



U.S. Department of Justice

United States Attorney  
Eastern District of New York

JAM/JKW/NMA/KM  
F. #2018R01064

271 Cadman Plaza East  
Brooklyn, New York 11201

December 27, 2024

By ECF

The Honorable Rachel P. Kovner  
United States District Court  
Eastern District of New York  
Brooklyn, New York 11201

Re: United States v. Gentile, et al.  
Criminal Docket No. 21-54 (RPK)

Dear Judge Kovner:

The government respectfully submits this letter in response to the Court's December 20, 2024 Order regarding the defendants' motion to delay decision on their Rule 29 and Rule 33 motions in light of oral argument before the Supreme Court in Kousisis v. United States, 82 F.4th 230 (3d Cir. 2023), cert. granted, 144 S. Ct. 2655 (2024). See ECF No. 513 ("Def's. Mot."). As explained in more detail below, the government's statements at oral argument in Kousisis concerning an essence-of-the-bargain instruction have no bearing on this case, and there is no basis to delay ruling on the defendants' post-trial motions<sup>1</sup> pending the Supreme Court's decision in Kousisis.

I. The Government's Statements at Oral Argument in *Kousisis* Are Irrelevant

In Kousisis, the defendants (now petitioners) fraudulently caused a state agency to award them contracts by lying about their compliance with certain regulatory requirements outlined in the contracts. The defendants in this case now direct the Court to a portion of the argument in Kousisis, during which the Supreme Court asked the government a series of questions regarding the materiality of the alleged misrepresentations in that case. It was during this colloquy regarding materiality, that the government stated it filed a corrective letter in one case and intended

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<sup>1</sup> Although the defendants seek to delay the Court's decision on both their pending Rule 29 and Rule 33 motions, an error in jury instructions is cognizable only under Rule 33. "A Rule 29 motion is 'not the proper vehicle for raising an objection to jury instructions.'" United States v. Chujoy, 207 F. Supp. 3d 626, 659 (W.D. Va. 2016) (quoting United States v. Crowe, 563 F.3d 969, 973 n.5 (9th Cir. 2009)). "Instead, 'the usual remedy for an error in a jury instruction is a retrial.'" Id. (quoting United States v. Cohen, 301 F.3d 152, 158 (3d Cir. 2002)). Accordingly, even accepting the defendants' argument, there would be no basis for the Court to delay deciding the defendants' pending Rule 29 motions.

to confess error in another in which the government had opposed a so-called essence-of-the-bargain or essence-of-the-contract instruction related to materiality. See Transcript of Oral Argument, Kousisis v. United States (“Kousisis Tr.”), No. 23-909, 2024 WL 5055868, at \*77–78 (Dec. 9, 2024). In short, such an instruction provides that a misrepresentation is material if it goes to the very essence of the bargain between the parties. To be clear, the second case referenced by the government is not this case, as the defendants suggest in their letter.<sup>2</sup> See Defs. Mot. at 2.

The government’s statements at oral argument in Kousisis, related to a materiality instruction, are irrelevant to this case. The defendants in this case did not request an essence-of-the-bargain instruction on materiality, unlike in Kousisis and the cases referenced by the government at the Kousisis oral argument. Rather, under the “Intent to Defraud” section of their proposed jury instructions, the defendants sought an instruction that “[m]isrepresentations amounting only to deceit are insufficient to maintain a wire fraud prosecution, and instead, the deceit must be coupled with contemplated harm to the victim, which must affect the very nature of the bargain itself.” ECF No. 276 at 47; see also ECF No. 456 at 6 (requesting additional instruction that a defendant “does not commit fraud ‘where the purported victim received the full economic benefit of its bargain’” (quoting United States v. Binday, 804 F.3d 558, 570 (2d Cir. 2015), abrogated on other grounds by Ciminelli v. United States, 598 U.S. 306, 306 (2023))). At the charge conference, too, the defendants raised benefit of the bargain only in arguing for their proposed intent-to-harm instruction, not in the context of the Court’s instruction on materiality. See Trial Tr. 6326:25–6328:23. At no point did the defendants seek the sort of benefit-of-the-bargain instruction on materiality at issue during argument in Kousisis, to which they now point the Court. That they did not seek this instruction is also consistent with their post-trial motions in which neither defendant argued that the Court erred by failing to adopt a benefit-of-the-bargain instruction on the element of materiality, or that the government failed to prove the materiality of the defendants’ misrepresentations and omissions under that standard. Rather, defendant Schneider cited Kousisis in his post-trial motion only in asserting “the fact that investors in this case received the benefit from their bargain from investing is a further, independent legal deficiency in the charged frauds.” ECF No. 487-1 at 33 n.21.

