UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. WESTPORT CAPITAL MARKETS, LLC, and CHRISTOPHER E. MCCLURE, Defendants.	)	Civil Action No. 3:17-cv-2064-JAM

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

The Plaintiff Securities and Exchange Commission ("Commission") hereby opposes defendants Westport Capital Markets, LLC ("Westport") and Christopher McClure ("McClure" and collectively "defendants") motion for judgment as a matter of law or, in the alternative, for a new trial ("Motion"). Defendants' Motion ignores the substantial evidence of their liability for violating Sections 206(1), 206(2) and 207 of the Investment Advisers Act of 1940 ("Advisers Act"). It also speculates wildly in an attempt to find bias or unfairness when there is none to argue that they should get a new trial. The Court should deny defendants' motion on both Fed. R. Civ. P. 50 and 59 grounds, and should proceed to decide the issue of the proper remedies for defendants' misconduct.

INTRODUCTION

McClure and Westport ignored their fiduciary duty and took advantage of their clients by repeatedly tapping client accounts for additional income. With Selling Dealer Offerings, defendants did this by having clients buy investments where defendants kept part of the purchase

price. Defendants received Selling Dealer compensation by selling to investors, and they had a captive revenue source in their unsuspecting, and purposely uninformed, advisory clients. When they invested their clients in speculative Selling Dealer Offerings, defendants ignored instructions from some investors who gave defendants discretion over trading in their accounts and only wanted conservative investments. Defendants repeatedly invested those clients in these speculative securities, and avoided discussions with those clients about the riskiness of these investments. Defendants also pocketed 12b-1 fees without disclosure, and contrary to McClure's misrepresentation to one client that his compensation from mutual funds would be limited to the advisory fee. The jury rationally reached the conclusion that defendants acted intentionally or recklessly. The jury also correctly concluded that defendants acted willfully in hiding the truth about their routine and conflicted business practices when they filed required SEC disclosure forms called Forms ADV.

ARGUMENT

I. Defendants' Rule 50 Motion Challenging the Sufficiency of the Evidence Should be Denied.

Defendants move under Fed. R. Civ. P. 50 ("Rule 50") for judgment as a matter of law on two counts of the Complaint that allege violations of the Advisers Act: Section 206(1) and Section 207. *See* Defendants' Memorandum ("Memorandum") at 2. The jury returned a verdict finding both defendants liable on both 206(1) and 207 based on two separate theories of liability on each count – relating to defendants' misconduct in both Selling Dealer Offerings and mutual fund 12b-1 fees. *See* Dkt. No. 121 (verdict form).

First, defendants' Rule 50 motion should be denied because granting them relief is not necessary to prevent "manifest injustice." *Broadnax v. City of New Haven*, 415 F.3d 265, 268 (2d Cir. 2005) ("[i]f an issue is not raised in a previous motion for a directed verdict, a Rule

50(b) motion should not be granted unless it is required to prevent manifest injustice."). Though defendants moved for a judgment under Rule 50 at the close of the Commission's case in chief, they did not do so after they had rested their good faith defense and the Commission had rested on its rebuttal evidence about defendants' lack of good faith. *See* Trial Transcript (hereafter "Tr.") at 984-85, 1072. Having failed to move for judgment under Rule 50 at the close of the evidence relating to good faith, they should not now be permitted to challenge the sufficiency of the evidence relating to good faith (or lack thereof). *See Sawant v. Ramsey*, No. 3:07-cv-980 (VLB), 2012 WL 3265020, *4 (D. Conn. Aug. 9, 2012). ("Defendant Murphy did not raise this argument in his Motion for Judgment as a Matter of Law at the close of evidence, and is thus precluded from doing so now on his Renewed Motion for Judgment as a Matter of Law.").

A. Relief Should Only be Granted Under Rule 50 When There Is a Complete Absence of Evidence Supporting the Verdict.

A court may grant judgment against a party as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party." Fed. R. Civ. P. 50(a)(1). In analyzing a Rule 50 motion, the court must review the record as a whole and consider the evidence in the light most favorable to the Commission, as the non-movant. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000); *Madeira v. Affordable Housing Found., Inc.,* 469 F.3d 219, 227 (2d Cir. 2006).

The defendants' burden on their post-trial Rule 50 motion is "particularly heavy" because the jury has deliberated and returned a verdict in favor of the Commission. *Cash v. County of Erie*, 654 F.3d 324, 333 (2d Cir. 2011). Defendants' Rule 50 motion may only be granted "if there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded [persons] could not arrive at a

verdict against [it]." *Id.* (quotation omitted); *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 567 (2d Cir. 2011) (quotation omitted).

The court must leave the verdict in place unless "the evidence is such that, without weighing the credibility of witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *This Is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998) (citations omitted); *see also Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (requiring complete absence of evidence supporting the verdict for Rule 50 motion). The court should "view the evidence 'in the light most favorable to the party against whom the motion was made and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence.'" *Lundstedt v. Deutsche Bank Nat. Trust Co.*, No. 3:13-cv-01423-JAM, 2020 WL 614194, *2 (D. Conn. Feb. 10, 2020). In addition, the court must disregard "all evidence favorable to the moving party that the jury is not required to believe." *Id.*; *Reeves*, 530 U.S. at 151. Defendants cannot meet that exacting standard.

B. Overwhelming Evidence Supports the Jury's Verdict that Defendants Are Liable Under Section 206(1) for Their Conduct Involving Both Selling Dealer Offerings and Mutual Fund 12b-1 Fees.

In prevailing on its claims under Section 206(1) at trial, the Commission proved that defendants acted recklessly or intentionally when they failed to make adequate disclosure to their advisory clients of their conflicts of interest when they decided to invest those clients in both Selling Dealer Offerings and mutual fund shares, which both paid them undisclosed compensation. *See* Jury Instructions, Dkt. No. 125, at 7-8 ("Jury Instr."). The other three elements of the Section 206(1) claim: (1) that defendants were investment advisers, (2) that they used interstate commerce in connection with their conduct, and (3) that they failed to make

adequate disclosures of their conflict of interest to their clients, were not contested at trial. *See id*. at 8.

