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**14-2902-cr**

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, APPELLEE

*v.*

JESSE C. LITVAK, DEFENDANT-APPELLANT

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (CRIM. NO. 13-19) (THE HONORABLE JANET C. HALL, C.J.)*

**REPLY IN SUPPORT OF MOTION FOR RELEASE PENDING APPEAL**

KANNON K. SHANMUGAM DANE H. BUTSWINKAS ALLISON B. JONES MASHA G. HANSFORD

WILLIAMS & CONNOLLY LLP

*725 Twelfth Street, N.W. Washington, DC 20005*

*(202) 434-5000*

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# INTRODUCTION

The government does not contest three of the four statutory factors for de- termining whether Mr. Litvak is entitled to continued release pending appeal. Spe- cifically, the government does not contest (1) that there is clear and convincing ev- idence that Mr. Litvak is not likely to flee or pose a danger; (2) that the appeal is not for the purpose of delay; or (3) that, if the appeal is decided in Mr. Litvak’s fa- vor, it is likely to result in reversal or a new trial on all counts. Nor does the gov- ernment dispute that, unless this motion is granted, Mr. Litvak will have served much of his sentence by the time the Court decides his appeal.

The only point the government contests is whether the appeal raises a sub- stantial question. On that point, the government’s response reads like a preview of its merits brief. But the only issue at this juncture is whether the appeal raises a substantial question—one that is “close” or “fairly debatable” or “has not been de- cided by controlling precedent.” *United States* v. *Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (internal quotation marks and citations omitted). Nowhere does the government identify any precedent that squarely forecloses Mr. Litvak’s argu- ments, nor does it deny that this case raises legal questions of first impression. Be- cause there can be no serious doubt that each of the questions Mr. Litvak intends to raise is substantial, and because the other requirements for continued release pend- ing appeal are indisputably satisfied, Mr. Litvak’s motion should be granted.

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# ARGUMENT

In its opposition to Mr. Litvak’s motion, the government offers its own spin on the facts—a spin that is unsupported by any citations to the actual record at tri- al. But the accuracy of the government’s rendition aside, the factual core of this case is simple and undisputed: Mr. Litvak made misrepresentations about his em- ployer’s profit margin on certain transactions, either by misstating Jefferies’ acqui- sition or resale price for a security or by misrepresenting whether the security was in Jefferies’ inventory. *See* Mot. 2-3. In those two ways, Mr. Litvak misstated his reservation price for the transaction—a figure that he was under no obligation to disclose (and that the counterparties testified they accordingly took with a grain of salt). *See* Mot. 5-6. None of the misrepresentations had any bearing on the value of the securities transacted, *see* Mot. 4-5, and in none of the cases did Jefferies earn a higher profit than it was permitted to charge, *see* SA7 (Eveland).

Notably, the government fails to mention that, in each trade, the counterpar- ty knew the total price and agreed to transact at that price. *See*, *e.g.*, A106 (Norris) (testifying that he “knew how much [he was] paying” and he “knew what [he was] getting”). This was therefore not a case where a counterparty agreed to one price but the broker charged another, or where a counterparty bargained for a fixed commission on top of an unknown best-available price—as, say, the seller of a house may do with his real-estate agent. In each of the charged trades, the coun-

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terparty knew the total price and could compare it against others available in the market. Each counterparty transacted because a transaction at the total price was viewed as profitable when compared to all the other options available in the mar- ket. *See*, *e.g.*, A97 (Vlajinac) (testifying that he “achieved best execution” at the total price); SA5 (Lemin) (explaining that he “mak[es] investment decisions[] based upon the full price to the fund when agreeing to buy a bond,” and that “[w]hat’s important” is the total price). It is against that factual backdrop that the questions Mr. Litvak intends to raise on appeal must be understood. And by any standard, those questions are substantial ones.

# Materiality

This Court has already held that misstatements relevant to a counterparty’s ability to negotiate but unrelated to the value of a security are immaterial as a mat- ter of law. *See Feinman* v. *Dean Witter Reynolds, Inc.*, 84 F.3d 539, 541 (2d Cir. 1996). Unable to distinguish *Feinman*, the government resorts to mischaracteriz- ing the facts both of this case and of that one. As to this case: the government ar- gues that the charged misrepresentations were relevant to more than the parties’ negotiations. Not so. In fact, the government does not, and cannot, dispute that the misrepresentations were irrelevant to the value of the securities. In each trade, the price proposed by Mr. Litvak was acceptable to the counterparty. As the coun- terparties testified, all that was left was to determine the final price in the range ac-

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ceptable to both parties—*i.e.*, the negotiation. *See*, *e.g.*, A94-95 (Vlajinac) (testify- ing that misrepresentations “did not affect my thinking about the bond itself” be- cause “[the information] sets the parameters of the negotiations, but did not influ- ence the valuation of the securities”); SA2-3 (Canter) (stating that he “made a deci- sion that [he] should transact with Jefferies because of the price levels” and then moved “on to negotiating, hopefully, a still better price with Jefferies”).

