18-1503

To Be Argued By:
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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

STUART SCOTT,

Defendant,

MARK JOHNSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

The government's brief starkly illustrates why courts refuse to rely "upon prosecutorial discretion to narrow the otherwise wide-ranging scope" of "highly abstract…statutory language" like that in the wire-fraud offense. *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). The brief is the latest flavor of the prosecution's many ever-shifting, imprecise, and contradictory attempts to explain just what, exactly, the crime here was, and it exposes why there was none.

First, the misappropriation theory, though heavily litigated below, is now an afterthought. The government relegates its limp response to the back of its brief and ignores the many controlling authorities conclusively foreclosing that theory. The government simply refuses to accept the contractual provisions disclaiming the necessary fiduciary-like relationship. Instead it flouts hornbook law, arguing that the plain and ordinary meaning of these binding disclaimers raises a "question of fact," and that the so-called "essence of [the] bargain" is found in extrinsic evidence instead of the contract itself. The government seeks to rewrite a freely negotiated agreement between sophisticated parties who disavowed the very duty the prosecutors now seek to impose. It would be a travesty of justice to deprive Johnson of his liberty based on these arguments, which would not even survive a motion to dismiss in a civil action. *See, e.g.*, *Negrete v. Citibank, N.A.*, No.17-2783-cv, 2019 WL 80773, at *3 (2d Cir. Jan. 3, 2019) (holding that "[t]he

ISDA…created an arms-length counterparty relationship" and "absent an explicit agreement to the contrary, Citibank had no fiduciary obligation to provide…the best execution for the FX trades").

Second, the "right to control" argument is similarly foreclosed by controlling law and the governing contract. The government says it only has to prove that the victim was deprived of economic information, but completely ignores the additional requirement that the victim receive less than "the full economic benefit of its bargain." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015). The government disregards this precedent because Cairn got everything it bargained for. As the government concedes, Cairn neither sought nor received any limitation on HSBC's profits in the contract. Nor does the government seriously suggest that the miniscule 0.2% profit somehow violated a contract that imposed no such limit.

Finally, the government manufactures a litany of new, equally meritless theories of deceit and intent to harm. These bogus theories are nowhere in the indictment, were not presented to the jury, are unsupported by the record, and cannot sustain the conviction. Not only do they contradict what the government said below, the government's brief repeatedly contradicts *itself*, typifying the lack of fair notice or coherent standard of criminality that has become the single defining feature of this prosecution.

The government's inability to articulate any crime demonstrates why the conviction must be reversed.

I. THE MISAPPROPRIATION THEORY FAILS

The contract defeats the misappropriation charges as a matter of law. The government sidesteps the Mandate Letter's disclaimers with baseless arguments that contravene black-letter contract law and the plain meaning of the Mandate Letter. The government repeats the meritless argument that "more" sophisticated parties like HSBC owe duties to "unsophisticated" parties like Cairn. Finally, the government argues for the first time that HSBC's receipt of confidential information by itself creates the requisite duty, which directly contradicts the governing law, the jury charge, and its concessions below.

A. There Was No Fiduciary-Like Relationship

1. The government concedes that the Mandate Letter is a valid agreement post-dating all others between Cairn and HSBC. And there is no dispute that, by its terms, the Mandate Letter and ISDA incorporated therein disclaim any fiduciary or similar relationship. (G.Br.48). Yet the government refuses to acknowledge that Cairn is bound by this disclaimer, instead arguing that: (1) construction of the contract's unambiguous terms involves a "question of fact for the jury"; (2) the extrinsic evidence is where the parties' "binding commitment" is reflected; and (3)

documents expressly incorporated by reference in a contract do not bind the parties. (G.Br.38, 41-42, 49). These contentions border on frivolous.

First, the contractual disclaimers could not be clearer: HSBC was "not acting as a fiduciary for or…adviser" to Cairn; there was not "any form of advisory or other relationship"; Cairn was "solely responsible for making its own independent appraisal" of the transaction; HSBC was not "acting on behalf of" Cairn and was instead "acting for its own account"; and Cairn made all decisions "based upon its own judgment" using "independent professional advice." (A-309-10, A-373). As a matter of law (*see* Br.28-38), these waivers foreclose any "fiduciary" or "similar relationship of trust and confidence." *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991).

