at the outset of a short conference held in the robing room after the jury charge, the district court expressly stated 'that if this is something that we raised the other day, you don't need to repeat yourself.'" Id. Under that particular set of facts, "a further objection to the charge as given, on a ground already thoroughly discussed, would have been futile." Id. Here, the facts were entirely different: this issue was not raised at the charge conference or at any point after the defendants' pre-trial proposed instructions and there was no directive by the Court to not raise the issue further. There was therefore no basis for the defendants to conclude that the issue had been fully aired or that an objection would be futile. Anderson is thus inapplicable.

As to the defendants' no-ultimate-harm claim, the defendants do not even attempt to argue that they objected to this instruction, and they did not. See ECF No. 235, 235-1

(defendants' proposed revisions to the Court's proposed jury instructions with no objection or comment on the no-ultimate-harm instruction or to any other aspect of the wire fraud instructions). Plain error thus applies to this argument as well.

2. The Jury Instructions Were Not Erroneous

The defendants cannot establish error, let alone plain error, for either of their jury instruction arguments.

As to the claim that the Court failed to instruct the jury that a scheme to defraud must contemplate depriving another of money or property, this argument is both confusing and fatally flawed because the Court included that very instruction (or equivalent instructions) numerous times. See Tr. 4506:7-9 (Court's instruction to jury that "you must find that the scheme contemplated depriving another of money or property" (emphasis added)); see also Tr. 4504:18-20 (Court's instruction to jury that "a scheme to defraud is merely a plan to deprive another of money or property by deceit, trick, deception, swindle, or false pretenses" (emphasis added)), 4507:4-7 (Court's instruction to jury that "[f]or purposes of the wire fraud statute, an intent to defraud means to act knowingly and with specific intent to deceive for the purpose of depriving another person of money or property" (emphasis added)), 4507:22-4508:2 (Court's instruction to jury that "in order to sustain a charge of wire fraud, the government must establish beyond a reasonable doubt that the defendant knew his conduct as a participant in the scheme was calculated to deceive, and, nevertheless, he associated himself with the alleged fraudulent scheme for the purpose of depriving somebody of their money or property" (emphasis added)). The error of which the defendants complain therefore simply does not exist.

The defendants' claim that the Court erred by including a standard no-ultimate-harm jury instruction also cannot withstand scrutiny. The Second Circuit has repeatedly held that such an instruction is appropriate in a wire fraud prosecution "where (1) there was [a]

sufficient factual predicate to necessitate the instruction, (2) the instruction required the jury to find intent to defraud to convict, and (3) there was no evidence that the instruction caused confusion." United States v. Lange, 834 F.3d 58, 79 (2d Cir. 2016); accord United States v. Calderon, 944 F.3d 72, 90 (2d Cir. 2019); see also United States v. Sterritt, No. 21-CR-193 (KAM), 2023 WL 7386660, at *3 (E.D.N.Y. Nov. 8, 2023). Those conditions are met here.

First, "there was a factual predicate for the instruction, because there was evidence that [Watson and his] co-conspirators intended to immediately deprive investors of their capital through fraud, even if they truly believed that in the long-term [Ozy] would ultimately succeed, deriving profits for the defrauded investors." Lange, 834 F.3d at 79. For example, Samir Rao repeatedly testified that he and Watson justified their lies to investors with the hope that they could ultimately turn Ozy into a profitable business, to the benefit of all investors. See Tr. 199:11-16 (testimony that Rao and Watson lied because they "believed deeply in the company that [they] were building, and in order for it to be -- in order for it in many cases to survive, much less to be successful, [they] needed to have enough cash to run the business, to grow it, to have a chance to earn more revenue, to have a chance to make it profitable"), 334:14-20 (testimony that Rao and Watson discussed that fraud was necessary to keep Ozy alive, which they believed was a prerequisite "in order for us to ultimately be successful for investors at all, any investors"), 334:22-335:1 (testimony of Rao) ("I think the larger justification was that if we do whatever we can to keep the company alive so that it can succeed, that is ultimately the greatest fulfillment of our responsibility to our investors."), 926:16-21 (testimony of Rao) ("My strong preference would have been to take the money that Antara had given us, do our best to build the business truthfully, honestly over the ensuing year, make as much progress as we could, and then go out freshly with real numbers to show to put the mess of all the [lying] that we had

done behind us."), 1228 (testimony of Rao) (discussing motive "to try to achieve [Ozy's] survival in the hope of recovering money not only for our investors and others, but ultimately, for ourselves").