Defendants' failure to disclose their conflicts of interests was a clear breach of their fiduciary duty, which imposed on them "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts" relating to the decisions they made for their advisory clients. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). Against this backdrop where defendants had to inform their clients about "all conflicts of interest which might incline [them] – consciously or unconsciously – to render advice which [is] not disinterested," the defendants' blatant failures are strong evidence of their scienter. *Id.* at 191-92. As both Ms. Murray and Mr. Lawton testified, defendants' obligation to act in accordance with their fiduciary duty and to disclose conflicts of interest was "investment adviser 101" or part of an investment adviser's basic obligations. Tr. at 537:18-538:24, 547:22-549:2, 572:4-573:3, 290:8-292:4; PX 168i. There was ample evidence for the jury to reach a common sense conclusion that McClure took unfair advantage of the Atterbury and Stein accounts, particularly given the standard applicable to the consideration of that evidence. It strains credulity for McClure to profess that he thought it was acceptable nearly to double his compensation from his clients' accounts without an upfront conversation with them and rely simply on vague Form ADVs. PX 167g.

Defendants do not challenge the definitions of reckless or intentional conduct that the Court provided to the jury. *See* Memorandum at 13-15. Thus, the jury was specifically, and correctly, directed that "recklessness is conduct involving more than simple, or even inexcusable negligence or mistake. It is an extreme departure from the standards of ordinary care, which presents a danger of misleading other persons that is either known to the defendant or so obvious that the defendant must have been aware of it" and that it may be established by showing

defendants "had a reckless disregard for the truth or that they did not have a genuine belief that the information they provided was accurate and complete in all material respects." Jury Instr. at 9. The jury was also properly instructed with respect to defendants' claimed defense of good faith reliance on a compliance consultant. *See id.* at 12-13. Specifically, the jury was correctly informed that good faith reliance provides a defense only if defendants made a complete disclosure to their consultants, and actually got and followed specific advice from their consultants. *See id.* at 13.

Though defendants say that there is inadequate evidence to support the jury's finding that they acted at least recklessly, first and foremost they are attempting to sidestep the appropriate standard of review. It is not "inadequate evidence" but, as discussed above, a much more exacting standard. In addition, what defendants are really complaining about is that the jury chose not to believe that defendants acted in good faith. *See* Memorandum at 15-16 (explaining defense arguments about good faith). The fact that defense counsel's closing argument could be supported by citations to the record that are mostly McClure's own testimony does not mean the jury had to credit that testimony. *See* Memorandum at 15-16, n.4-8; *Reeves*, 530 U.S. at 151. The jury rejected defendants' defense of reliance on Regulatory Compliance and clearly chose not to credit McClure's testimony that he made a complete disclosure of facts to his consultant.

1. There Was Substantial Evidence of Defendants' Intent or Recklessness.

The facts, and the inferences to be drawn from those facts, fully support the jury's findings that defendants acted recklessly or intentionally in failing to disclose their conflicts of interest. Those facts and inferences, considered in the light most favorable to the Commission, clearly provide a legally sufficient evidentiary basis for the jury's findings. Defendants' state of mind is demonstrated by at least six types of evidence. First, the sheer volume of both conflicted

Selling Dealer Offerings and mutual fund transactions demonstrates that defendants' conduct was not an isolated mistake or oversight, but rather an intentional decision to conduct business in a way that Ms. Murray described as antithetical to what it means to be an investment adviser. *See* Ex. PX 75, PX 167a (McClure personally sold SDOs to clients over 1,000 times); PX 136 (showing some of mutual funds that needed to be converted to non 12b-1 fee-paying share class); Tr. at 543:17-544:10 (conduct "runs counter to the very purpose of why a client would want to have an investment adviser in the first place"). Second, their conflicted transactions were critical to defendants' finances, and increased their revenue by at least 45%. PX 168f. Defendants' Selling Dealer Offering profits were more that advisory fees for at least 10 of their clients. PX 87. Defendants' disregard of their fiduciary obligations as to such a large part of their business demonstrates both their intent to defraud, and at least recklessness. Defendants contend that both the amount of money they made from these conflicted transactions and the large number of times they did these transactions is actually evidence of their good faith because it shows they believed in the legality of their transactions. *See* Memorandum at 16, n.9. The jury clearly did not believe that argument after applying its own common sense to the facts. The court must credit the jury's evaluation of this circumstantial evidence of intent and credit the jury's common sense application of these facts to the law. *See Kennedy v. Supreme Forest Prods., Inc.*, 295 F. Supp. 3d 113, 120-21 (D. Conn. 2017) (Meyer, J.) The Commission is "entitled to the "benefit of all reasonable inferences that the jury might have drawn in [its] favor from the evidence." *Id.* at 120 (citation omitted).

Third, the importance to clients of the information defendants failed to disclose demonstrates their intent. Defendants didn't omit a minor detail. They failed to tell their clients that they had a financial incentive to pick certain investments for them. The jury had ample

grounds to conclude that defendants knew that omission concerned whether they were providing the unbiased and impartial advice at the heart of the advisory client relationship. The jury could also conclude that defendants understood that all of their clients would have wanted to know they were repeatedly investing them in products through which they made money on the side. Tr. at 131:14-132:5, 201:6-22, 225:18-226:6, 593:19-25, 606:7-13. When defendants used their discretion over clients' accounts to pick investments, time after time, that put undisclosed sums of money into their pockets, that is something any reasonable advisory client would want to know. PX 75 ("d" in column 3 shows accounts over which defendants had discretion).

Fourth, the fact that defendants departed so extremely from their clients' investment objectives to buy investments that paid them extra demonstrates their intent to defraud, or at least their recklessness. There was ample evidence of the riskiness of many of the Selling Dealer Offering securities. PX 102-22 at 1 (Fifth Street), PX 124 at 3 (Saratoga); PX 168 b (29% were junk rated; another 63% not rated); Tr. at 87:18-88:14, 512:6-513:17, 515:3-516:12, 551:13-554:23, 562:17-564:24, 567:1-569:16. The clients who testified wanted only conservative investments, not speculative ones like the Selling Dealer Offerings. PX 110, DX 630; PX 115, PX 117; Tr. at 115:21-116:1, 212:24-213:20, 599:12-600:4. Defendants' actions in contravention of their obligation to follow their clients' investment objectives (PX 107 at ¶1, PX 114 at ¶1) demonstrates their intent to benefit themselves from conflicted transactions and keep that information from their clients. The clients who testified provided ample evidence for the jury to conclude that they would have objected to any investments they had known were speculative and that defendants would thus have lost this significant income stream had they disclosed their real practices. Tr. at 115:21-116:1, 220:9-12, 225:18-226:7, 597:22-598:9, 599:25-600:4, 633:23-634:3.

