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October 25, 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 further support of his 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. Mr. Watson's motion is procedurally proper, excusable neglect applies to this case, and the motion has substantive merit because the Court's jury instructions were erroneous.

I. Defendant's Motion Is Procedurally Proper

The Government contends that Rule 29 is an improper vehicle to raise objections to jury instructions because "the sole proper basis for a Rule 29 motion is insufficiency of the evidence." Opposition Brief ("Opp.") at 9. But the Government overlooks that the foundation of Mr. Watson's Rule 29 motion *is* insufficiency of the evidence. Mr. Watson argues that, because of the error in the Court's jury instructions, the Court's jury charge requiring a finding of intent to defraud was conveyed unclearly and insufficiently to ensure that the jury properly understood the charge. *See* Opening Br. at 4. The defense presented evidence and arguments at trial that impugned the sufficiency of the Government's evidence establishing Mr. Watson's intent to defraud investors. *See id.* at 6–7. As a result, the error in the jury instructions calls into question whether the jury convicted Mr. Watson under the correct "intent to defraud" standard. *See id.* at 7.

Additionally, the Government does not contest that Mr. Watson's challenge is proper under Rule 33. Mr. Watson's motions under both rules should be granted for the reasons explained below.

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II. Mr. Watson's Motion Is Timely

The Government next argues that Mr. Watson's jury instruction arguments are untimely, and do not meet the showing of "excusable neglect" necessary to justify an untimely challenge. *See* Opp. at 10. The Government is mistaken.

The Second Circuit has held that, "[i]n determining whether or not there was excusable neglect, the district court is to consider the *Pioneer* factors." *United States v. Hooper*, 43 F.3d 26, 29 (2d Cir. 1994) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)). The Supreme Court explained in *Pioneer* that, "[b]ecause Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." 507 U.S. at 395. "Prejudice requires greater harm than simply that relief would delay resolution of the case." *Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009).

In this case, there is no danger of prejudice to the Government because the delay was minimal—64 days—and it had no impact on the judicial proceedings, nor does the Government contend that it did. *See id.* at 1197 (finding a two-month delay "insubstantial"). Mr. Watson filed the motion far in advance of sentencing and it can be resolved before sentencing. Additionally, there were two reasons for the delay in filing, both of which were outside of Mr. Watson's control. *First*, the parties were engaged in a prolonged dispute over Mr. Watson's request for pre-sentencing bail, which extended from July 23 to August 23, 2024. Mr. Watson's counsel was consumed with resolving the bail issue during that time. This bail application required several novel actions, including securing his bank accounts, which the Government had not dealt with in the past. *Second*, Mr. Watson was incarcerated at the Metropolitan Detention Center, Brooklyn ("MDC") from July 16 to August 22, 2024. During this period, MDC was on lockdown, and Mr. Watson was not permitted to make phone calls to counsel. Additionally, after voicing concerns about his safety, the Bureau of Prisons placed Mr. Watson in the Special Housing Unit, further restricting his access to counsel. Mr. Watson acted in good faith in resolving his bail proceedings and then filing his Rule 29 and 33 motions as expeditiously as possible—within a couple weeks of the bail grant. Therefore, in this case, the balance of the equities weighs in favor of a finding of excusable neglect. *See Lemoge*, 587 F.3d at 1195 ("Turning to its application of the specific *Pioneer–Briones* factors, the district court in our view erred by concluding that the [moving party] did not establish excusable neglect sufficient for relief."); *United States v. Ceasar*, 2006 WL 1793645, at *2 (W.D. La. 2006) (evaluating the balance of the equities under *Pioneer* and finding excusable neglect because the defendant missed a deadline due to sentencing).