Moreover, the defendants repeatedly argued to the jury, elicited on cross-examination, and elicited on direct examination of Watson that Watson had invested his own money in the company, suggesting that he believed in its long-term success. See Tr. 45-46 (Ozy opening argument that Watson and his family had invested millions in Ozy), 61 (Watson opening argument that Watson put money into Ozy), 168:4-6 (cross-examination of Janeen Poutre: "Q: And you are aware that there were many occasions that Carlos Watson put up his own money in order to make payroll? A: Yes."), 3013:4-7 (direct examination of Watson: "Q: How much did you invest in OZY over the years OZY was operational, of your personal money? A: My family and I probably did $5 million together. So I probably -- so about that."), 4267:11-13 (Watson summation highlighting that Watson put money into Ozy); see also Mot. 6 (providing additional examples). Such arguments create a further factual predicate for the instruction as they could mislead the jury to believe that long-term optimism is a defense. See United States v. Leonard, 529 F.3d 82, 91-92 (2d Cir. 2008) (no-ultimate-harm instruction proper where defendants attempted to highlight their belief that everything would work out in the end).

Second, the Court properly instructed the jury that it needed to find that the defendants acted "with the specific intent to defraud," which the Court appropriately defined as "to act knowingly and with specific intent to deceive for the purpose of depriving another person of money or property." Tr. 4506:22-4507:7. The defendants cannot claim that this definition is inadequate, as they not only never objected to it, but even affirmatively stated that they had no objection to this formulation of the element. See Tr. 4102:13-22. Such conduct waives any

claims of error, negating even plain error review. See United States v. Agrawal, 726 F.3d 235, 259 (2d Cir. 2013) (waiver applied where defendant did not object to proposed instruction despite court's invitation; "Such a strategic decision, evidenced not merely by silence but by a negative response on the record to a district court invitation to voice objection, does more than forfeit the unraised objection; it waives it.").

Third, there is no evidence that the instruction caused any confusion, and the defendants point to none. See United States v. Berkovich, 168 F.3d 64, 67 (2d Cir. 1999) (no evidence that no-ultimate-harm instruction created confusion where jury did not request any clarification on court's instructions on that topic). Absent such evidence of jury confusion, the challenge to the no-ultimate-harm instruction must be rejected.

The cases on which the defendants rely in support of their arguments are inapposite. The defendants misstate the holding of United States v. Gramins, No. 21-5, 2022 WL 6853273 (2d Cir. Oct. 12, 2022), which they claim "held that the [no-ultimate-harm] instruction was permissible only because 'the district court expressly limited the no-ultimate harm charge instruction to securities fraud.'" Mot. 5 (quoting Gramins, 2022 WL 6853273, at *5) (emphasis in Gramins). That claim is not accurate. To the contrary, Gramins merely rejected out of hand an argument that a no-ultimate-harm instruction had confused the jury about the elements of wire fraud by pointing out that the district court in that case had specifically limited the instruction to securities fraud. See Gramins, 2022 WL 6853273, at *5. Gramins did not make a generalized holding about the appropriateness of such instructions — let alone one that would have sub silentio overruled numerous prior decisions of the Circuit approving the use of the no-ultimate-harm instruction in wire fraud cases. See, e.g., Calderon, 944 F.3d at 90-91; Lange, 834 F.3d at 78-79; United States v. Ingram, 490 F. App'x 363, 366-67 (2d Cir. 2012);

United States v. Levis, 488 F. App'x 481, 486 (2d Cir. 2012); United States v. Marzo, 312 F. App'x 356, 358-59 (2d Cir. 2008). Rather, Gramins did exactly what summary orders normally do: it narrowly addressed the arguments before it.