Fifth, defendants' actions in ignoring their clients' best interests in mutual fund purchases demonstrates their intent. During the time period that defendants chose to use JP Morgan as their custodian, McClure failed to put in the effort that Mr. Lawton did to get Class I shares for his clients. Tr. at 296:23-297:10, 304:22-306:12, 317:24-324:23 (Lawton described what he did to get Class I shares); Tr. at 915:11-917:9 (McClure acknowledged he did not take those steps); PX 43. Mr. Lawton acknowledged that it was frustrating sometimes to deal with JP Morgan, but he did it because it was his fiduciary duty to get Class I shares (which did not pay a 12b-1 fee) for his clients. Tr. at 297:7-10, 305:13-24, 343:2-9. Even after defendants switched custodians to NFS and it was easy to convert to Class I shares, defendants still failed to do it, and failed to tell their clients that a better option was available. PX 136 (chart of delay in conversions); PX 123 (Lord Abbett prospectus) (showing how Class I shares are more advantageous for advisory clients); Tr. at 918:17-923:24.

Sixth, defendants' intent is demonstrated by the fact that even McClure admitted that he knew he had a duty to disclose his conflicts of interest. Tr. at 516:13-517:12, 858:10-21, 861:1-22, 863:25-864:24. Both Ms. Murray and Mr. Lawton, who have worked as investment advisers, testified that they understood this duty. Tr. at 538:14-539:21, 543:17-544:10, 548:2-549:2, 291:21-292:4. In any event, conflicted transactions should not be a mainstay of an adviser's business. Tr. at 544:2-10. Even people studying to become investment advisers need to know this basic fact. PX 168h (quoting from exam prep guide).

2. Defendants' Rule 50 Arguments Ask This Court to Draw Inferences in Their Favor, Rather than In Favor of The Verdict, and to Accept Their Interpretation of Testimony the Jury was Free to Disbelieve.

Defendants claim, contrary to the trial evidence, that their clients must have known about their conflicts of interest. *See* Memorandum at 16-17. This claim is both contrary to the

evidence and at odds with the appropriate standards for considering that evidence. Neither Ms. Pinchevsky, Ms. Holzman, nor Mr. Atterbury understood that defendants were making compensation from their accounts' purchases of the Selling Dealer Offerings nor from mutual fund shares that paid defendants a 12b-1 fee. Tr. at 131:10-133:11, 163:21-165:8, 197:9-198:16, 220:13-23, 232:7-14, 247:14-24, 249:12-20, 276:4-277:13, 605:20-23, 615:22-25, 646:10-19. The jury was entitled to credit these clients' testimony. The jury also saw McClure's email to clients misrepresenting that his mutual fund compensation in the Stein advisory account would be limited to the advisory fee. PX 34. Defendants' next argument is that even if clients did not know, they should have known because of amorphous language in their From ADVs (which they quote at length). *See* Memorandum at 16-18. This is an attempt to completely flip the how the weight of inferences applies in a Rule 50 motion. In addition, defendants' arguments essentially rehash their arguments about the adequacy of the Form ADV disclosure that the Court already rejected at summary judgment.

Even if defendants' point in recycling these arguments was to argue that there was enough disclosure in the Forms ADV that it would be impossible for the jury to conclude they acted recklessly or intentionally, the trial evidence is to the contrary. At best, these Forms tell clients that defendants could earn "commissions" in addition to advisory fees and imply that they would be informed when such commissions were charged, because clients "were under no obligation to pursue" such investments with commissions. *E.g.* PX 6 at 3, 4, 7. But, neither defendants' Selling Dealer Offering compensation, nor mutual fund 12b-1 fees, is a "commission." Both Maher and McClure agreed. Tr. at 407:25-408:4, 884:2-6. Commissions would be shown on clients' account statements, but a client looking at his statement would not see defendant's profit from Selling Dealer Offering trades. *E.g.* PX 104-31 at 8-9; Tr. at 407:25-

408:4. Again, 12b-1 fees are not shown on the clients' account statements. *E.g.* PX 116-9 at 8-10. Moreover, all of this inapplicable language is couched in terms of what defendants' "may" do, and the disclosure does not tell any client that defendants *did* receive, and always received, 12b-1 fees from their mutual fund holdings and selling dealer compensation from certain investments. PX 6 at 3, 4. The Commission's instructions for Forms ADV have, since 2010, cautioned advisers against using the term "may": "If you have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, indicate as such rather than disclosing that you 'may' have the conflict or engage in the practice." *See* General Instruction No. 2 for Part 2 of Form ADV, 17 C.F.R. 275, 279 (2010), *available at* https://www.sec.gov/rules/final/2010/ia-3060.pdf. Westport's Forms ADV also failed to disclose in Part 2, in contravention of the Forms' instructions, the receipt of 12b-1 fees as a type of service or trail fee. Tr. at 579:1-20, 906:15-907:1; *e.g.* PX 6 at 3-4.