III. The Jury Instructions Were Erroneous

A. Mr. Watson Preserved His Objection

Contrary to the Government's contention, plain error review does not apply in this case. The Government argues that plain error review must apply because Mr. Watson did not preserve his objection to the instructions given by the court. *See* Opp. at 11–13. Not so. Mr. Watson

objected via his revised proposed jury instruction that this Court rejected. *See* Opening Br. at 3. In his opening brief, Mr. Watson cited *Anderson v. Branen* to combat this notion. *See id.* (citing 17 F.3d 552 (2d Cir. 1994)). In *Anderson*, the Second Circuit held that "address[ing a] charge in the proposed jury instruction . . . adequately apprise[s] the district court of [a party's] position that the jury should be instructed" in a particular manner and that the trial court's rejection of such proposed instructions makes "apparent that further efforts to object would be unavailing." 17 F.3d at 557.

The Government's attempts to distinguish *Anderson* merely show distinctions without differences. The principle that *Anderson* stands for is not unique to civil cases, and aptly applies here. In fact, contrary to the Government's contention, the Second Circuit has applied the holding in *Anderson* to criminal cases. *See, e.g.*, *United States v. Dinome*, 86 F.3d 277, 282 (2d Cir. 1996) ("Counsel had made explicitly clear his disagreement with the court's view of the law, and proposed alternative instructions that the court rejected. It would have been superfluous, in our view, for counsel to have specified the particulars in which the court's instructions diverged from counsel's view of the governing law."). Moreover, the Government cannot elucidate any reason why the standard for criminal defendants—where liberty is at stake—should be higher than one for civil litigants. Additionally, as in *Anderson*, this Court cautioned counsel not to re-raise objections. *See, e.g.*, Tr. at 3494:10–12 ("No, let's push ahead here. That same objection has been sustained in respect of analogous context a number of times now.").

In this case, Mr. Watson has proposed alternative instructions, which were rejected by the Court. Per *Dinome*, this is sufficient to preserve an objection to the Court's instructions; specification of the "particulars" is superfluous and unnecessary. *Dinome* makes clear that a defendant is not under an obligation to re-raise an objection when doing so would be fruitless; this principle distinguishes the present case from the Government's cited cases, *Solano* and *Crowley*, in which the Court never found that raising an objection would be ineffectual. *See* Opp. at 11–12 (citing *United States v. Solano*, 966 F.3d 184, 193 (2d Cir. 2020); *United States v. Crowley*, 318 F.3d 401, 412 (2d Cir. 2003)). Therefore, plain error review does not apply to either the "contemplated depriving another of money or property" instruction or the "no ultimate harm" instruction. Mr. Watson's proposed instructions offered the inclusion of a clear statement of the "contemplated depriving" instruction and did not include the no-ultimate-harm instruction. *See, e.g.*, 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."). Under *Dinome* and *Anderson*, this is a sufficient objection.

B. The Jury Instructions Were Erroneous

Contrary to the Government's assertion, Opp. at 13–18, the jury instructions were clearly erroneous. The Court's inclusion of a no-ultimate-harm instruction vitiated the "contemplated harm" instruction in this case, as in *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998). As the Government notes, *see* Opp. at 13–14, a no-ultimate-harm instruction is only permissible

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). The Government fails to demonstrate that any of these requirements were met. Therefore, the inclusion of the instruction is impermissible in this case.

1. There Was An Insufficient Factual Predicate For The Instruction

First, there was an insufficient factual predicate for the instruction in this case. As the cases that the Government cites make clear, the Government is required to prove beyond a reasonable doubt an intent "to immediately deprive investors of their capital through fraud." *Lange*, 834 F.3d at 79; *see also United States v. Calderon*, 944 F.3d 72, 90 (2d Cir. 2019). The Court recognized this burden at trial as well. *See* Tr. at 3127:3–4 (explaining that "good faith . . . go[es] to the core issue in this trial"). However, as Mr. Watson pointed out in his opening brief, *see* Opening Br. at 6, the Government, at most, demonstrated that Mr. Watson made certain representations to investors, not that he made those representations with the requisite intent for conviction. In fact, all of the examples that the Government cites in its brief, *see* Opp. at 14–15, come from Samir Rao's witness testimony and relate to Rao's perception that Mr. Watson wanted the company to "be successful for investors." *See* Tr. at 334:16; *see also id.* at 119:11–16, 334:22–335:1, 1228:20–21 (same). These statements do not, by any means, prove that Mr. Watson contemplated depriving investors of money or property. If anything, they establish the opposite.