The government ignores both the general rule that "[c]ontract interpretation [is] a question of law" this Court reviews "de novo," *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007), and the numerous authorities confirming that "there is no factual issue" where, as here, "the parties to the relevant agreements…disclaimed any sort of advisory, brokerage, or other fiduciary relationship," *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 174 (2d Cir. 2011); *accord, e.g.*, *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998); *Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 808-09 (5th Cir. 2017); *Children's Broadcasting Corp. v. Walt Disney Co.*, 245

F.3d 1008, 1021-22 (8th Cir. 2001). Rather, in claiming that "the existence of a fiduciary duty is a question of fact" (G.Br.38), the government cites two cases that involved no contract at all—let alone one disclaiming such a duty. *See United States v. Halloran*, 821 F.3d 321 (2d Cir. 2016); *United States v. Szur*, 289 F.3d 200 (2d Cir. 2002). Even these cases confirm that "a fiduciary or similar relation of trust and confidence" exists only if the defendant acts "for the benefit of another person." *Szur*, 289 F.3d at 210; *accord Halloran*, 821 F.3d at 338 (fiduciary "is required to act for the benefit of another person"). Here Cairn agreed that HSBC was "acting for its *own*" benefit, not Cairn's, and that Cairn was "*solely* responsible for making its *own independent* appraisal." (A-310, A-373) (emphasis added). There is no factual question, because these admissions are legally binding.[1]

Second, the government contends that alleged "promises" in the sales pitch give rise to "a binding commitment." (G.Br.41). But the pitch is not the contract, and the "plain and ordinary meaning" of agreements is "construed without reference to extrinsic evidence." *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89,

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[1] The government argues (at 43) that the contract afforded HSBC "discretion" in how it traded, but the above authorities demonstrate why that does not create a fiduciary-like relationship when the same contract disclaims any such relationship. Moreover, every fix transaction confers such discretion on the bank's traders, and this Court has already held that a multitude of fix transactions performed by HSBC "did not give rise to…fiduciary status." *Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214, 223 (2d Cir. 2018).

99 (2d Cir. 2012); *accord Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (the "plain language" of a contract is "determined without reference to extrinsic evidence").

Even if an extrinsic promise to act in Cairn's "best interest" could somehow trump the agreement (it cannot), Johnson made no such promise. Not only was he unaware of the pitch materials' contents,[2] but their statement that HSBC would "like to" act in Cairn's "best interest" is not a promise to do anything. (*See* Br.36). The government argues that this statement was "material" to Cairn and the "key criterion" driving its decision to contract with HSBC (G.Br.42), but the contract says the opposite: that HSBC was not "acting on behalf of" Cairn at all, but instead was "acting for its own account."[3] (A-310, A-373). But "the contract itself" indisputably trumps the government's after-the-fact rendition of what "might be preferable" for Cairn, *John Hancock Mut. Life Ins. Co. v. Amerford Int'l*

[2] In claiming Johnson knew about supposed "representations" in the pitch (G.Br.7-9), the government cites (1) the transcript of a totally inapposite call that does not remotely suggest Johnson saw the pitch, and (2) the testimony of HSBC salesman Dipak Khot, who vaguely mentioned a conversation with Johnson about the pitch but recalled nothing specific (let alone any discussion of a representation) and admitted that Johnson never received the document. (A-91-92, A-97-98, A-100).

[3] The government also relies upon an HSBC email—which Johnson was not even copied on—predating the pitch meeting (G.Br.42), but like the pitch itself, that email expresses only a "hope" as to the terms of any agreement (GA-135).

Corp., 22 F.3d 458, 462 (2d Cir. 1994), and "a sophisticated commercial" party's "failure" to negotiate a contractual right "precludes [this Court from] divining or implying" one, *Ore Cargo, Inc. v. Israel Discount Bank Ltd.*, 544 F.2d 80, 82 (2d Cir. 1976).