Defendants contend that the five points they raised in closing demonstrate their good faith and lack of recklessness. *See* Memorandum at 15-16. None of these points withstands scrutiny. First, defendants did not make full disclosure -- either to their clients in their Forms ADV or to their consultant -- about their conflict of interest when they acted as a principal in the Selling Dealer Offerings or with respect to mutual fund share classes. When pressed on cross-examination, McClure could not explain how the Forms ADV provided fair disclosure either of the compensation he earned in the Selling Dealer Offerings or from mutual funds that paid him 12b-1 fees. Tr. at 874:7-884:7, 903:8-906:14. Similarly, Ms. Weston explained how she was unaware of how the defendants structured and were paid from the Selling Dealer Offerings until the summer of 2015 and once she was provided with sufficient information, she recognized that defendants were engaged in a conflicted transaction called a principal transaction. Tr. at

1029:15-17; 1037:13-25; 1043:17-21. Even McClure's contention that he made full disclosure to his consultant in 2011 is contradicted by the contemporaneous evidence, which does not show full disclosure, but rather a curtailed request to edit a description drafted by McClure's assistant. PX 140, DX 509. Nor do the circumstances of that purported request for advice support McClure's contention that such a single conversation -- without confirmatory or documenting notes or memos -- could, in good faith, form the basis for four years of Selling Dealer Offering investments that came to represent a third of Westport's revenue. Tr. at 934:1-25; PX 140, DX 509, PX 168f. At the very least, the jury could find that McClure acted recklessly by basing a significant portion of his business in clearly conflicted transactions on such thinly-described and never-revisited advice. McClure himself admitted that he did not seek advice from the consultant about disclosing 12b-1 fees. Tr. at 927:23-928:3. No good faith reliance on consultants can thus excuse that aspect of defendants' failure to disclose their conflicts of interest in their mutual fund practices.

Second, defendants' entire argument that they received explicit advice that their Selling Dealer Offering conduct was legal is based on an email from Mascolo in which he edited language drafted by McClure's assistant. PX 140, DX 509. That email does not provide full disclosure to Mascolo of defendants' conduct in Selling Dealer Offerings. The explicit advice that defendants actually received from their consultant told them, between 2011 and 2013, that they could not engage in principal transactions like the Selling Dealer Offerings, and after November 2013, that they could only engage in principal transactions like the Selling Dealer Offerings if they first obtained written client consent to each transaction that disclosed their conflict of interest. PX 40 at SEC-WESTPORT-E-0644334; PX 41 at SEC-WESTPORT-E-0644433-34. Defendants, however, did not follow these policies that were drafted by their

consultant and that they adopted as their own. Tr. at 895:1-6; 896:7-897:23.

Third, the fact that the consultants worked with defendants on the language of the Forms ADV does not give defendants a free pass. The defendants maintained responsibility for the truth and completeness of the statements in their Forms ADV. Tr. at 903:1-4; PX 41 at SEC-WESTPORT-E-0644450-52. The defendants did not make a complete factual disclosure to the consultants about their business (as they were obligated to do by their contracts with the consultants) and thus cannot claim that they acted in good faith when the consultants did not suggest changes to the Forms ADV. Tr. at 1045:15-1046:5; PX 152 at 7.

Fourth, defendants stopped purchasing Selling Dealer Offerings for their clients when the consultant told them they were not disclosing their conflicts of interest properly as required by Section 206(3) of the Advisers Act. This does not demonstrate good faith. Rather, it demonstrates that defendants believed there was too much risk in making the disclosures required to continue buying these securities. If defendants thought the Selling Dealer Offerings were good investments for their clients, they could have started providing the transaction-specific disclosure required by Section 206(3) and tried to obtain the required client consent. Further, after learning of their violations in July 2015, defendants never told their clients about their purported "mistake" or about the number of times they had engaged in these conflicted transactions or the amount of money they had earned thereby. Tr. at 197:13-22, 276:13-15, 866:12-21. The jury could have drawn the reasonable inference that was because defendants knew that learning of the defendants' additional compensation would likely have upset clients.

Fifth, defendants' purported "self-report" to FINRA came only after their hand had been caught in the cookie jar. That "self-report" was required by FINRA rules. DX 587, 588. The "self-report" also misleadingly attempts to minimize defendants' conduct. DX 587 at 3, ¶1

(claiming violations happened "on several occasions" when defendants knew they happened over 1,300 times), *compare* PX 75. Tellingly, there is no evidence that defendants sent a similar letter to the SEC. Defendants could simply no longer conceal their violations. Their consultant knew and their accountants knew. Tr. at 848:3-8. Making required disclosures to regulators does not minimize their reckless and intentional conduct for the preceding four years. They had to tell FINRA. If defendants were acting in good faith, they would have told their clients too.

The jury relied on overwhelming evidence to support its finding that defendants violated Section 206(1) both with respect to Selling Dealer Offerings and their receipt of 12b-1 fees. Given the highly deferential standards applied in a Rule 50 motion, those facts and inferences, when considered in the light most favorable to the Commission, provide a legally sufficient evidentiary basis for the jury's findings. The Court should not reassess the weight of any conflicting evidence as defendants urge, or substitute its own judgment for that of the jury. *See Dymskaya v. Orem's Diner of Wilton, Inc.*, 3:12–cv–00388 (JAM), 2015 WL 1038394, at *1 n.1 (D. Conn. Mar. 10, 2015).

C. Overwhelming Evidence Supports The Jury's Verdict that Defendants Are Liable Under Section 207 for Willfully Making False Statements Or Omissions.

The jury found defendants liable under Section 207 of the Advisers Act for willfully making false statements or omissions in two sections of their Forms ADV – one relating to whether they engaged in principal transactions with their clients and one relating to their failure to disclose their receipt of 12b-1 fees. *See* Dkt. No. 121, Count 2.

The jury's findings on the principal transaction question were supported by evidence that McClure knew that he was engaging in principal transactions and still answered no when asked on the Form ADV "do you sell securities you own to advisory clients (principal transactions)?".

PX 5 at 22 (Item 8.A). Specifically, McClure knew that Westport was selling securities it owned to advisory clients because he reviewed the trading in Westport's accounts every day, and he saw that Westport bought the securities at a lower price and sold them at a higher price. Tr. at 506:10-14. That's all the information he needed to answer the question on the Form ADV honestly. Also, McClure was told by MLV (from whom it bought the Selling Dealer Offerings) that these were principal transactions, and also told others that a significant portion of his revenue came from principal transactions. PX 20 at 3 (agreement allowed Westport to "purchase as principal and/or agent a portion of such securities on the terms set forth herein as a Selected Dealer"), PX 35 at 4 (26% of revenue is from "principal trades from selling group participation"), PX 37 at 2 ("The 26% is when we participate and get paid on a principal basis (the fee is part of the selling price).").