The defendants' reliance on United States v. Rossomando, 144 F.3d 197 (2d Cir. 1998), fares no better. See Mot. 5. The Second Circuit has repeatedly and expressly "limited [Rossomando] to the quite peculiar facts that compelled its result." United States v. Ferguson, 676 F.3d 260, 280 (2d Cir. 2011); see United States v. Percoco, 13 F.4th 158, 176 (2d Cir. 2021) (same), vacated on other grounds sub nom. Kaloyeros v. United States, 143 S. Ct. 2490 (2023); Levis, 488 F. App'x at 486 n.3 (same); see also Ingram, 490 F. App'x at 367 (noting that "[o]nly in Rossomando have we ever concluded that a 'no ultimate harm' instruction was given in error" and remarking on the "unique facts" of that case). The cases since Rossomando, including the cases cited above, make clear that no-ultimate-harm instructions remain appropriate in wire fraud cases, as long as a proper factual predicate exists.

Finally, even if the defendants could establish both that an error had occurred and that it was plain — which they cannot — they still fail to meet their burden of showing a "reasonable probability that, but for the error, the outcome of the proceeding would have been different," as is required. Greer, 593 U.S. at 507-08. The evidence was overwhelming that Watson and his co-conspirators intended to deprive victims of their money, at least temporarily, through lies about Ozy's performance. Indeed, the fundamental purpose of the scheme was to obtain cash from investors to overcome Ozy's persistent cash crunch. See Tr. 192, 1871. That intent to deprive investors of their capital, regardless of what Watson intended or hoped would happen later, is sufficient to establish a scheme to defraud and an intent to defraud. See United States v. Stitsky, 536 F. App'x 98, 108-09 (2d Cir. 2013) ("The evidence was sufficient to prove

that Shapiro intended fraudulently to induce investors to entrust him with their money. Shapiro's intent to cause that immediate loss to his victims is sufficient to sustain his mail and wire fraud convictions, regardless of whether he intended ultimately to generate a return on their investments." (emphasis in original)); United States v. Males, 459 F.3d 154, 159 (2d Cir. 2006) (approving instruction that "the requirement of contemplated harm or injury does not require that [the defendant] intended to permanently deprive the victim's money or property").

The defendants therefore cannot meet their burden of establishing error, let alone plain error, as to any of the jury instruction issues they raise. Thus, even if the Court overlooks the motions' procedural failings, the Rule 29 and Rule 33 motions should be denied as to those issues on the merits.

II. Sufficiency and Weight of the Evidence Arguments

The defendants further argue that the evidence was insufficient to convict them and that a new trial is warranted based on the weight of the evidence. See Mot. 6-7, 8. As with the defendants' other claims, these arguments are procedurally improper and substantively baseless. They should therefore be denied.

A. Procedural Issues

For the reasons set forth above, any motions under Rule 29(c) and Rule 33 are untimely and therefore must be denied absent a showing of excusable neglect, which the defendants have not made or even attempted. Thus, the only permissible motion remaining for the defendants to challenge the sufficiency of the evidence is the defendants' pending Rule 29(a) motion, which was made at the close of the government's case. See Tr. 2684:18-2685:3.

As noted above, such a motion must be decided "on the basis of the evidence at the time the ruling was reserved," that is, before the defendants put on their defense case. Fed. R. Crim. P. 29(b). As a result, although the defendants rely heavily on testimony of witnesses

they called in their defense, including Watson himself (see Mot. 6), such testimony may not be considered in deciding the Rule 29(a) motion.

B. The Rule 29(a) Motion Should Be Denied

The defendants argue that "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." Mot. 6. In fact, the evidence was overwhelming that the intent of the scheme was to induce investors to give money to Ozy. See, e.g., Tr. 192, 1871. Even accepting Watson's claims that he hoped or believed that everything would work out (see Mot. 6-7) — which the jury was by no means required to accept, especially when considering the evidence in the light most favorable to the government — such a hope or belief is not a defense to wire fraud, as the Second Circuit has repeatedly and unequivocally held. See United States v. Gatto, 986 F.3d 104, 118 (2d Cir. 2021) ("The law is clear: a defendant cannot negate the fraud he committed by wishing that everything works out for his victim in the end."); Rossomando, 144 F.3d at 201 ("[T]he fact that the defendant believes (rightly or wrongly) that he will 'ultimately' be able to work things out so that the victim suffers no loss is no excuse for the real and immediate loss contemplated to result from defendant's fraudulent conduct.").