The Government further argues that defendants repeatedly emphasized that "[Mr.] Watson had invested his own money in the company, suggesting that he believed in its long-term success. . . . 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." Opp. at 15. However, the Government never explains why Mr. Watson's investment in Ozy connotes his interest in its *long-term* success alone. To the contrary, Mr. Watson's testimony demonstrates that he was also concerned with the short-term success of the company and its investors' stakes therein. *See, e.g.*, Tr. at 3233:7–10 (discussing the importance of Ozy's diligence on its offers from Goldman Sachs, J.P. Morgan, Morgan Stanley, and other groups "to make sure overall that we kept getting – we're not going to get to perfection, but you want to keep getting better and healthier and better infrastructure"); *id.* at 3290:24–3291:1 ("[W]e wanted to try and give people a sense, if we were able to raise the money in the Series D, how we would use the money."). The Government has failed to establish a sufficient factual predicate for the instruction in this case.

2. The Instruction Created Ambiguity About The Intent To Defraud Requirement

Second, the no-ultimate-harm instruction is impermissible in this case because it created ambiguity about whether the jury had to find intent to defraud in order to convict. The issue was explained by the Second Circuit in *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998): "Through 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 Government tries to characterize *Rossomando* as defunct when, in fact, it is the "leading precedent on the 'no ultimate harm' instruction." *United States v. Ferguson*, 676 F.3d 260, 280 (2d Cir. 2011). The Government also argues that *Rossomando* is "limited [] to the quite peculiar facts that compelled its result." Opp. at 17. However, the Government does not explain what those "quite peculiar facts" were. And, as Mr. Watson argued in his opening brief, the facts in *Rossomando* are comparable to the facts in this case. Opening Br. at 5. In *Rossomando*, there was insufficient evidence that the defendant intended for the alleged victim to lose money, either in the short or long term. *See* 676 F.3d at 202. As a result, the Second Circuit held that the district court's no-ultimate-harm instruction was misleading because "the jury could well have been persuaded by Rossomando's defense that he did not intend to harm the Pension Fund, but still have believed that it should convict because '[n]o amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the New York City Fire Department or its Pension Fund will excuse fraudulent actions or false representations by him to obtain money.'" *Id.*

Likewise, here, Mr. Watson testified that he did not intend for investors to lose money, either in the short or the long term. In fact, this is the reason that he poured so much money into Ozy in its first few years of existence. *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

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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.").

The Government leans heavily on its argument that the Court defined "specific intent to defraud" in the instructions as: "to act knowingly and with specific intent to deceive for the purpose of depriving another person of money or property." Opp. at 15. The critical issue that the Government overlooks, however, is the phrasing and ordering of the Court's instructions. Because the "specific intent to defraud" instruction comes before the no-ultimate-harm instruction, and the no-ultimate-harm instruction comes at the end of the charge, it leaves the jury with the impression that it need not find an intent to harm in order to convict. *See Rossomando*, 144 F.3d at 202 ("[t]he fact that the 'no ultimate harm' instruction came toward the end of the charge only exacerbated the problem" (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."))). Mr. Watson raised this issue in his opening brief and the Government failed to respond to it. *See* Opening Br. at 5.

The Government further argues that defendants "waive[d] any claims of error" in regard to the "specific intent to defraud" instruction. Opp. at 15–16. However, as discussed in Section II.A, *supra*, no waiver occurred because Mr. Watson proposed alternative instructions that did not contain a no-ultimate-harm charge, and this proposal was sufficient to preserve his objection to the Court's erroneous instructions.

