UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA

v. 23 CR 622 (JMF)

MICHAEL CASTILLERO
FRANCINE LANAIA
BRIAN MARTINSEN,

Defendants.
----------X

MEMORANDUM OF LAW IN SUPPORT OF
BRIAN MARTINSEN'S MOTION FOR BAIL PENDING APPEAL

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PRELIMINARY STATEMENT

Brian Martinsen was convicted, following a jury trial, of the following counts: (1) Conspiracy to Commit Securities, Wire and Investment Adviser Fraud; (2) Securities Fraud; (3) Wire Fraud; (4) Investment Adviser Fraud; (5) Conspiracy to Obstruct Justice; and (6) Obstruction of Justice. Counts One through Four pertained to the Defendant's management of the StraightPath Funds, while Counts Five and Six related to the deletion of corporate email accounts that were the subject of an SEC subpoena. On May 20, 2026, Mr. Martinsen was sentenced to a cumulative term of 120 months' imprisonment; the Court imposed a sentence of 60 months with respect to Counts One, Four, and Five, and a sentence of 120 months with respect to Counts Two, Three, and Six. All sentences were imposed to run concurrently. On May 29th, Mr. Martinsen filed a timely notice of appeal.

We are respectfully seeking bail pending appeal on behalf of Mr. Martinsen, because he does not present a risk of flight or a danger to the community, and because his appeal will raise substantial questions of law which, if successful, would result in the reversal of his convictions. Specifically, the Defendant's appeal will raise a substantial question as to whether his fraud convictions were tainted by a *Yates*-type error which permitted the jury to convict based upon an infirm theory that Mr. Martinsen owed a fiduciary duty to StraightPath's individual investors. Second, the Defendant's appeal will challenge his obstruction-related convictions under Counts Five and Six, based upon the Supreme Court's recent holding in *Abouammo v. United States*, No. 25-5146, 2026 U.S. LEXIS 2467, at *8 (June 11, 2026).

Because these are, at the *very least,* close questions, and because Mr. Martinsen has demonstrated that he is not a flight risk or a danger to the community, we respectfully submit that this Court should permit him to remain at liberty pending the outcome of his appeal.

ARGUMENT

I. APPLICABLE STANDARD FOR BOND PENDING APPEAL

Bond pending appeal pursuant to 18 U.S.C. § 3143(b)(1) should be granted where the Court determines that: (A) the person is not likely to flee or pose a danger to the safety of the community, and (B) that the appeal is not for the purpose of delay, but will raise substantial questions of law or fact likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

In the present case, we respect the fact that the Court has previously ruled against the Defendant with respect to some of the issues which will form the basis of his appeal. To grant the relief which the Defendant seeks, however, the Court need not hold "that its own judgment is likely to be reversed on appeal." *United States v. Randell*, 761 F.2d 122, 124 (2d Cir. 1985). As the Second Circuit has explained, "we do not believe [Congress] intended either to eliminate bail pending appeal or make such bail dependent upon 'the willingness of a trial court to certify' that it is likely to be reversed." 761 F.2d at 124, *quoting United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985). Instead, a "substantial question of law or fact" is "one of more substance than would be necessary to a finding that it was not frivolous." *Randell*, 761 F.2d at 125 (quoting, with approval, *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). "It is a 'close' question or one that very well could be decided the other way." *Id.* Should the Defendant meet this standard, bail is "not simply discretionary but mandatory." *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004).

As set forth in greater detail below, Mr. Martinsen meets the standard for bail pending appeal, because his forthcoming appeal will present multiple, substantial issues which, if

successful, will mandate reversal on all counts, and because he presents no risk of flight or danger to the community.