Moreover, the Second Circuit has long held that "[w]here the false representations are directed to the quality, adequacy or price of the goods themselves, the fraudulent intent is apparent because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain." United States v. Regent Off. Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970); accord United States v. Kaplan, 758 F. App'x 34, 37 (2d Cir. 2018) (evidence sufficient to support wire fraud conviction where defendants "repeatedly lied to customers about the quality of the machines and candy they were selling and about the quality of the locating companies to which they referred their customers, factors essential to making the customers

believe they were making a good investment"). That is precisely what the evidence shows Watson and his co-conspirators did — they lied about the quality and value of the good at issue: shares of Ozy Media. Indeed, as Rao and Han testified about at length, they lied about the company's historical financial performance, its growth rates, the existence and nature of its key contracts, the existence and nature of acquisition offers, and the quality of its investors. See, e.g., Tr. 542 (testimony of Rao) ("[Watson] approved us falsifying the contracts and submitting edited versions of them or falsified version of them to Buzzfeed . . . ."), 637-43 (testimony of Rao) (describing GX 5076-A, a document Rao sent to Watson for his review and approval, that falsely claimed that Oprah Winfrey, Live Nation, Marc Lasry and others were investors in Ozy's Series D fundraising round), 1949 (testimony of Han) ("[W]e kept bumping [the revenue number] up over the course of a year to keep investors or potential investors excited about OZY's potential growth."), 2012 (testimony of Han) ("We lied about historical financials and we lied about how much money the company was making."). And these were all topics that numerous witnesses testified were critical to their analysis of the quality and appropriate price of an Ozy investment. See Tr. 1338 (testimony of Thomas Franco), 1381 (testimony of Abbas Maniar), 1748 (testimony of Hillel Moerman), 2211, 2251 (testimony of Maurice Werdegar), 2325 (testimony of Joseph O'Hara), 2520-21 (testimony of Chetan Bansal).

The evidence thus overwhelmingly shows that Watson and his conspirators intended to deprive investors of their money and used false representations about facts important to the nature of the bargain to do so. Particularly when the evidence is viewed in the light most favorable to the government, as it must be, the government introduced more than sufficient evidence to establish a scheme to defraud and an intent to defraud beyond a reasonable doubt.

C. The Untimely Rule 29(c) Motion is Meritless

Even if the Court were to consider the defendants' untimely Rule 29(c) motion, the motion should be denied on the merits, largely for the reasons set forth above. The only difference in the evaluation of a Rule 29(c) motion is that it would allow consideration of evidence admitted after the close of the government's case-in-chief, such as Watson's testimony. But even on a Rule 29(c) motion, the Court must "assume[] that the jury did not credit Defendant's testimony or that of [his] witnesses." United States v. Huong Thi Kim Ly, 798 F. Supp. 2d 467, 474 (E.D.N.Y. 2011), aff'd, 507 F. App'x 12 (2d Cir. 2013); see also United States v. Heras, 609 F.3d 101, 103 (2d Cir. 2010). The evidence admitted in the defense case therefore changes nothing.

Indeed, the jury was well within its rights to conclude that Watson's self-serving testimony was perjurious, as it plainly was. See Tr. 4597 ("THE COURT: . . . And he did perjure himself on the witness stand in way both large and small during this case, as the jury necessarily found and as was plainly evident when one compares Mr. Watson's testimony to the other evidence that we all saw with our own eyes.").

The jury, for example, could have focused on the many instances in which Watson was caught in a lie. See, e.g., Tr. 3631-50 (cross-examination regarding timing of call with Goldman Sachs and inconsistency of Watson's account with other evidence); compare Tr. 3658-59 (Watson claiming that in the first week of December 2019, negotiations with Buzzfeed were focused around an offer of approximately $250 million), with GX 3512 (December 7, 2019 text from Watson stating that he told Abbas Maniar that Buzzfeed had offered $300 million); compare also Tr. 3099, 3102, 3103, 3691 (Watson claiming that he spoke with Dan Fox about an investment by Oprah Winfrey in 2019), with Tr. 4007-08 (testimony by

Dan Fox that he had not spoken to Watson since 2018 and had never discussed an investment on behalf of Oprah Winfrey).