The jury's findings on defendants' failure to disclose their receipt of 12b-1 fees in their Forms ADV are also supported by substantial evidence. Both the ADV Parts 2A and 2B require investment advisers to disclose the forms of compensation they receive. *E.g.* PX 9 at 3, 4, 7. McClure knew he was receiving 12b-1 fees. PX 35 at 4 (6% of revenue comes from 12b-1 fees). McClure admitted that he was familiar with the instructions for how to fill out Form ADV Part 2. Tr. at 906:15-17. McClure also admitted that those instructions required the disclosure of service or trail fees from selling mutual funds. *Id.* at 906:18-907:1. The disclosure is just not there. McClure also cannot seek to blame his consultant for this failure. He never discussed with the consultant the fact that he received 12b-1 fees. Tr. at 927:23-928:3. He thus did not ask for, or get, any advice on this question on which he can claim to have relied in good faith.

Defendants argue that their purported reliance on a consultant negates all of this evidence. *See* Memorandum at 23-24. They are wrong for two reasons. First, the evidence

demonstrated McClure's own knowledge of the facts that made his Form ADV disclosures (and non-disclosures) false. He cannot rely on someone else to absolve him of that knowledge. *See SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 467 (9th Cir. 1985) (good faith reliance cannot be established if defendant knows information that contradicts a professional's stated opinion). Second, while defendants' claim that they made full disclosure to their consultant, the consultant testified to the contrary and the jury was entitled to believe her. *See Ferguson v. Fairfield Caterers, Inc.*, No. 3:11–cv–01558-JAM, 2015 WL 2406156, *5 (D. Conn. May 20, 2015) (court should defer to jury's credibility determinations). Ms. Weston testified that she was provided with new information in the spring of 2015 that caused her to understand for the first time that defendants were engaged in principal transactions. Tr. at 1029:15-17, 1037:13-25, 1043:12-21. Moreover, McClure, Westport's Chief Compliance Officer – who knew that the selling dealer offerings were principal transactions – is the person who retained ultimate responsibility for the truth and accuracy of defendants' Form ADV filings. Tr. at 379:9-12, 903:1-4. The *Slocum* case cited by defendants does not change this calculus. *See* Memorandum at 23 (discussing *SEC. v. Slocum, Gordon & Co.*, 334 F. Supp. 2d 144, 181-82 (D.R.I. 2004)). Although that court, acting as fact-finder, concluded that a defendant reasonably relied on an auditor's sign-off on its account structure and published guidance, and thus did not act willfully in failing to make a related disclosure, that decision was fact specific. *See Slocum*, 334 F. Supp. 2d at 181. The jury here could reasonably believe that defendants' false and misleading statements were willful based on the evidence at trial.

II. Defendants' Claim of Prejudice Relating to The Court's Summary Judgment Ruling on Section 206(2) is Without Merit.

At a prior stage of this case, the Court found both defendants liable for violating Section 206(2) of the Advisers Act. *See* Dkt. No. 69, 86. Defendants then moved for reconsideration of

the Court's ruling, and the Court denied that motion for reconsideration. *See* Dkt. Nos. 72, 102. Defendants now claim that they were unfairly prejudiced by the "unfair impact" the Court's prior summary judgment ruling had on the verdict form or jury instructions. Memorandum at 20. In making that claim defendants fail to explain, however, through what procedural lens the Court should view their complaints. The Motion seems to make two primary arguments: (1) that the Court should not have instructed the jury, either in the instructions or in the verdict form, that the defendant's disclosures of their conflict of interest were inadequate as a matter of law and (2) that *The Robare Group, Ltd. v. SEC,* 922 F.3d 468 (D.C. Cir. 2019), is distinguishable and supports a finding that they were not negligent. *See* Memorandum at 19-22.

The first argument appears to be premised on defendants' mistaken assumption that the Court's finding of inadequate disclosures was solely or primarily a finding of negligence that established a violation of Section 206(2). *See* Memorandum at 20. To the contrary, the Court's discussion of the adequacy of defendants' disclosures was part of the Court's summary judgment ruling on one element of Section 206(1), and it was thus fully appropriate for the Court to instruct the jury that the adequacy element of Section 206(1) was not an issue for trial. *See* Dkt. No. 86 at 9-11.

Defendants' second argument was already decided when the Court denied their motion for summary judgment and denied reconsideration of its summary judgment ruling. *Robare* was decided before the summary judgment hearing, and defendants brought it to the Court's attention via a notice of supplemental authority. *See* Dkt. No. 62. Further, the meaning and applicability of *Robare* was discussed at the summary judgment hearing and was fully briefed by the parties on the motion for reconsideration, and the Court should not entertain further briefing on it now. *See* Dkt. Nos. 72-1 at 8-9, 74 at 2-4, 5-6.

III. Defendants Have Not Met Their Heavy Burden Under Fed. R. Civ. P. 59 of Showing that the Jury Reached a Seriously Erroneous Result or a Verdict That is a Miscarriage of Justice.

Defendants face a heavy burden in moving for a new trial under Fed. R. Civ. P. 59 ("Rule 59"), a burden they have failed to carry here:

> Rule 59(a) of the Federal Rules of Civil Procedure provides that the Court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." The standard for granting a motion for a new trial is lower than the standard for granting a Rule 50 motion—a judge "may weigh the evidence and the credibility of witnesses and need not view the evidence in the light most favorable to the verdict winner." *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012) (citation omitted). **Still, the Second Circuit has emphasized "the high degree of deference [that should be] accorded to the jury's evaluation of witness credibility, and that jury verdicts should be disturbed with great infrequency**." *Ibid.* **Nor is a motion for a new trial "a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple."** *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998). The Court may only grant a motion for new trial "if the jury has reached a seriously erroneous result or [its] verdict is a miscarriage of justice," or "if substantial errors were made in admitting or excluding evidence." *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 202 (2d Cir. 2014).

Lundstedt, 2020 WL 614194, *2 (emphasis added).

Applying the Rule 59 standard, the Court should deny the defendants' motion for a new trial because the record evidence cited above weighed heavily in the Commission's favor, and the verdict was far from a "seriously erroneous result." Nor is Rule 59 a vehicle for relitigating the Court's Section 206(2) ruling at summary judgment, and the Court should ignore defendants' Section 206(2) arguments for the reasons stated in Part II above.

The defense raises three additional matters to argue that the jury's verdict was a miscarriage of justice: the verdict form, a juror's post-trial letter to Commission counsel, and the Coronavirus pandemic. These arguments are procedurally improper, speculative, and substantively insufficient to disturb the jury's verdict.

