Case: 14-2902 Document: 33 Page: 1 09/11/2014 1317948 21

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

v.

JESSE C. LITVAK

: DOCKET NO. 14-2902

:

:

:

: September 11, 2014

# MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR RELEASE ON BOND PENDING APPEAL

The defendant, Jesse C. Litvak, has moved the Court for release on bond pending appeal. The district court denied the defendant’s motion seeking this relief. A197-A203. Because the defendant’s motion misstates the facts, disregards the applicable law and fails to establish that the defendant is eligible for release pending appeal, the government respectfully submits that his motion should be denied.

# FACTUAL AND PROCEDURAL BACKGROUND

The defendant was a licensed securities broker who perpetrated a multi-year, multi-victim, multi-million dollar scheme to defraud customers of his employer, Jefferies & Co., Inc. (“Jefferies”), by making misrepresentations in the purchase and sale of residential mortgage-backed securities (“RMBS”). The defendant perpetrated this fraud in trades with investment funds, hedge funds and Public-Private Investment Funds (or “PPIFs”), which were investment vehicles established by the Department of Treasury after the financial crisis to purchase troubled assets—including RMBS bonds—using Troubled Asset Relief Program (“TARP”) money.

Case: 14-2902 Document: 33 Page: 2 09/11/2014 1317948 21

The defendant was charged with and (following pre-trial dismissal of one securities fraud count on the government’s motion) convicted after a ten-day trial of ten counts of securities fraud under 15 U.S.C. § 78j(b) & 78ff, one count of TARP fraud under 18 U.S.C. § 1031, and four counts of making false statements in a matter within the jurisdiction of the United States Government in violation of 18 U.S.C.

§ 1001.

The government proved its case at trial with evidence that included the electronic communications in which Litvak made misrepresentations to victims about facts that determined the prices they paid or accepted for RMBS bonds, testimony on the accuracy of such communications, trade tickets reflecting the actual facts relevant to pricing for the securities in question, testimony on the accuracy of the information in such trade tickets, the testimony of six victims as to their negotiations with the defendant and the impact of his lies on their trade executions and investors’ profitability, testimony of a Financial Industry Regulatory Authority (“FINRA”) employee as to the licensing examination that Litvak was required to pass, testimony by the former Chief of Investment for the Office of Financial Stability at the Department of Treasury (“Treasury”) regarding the government’s investment in certain RMBS bonds through TARP, and testimony by a special agent from the Office of the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”) who investigated the defendant after a victim reported Litvak’s fraud to Treasury.

Case: 14-2902 Document: 33 Page: 3 09/11/2014 1317948 21

The defendant’s job at Jefferies was to buy and sell bonds for the firm’s own account (“inventory trades”) and to match customers willing to buy and sell RMBS bonds (through “orders” or “bid lists”); in the latter transactions, Litvak would use Jefferies’ account to purchase a RMBS bond from the seller and then sell it to the buyer, sometimes immediately. In the RMBS bond market, buyers and sellers do not know one another’s identity, cannot communicate directly, and must negotiate through a broker-dealer, like the defendant. Thus, in the RMBS trades at issue, only Litvak knew both the price paid by the buyer and the price accepted by the seller, and he determined what information buyers and sellers received.

The evidence demonstrated that the defendant’s scheme involved using three different types of misrepresentations to fraudulently increase Jefferies’ profitability at the expense of customers. First, in selling bonds in orders and bid list trades, the defendant misrepresented to certain buyers the price that Jefferies was paying the seller for a bond. These buyers agreed to pay Jefferies’ purchase price, plus a specifically negotiated commission. But Litvak, by falsely claiming that Jefferies’ purchase price was higher than it actually was, caused the buyer to pay a fraudulently inflated purchase price so that Litvak could secretly take a larger than agreed-upon commission for Jefferies. The simultaneous bond trades charged in Counts One and Two are a useful example. A10-13, 17 (Indictment, Jan. 25, 2013). There, Litvak repeatedly misrepresented to the buying victim that Jefferies was purchasing two

Case: 14-2902 Document: 33 Page: 4 09/11/2014 1317948 21

bonds from the seller at 58 cents and 58.25 cents per dollar of face value, respectively. In truth, Jefferies paid 57.5 cents and 56.5 cents on the dollar. The buying victim agreed to buy the bonds at Jefferies’ purchase price, plus a negotiated commission. Specifically, the victim and Litvak agreed that Jefferies would forego a commission on the first transaction in favor of taking a larger than usual commission of 0.15625 cents per dollar on the second transaction. By lying about Jefferies’ purchase price and fraudulently increasing the price paid by the victim, Litvak was secretly able to take an undisclosed additional commission for Jefferies of 0.5 cents on the first transaction and 1.59375 cents per dollar on the second transaction. The net effect of the defendant’s misrepresentations in these two trades was that the victim paid a higher price and lost $662,540.09, which Litvak secretly kept for Jefferies.