II. THE APPEAL OF THIS MATTER WILL RAISE SUBSTANTIAL LEGAL ISSUES

A. There is a Substantial Question as to Whether the Defendant's Convictions Under Counts One through Four were Tainted by a *Yates*-type Instructional Error

At this juncture, the Court is well familiar with the legal argument we have raised throughout these proceedings: that the investment adviser to a private, pooled investment fund is not an investment adviser to the fund's individual clients, and as such, owes no fiduciary duty to those investors. This general proposition was established by the D.C. Circuit's decision in *Goldstein v. SEC*, 371 U.S. App. D.C. 358, 366, 451 F.3d 873, 881 (2006), and effectively ratified by the SEC when it abandoned the Hedge Fund Rule, which had previously sought to impose such fiduciary duties upon institutional investment advisers.

Based on this authority, counsel for Martinsen sought to prevent prosecutors from relying upon a theory that the Defendants were investment advisers owing a fiduciary duty to StraightPath's customers. *See* ECF 42, 127, 159. Those applications were denied; this Court held that the *Goldstein* decision did not prevent prosecutors from pursuing such a theory at trial. In doing so, the Court relied upon the Sixth Circuit's decision in *United States v. Lay*, 612 F.3d 440 (6th Cir. 2010), which held that under specific circumstances, a fiduciary duty might arise between a private fund's investment advisor and the fund's individual investors. *See* 10/16/25 Transcript at ECF 199, p. 77.

However, in allowing prosecutors to pursue such a theory, this Court expressly cautioned that it was an open legal question that was likely to generate appellate issues:

> I have to get into more of the weeds on this, and the government should think hard about whether it wants to sort of adopt -- well, to the extent that the Second Circuit

> hasn't opined on the *Goldstein/Lay* issue, in that regard it's an open question in the Second Circuit, and I query whether the government wants to buy a potential appellate issue by allowing the jury to rely on viewing the investors themselves as clients for purposes of the investment adviser's fiduciary duties.

Id. at 78.

The Government evidently concluded that it was willing to embrace the risk of pursuing an untested theory of criminal liability. In their request to charge, prosecutors asked the Court to adopt an instruction which would permit the jury to find that the Defendants were investment advisors and that the individual investors were their clients. ECF 181, p. 17-18.

Counsel for Martinsen objected, arguing that the jury should not be charged on a theory that Defendants owed a fiduciary duty to individual investors. TR 1883, 1958, 1963, 1967-68. Counsel expressly argued that the jury should not be permitted to convict the Defendants under 15 U.S.C. § 80b-6 (1) and (2), given the lack any investment advisory relationship between the Defendants and individual investors. TR 1974.

The Court overruled such objections, charging the jury on subdivisions (1), (2) and (4) of § 80b-6. The jury was told that "an investor in a fund may qualify as a client of the fund's investment advisory" and further instructed that "as a matter of law, investment advisors have a fiduciary duty to their investment advisory clients." ECF 195 at p. 37. That fiduciary duty included, the jury was informed, "an affirmative duty to make full and fair disclosure of all material facts, and an affirmative obligation to employ reasonable care to avoid misleading his or her clients." *Id*.

In summation, prosecutors repeatedly advanced the legal theory that the Defendants were guilty because they were investment advisers owing a fiduciary duty to StraightPath's investors. Under this theory, prosecutors were not obligated to prove affirmative misrepresentations, but

could instead rely upon the Defendants' failure to disclose any information which would have been important to such investors. As prosecutors argued:

> you can find that the defendants had an obligation to tell their clients all the important details about the transaction, and they had an obligation to take care to avoid misleading their clients. They had these obligations because of the relationship they had with the clients, the relationship where they're giving the clients investment advice.
>
> TR 2048, *see also* TR 2020.

According to prosecutors, such "important details" included an obligation to disclose the price at which StraightPath had acquired pre-IPO shares:

> Because the pre-IPO industry is opaque, the investors can't see, they can't get the information on pricing. Where there's a lack of good information, there are informational asymmetries in the market. And in this case what that means, asymmetries, is that StraightPath knows a heck of a lot more about the pricing than either of these two investors. And as we talked about earlier, because of the defendants' relationship to their clients, but they were providing investment advice, they had an obligation to provide their clients all the relevant information. Their failure to make those disclosures, their concealment of that information is one way that they committed fraud.
>
> TR 2023-24.