The jury could have disbelieved Watson because of his apparent tell of claiming that something was a "hundred percent" or a "thousand percent" not true when denying something that was clearly true. See Tr. 3094 ("Q: Now, did you ever tell Ms. Thakur to draft a fake contract? A: No. I'm very angry that she said that. It's one thousand percent not true."); id. ("Q: Did you ever -- whoever it was made by, did you know anything about [a fake contract with the Oprah Winfrey Network]? A: I one thousand percent did not."), 3269 ("Q: And in the course of those conversations did you ever ask [Suzee Han] to make up numbers? A: A thousand percent not."); 3272 ("Q: Let's finish and I'll ask that next question. Are you saying that Ms. Han was not one of your eight direct reports that you testified to earlier? A: A hundred percent not, a hundred percent not.").

The jury could have properly relied on Watson's demeanor to discredit his testimony, such as his repeated resistance to answering questions on cross-examination, despite multiple warnings from the Court. See Tr. 3618 ("THE COURT: Sir, if you are not sure what the question is, you can say you're not sure what the question is, but it is not a dialogue."), 3624 ("THE COURT: Sir, you have to listen to the questions that are asked and answer the questions that are asked. Again, your lawyers will have a fulsome opportunity to clear whatever they think needs to be cleared up on redirect, but right now, listen to the questions and please answer those."), 3850 ("THE COURT: I'm going to instruct the witness, again, that when you're asked a yes or no question or a correct or incorrect question, you should answer the questions, if you can, yes or no or correct or incorrect. If you can't, you should simply so indicate."); id. ("THE COURT: If you can answer the question, you should answer the question.").

The jury could also have found Watson not credible based on his rambling and accusatory tangents about Ben Smith and Brooklyn. See Tr. 3303 ("And, so, they can say over and over again that it's revenue and that may make them feel better 3,000 miles away from Silicon Valley. But in Silicon Valley what matters is the product, right. I don't know why I'm here in Brooklyn, but -- I don't live here. But in the Bay area where I'm based, where the company was based, for that whole time never was in Brooklyn, never had executives here, never had an office here -- THE COURT: Let's have another question."), 3492 ("Ben Smith who, like, looked through all of our books and didn't tell his editors at *The New York Times*. And then used it to write false stories about us, which almost destroyed my company and directly led to me getting prosecuted 3,000 miles away from where I even live. He lives in Brooklyn, I don't. THE COURT: Are you saying -- we are not going to be more -- please stick to the questions that are asked."), 3731 ("I believe that Ben Smith, who lives in Brooklyn and who tried to buy me five times and who didn't -- who wasn't successful in that, and who had $23.5 million worth of stock options in play in late 2021, knew that if he knocked me out by smearing me and smearing my name with seven front-page stories in The New York Times in seven days that BuzzFeed, who was about to die, would be able to do a backdoor IPO. And they did that. And as soon as he collected his $23.5 million, he promptly did what? Started a company that sounds an awful lot like OZY. The newsletters he said he never liked, now all of a sudden he has newsletters. The TV shows he thought were just a sideshow, now he's pursuing TV. Q: I think we are going a little far field here, Mr. Watson. You think Ben Smith did something wrong? A: No, I know. That's why we're suing him for $2 billion in federal court.").

Or the jury could have simply weighed the testimony of witnesses describing fraudulent conduct by Watson, including Rao, Han, Thakur, Bansal, Moerman, Franco, Maniar,

and O'Hara, as well as all of the documents, and found that evidence more credible than Watson's denials. Whatever it was, the jury's verdict was amply supported by evidence, and particularly so when the evidence is viewed in the light most favorable to the government. The Rule 29(c) motion should therefore be denied.

D. Any Untimely Rule 33 Motion Is Meritless

To the extent the defendants bring an untimely motion pursuant to Rule 33 for a new trial based on the weight of the evidence, that motion should be denied for the reasons set forth above. There is no manifest injustice here nor any risk than an innocent person was convicted.

III. Counts One and Three

The defendants' arguments focus almost entirely on Count Two, and their sole arguments regarding Counts One and Three are derivative of those arguments. See Mot. 7, 8. Because their attacks on Count Two fail, their attacks on Counts One and Three must fail as well.

CONCLUSION

For the reasons set forth above, the defendants' Rule 29 and Rule 33 motions should be denied in their entirety.

Dated: Brooklyn, New York
October 7, 2024

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