The defendant’s second kind of misrepresentation occurred in the purchase of RMBS bonds from victims, and is the mirror image of the above: in certain order transactions, Litvak misrepresented to the seller the price at which the buyer was buying bonds from Jefferies. These sellers agreed to sell at Jefferies’ sale price, minus a specifically negotiated commission. By misrepresenting that Jefferies’ sale price was lower than it actually was, Litvak convinced the seller to accept a fraudulently deflated price so that Jefferies could secretly take a larger commission than the victim had agreed to. The transaction in Count 8 was this type of misrepresentation. A17. There, the selling victim explicitly asked the defendant, “how much do you work

Case: 14-2902 Document: 33 Page: 5 09/11/2014 1317948 21

for?” and Litvak responded that a commission of 0.25 cents per dollar of face value was “great.” Litvak then made clear that he would deduct this commission from the price paid by the buyer to Jefferies, and proposed that he ask the buyer to pay either 61 cents or 61.25 cents per dollar, saying “wanna get you the highest i can...”1 The seller replied “well i want best execution obv[iously] so try and get him to [61.25 cents]!” Litvak soon responded “im selling him bonds at [61.25 cents] will buy em

from you at 61 [o]k?” In fact, Jefferies sold this bond at 62.375 cents on the dollar. Litvak’s lies caused the selling victim to accept a lower price and lose $228,561.45, which Litvak secretly kept for Jefferies.

The defendant’s third type of misrepresentation occurred in his sale of bonds from Jefferies’ inventory. Although he knew that Jefferies owned the bonds, Litvak misrepresented to certain buyers that he was negotiating to buy from a third-party seller. This misrepresentation falsely portrayed inventory trades as orders, which harmed buyers and benefitted Litvak and Jefferies because buyers paid a “match- making” commission, even though Litvak had not actually made a match. The transaction in Count Five is an example of this kind of misrepresentation. A14-17. There, although Litvak knew that he had purchased the bond in question for Jefferies’ inventory on December 14, he misrepresented to the buying victim that he was in negotiations with a fictitious seller on December 18 and again on December 23.

1 All quoted electronic communications appear as in the original, unless noted.

Case: 14-2902 Document: 33 Page: 6 09/11/2014 1317948 21

Eventually, on the later date, Litvak falsely claimed that he had managed to convince the seller to accept 75.875 cents per dollar of face value, and he negotiated with the buying victim to pay Jefferies that price plus an additional “match-making” commission of 0.125 cents on the dollar. This victim (and every other witness who was asked) testified that buyers never pay commissions on inventory trades.

# APPLICABLE LEGAL STANDARD

Under 18 U.S.C. § 3143(b), a district court must order a convicted defendant detained pending appeal unless it determines that (1) there is clear and convincing evidence “that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released”; (2) “the appeal is not for purpose of delay”; (3) “the appeal raises a substantial question of law or fact”; and (4) if the appeal is decided in the defendant’s favor, it is “likely to result in reversal or an order for a new trial.” *See United States v. Randell*, 761 F.2d 122, 124-25 (2d Cir. 1985). A “substantial question” is one that is “close,” “fairly debatable,” or “very well could be decided the other way.” *Id.* at 125 (quotations omitted).

The defendant bears the burden of establishing all of the criteria for release pending appeal. *Id.*; *see also United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004) (recognizing statutory “presumption in favor of detention” following conviction). Moreover, a defendant must establish the infirmity of every count of his conviction. *See Randell*, 761 F.2d at 125-26 (declining to consider whether fraud

Case: 14-2902 Document: 33 Page: 7 09/11/2014 1317948 21

charges raised substantial questions because tax charges were effectively unchallenged); *see also Morison v. United States*, 486 U.S. 1306, 1306-07 (1988) (Rehnquist, J., in chambers) (“Because Morison has not shown that his appeal is ‘likely to result in reversal’ with respect to all the counts for which imprisonment was imposed, his application is denied.” (citation omitted)).