This theory of liability by omission provided the jury with an expedient path to conviction which skirted the otherwise messy factual disputes presented at trial, including the question of whether the Defendants were aware of misrepresentations being made – not by the Defendants themselves – but by outside sales agents who were promoting StraightPath's offerings. And indeed, it is clear from the record that the jury immediately gravitated to this theory. The one and only substantive jury note received by the parties at 1:14 p.m. on November 4, 2025, asked:

> *What exactly constitutes as "advice" as it relates to being an investment adviser?*
>
> ECF 196, p. 5.

At 1:44 p.m., the Court provided the jury with a written response repeating the Court's earlier instruction on the definition of an investment adviser. TR 2311, ECF 196 at p. 6. At 2:23 p.m. – less than an hour later – the jury submitted its next note, indicating it had reached its verdict. Mr. Martinsen was convicted of Investment Adviser Fraud, as well as Conspiracy, Securities and Wire Fraud. Because the jury was not provided with a special verdict sheet, there is no indication as to whether Mr. Martinsen was convicted under subdivisions (1), (2) or (4) of § 80b-6.

Under the circumstances, we respectfully submit that there is a substantial question as to whether the Court erred in permitting the jury to find that Mr. Martinsen was an investment adviser to StraightPath's customers. At this juncture, both the D.C. and Fifth Circuits have held, as a matter of law, that investors in a private, pooled fund are not "clients" of the fund's investment adviser for purposes of the Investment Adviser Act. As the D.C. Circuit explained in *Goldstein*:

> An investor in a private fund may benefit from the adviser's advice (or he may suffer from it) but he does not receive the advice *directly*. He invests a portion of his assets in the fund. The fund manager -- the adviser -- controls the disposition of the pool of capital in the fund. The adviser does not tell the *investor* how to spend his money; the investor made that decision when he invested in the fund. Having bought into the fund, the investor fades into the background; his role is completely passive. If the person or entity controlling the fund is not an "investment adviser" to each individual investor, then *a fortiori* each investor cannot be a "client" of that person or entity.

Goldstein v. SEC, 371 U.S. App. D.C. 358, 364-65, 451 F.3d 873, 879-80 (D.C. Cir. 2006); *see also Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1103 (5th Cir. 2024) ("The Advisers Act recognizes a fiduciary duty between an investment adviser and his client. 15 U.S.C. § 80b-6. In the private fund context, that client is the fund itself—not the fund's investors."); *In re Allianz Glob. Inv'rs U.S. LLC Alpha Series Litig*., 2021 U.S. Dist. LEXIS 188650, at *71 (S.D.N.Y. Sep. 30, 2021) (granting summary judgment where defendant "served as investment advisor *to the Funds*, not to any individual investor."); *SEC v. Northshore Asset Mgmt*., 2008 U.S. Dist. LEXIS

36160, at *17-18 (S.D.N.Y. May 5, 2008) (granting summary judgment because "a hedge fund adviser's client, for purposes of the Advisers Act, is the hedge fund, not the hedge fund investors.").

Indeed, as both the D.C. Circuit and Fifth Circuit have recognized, any contrary rule would be untenable, insofar as it would generated potentially conflicting fiduciary duties to both the fund and the fund's investors. *See Goldstein*, 451 F.3d at 881 ("It simply cannot be the case that investment advisers are the servants of two masters.").

In light of this well-established body of authority, the SEC and prosecutors in the Southern District of New York have previously recognized that 15 U.S.C. § 80b-6 (1) and (2) may not be used to prosecute a fraud perpetrated by a fund's investment adviser upon investors in that fund, because such investors are not the adviser's "clients." Rather, those sections have been reserved to prosecute frauds directed at *the fund itself*.