As to *Feinman*: the government asserts that the plaintiffs there “admitted that the alleged misrepresentations were irrelevant to the prices they paid.” Opp.

11. That is incorrect. The plaintiffs in *Feinman* argued that the misrepresentations mattered to the price they paid because they hampered plaintiffs’ “efforts to nego- tiate [fees].” *See* Br. of Appellants at 3, *Feinman*, *supra* (No. 95-9081), *available at* 1995 WL 17207220; *see also id.* at 2, 11, 26-27. And the Court decided *Feinman* on that premise. *See* 84 F.3d at 540 (explaining the plaintiffs’ allegation that the misrepresentation “prevent[ed] customers from negotiating the fees”). In *Feinman*, just as in this case, the counterparties knew and agreed to the final price. The misrepresentation in both cases went only to the makeup of that price: name- ly, what portion of it reflected actual “cost to the firm[]” and what portion repre- sented a profit. *Id.* Knowing that a certain component represented pure profit might have spurred further negotiation, but that was insufficient to establish mate- riality in *Feinman*, and it is similarly insufficient here.

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As to the other cases the government cites, *see* Opp. 11-12, those cases are readily distinguishable because the misrepresentation at issue in each of those cas- es actually affected the value of the security. *See*, *e.g.*, *SEC* v. *DiBella*, 587 F.3d 553, 562, 565-566 (2d Cir. 2009) (holding material a fee arrangement that gave a pension fund treasurer a personal stake in making a certain investment, because the investment decision could have been made for reasons other than the fund’s best interest); *United States* v. *Leonard*, 529 F.3d 83, 86 (2d Cir. 2008) (describing a scheme in which the offering memoranda for a security—an interest in a compa- ny—substantially understated the company’s liability for sales commissions). Of course there are circumstances in which fee structures or commissions could affect the value of a security: for example, the profits that Jefferies makes would be rele- vant to an investor considering a purchase of *Jefferies’* stock. Critically, however, the government is unable to identify any case—from this Court or from any oth- er—in which a misstatement irrelevant to the value of the security was deemed ma- terial.

Furthermore, the government has no answer to the argument that the charged misrepresentations could not constitute fraud at common law. As the Supreme Court has explained, “where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these

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terms.” *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (internal quotation marks and alter- ations omitted). As Mr. Litvak has explained, it is well established at common law that misrepresentations of this type are immaterial. *See* Mot. 10.

Given this Court’s decision in *Feinman* and the common-law principles sup- porting it—and the government’s failure to identify even a single case to the con- trary—the question whether Mr. Litvak’s misrepresentations were material is plainly a substantial one. The government errs in contending otherwise.

# Evidentiary Rulings

The government does not assert that the district court’s evidentiary rulings excluding Mr. Litvak’s evidence were harmless, nor does it cite any cases in which exclusions of this type were upheld. Instead, in defense of the evidentiary rulings, the government merely asserts, without elaboration, that the district court was “in the best position to assess” the evidence. Opp. 14.

In some sense, of course, that is true. But it hardly follows that the district court’s evidentiary rulings do not present substantial questions.[1](#_bookmark4) Based on nothing more than its conclusory view that the evidence was irrelevant, the district court excluded evidence that goes to the heart of the materiality inquiry—including evi- dence of the fair market value of the securities at issue, the arm’s-length nature of

1 It is beyond dispute that evidentiary rulings can create a substantial issue for the purposes of release pending appeal. Indeed, this Court recently granted a bail motion based *entirely* on alleged errors in evidentiary rulings. *See United States* v. *Gupta*, No. 12-4448, ECF No. 47 (2d Cir. Dec. 6, 2012).

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the transactions, and features of the market for the securities. *See* Mot 11-12 & n.5.[2](#_bookmark5)

Similarly, the district court excluded testimony about the widespread nature of this conduct, highly relevant to the question of good faith, because it “does not [directly] involve . . . Mr. Litvak.” A143. To be sure, the evidence did not *guarantee* Mr. Litvak’s good faith: he could somehow have been unaware of the widespread norms in his industry. By excluding the evidence on this basis, how- ever, the district court required the evidence to be conclusive before Mr. Litvak could introduce it. That was error. *See*, *e.g.*, *United States* v. *Certified Environ- mental Services, Inc.*, 753 F.3d 72, 90 (2d Cir. 2014) (stating that “evidence need not be conclusive in order to be relevant” (internal quotation marks and alteration omitted)).

Misconstruing the relevance standard, the district court dismissed crucial de- fense evidence on core disputed issues and substituted its own assessment of the evidence for that of the jury. The district court’s evidentiary rulings constituted a clear abuse of discretion and thus present a substantial question for appeal.

