IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	CASE NO. 3:13CR19 (JCH)
v.	
JESSE C. LITVAK	JANUARY 12, 2017
Defendant.	
_____/	

MEMORANDUM OF LAW IN SUPPORT OF JESSE C. LITVAK'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(a)

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Mr. Litvak moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). The government has failed to prove, beyond a reasonable doubt, any of the elements of any of the charged offenses. No rational jury could find otherwise. *United States v. Gjurashaj*, 706 F.2d 395, 398 (2d Cir. 1983).[1]

I. Because the Alleged Misrepresentations Did Not Go to the Heart of the Bargain between Mr. Litvak and his Counterparties, No Rational Juror Could Find that the Government Has Proven, Beyond a Reasonable Doubt, Elements 1-3 of Each Count in the Indictment.

There is no dispute that, as to the trades at issue in Counts 1, 2, 3, 4, 5, 6, 9 10, and 11, each of Mr. Litvak's counterparties received the bonds they agreed to purchase from Jefferies & Company at the prices they agreed to pay. As to Count 8, there is no dispute that Mr. Litvak's counterparty sold the bond in question to Jefferies at the price it agreed to. There is no evidence that Mr. Litvak made any false statement or omission relating to the characteristics of the bonds themselves or about the essential terms of the transaction. The alleged misstatements, which took place in the context of negotiations, had no effect on the value of the securities, did not go to the heart of the bargain between the parties, and thus cannot constitute an offense within the meaning of the federal antifraud statutes, including the relevant provisions of the Exchange Act. *See Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 613 (7th Cir. 2012); *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016); *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016).

For these reasons, the government has failed to demonstrate that the statements in question—even if they were false or misleading—fall within the ambit of the statements and

[1] The Second Circuit has held that "the defendant need not specify the ground of the [Rule 29] motion in order to preserve a sufficiency claim for appeal." *Gjurashaj*, 706 F.2d at 399. Mr. Litvak reserves all rights.

conduct described in 15 U.S.C. §§ 78(b) and 78ff and SEC Rule 10b-5. The government therefore has failed to prove, beyond a reasonable doubt, the first element of securities fraud (as set forth in the Court's draft final jury charge of January 9, 2017).

For the same reasons, the government has failed to prove that any of the alleged misstatements or omissions were material. The government therefore has failed to prove the second element of securities fraud (as set forth in the charge).

For the same reasons, the government has failed to show that Mr. Litvak acted willfully and with an intent to defraud for purposes of the third element (as set forth in the charge).

II. Materiality Arguments that Apply to Each Count.

In addition to the grounds set forth above, the government has failed to meet its burden on the second element (materiality) for the following additional reasons:

The evidence has shown that a "reasonable RMBS investor" during the relevant timeframe was a highly sophisticated qualified institutional buyer (QIB), who was skeptical about the unverified information and made independent judgments about whether to buy or sell and at what price. The focus of these investors is the all-in price. The evidence is insufficient to prove the statements at issue had a material effect on those investors' decisions about what to buy (or sell) and at what price.

The evidence has shown that a "reasonable RMBS investor" was relatively insensitive to minor variations in price during the relevant time period when RMBS were trading at steep discounts.

The evidence has shown that each of the trades at issue was a principal-to-principal trade between self-interested parties whose economic interests were not aligned.

There is no evidence that any of the counterparties could have purchased (or sold in the case of the trade as issue in Count 8) the bonds in question at a price lower (or higher in the case of Count 8) than it received.

The evidence has shown that the "total mix of information" available to a reasonable investor consists of a large number of data points. That mix is dominated by the investors' analytics and proprietary models. The evidence is not sufficient to show that the alleged misstatements "significantly altered" that total mix available to a reasonable investor. *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988).

III. Transaction-Specific Materiality Arguments.

Counts 1-3. In addition to the reasons set forth above, the government has failed to prove materiality as to Counts 1-3, because there was insufficient evidence that AllianceBernstein's investment decisions were influenced by statements of the kind at issue in this case. The government further failed to prove that the statements at issue were of a kind that could reasonably be expected to cause or induce a reasonable investor to act or not act with respect to the transaction at issue.

Count 4. In addition to the reasons set forth above, the government has failed to prove materiality as to Count 4, because there was insufficient evidence that Invesco's investment decision was influenced by statements of the kind at issue in this case. The government further failed to prove that the statements at issue were of a kind that could reasonably be expected to cause or induce a reasonable investor to act or not act with respect to the transaction at issue.

Count 5. In addition to the reasons set forth above, the government has failed to prove materiality as to Count 5. The government presented no testimony from a counterparty to support this count. The government further failed to prove that the statements at issue were of a

kind that could reasonably be expected to cause or induce a reasonable investor to act or not act with respect to the transaction at issue.

Count 6. In addition to the reasons set forth above, the government has failed to prove materiality as to Count 6. The government presented no testimony from a counterparty to support this count. The government further failed to prove that the statements at issue were of a kind that could reasonably be expected to cause or induce a reasonable investor to act or not act with respect to the transaction at issue.

Count 8. In addition to the reasons set forth above, the government has failed to prove materiality as to Count 8, because there was insufficient evidence that York's investment decision was influenced by statements of the kind at issue in this case. The government further failed to prove that the statements at issue were of a kind that could reasonably be expected to cause or induce a reasonable investor to act or not act with respect to the transaction at issue.

Counts 9-10. In addition to the reasons set forth above, the government has failed to prove materiality as to Counts 9-10, because there was insufficient evidence that QVT's investment decisions were influenced by statements of the kind at issue in this case. The government further failed to prove that the statements at issue were of a kind that could reasonably be expected to cause or induce a reasonable investor to act or not act with respect to the transaction at issue.

Count 11. In addition to the reasons set forth above, the government has failed to prove materiality as to Count 11, because there was insufficient evidence that Magnetar's investment decision was influenced by statements of the kind at issue in this case. The government further failed to prove that the statements at issue were of a kind that could reasonably be expected to cause or induce a reasonable investor to act or not act with respect to the transaction at issue.

IV. Intent-Specific Arguments Applicable to Each Count.

The government has failed to prove, beyond a reasonable doubt, that Mr. Litvak intended or contemplated some harm to his purported victims. It therefore has failed to show, as it must, that Mr. Litvak acted with an intent to deceive. *See Takhalov*, 827 F.3d at 1312-14 (11th Cir. 2016); *In re Merrill Lynch & Co., Research Reports Sec. Litig.*, 289 F. Supp. 2d 416, 427 (S.D.N.Y. 2003). Mr. Litvak recognizes, however, that the Second Circuit ruled in his appeal that the government does not need to prove intent to harm in order to establish the third element of the charged offenses. *See United States v. Litvak*, 808 F.3d 160, 179 (2d Cir. 2015).

The government has also failed to show that Mr. Litvak was aware of the generally wrongful or unlawful nature of the alleged statements and conduct.

V. Interstate Commerce-Related Arguments Applicable to Each Count.

The government has not proven, beyond a reasonable doubt, that Mr. Litvak knowingly used, or caused to be used, the mails or any means or instruments of transportation or communication in interstate commerce in furtherance of the fraudulent conduct.

Respectfully Submitted,

Dated: January 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2017, a copy of the foregoing motion was hand delivered to the Court and the government. On this 17th day of January, 2017, a copy of the foregoing motion was uploaded to and filed with the CM/ECF System for the United States District Court for the District of Connecticut, which served a courtesy copy on all counsel in the case.

_/s/_ *C.J. Mahoney*_____