For instance, in *United States v. Tournant*, No. 22-CR-276-LTS, 2023 U.S. Dist. LEXIS 222329, (S.D.N.Y. Dec. 13, 2023), Judge Swain recently observed that the indictment in *that case* properly followed the established practice of the SEC, by relying upon 15 § 80b-6 (1) and (2) to charge conduct directed against the hedge fund, while fraud directed towards the fund's investors was "separately charged . . . under subsection 206(4) and SEC Rule 206(4)-8." *Id*. at *40 *citing SEC v. SBB Research Grp*., LLC, No. 19-CV-6473-SJC (N.D. Ill. 2019); *SEC v. Yorkville Advisors, LLC*, 12-CV-7728-GBD (S.D.N.Y. 2012); *SEC v. Balboa et al*., 11-CV-8731-PAC (S.D.N.Y. 2011). Indeed, in *Tournant*, prosecutors charged two separate counts of Investment Adviser Fraud for this precise reason: Count Three charged a fraud directed at the fund itself, whereas Count Four charged affirmative misrepresentations directed at the fund's investors, in violation of § 80b-6(4). *See United States v. Tournant*, No. 22-CR-276-LTS, Indictment at ECF 2, pp. 43-44.

It is unclear why the prosecutors in this case chose to deviate from the established practice described by Judge Swain in *Tournant*. What *is* clear is that by doing so, they have created a significant appellate issue.

To the extent that the jury here was improperly permitted to convict based upon a legally infirm theory, there is a substantial argument that the Defendants are entitled to a new trial. When the Government pursues multiple, competing theories of liability, and where one of those theories is subsequently determined to be invalid, a so-called *Yates* error has occurred. Under such circumstances, the Supreme Court has directed that a guilty verdict must be vacated if it is impossible to tell whether the jury relied upon an invalid theory to reach such verdict. *Yates v. United States*, 354 U.S. 298, 312, 77 S. Ct. 1064, 1073 (1957) ("a verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."). While *Yates* errors are reviewed for harmlessness, it is the Government's burden to prove such harmlessness beyond a reasonable doubt. *United States v. Capers*, 20 F.4th 105, 123 (2d Cir. 2021); *United States v. Blaszczak*, 56 F.4th 230, 245 (2d Cir. 2022) ("In harmless-error analysis [arising from Yates error], the government bears the burden of proof . . . and it must sustain that burden beyond a reasonable doubt."); *see also Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837 (1999) (test, for constitutional errors, is whether the Court can determine "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

Given the jury's note indicating its fixation upon the investment adviser issue immediately prior to its verdict, we respectfully submit there is at least a substantial question as to whether the Government can meet that burden on appeal. Moreover, if the jury relied upon an infirm theory that the Defendants were investment advisers to the fund's investors, this error would have tainted

each and every fraud-related count. As noted above, the Court instructed the jury that as a matter of law, investment advisers owe an affirmative, fiduciary duty to make "full and fair disclosure of all material facts." Moreover, the jury was also instructed – with respect to Counts One through Three – that it could convict if it found such a duty to disclose, coupled with a material omission. ECF 195, pp. 26, 28, 31. Hence, if the jury found that the Defendants were fiduciaries who breached a duty by failing to disclose the price at which StraightPath acquired its pre-IPO shares, convictions would have necessarily followed on every fraud-related count, irrespective of whether the Defendants made or caused any affirmative misrepresentations to be made, and regardless of whether mark-ups exceeded the SEC's 10% disclosure rule.

Finally, we note that this is an issue entirely of the Government's own making. The Government could have confined itself to established theories of liability. Instead, prosecutors elected to gamble on a questionable and novel theory that clearly contravenes out-of-circuit authority. In doing so, prosecutors knew full well they were "buying themselves an appeal." Because those appellate issues are substantial, this Court should grant bond pending appeal.