A. Defendants Waived Any Objection to the Verdict Form and There was No Error in the Verdict Form Regardless.

Defendants should not now be permitted to complain about a verdict form to which they agreed at trial. On March 12, 2020, in the evening before closing arguments and the Court's jury charge, defense counsel wrote to the Court's law clerk and the parties that, "[t]he defense appreciates the balancing the court has engaged in and we are satisfied with the instructions and verdict form." Email dated Mar. 12, 2020 at 9:16 p.m. (sent to chambers). On March 13, 2020, the day that the jury received the verdict form and began deliberations, the defense was presented with the opportunity to raise any remaining objections or concerns, and raised none. Tr. at 1010:21-1011:8. This forecloses the defense from challenging the verdict form unless there was a "fundamental error" in the verdict form, and there was no such error. *See Howard v. Town of Dewitt*, 5:12-cv-870, 2015 WL 2381334, at *10-*11 (N.D.N.Y. May 19, 2015) (party waived issue where "did not object to the verdict slip before the jury received it" and relief is then available "only if the Court committed 'fundamental error' in crafting the verdict slip as it did.") (citing *Shade ex rel. Velez–Shade v. Hous. Auth.*, 251 F.3d 307, 312 (2d Cir. 2001)).

It was not error for the verdict form to indicate that the Commission had proven that "Westport and Mr. McClure failed to make adequate disclosure of their conflicts of interest." Memorandum at 24. That element was established as a matter of law at summary judgment. Dkt. 86 at 9-11. In this manner, the Court's verdict form was consistent with the partial summary judgment ruling's purpose of "eliminating before trial matters wherein there is no genuine issue of fact." *Algie v. RCA Global Communications, Inc.*, 891 F. Supp. 875, 883 (S.D.N.Y. 1994) (quoting Fed. R. Civ. P. 56(d), Advisory Committee Notes (1946)); *see also* Fed. R. Civ. P. 56(g) (2010 amendment) ("If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact . . . that is not genuinely in dispute and

treating the fact as established in the case."); *Gaither v. Stop & Shop Supermarket Co. LLC*, 84 F. Supp. 3d 113, 122 n.8 (D. Conn. 2015) ("freedom to use summary judgment procedure to address particular issues or elements of a claim is an important feature of Rule 56, making it a much more useful case management device") (quoting 11–56 MOORE'S FEDERAL PRACTICE–CIVIL § 56.122). The only question remaining for trial, and for the jury's deliberations, was whether the Commission had proven by a preponderance of the evidence that defendants acted intentionally or recklessly. It was not error for the verdict form to include, and to include as already established, the act – a failure of disclosure – that defendants were alleged to have done intentionally or recklessly.

The Court instructed the jury regarding the Commission's burden of proof and its burden in proving scienter (Jury Instr. at 4, 8-10), and the defense neither objected to the instructions at trial nor complains about them now. The Court went so far as to instruct the jury that there was evidence of some disclosure in the Forms ADV, clearly indicating that the jury could find that the defendants, rather than acting with scienter, *meant* to make disclosure to clients. Jury Instr. at 10 ("Although Westport and Mr. McClure did not make adequate disclosures, there is some evidence that they made statements to clients in the Forms ADV, and you may consider the nature and scope of any statements or disclosures that they did make in the Forms ADV when deciding whether their failure to make adequate disclosures was intentional or reckless."). The jury, having heard defendants emphasize the disclosures in Forms ADV, also heard evidence of the sheer scope of defendants' financial interest in client transactions, and heard from clients who were plainly unaware of defendants' conflicts of interest. After balancing this evidence, the jury concluded that defendants acted intentionally or recklessly in their failure of disclosure. There is no reason to doubt that the jury rigorously applied the Court's instructions to the

remaining intent element on the verdict form. *See Howard*, 2015 WL 2381334, at *11 ("The Court's instructions on these issues were clear, and 'juries are presumed to follow their instructions.'") (quoting *Zafiro v. U.S.*, 506 U.S. 534, 540 (1993)); *see also Ladenburg Thalmann & Co., Inc. v. Modern Continental Construction Holding Co., Inc.*, 408 Fed. Appx. 401, 405 (2d Cir. 2010) (unpublished summary order) (affirming denial of motion for new trial where only one question of fact remained for jury and trial court "present[ed] the jury with instructions and a verdict form that simply and succinctly addressed that question"). As a result, defendants' motion premised on the verdict form should be denied.

B. Federal Rule of Evidence 606(b) Precludes Use of the Post-Trial Juror Letter to Impeach the Verdict, and the Letter is Not Indicative of Misconduct in Any Event.

Under Fed. R. Evid. 606(b) ("Rule 606(b)"), the March 24, 2020 juror letter to Commission counsel cannot be used to impeach the jury's verdict. Rule 606(b) provides that "[d]uring an inquiry into the validity of a verdict . . . a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court *may not receive a juror's affidavit or evidence of a juror's statement on these matters*." Rule 606(b)(1) (emphasis added). "FRE 606(b) broadly prohibits accepting into evidence juror testimony regarding the course of a jury's deliberations." *Anderson v. Miller*, 346 F.3d 315, 326 (2d Cir. 2003). That is because "[t]he jury's deliberations are secret and not subject to outside examination." *Israeli v. Ruiz*, No. 14 cv 9244, 2015 WL 6437374, at *6 (S.D.N.Y. Oct. 7, 2015) (citing *Yeager v. United States*, 557 U.S. 110, 122 (2009)).