# ARGUMENT

The defendant’s motion argues that the district court erred in its post-trial ruling regarding the sufficiency of the government’s evidence, in its pre-trial rulings excluding certain expert and lay evidence, and in its jury charge regarding securities fraud *scienter.* Under the applicable standards of review—which the defendant’s motion largely overlooks—these arguments do not present “close” or “fairly debatable” questions of law or fact that are likely to result in reversal.

# Litvak’s Misrepresentations Were Material to His Victims

The first issue raised by the defendant is whether there is a substantial question that the government presented sufficient evidence that his misrepresentations, which made RMBS bond trades more expensive and less profitable to his victims, were material.

While this Court reviews challenges to the sufficiency of evidence *de novo*, a defendant bears a “heavy burden” given the “exceedingly deferential standard of review” employed. *United States v. Anderson*, 747 F.3d 51, 59 (2d Cir. 2014)

Case: 14-2902 Document: 33 Page: 8 09/11/2014 1317948 21

(citations and quotations omitted), *pet’n for cert. filed*, No. 13-10475 (June 2, 2014). After viewing “the evidence in a light that is most favorable to the government, and with all reasonable inferences resolved in favor of the government,” the Court “must uphold a conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Anderson*, 747 F.3d at 59-60 (emphasis in original, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), *inter alia*). “[T]he only question under *Jackson* is whether that finding [of guilt] was so insupportable as to fall below the threshold of bare rationality.” *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012) (*per curiam*).

Under this standard, the government’s evidence was plainly sufficient for a reasonable jury to find that Litvak’s lies concerned material facts. For securities fraud, a showing of materiality requires only “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *United States v. Vilar*, 729 F.3d 62, 88-89 (2d Cir. 2013) (defining materiality as “a substantial likelihood that a reasonable investor would find the omission or misrepresentation important in making an investment decision, and not actual reliance”), *cert. denied*, 134 S. Ct. 2684 (2014). For TARP fraud, a material fact would reasonably be expected to be of concern to a prudent person in making a decision, and may include information necessary to make

Case: 14-2902 Document: 33 Page: 9 09/11/2014 1317948 21

discretionary economic decisions. *See United States v. Dinome*, 86 F.3d 277, 280 (2d Cir. 1996) (affirming materiality instruction for mail and wire fraud, on which the TARP fraud statute is based); *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007) (wire fraud instruction). For § 1001, any statement is material to the government if it has “a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.” *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (internal quotation marks omitted).

The defendant misstates the facts when he argues that his misrepresentations were “relevant only to negotiations.” Mot. at 8-9. The evidence at trial was that Litvak’s misrepresentations caused his victims to (i) pay more when purchasing and accept less when selling so that Jefferies could secretly take larger commissions, or

(ii) pay unwarranted commissions on inventory trades. As the district court held, “there was ample evidence at trial that, in misstating his acquisition price in bid list and order trades and holding himself out to be buying from a fictional seller in inventory trades, Litvak exploited the opacity of the RMBS market to his victims’ detriment and to Jeff[e]ries’ and his own advantage.” A170-171 (Ruling Re: Defendant’s Motions For Judgment of Acquittal and For New Trial [hereinafter “Ruling on Post-Trial Motions”]).

The clearest evidence of materiality at trial came in through the testimony of the defendant’s victims, including employees of investment managers selected by

Case: 14-2902 Document: 33 Page: 10 09/11/2014 1317948 21

Treasury to manage PPIFs. These victims testified that knowing the truth about a fact that determined the price they agreed to would have mattered to them: it would have caused them to negotiate more, led them to demand compensation from Jefferies, resulted in cancelling the trade, or caused them to offer to pay a lower price. In short, as the district court put it, “Litvak’s victims testified that his lies mattered to them because his lies affected the price they paid for the underlying securities.” A169 (Ruling on Post-Trial Motions) (citing testimony). Indeed, as one victim put it (using an industry slang term for 0.03125 cents on the dollar), “every tick counts.” A170 (same).

Moreover, some of the most important exhibits in the government’s case were Litvak’s communications with his co-workers and victims, where the primary—if not only—topic of discussion was information affecting bond price. A170 (Ruling on Post-Trial Motions: “[T]he Bloomberg chats showed protracted negotiations over price . . . .”). This contemporaneous conduct demonstrated the importance of price in RMBS bond trades.