B. There is a Substantial Question as to Whether Defendant's Convictions Under Counts Five and Six Can Stand in the Wake of The Supreme Court's Recent Ruling in *Abouammo v. United States*

Count Five of the indictment charged a conspiracy to violate 18 U.S.C. § 1519, while Count Six charged a substantive violation of that same provision. The statute provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

As the Court explained to the jury in its instructions, these charges were premised upon the allegation that Martinsen and Castillero deleted email accounts subpoenaed by the SEC. *See* ECF 195, p. 43-45. The jury was required to find that the Defendants "altered, destroyed, or caused to be altered or destroyed, a record or document." *Id*. at 44. On the issue of venue, the Court instructed the jury generally that "any communication into or out of this District can establish venue so long as the action or communication furthered the charged offense." *Id*. at 55.

In the wake of the jury's verdict, the Supreme Court issued its decision in *Abouammo v. United States*, No. 25-5146, 2026 U.S. LEXIS 2467, at *8-9 (June 11, 2026), which held that "the venue for trying a §1519 offense must be where a document's falsification happened." *Id*. at *8-9.

The facts of *Abouammo* are both illustrative and directly analogous to the instant case. Abouammo was a former employee of Twitter who had allegedly provided Saudi officials with confidential information about political activists in exchange for a payment of $300,000. By the time law enforcement in the Northern District of California began their investigation, Abouammo had left his job and moved to Seattle. When FBI agents interviewed Abouammo at his Seattle home, they asked about the $300,000 payment. Abouammo allegedly excused himself, went into the next room, created a fake consulting invoice, and emailed it to one of the agents.

The Ninth Circuit held that venue in the Northern District of California was proper because Abouammo's actions were designed to obstruct an investigation proceeding in that district. But the Supreme Court disagreed, holding that "[a] defendant charged with violating §1519 must be tried in the district where the falsification occurred; he cannot be tried in a different district where the investigation was located because no 'conduct constituting the offense' happened there." *Id*. at *2. In reaching this conclusion, the Court focused on the language of the statue. Under §1519,

"the only prohibited act is the falsification of a document; once a person has committed that act with the requisite intent, he need do nothing more to violate the law. Because the only proscribed conduct is falsification, venue must be where falsification occurred." *Id*. at *3

The Court's instruction in the present case cannot be reconciled with *Abouammo* because it allowed the jury to find venue based upon communications into this venue. Moreover, focusing on the trial evidence, it is clear that the destruction of records did not occur within this venue.

By May of 2021, at the time of the alleged destruction, the Defendants had opened StraightPath's new office in Jupiter, Florida. *See* TR 543 (Jupiter office opened by late 2020); TR 427-428 (M. Machado and M. Castillero working in Florida Office by February 2021). Welcome letters sent out by Mr. Martinsen in the April and May 2021 time frame reflect this change of address. *See* ThoughtSpot Welcome Letters at GX 60-21, Klarna Welcome Letters at GX 60-11. Indeed, the Florida location is reflected in the very documents which were used to prove the obstruction. GX 701-A, the GoDaddy report, shows that at 7:50 a.m. on May 5, 2021 – shortly before the email accounts were deleted – StraightPath's administrator updated GoDaddy's records to reflect their new location in Jupiter, Florida. *See* GX 701-A at p. 5. Likewise, GX 411, the May 5, 2021 letter from Brian Martinsen to Tian Wen reporting a lack of responsive email addresses includes a header with the Jupiter Florida address.

In short, there is no evidence that the deletion or destruction of records took place in the Southern District of New York, as required by *Abouammo*.[1] To the extent Defendants did not object to the Court's venue instruction or the sufficiency of the evidence as it relates to that element, the error here nevertheless meets the plain error standard. As the Supreme Court has

[1] To the extent it is relevant, GoDaddy's offices are located in Tempe Arizona. See GX 701-A. p. 2.

explained, the question of whether an error is "clear and obvious" is determined based upon the status of the law at the time of appellate review. Hence, even though a legal issue may have been unsettled at the time of trial, a trial court's ruling will nevertheless be deemed "plain error" if it is clearly inconsistent with a subsequently issued Supreme Court decision. *Henderson v. United States*, 568 U.S. 266, 273, 133 S. Ct. 1121, 1127 (2013).