Rule 606(b) precludes the use of evidence from a juror to attack a verdict. *See Ohanian v. Avis Rent A Car System, Inc.*, 779 F.2d 101, 110 (2d Cir. 1985) ("[i]t is well established that

evidence from a jury or juror may not be used to impeach the jury's verdict.") (citing *McDonald v. Pless*, 238 U.S. 264, 267-69 (1915)); *SEC v. Payton,* 219 F. Supp. 3d 485, 493 (S.D.N.Y. 2016) (declining to consider jurors' alleged post-trial statements for Rule 50 and Rule 59 motions); *Israeli*, 2015 WL 6437374, at *6 (Rule 606(b)(2) "has been applied to preclude not merely testimony by jurors, but also the use of other statements by a juror outside of his role in rendering a verdict."); *Luciano v. Olsten Corp.,* 912 F. Supp. 663, 670-71 (E.D.N.Y.1996) (Rule 606(b) precluded use of juror's post-verdict statement to journalist to challenge verdict), *aff'd,* 110 F.3d 210 (2d Cir.1997). Rule 606(b) has been applied in circumstances involving a letter similar to that here. *See U.S. v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990) (affirming trial court's denial of motion, on Rule 606(b) grounds, to interview jurors in criminal trial following congratulatory post-trial letter to prosecutor); *U.S. v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 331-32 (D. Conn. 2007) (denying motion for post-verdict inquiry into juror bias based on juror letter congratulating government on trial victory).

Rule 606(b)(2) includes exceptions, inapplicable here, if "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." Rule 606(b)(2); *Jacobson v. Henderson,* 765 F.2d 12, 14 (2d Cir. 1985) ("affidavits and statements by jurors may not ordinarily be used to impeach a verdict once the jury has been discharged unless extraneous influence has invaded the jury room."). Even then, post-trial inquiry into jury room deliberations requires "clear, strong, substantial and incontrovertible evidence that a specific non-speculative impropriety has occurred." *U.S. v. Baker*, 899 F.3d 123, 131 (2d Cir. 2018) (quoting *U.S. v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). None of those exceptions apply here.

Certainly, Juror #5's letter makes no reference to any outside influence or any mistake in completing the verdict form. Rule 606(b)(2)(B)-(C). Defendants argue that the juror's letter indicates that the jurors improperly considered Mrs. McClure's appearance, or the expense of her shoes. This, however, is not "extraneous prejudicial information [] improperly brought to the jury's attention." Rule 606(b)(2)(A). *See also Warger v. Shauers*, 574 U.S. 40, 51 (2014) ("'[e]xternal' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room"). There was nothing improper about the manner in which Mrs. McClure's presence was brought to the jury's attention – it was *defendants* who admitted into evidence that Mrs. McClure was in the gallery. Tr. at 655:21-22 (Q. "Are you married, sir?" A. "I am. My wife's in the courtroom."). The defense brought Mrs. McClure to the jury's attention as a matter of trial strategy and thus her presence was not an external influence first revealed in the juror's letter. The Rule 606(b)(2)(A) exception, not applicable here, concerns a jury "receiving information *outside the record*." *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994) (emphasis added). *Cf. U.S. v. Aiyer*, --- F. Supp. 3d ----, 2020 WL 223619, *5 (S.D.N.Y. Jan. 15, 2020) (court interviewed juror following juror's remarks in post-trial podcast indicating juror had researched defense counsel, "which raised a possibility that he had conducted further outside research during the case in violation of the Court's repeated instructions. Additionally, there were allegations that [juror's] girlfriend and boss had looked up information about the case".); *U.S. v. Dickerson*, 3:10 cr 227, 2013 WL 12073215, *2-*3 (D. Conn. Oct. 23, 2013) (court interviewed juror following allegation that during deliberations in criminal trial a juror searched for definition of "conspiracy" on mobile phone).

Even if Rule 606(b) allowed use of Juror #5's letter to question the jury's deliberations (which it does not), it would be pure speculation to conclude that comments about Mrs. McClure's shoes or perceived wealth had any impact on the jury's substantive deliberations. Jurors notice how people dress at trial. *See Cuthel*, 903 F.2d at 1384 (juror letter to prosecutor noted "we, the jury, was [sic] also impressed by the suits & ties you wore & those Argyle socks too"); *Aiyer*, 2020 WL 223619, at *6 ("Juror explained that during the course of the trial, some of the jurors would comment on the physical appearance and trial mannerisms of the lawyers"); Sonya Hamlin, *Who Are Today's Juror's and How Do You Reach Them?*, LITIGATION (Am. Bar Assoc. Spring 2001), 27 No. 3 LITIG 9, at *15 ("Jurors *really* notice your shoes"). Despite the unavoidable reality that jurors pay attention to mundane and extraneous courtroom details, they are trusted to deliberate and reach verdicts on the merits. *See Baker*, 899 F.3d at 134 ("[c]rediting a speculative conclusion to the contrary would run counter to our presumption that 'jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court.'") (quoting *U.S. v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997)). Indeed, Juror #5's letter made reference to the jury's discussions of Mrs. McClure "as an aside" and noted that during deliberations the jurors "spoke of many things and McClure's wife came up" – again, her presence in the courtroom having been flagged by a question posed by defense counsel.

The letter does not indicate that the jury's observations of Mrs. McClure, or anything else they chatted about, influenced their substantive deliberations. *See Baker*, 899 F.3d at 132 ("[n]ot every comment a juror may make to another juror about the case is a discussion about a defendant's guilt or innocence that comes within a common sense definition of deliberation.") (quoting *U.S. v. Peterson*, 385 F.3d 127, 135 (2d Cir. 2004)). In any event, courtroom observations that the jurors considered in deliberations are beyond consideration per Rule

606(b)(2). *See Peña-Rodriguez v. Colorado*, —— U.S. ——, 137 S.Ct. 855, 861 (2017) ("[a] general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations");[1] *Warger*, 574 U.S. at 51 (Rule 606(b) applied where juror indicated pro-defendant sentiments during deliberations); *Baker*, 899 F.3d at 132 ("even assuming, arguendo, that premature deliberations occurred, we agree with the district court that Rule 606(b) of the Federal Rules of Evidence prohibited the jurors from impeaching their verdict by testifying about the effect of such deliberations on the verdict, rendering the inquiry futile from the start"); *Israeli*, 2015 WL 6437374, at *7 n.11 ("reliance on the jurors' non-verdict statement to infer the course of their deliberations is a non-starter"); *U.S. v. Botti*, 722 F. Supp. 2d 188, 202-03 (D. Conn. 2010) (juror statement "if made, was inappropriate, even suggestive of bias, [but] the statement was made during deliberations; and Fed. R. Evid. 606(b) bars any inquiry into it for the purpose of testing the validity of the verdict.").