2 The government implies that the district court excluded evidence of fair mar- ket value on the independent ground that it would be “prejudicial and confusing” to the jury. Opp. 14. But the district court ultimately based that ruling on relevance: it explained that, because the opinions “are *irrelevant*[,] their ability to confuse the jury about *what the issue really is in this case* greatly outweighs any probative val- ue which I don’t think it has any.” A63-64 (emphases added).

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# Scienter

Struggling to justify its failure of proof as to scienter, the government simply ignores this Court’s statement that the government must prove that a defendant “in- tended to defraud [the victim] in connection with his sale of the [security].” *See United States* v. *Vilar*, 729 F.3d 62, 93 (2d Cir. 2013). Failing even to cite *Vilar* in this connection, the government instead points to general descriptions of the scien- ter standard in two *civil* cases. *See* Opp. 16. And it argues that, in a case that pre- dated *Vilar*, this Court approved an instruction that required only deceit. Opp. 16 (citing *United States* v. *Kaiser*, 609 F.3d 556 (2d Cir. 2010)). The government fails to mention, however, that intent to defraud was not at issue in *Kaiser*: the de- fendant challenged the scienter instruction in that case only on the ground that “‘willfulness’ required knowledge of illegality.” *Kaiser*, 609 F.3d at 568. This Court’s failure to address an error that the defendant did not raise hardly consti- tutes support for the government’s view.

Nor does the government explain why this Court’s holdings about intent to defraud would apply any differently to securities fraud than to mail and wire fraud. Far from disregarding precedent from the mail- and wire-fraud context, the Su- preme Court has described it as “a particularly apt source of guidance” for inter- preting securities fraud under Rule 10b-5. *United States* v. *O’Hagan*, 521 U.S. 642, 654 (1997) (internal quotation marks omitted); *see also*, *e.g.*, *SEC* v.

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*Holschuh*, 694 F.2d 130, 144 n.24 (7th Cir. 1982) (describing a statement about a scheme to defraud “written in reference to a mail fraud scheme” to be “fully appli- cable to a scheme to defraud under the securities laws”).

The government is thus left to argue that “even if securities fraud required an intent to cause harm . . . the government has met that burden.” Opp. 18. But Mr. Litvak transacted securities that were worth exactly what the counterparties expected and that the counterparties testified they would transact again at the same price. Mr. Litvak did not “intend[] to get,” nor did he in fact get, “more for [his] merchandise than it was worth to the average customer.” *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970). As a result, there could not have been any harm “affect[ing] the very nature of the bargain itself.” *United States* v. *Starr*, 816 F.2d 94, 98 (2d Cir. 1987).

The government’s contrary arguments run afoul of *Regent Office Supply* and *Starr*. In both of those cases, the defendants made “misrepresentations in order to reap a pecuniary benefit.” Opp. 18. And in both, the misrepresentations sought “to induce [the] victims to agree” to transact at a certain price. Opp. 19. But that intent was insufficient in those cases, and it is similarly insufficient here.[3](#_bookmark7)

3 The government does not dispute that Mr. Litvak’s appeal will pose substan- tial questions as to the TARP-fraud and false-statements counts; accordingly, a substantial question as to scienter on the securities-fraud counts would entitle Mr. Litvak to release. *See* Mot. 17 n.8.

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\* \* \* \* \*

Mr. Litvak need only show that his appeal will present one substantial ques- tion, but his appeal will in fact present three. Each of the foregoing questions is “close” and “fairly debatable” and “very well could be decided the other way.” *Randell*, 761 F.2d at 125 (internal quotation marks and citations omitted). If this Court were ultimately to reject all of Mr. Litvak’s arguments on the merits, his continued release would have no impact on his ability to serve the full term of im- prisonment imposed by the district court. But if Mr. Litvak surrenders in Novem- ber and this Court accepts even one of his arguments, he will have served most, if not all, of the term of imprisonment by the time this Court rules. Mr. Litvak’s con- tinued release is necessary to ensure he has a meaningful opportunity to raise his substantial arguments before this Court.[4](#_bookmark9)

# CONCLUSION

The motion for release pending appeal should be granted.

4 The government has not opposed Mr. Litvak’s request that his surrender date be stayed if this motion cannot be decided before November 5. *See* Mot. 1 n.1.

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Respectfully submitted,

/s/ Kannon K. Shanmugam KANNON K. SHANMUGAM DANE H. BUTSWINKAS ALLISON B. JONES

MASHA G. HANSFORD WILLIAMS & CONNOLLY LLP

*725 Twelfth Street, N.W. Washington, DC 20005*

*(202) 434-5000*

September 22, 2014

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# CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for defendant-appellant Jesse C. Litvak and a member of the Bar of this Court, certify that, on September 22, 2014, a copy of the attached Reply in Support of Motion for Release Pending Appeal was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam KANNON K. SHANMUGAM