Because the Court's venue instruction was plainly inconsistent with *Abouammo*, and because the trial evidence does not establish the destruction of records in this venue, there is a strong argument here for plain error, raising a substantial question for purposes of bail pending appeal.

III. BRIAN MARTINSEN IS NOT A FLIGHT RISK OR A DANGER TO SOCIETY

The remaining question under 18 U.S.C. § 3143(b)(A) is whether the Defendant can demonstrate, by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of any other person or the community if released.

In November of 2023, Mr. Martinsen was released upon a $1,000,000 bond co-signed by both of his parents and his daughter. As part of his conditions of release, Mr. Martinsen was required to surrender his passport, and his travel was restricted to the Southern District of Florida and the Southern and Eastern Districts of New York. Over the past three years, Mr. Martinsen has scrupulously complied with all conditions of his release and has been present at all required court appearances.

Although Mr. Martinsen now stands convicted of felony offenses, this Court has permitted him to remain at liberty pending sentence and designation, reflecting its judgment under 18 U.S.C. § 3143(a) that he is not likely to flee or pose a danger to any other person or the community. Notably, prosecutors have not taken a contrary position.

Because Mr. Martinsen has demonstrated through his actions that he does not present a risk of flight or a danger to the community, because this Court has already made an equivalent finding by permitting him to remain on bond post-conviction, and because the Government has never taken a contrary position, we respectfully submit that Mr. Martinsen has met his burden in satisfying the requirements of 18 U.S.C. § 3143(b)(A) by clear and convincing evidence.

IV. THE COURT SHOULD ALSO STAY FINANCIAL PENALTIES PENDING APPEAL

Rule 38 of the Federal Rules of Criminal Procedure vests this Court with broad discretion to stay restitution pending appeal. It also provides the Court with the option of entering a restraining order or injunction, requiring funds to be deposited into the District Court's register, or requiring a bond to ensure future compliance with the restitution order.

Stay of forfeiture is governed by FRCP Rule 32.2(d), which provides: "[i]f a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review." As described by the Advisory Committee Notes, the purpose of Rule 32.2(d) "is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful." *Id.*

"District courts in this Circuit typically consider four factors when considering a motion to stay a forfeiture order: 1) the likelihood of success on appeal; 2) whether the forfeited asset is likely to depreciate over time; 3) the forfeited asset's intrinsic value to defendant (i.e., the availability of substitutes); and 4) the expense of maintaining the forfeited property." *United States v. Silver*, No. 15-CR-93 (VEC), 2018 U.S. Dist. LEXIS 158216, at *30-31 (S.D.N.Y. Sep. 17, 2018).

We respectfully submit that the Court should stay financial penalties for the same reasons set forth above: the Defendant's appeal will raise substantial issues which, if successful, will require a new trial. Such a stay is particularly appropriate with respect to the forfeiture order, which includes multiple pieces of real estate, cars and valuable personal property; once such items are liquidated, the Defendant will have suffered an irreversible loss. Neither maintenance nor depreciation should be a significant contravening factor given the likely duration of an appeal. If anything, there is a substantial likelihood that the real property will appreciate in value over time.

Accordingly, in addition to extending the Defendant's bail, this Court should stay financial penalties, while entering an injunction to prevent the depletion of forfeitable assets, in order to maintain the status quo during the pendency of the appeal.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the instant motion for bail pending appeal and to stay financial penalties should be granted, and the Defendant's bail should be continued upon the conditions which are currently in place.

Dated: Garden City, New York
July 6, 2026

Respectfully submitted,

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