Rule 606(b) not only prohibits consideration of the letter as it relates to deliberations among the jurors, it prohibits the letter as evidence of Juror #5's own deliberations, thought processes, or even as it relates to defendants' unfounded claim that the juror was untruthful during *voir dire*. *See* Rule 606(b)(1) (precluding juror evidence on the "effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict"); *Warger*, 574 U.S. at 44 ("Rule 606(b) applies to juror testimony during a proceeding in which a

[1] The Supreme Court held in *Peña-Rodriguez* that when a juror "makes a clear statement that indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S.Ct. at 869. *Peña-Rodriguez*, inapplicable here, provides a limited "exception to the rule that jurors will not be heard to impeach their own verdicts." *Baker*, 899 F.3d at 134.

party seeks to secure a new trial on the ground that a juror lied during *voir dire*"); *Ionia Mgmt.*, 526 F. Supp. 2d at 331 (Rule 606(b) precluded interview of juror who sent post-verdict letter allegedly showing pro-government bias); *see also Peña-Rodriguez*, 137 S. Ct. at 866 ("after the trial, evidence of misconduct *other than juror testimony* can be used to attempt to impeach the verdict") (emphasis added). Regardless, it is pure speculation, and baseless speculation at that, for defendants to suggest that Juror #5's letter indicates that he was untruthful during *voir dire*. *See* Memorandum at 26.

It does not follow from Juror #5's impressions of Commission counsel, plainly formed during trial, that he falsely answered "yes" to the *voir dire* question of whether he could be fair and impartial. The letter could have been written by someone who had no opinion, or even a negative opinion, of government enforcement, found himself pleasantly surprised by the presentation during the trial, and felt moved enough to contact counsel. The juror could be grateful for Commission counsel's public service because the juror had found, like his fellow jurors, that the defendants intentionally defrauded people whom the juror heard testify. Similarly, the juror's statement that the "Defense didn't have a chance" (Memorandum at 26) is likely a post-trial assessment of all the evidence he heard, rather than an admission of a premature conclusion.[2] *Aiyer*, 2020 WL 223619, at *3 ("the comment in this case [that 'defendant wouldn't be smiling at the end of this'] does not demonstrate pre-existing bias against the defendant, but rather demonstrates a Juror's contemporaneous view of the evidence."); *see*

[2] Defendants suggest that Juror #5's reference to "your case" in writing to Commission counsel means that Juror #5 had made up his mind at the completion of the Commission's case-in-chief, before McClure testified. Memorandum at 26. A more reasonable reading is that the juror was referring to his impressions of the entire trial. Defendants also argue that Juror #5's use of the term "guilty" means that he or other jurors may have been confused about whether the trial was a criminal trial rather than a civil trial. Memorandum at 27 n.21. This too is pure speculation, but it would have meant holding the Commission to a higher standard of proof in any event. More likely, the juror is using "guilty" in a colloquial sense. Only lawyers say things like "civilly liable."

also Baker, 899 F.3d at 131, 134 (affirming district court's denial of post-trial inquiry where juror alleged "after the verdict was rendered I overheard one juror say that he knew the defendant was guilty the first time he saw him (before he was sworn in as a juror)"). To obtain a new trial based on an allegedly false answer at *voir dire*, "a party must first demonstrate that a juror failed to answer honestly a material question at *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984). Defendants have failed to demonstrate that Juror #5 answered any question dishonestly at *voir dire*.

Finally, even if Juror #5's letter could be read to mean that he reached his own conclusions prior to the close of evidence, the letter cannot be used to impugn the jury's verdict. *Baker*, 899 F.3d at 131 (affirming trial court's denial of post-verdict juror inquiry where juror alleged premature deliberations "during virtually every break": allegations "relate[d] to statements made by the jurors themselves, rather than to outside influences") (internal quotation and citation omitted). Defendants' motion premised on the juror's letter should be denied.

C. The Growing Specter of the Coronavirus Pandemic During Trial Only Demonstrated the Conscientiousness of this Particular Jury.

Defendants raise the backdrop of the growing Coronavirus crisis as additional support for their motions, but admit that they are unable to articulate how this supports their arguments. Memorandum at 29. This speculation about the impact of courthouse atmospherics is far from sufficient grounds for a new trial. *See Hogan v. City of New York*, 396 Fed. Appx. 765, at *2 (unpublished summary order) (2d Cir. 2010) (affirming denial of new trial where plaintiffs argued jurors having seen defense come to aid of ill judge tainted verdict: "Plaintiffs' arguments to the contrary are based largely on speculation and do not meet their heavy burden of showing that the jury reached a seriously erroneous result or a verdict that is a miscarriage of justice.").

The parties and the Court were aware of the Coronavirus situation during the week of trial, and discussed its potential impact on the timing of closing arguments. On Thursday, March 12, 2020, the Court raised a concern about the worsening national news and indicated a preference for closing arguments to be the next day rather than on Monday, March 16, 2020, as previously contemplated. The defense's only reaction was agreement that the situation merited having closing arguments sooner than originally planned. Tr. at 739:14-18.

The jury was charged, and closing arguments delivered, on Friday, March 13, 2020. The jury began its deliberations at approximately 2:24 p.m. Tr. at 1152:7. At 4:00 p.m., they had not reached a verdict and retired for the day (Tr. 1154:24-1155:4), only to return on Monday, March 16, 2020 to resume deliberations for another several hours before returning their verdict. As far as counsel is aware, the jurors each returned without complaint or an expression of any concern or dismay at returning to the courthouse during the growing health crisis. The only thing this series of events makes clear is that this jury was particularly conscientious and devoted to its oath. Another jury might have rushed to a decision on Friday afternoon out of a desire to avoid returning to the courthouse three days later. This jury was exceptionally dedicated, and its well-supported verdict should not now be disturbed by defendants' Coronavirus argument, or any of the other arguments advanced in their Motion.

CONCLUSION

For all of the foregoing reasons, the Commission respectfully requests that the Court deny defendants' motion for judgment as a matter of law or, in the alternative, for a new trial.

Dated: May 11, 2020

SECURITIES AND EXCHANGE COMMISSION
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CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2020, a true and correct copy of this document was filed through the Court's CM/ECF system, and accordingly, this document will be sent electronically to all participants registered to receive electronic notice in this case.

/s Michael C. Moran
Michael C. Moran