Finally, the defendant admitted that his misconduct was economically motivated. One victim—an employee of a PPIF manager—testified that after he discovered and confronted Litvak with a few of his lies, “Litvak apologized and explained that ‘it was a hard year and guys were doing whatever they needed to make money.’” *Id.* (quoting testimony).

Case: 14-2902 Document: 33 Page: 11 09/11/2014 1317948 21

The defendant is wrong to claim that *Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539 (2d Cir. 1996), is relevant precedent, much less the only relevant precedent of this Court. Mot. at 8-9. In that case, in the context of a transparent equity market, the plaintiffs admitted that the alleged misrepresentations were irrelevant to the prices they paid because the defendants had correctly stated all of the components that determined final price. *Feinman*, 84 F.3d at 541-42; *Feinman v. Dean Witter Reynolds, Inc.*, No. 94 CIV. 7798 (DLC), 1995 WL 562177, at \*4 (S.D.N.Y. Sept. 21,

1995) (noting the complaint alleged that “each of the defendants discloses the fee on the face of the confirmation slip and to a lesser or greater extent give an explanation for the fee”). Here, in contrast, in an opaque RMBS bond market, Litvak’s lies secretly increased the size of Jefferies’ commission—“a heavily negotiated term”—by causing buyers to pay more and sellers to accept less. A170 n.1 (Ruling on Post-Trial Motions).

Moreover, despite the defendant’s claim to the contrary, this Court has had numerous fraud cases where misstatements or omissions went to a component of price. *See*, *e.g.*, *S.E.C. v. DiBella*, 587 F.3d 553, 565-66 (2d Cir. 2009) (finding no abuse of discretion in holding that failure to disclose a fee arrangement with a third- party was a material omission for a § 10(b) and Rule 10b-5 charge); *United States v. Leonard*, 529 F.3d 83, 85-86 (2d Cir. 2008) (affirming conspiracy and securities fraud convictions for misrepresented sales commissions in offering memoranda, where

Case: 14-2902 Document: 33 Page: 12 09/11/2014 1317948 21

materiality undisputed on appeal); *United States v. Rutkoske*, 506 F.3d 170, 171, 173 (2d Cir. 2007) (affirming securities fraud conviction where, among other deceptions, brokers made misrepresentations and falsified documents to hide undisclosed commissions); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 242 (2d Cir. 1985) (holding complaint stated cognizable securities fraud claim for undisclosed broker commissions, cited by district court in *Feinman*); *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1032 (2d Cir. 1974) (affirming preliminary injunction granted SEC because, in addition to other deceptions, “the defendants did not indicate to their customers that they were charging Scotch whisky prices considerably in excess of the prices charged by other brokers”).

The defendant cannot overcome his heavy burden of demonstrating that there was insufficient evidence of materiality, and this appeal does not raise a substantial question of fact or law.

# The Evidentiary Rulings Below Were Not an Abuse of Discretion

The second question raised by the defendant is whether the district court’s decision to preclude irrelevant and prejudicial expert and lay evidence raises a substantial question. Evidentiary rulings are reviewed for abuse of discretion.

Case: 14-2902 Document: 33 Page: 13 09/11/2014 1317948 21

# Irrelevant and Unreliable Expert Testimony

“A decision to . . . exclude expert . . . testimony is not an abuse of discretion unless it is ‘manifestly erroneous.’” *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (internal citations omitted).

The admission of expert testimony is governed by Federal Rule of Evidence 702 and analyzed under the framework set out by the Supreme Court. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (holding that scientific expert testimony is admissible only if it “rests on a reliable foundation and is relevant to the task at hand”); *see also Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (extending *Daubert* to non-scientific testimony and requiring “‘technical’ and ‘other specialized’ knowledge”). Even expert testimony that is admissible under Rule 702 may still be properly excluded on other evidentiary grounds. *See Daubert*, 509 U.S. at 595 (“[A] judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules.”).