3. The Instruction Misled The Jury

Third, the Government asserts that there is "no evidence that the instruction caused any confusion," but Mr. Watson's argument about the ordering of the jury instructions, recognized by the Second Circuit as misleading in *Rossomando*, satisfies this element. *United States v. Gramins* also establishes the likelihood of juror confusion in this case. *See* 2022 WL 6853273 (2d Cir. 2022). As the Government acknowledges, in *Gramins*, the Court "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*." Opp. at 16 (emphasis added). The Court made no such limiting instruction here. The Government attempts to distinguish *Gramins* by arguing that it "did not make a generalized holding about the

appropriateness of such instructions." *Id.* But the Government cannot rebut what the Second Circuit actually said. *See Gramins*, 2022 WL 6853273, at *5 (holding that the no-ultimate-harm charge was permissible 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." (emphasis in original)). And while *Gramins* is a summary order, it is "highly persuasive" and "eminently predictive" of Second Circuit precedent at the very least. *Hahn v. JetBlue Airways Corp.*, -- F. Supp. 3d --, 2024 WL 3422391, at *22 (E.D.N.Y. 2024) ("Although *Cox* is an unpublished opinion, this Court must view it as highly persuasive authority. *See, e.g.*, *Guida v. Home Sav. of Am., Inc.*, 793 F. Supp. 2d 611, 617 n.5 (E.D.N.Y. 2011); *LaSala v. Bank of Cyprus Pub. Co.*, 510 F. Supp. 2d 246, 274 n.10 (S.D.N.Y. 2007) (finding an unpublished Second Circuit opinion 'highly persuasive . . . and eminently predictive of how the Court would in fact decide a future case such as this one.')."

Moreover, the language of the Court's instructions would have been confusing to the jurors because the instructions first stated that the jury did not need to find that Mr. Watson intended any loss, then the following sentence stated that Mr. Watson must have "contemplated depriving another of money or property," and the instructions later stated that no amount of honest belief by Mr. Watson would render his actions excusable. *See* Tr. at 4506:5–4507:21 ("It is not necessary that a defendant or his alleged co-conspirators actually realized any gain from a scheme, or that the intended victim actually suffered any loss. Instead, you must find that the scheme contemplated depriving another of money or property. . . . [N]o amount of honest belief on the part of a defendant that the scheme ultimately will make a profit for the investors will excuse fraudulent actions."). Indeed, the attached affidavit by Juror No. 5 confirms that the Court's erroneous instructions confused at least one juror about whether the jury was required to find intent to defraud in order to convict. Ex. A ¶¶ 5, 8–9; *id.* ¶ 6 ("In my mind, the government did not prove that the defendant was guilty beyond a reasonable doubt. There was no evidence that Mr. Watson intended for any investors to be harmed or to lose their money."). The Government never asserts, nor can it, that a jury request for clarification of the instructions is the *only* manner in which juror confusion can manifest.

C. This Is Not Harmless Error

Even if plain error review did apply, Mr. Watson has established that the Court plainly erred in its instructions to the jury, and that the Court's error affected substantial rights. *See infra* at Section B; Opp. at 8 (citing *Greer v. United States*, 593 U.S. 503, 507 (2021)). The Government presented insufficient evidence to establish an intent to defraud, while the defense established a

lack of such intent. *See* Opening Br. at 6–7. Because intent to defraud is a necessary element of Counts Two and Three of the indictment, *see id.* at 1–2, Mr. Watson should not have been convicted absent proof beyond a reasonable doubt that he intended to defraud investors.

The Government argues that, even if defendants are able to establish plain error in this case, the error was harmless because "[t]he 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." Opp. at 17. But the Government neglects to consider the evidence presented by Mr. Watson at trial that his representations to investors were truthful and factual, and that he wanted the company to succeed and investors to profit, even in the short term. *See, e.g.*, Tr. at 3046–47, 3206:10–13 ("I was willing to think about it because, you know, for some of my fellow investors it could be a good payday. Some of our fellow investors could make ten times their money . . . ."). Therefore, the error in this case was not harmless, but rather, directly resulted in Mr. Watson's conviction.

IV. Conclusion

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

Respectfully submitted,



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