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United States Court of Appeals for the Ninth Circuit

United States v. Ellison

June 5, 2017, Argued and Submitted, Seattle, Washington; August 15, 2017, Filed

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No. 14-30180, No. 14-30183, No. 14-30184, No. 14-30185

UNITED STATES OF AMERICA, Plaintiff -Appellee, v. MARK A. ELLISON, Defendant-Appellant, UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID D. SWENSON, Defendant-Appellant, UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEREMY S. SWENSON, Defendant-Appellant, UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DOUGLAS L. SWENSON, Defendant-Appellant,

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Judges: Before: FERNANDEZ, CALLAHAN, and IKUTA, Circuit Judges.

Opinion

MEMORANDUM*

Douglas Swenson, Mark Ellison, David Swenson, and Jeremy Swenson (collectively, the Appellants) appeal their convictions after a joint jury trial. All of the Appellants also appeal their restitution orders, and Douglas, David, and Jeremy also appeal their prison sentences. The Appellants worked for the DBSI Group[1] and were convicted for their roles in defrauding investors in fifteen investment offerings. Each of the Appellants was convicted of securities fraud,[2] and Douglas was also convicted of wire fraud.[3] We affirm the Appellants' convictions and sentences in virtually all respects; however, we vacate the restitution order against Ellison, David, and Jeremy, and remand for the district court for recalculation of the amount.

(A) Jury Instructions

The Appellants challenge a number of jury instructions given in their joint trial. Each challenge fails.

(1) Scheme to defraud

The Appellants hypothesize that the district court's Instruction 40, which defines "a scheme to defraud" for the securities and wire fraud charges,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[1] "DBSI Group" refers to the whole DBSI group of companies.

[2] 15 U.S.C. 78j(b), 78ff(a); 18 U.S.C. 2; see also 17 C.F.R. 240.10b-5.

[3] 18 U.S.C. 1343.

could have allowed the jury to convict them for silence, even in the absence of a duty to disclose any information to investors. The district court did not abuse its discretion in formulating this instruction. See *United States* v. *Lloyd*, 807 F.3d 1128, 1164-1165 (9th Cir. 2015). In general, guilt for securities fraud and wire fraud "is not restricted solely to isolated misrepresentations or omissions." *Blackie* v. *Barrack*, 524 F.2d 891, 903 n.19 (9th Cir. 1975); see 17 C.F.R. 240.10b-5(a), (c); see also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 152-153, 92 S. Ct. 1456, 1471-72, 31 L. Ed. 2d 741 (1972); *United States* v. *Woods*, 335 F.3d 993, 997-998 (9th Cir. 2003). Moreover, in this case, it was undisputed that a number of statements were made to investors in connection with the investment offerings. Cf. *Chiarella* v. *United States*, 445 U.S. 222, 226, 100 S. Ct. 1108, 1113, 63 L. Ed. 2d 348 (1980). Because statements were made to investors, the securities laws imposed a duty to disclose material facts necessary to render those statements not misleading, regardless of whether any fiduciary relationship with investors existed. See *S.E.C.* v. *Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996); *Hanon* v. *Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992); see also 17 C.F.R. 240.10b-5(b). On this record, the instruction was correct and did not mislead the jury. See *United States* v. *Smith*, 831 F.3d 1207, 1219 (9th Cir. 2016).[4]

(2) Materiality

[4] We decline to consider Douglas's conclusory assertion in his reply brief that the jury's verdicts were inconsistent. See *United States* v. *Romm*, 455 F.3d 990, 997 (9th Cir. 2006); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

The Appellants argue that Instruction 30, which defines materiality for securities fraud, did not tell the jury to consider the purported omission or misstatement in light of all the circumstances.[5] At bottom, "'materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information,'"[6] and a reasonable investor would consider all of the circumstances in determining whether a false statement or omitted fact was significant.[7] By referring to a reasonable investor, the instruction adequately communicated that the jury should consider relevant circumstances in evaluating materiality. See *United States* v. *Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). We reject the Appellants' speculation that the jury could have convicted them based on inadequate evidence of materiality: there was sufficient evidence to support the jury's verdicts. See *Griffin* v. *United States*, 502 U.S. 46, 59–60 (1991). We also reject the Appellants' suggestion that the jury should have been told to consider information that was made available to third parties, but not to investors, when it evaluated the materiality of a particular fact to a reasonable investor. See *United States* v. *Bingham*, 992 F.2d 975, 976 (9th Cir. 1993) (per curiam)

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[5] We decline to consider Douglas's argument in reply regarding the degree of importance required to establish materiality. See *Romm*, 455 F.3d at 997.

[6] *No. 84 Empl.-Teamster Joint Council Pension Tr. Fund* v. *Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003); see also *United States* v. *Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004), amended, 413 F.3d 928, 928 (9th Cir. 2005).

[7] See *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976) (defining materiality in terms of the "'total mix' of information made available").

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