The district court precluded the testimony of one of the defense’s proposed experts (Ram Willner) and limited the testimony of another (Mark Menchel) on the grounds of relevance. In considering the proffered testimony of Willner, the district court first noted that the defense’s expert notice was defective, but still attempted to discern the topics on which the defense proposed to offer expert testimony. A58-59. The trial court concluded that Willner’s testimony would be about the fiduciary duties

Case: 14-2902 Document: 33 Page: 14 09/11/2014 1317948 21

of Litvak’s victim’s to their investors, the fair market value of the RMBS bonds that Litvak traded, whether victims later managed to sell the bonds in question at a profit and the volatility of the RMBS bond market. The district court found that each of those proposed areas of testimony was irrelevant under Rule 401 to the facts of the case (A59-61), and, with respect to fair market value and any victim’s post-fraud profits, prejudicial and confusing to the jury under Rule 403 (A63-64).

With respect to Menchel’s purportedly expert testimony, the district court found that it was irrelevant under Rule 401 whether Litvak had a duty to disclose facts that he chose to misrepresent, that Menchel lacked a basis to opine under Rule 702 about whether victims consider certain facts important and that Menchel could testify about the definition of relevant industry terms. A62-64.

The trial court was in the best position to assess the proffered expert testimony’s reliability and the extent to which it was “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Daubert*, 509 U.S. at 591 (quotation omitted). The court did so conscientiously and its rulings were not manifestly erroneous. Accordingly, this appeal does not raise a substantial question.

# Irrelevant State of Mind Evidence

The district court also excluded as irrelevant evidence regarding negotiations and transactions by Jefferies’ employees other than the defendant. A142-44. The defense proffered this evidence as going to Litvak’s state of mind, but the lower court

Case: 14-2902 Document: 33 Page: 15 09/11/2014 1317948 21

noted that, “if it is something [Litvak] didn’t know, then it can’t go to a state of mind.” A143. The defense did not lay any foundation that the defendant was in any way aware of the proffered events. The district court did not abuse its discretion in finding that these excluded facts were irrelevant, and it is not a close question otherwise on appeal.

# Intent to Defraud in Securities Fraud

* + 1. **The Jury Charge on *Scienter* Was Proper**

The defendant argues that a substantial question is raised by the district court’s instruction to the jury regarding *scienter* for securities fraud, which failed to require a finding of “contemplated harm to the counter-party.” Mot. at 16.

In this Circuit, as the district court properly instructed the jury, securities fraud requires an “intent to defraud,” which means “to act willfully and with the specific intent to deceive.” *See* A158 (trial court’s securities fraud charge: “To act with intent to defraud here means to act willfully and with the specific intent to deceive. The

misrepresentation or omission must have had the purpose of inducing the victim of the fraud to undertake some action.”); *United States v. Kaiser*, 609 F.3d 556, 567-68 (2d Cir. 2010) (approving of the following securities fraud instruction: “In order to convict the defendant, you must find that he knew that false statements were being made, and that he did this with intent to cause a deception, a falsification.”).

Case: 14-2902 Document: 33 Page: 16 09/11/2014 1317948 21

In securities fraud cases such as this one, courts have never imposed the additional element of intent to cause harm. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (stating, in securities fraud case, “[i]n this opinion the term ‘*scienter*’ refers to a mental state embracing intent to deceive, manipulate, or defraud,” without mentioning intent to cause harm); *Kaiser*, 609 F.3d at 569-70 (upholding instruction that did not include intent to cause harm); *S.E.C. v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996) (“Scienter, as used in connection with the securities fraud statutes, means intent to deceive, manipulate, or defraud or at least knowing misconduct.”) (citations omitted). Indeed, this Court has explicitly distinguished between securities fraud and mail fraud, which is a crime that requires a specific intent to cause harm. *United States v. Dixon*, 536 F.2d 1388, 1396 (2d Cir. 1976) (Friendly, J.: “[T]he Government’s burden with respect to criminal intent on the Securities Exchange Act counts was less than under the mail fraud counts.”).

Litvak ignores the unfavorable securities fraud precedent, and instead relies on mail and wire fraud cases. Mot. at 14-15 (citing *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) and *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987)). In *Regent Office*, this Court held that wire fraud defendants who sought to sell stationery by directing their salespeople to misrepresent their identities lacked the necessary intent to defraud. *Regent Office*, 421 F.2d at 1179. The Court found that the defendants’ misrepresentations were not “directed to the quality, adequacy or price

Case: 14-2902 Document: 33 Page: 17 09/11/2014 1317948 21

of goods to be sold, or otherwise to the nature of the bargain.” *Id.* In that case, unlike this one, there was no “discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered or intended to deliver.” *Id.* at 1182.