But even if the defendants had requested such an instruction, it would not have been error for the Court not to adopt it. The government did not suggest at the Kousisis oral argument that an “essence of the bargain” instruction was required, even in the particular circumstances of a fraudulent inducement case like Kousisis. To the contrary, the government made clear that, “I [the government] don’t think it’s error just to use the standard materiality instruction,” Kousisis Tr., 2024 WL 5055868, at \*78, because the “essence of the bargain” instruction is a gloss on that standard. Likewise, in the corrective letter the government referenced during the Kousisis argument, the government merely withdrew its assertion on appeal before the Ninth Circuit in United States v. Miller, that the defendants’ proposed benefit-of-the-bargain instruction on materiality was “legally unsound.” No. 23-3194 (9th Cir.), ECF No. 39.1 at 1. In doing so, the

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<sup>2</sup> A representative from the Office of the Solicitor General confirmed that the government was referring to United States v. Mokbel, No. 21-cr-103 (S.D. Tex.), cited in footnote 4 of the defendants’ reply brief in Kousisis.

government did not suggest that a standard materiality instruction, like the one adopted by the Court in this case, was improper.

Moreover, any error in not giving an instruction that was not requested by the defendants would have been harmless. The “essence of the bargain” instruction referenced by the government during the Kousisis argument is derived from United Health Services, Inc. v. United States, 579 U.S. 176 (2016). There, the Court explained that “[u]nder any understanding of the concept, materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” 579 U.S. at 193 (internal quotation marks and alteration omitted); see also id. at 192–93 (“The term ‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” (internal quotation marks and alteration omitted)). Those concepts are reflected in the standard materiality instruction given in this case. Consistent with longstanding precedent, the Court instructed the jury that a misrepresentation is “material” when “there is a substantial likelihood that it would have been significant to a reasonable investor’s investment decision.” Trial Tr. 6989:9–12. If anything, the materiality instruction in this case required more than in United Health Services because it required a “substantial likelihood” that information would have been significant to a reasonable investor, as opposed to merely having a “natural tendency” or being “capable” of influencing a decision. The government also introduced overwhelming evidence of the materiality of the defendants’ misrepresentations, as detailed in the government’s opposition to the defendants’ post-trial motions. See ECF No. 499 at 16–18, 41–42.

II. There is Otherwise No Basis to Delay Ruling on the Defendants’ Post-Trial Motions Pending the Supreme Court’s Decision in *Kousisis*

There is otherwise no reason to delay ruling on the defendants’ post-trial motions pending the decision in Kousisis. Whether to stay proceedings pending decision in another case is within the Court’s discretion. See, e.g., United States v. Spencer, No. 21-cr-147, 2024 WL 578953, at \*3 (D.D.C. Feb. 13, 2024). However, “a party requesting a stay of proceedings must make out a clear case of hardship or inequity in being required to go forward.” Id.; see also id. (discussing factors in deciding whether to grant stay including whether movant “will be irreparably injured absent a stay”). The defendants have not done so here. For the reasons explained above, the government’s statements at argument in Kousisis regarding an essence-of-the-bargain materiality instruction have no bearing on this case. The defendants did not request that instruction, and they do not suggest there was any error in the standard materiality instruction actually given here.

Any other potential for the Supreme Court’s decision in Kousisis to impact this case is too uncertain and speculative to warrant delay, and the defendants fail to identify any prejudice or harm they would suffer if their request were denied. Contrary to the defendants’ suggestion, this is not a situation where the Supreme Court is poised to answer a clear-cut and dispositive issue in this case. The Supreme Court granted certiorari as to three questions presented—although the defendants only cite one of the questions in their motion. See Defs. Mot. at 1. Neither the parties nor the Court know which of the questions the Supreme Court will address or, importantly, the scope of any forthcoming decision as to any of the questions. The Supreme Court could, for example, decide whether a sovereign’s regulatory interest constitutes property for purposes of the wire fraud statute. Such a ruling would have no impact on this case. Theories about the scope of