In *Starr*, the defendants cheated the Postal Service by hiding high-rate mail among low-rate packages, then charged customers the high-rate costs and supported those incorrect costs with false invoices. *Starr*, 816 F.2d at 95-96. This Court held that although the defendants had plainly deceived their customers, they had not committed mail fraud against them because “[t]he misappropriation of funds simply ha[d] no relevance to the object of the contract [with the customers]; namely, the delivery of mail to the appropriate destination in a timely fashion.” *Id.* at 100. Citing *Regent Office*, the Court stated that “the harm contemplated must affect the very nature of the bargain itself.” *Id.* at 98. As Judge Newman noted in his concurring opinion, the flaw in *Starr* was that the prosecution had charged the defendant with defrauding the wrong victim: “An indictment for defrauding the Postal Service would have led to a conviction that would surely have been affirmed.” *Id.* at 102 (Newman, J., concurring).

The defendant’s cited cases do not purport to speak to the intent to defraud element of securities fraud, and the district court was correct to instruct that only an intent to deceive, rather than to cause harm, is required. This proposition is not fairly

Case: 14-2902 Document: 33 Page: 18 09/11/2014 1317948 21

debatable, and this appeal does not raise a substantial question of law. But even if securities fraud required an intent to cause harm, as discussed below, the government met that burden.

# The Evidence Established Litvak’s Fraudulent Intent

The defendant argues that a substantial question exists whether the government presented sufficient evidence for a rational jury to find that the defendant had the intent to commit securities fraud. As above, the defendant bears a “heavy burden” to demonstrate on appeal that the “finding [of guilt] was so insupportable as to fall below the threshold of bare rationality.” *Coleman*, 132 S. Ct. at 2065.

The government established that Litvak’s lies in the transactions relevant to the securities fraud counts were made with the intent to deceive his customers. The district court identified numerous pieces of evidence that demonstrated the defendant made his misrepresentations in order to reap a pecuniary benefit for Jefferies. A172. For instance, when caught lying by one of his victims, the defendant admitted that “it was a hard year and guys were doing whatever they needed to make money.” A170 (quoting testimony). The logical interpretation of Litvak’s uncontested statement is that, in response to economic pressure, he lied to customers for the purpose of increasing Jefferies’ profits on trades. The jury saw this play out in numerous contemporaneous electronic chats, where the defendant knowingly supplied false information to victims in a way that decreased their profitability on trades and

Case: 14-2902 Document: 33 Page: 19 09/11/2014 1317948 21

correspondingly increased Jefferies’ profits. A172. Moreover, the kind of facts that Litvak lied about circumstantially proved his fraudulent intent; as the district court put it, “a rational jury could have inferred from the fact that Litvak misrepresented price information characteristically unavailable in the RMBS market that his purpose in providing this information was to induce his victims to agree to the price he was representing as the actual price from the counterparty and not to engage in further negotiation, as they might otherwise have done, absent the lie.” A172.

Viewing all of the evidence together and making all inferences in the government’s favor, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Litvak had the required fraudulent intent to deceive. And, even if an intent to harm were required, this evidence was also sufficient to circumstantially prove the defendant’s intent to cause economic harm to his victims, insofar as his misrepresentations—designed to cause buyers to pay more and sellers to accept less— “affect[ed] the very nature of the bargain itself.” *Starr*, 816 F.2d at 98. This appeal does not raise a substantial question to the contrary.

Case: 14-2902 Document: 33 Page: 20 09/11/2014 1317948 21

# CONCLUSION

The defendant’s appeal is based on claims that do not amount to a substantial question of law or fact likely to result in a reversal of his conviction or a new trial. Accordingly, the defendant’s motion for bail pending appeal should be denied.

Respectfully submitted,

DEIRDRE M. DALY

UNITED STATES ATTORNEY

 /s/ JONATHAN N. FRANCIS

ASSISTANT UNITED STATES ATTORNEY

Federal Bar No. phv05083 157 Church Street, 25th Floor New Haven, CT 06510

Tel.: (203) 821-3700

Case: 14-2902 Document: 33 Page: 21 09/11/2014 1317948 21

**CERTIFICATE OF SERVICE**

I hereby certify that on September 11, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s CM/ECF System.

 /s/ JONATHAN N. FRANCIS

ASSISTANT UNITED STATES ATTORNEY