Third, the government concedes that the Mandate Letter post-dates the pitch and NDA, but claims the Letter's incorporation of the ISDA somehow does not.[4] From this faulty premise, the government argues that the ISDA's disclaimers predate those other documents and therefore do not apply. (G.Br.49). There are two reasons why the government is wrong. The first is that the disclaimers in the Mandate Letter itself, which the government ignores, independently disavow any fiduciary or similar relationship. (Br.28-30). The second is the black-letter principle (*see* Br.30-31) that a document incorporated by reference becomes "part of the [agreement] as if incorporated into the body of it," *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996), such that "the two form a single instrument," 11 Williston on Contracts § 30:25 (4th ed. 2008). That instrument—

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[4] Cairn's witnesses refused to acknowledge that the Mandate Letter fully incorporated the ISDA (G.Br.11), but their purported "subjective understanding" of the agreement—which conveniently surfaced after "litigation commenced" and contradicted the agreement's unambiguous terms—"cannot be used to establish that [the parties] had such intent and understanding when they entered into the...contract." *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 207 n.10 (2d Cir. 2005).

the Mandate Letter—post-dates and thus "supersede[s]" the prior ones as a matter of law. *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011). The Mandate Letter's terms are legally binding. It is astonishing that anyone, let alone the government, would suggest otherwise.

2. Nor does the government seriously dispute that Cairn's sophistication and arms-length dealings with HSBC separately foreclose the misappropriation charges. (*See* Br.32-35). It repeats the frivolous argument that in a commercial transaction, the more sophisticated party owes a fiduciary duty to the less sophisticated one. (G.Br.45-46). The notion that Cairn—a multi-billion-dollar enterprise represented by sophisticated counsel and Europe's "premier investment bank[]" (A-73)—could not fend for itself is laughable. The government ignores *Allen*, which held, under materially indistinguishable circumstances, that HSBC did not "perform[] a fiduciary function" when "amass[ing] large proprietary currency positions" to sell to sophisticated customers like Cairn "before or during the fixing window." 895 F.3d at 220, 223. The government also disregards (1) the authorities cited in the opening brief (at 34) holding that "superior knowledge, skill [or] expertise" does not create a fiduciary-like relationship, *Int'l Strategies Grp., Ltd. v. Ness*, 645 F.3d 178, 184 (2d Cir. 2011); and (2) the evidence that Cairn withheld relevant information from HSBC (A-139), which "is not consistent with

the view that [HSBC] was [Cairn's'] agent," *United States v. Litvak*, 889 F.3d 56, 71 (2d Cir. 2018).

Instead, the government cites *In re Daisy Sys. Corp.*, 97 F.3d 1171 (9th Cir. 1996), supposedly for the proposition that a bank customer may be owed a fiduciary duty notwithstanding its sophistication. But the "retention" agreement in that case confirmed that the bank served as the customer's "exclusive financial advisor," *id*. at 1173, which is a classic example of a "fiduciary" relationship, *United States v. Tagliaferri*, 820 F.3d 568, 572 (2d Cir. 2016) ("advisory relationship" is "fiduciary" in nature). Here, by contrast, Cairn *disclaimed* "any form of advisory…relationship," and opted instead to exercise "its own judgment" using "independent professional advice." (A-309-10, A-373).

3. Unable to show that HSBC and Cairn had the requisite "relationship of trust and confidence," *Chestman*, 947 F.2d at 566, the government argues for the first time that a relationship of "confidence" alone is sufficient, despite the contract's explicit disclaimer of "trust." (G.Br.39-41). This argument fails for several independent reasons.

First, the jury did not consider this theory, which contradicts the (government-endorsed) jury instructions. The district court correctly instructed the jury that "[s]imply entrusting someone with confidential information *does not, without more*, give rise to a relationship of trust and confidence"; the government

must also show "reliance and de facto control and dominance," such that the "agent serve[d] the principal's interests" and acted not for its own benefit, but rather to "benefit the principal."[5] (Tr.2714-15) (emphasis added). This was language the government *itself* had proposed. (Dkt.154-1 at 34). The jury obviously did not convict on a theory it was told was insufficient to establish guilt. That alone disposes of the government's new theory; this Court "cannot affirm a criminal conviction on [a] basis…not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980).

Second, no confidence was betrayed anyway. HSBC never revealed confidential information to a third party. (A-122). The government suggests that the alleged duty was breached when Johnson told other *HSBC* foreign exchange traders about the large trade at the 3pm fix. (G.Br.53). But what HSBC was mandated to do was sell pounds to Cairn. Who else would buy the pounds, if not HSBC traders? The government even admits that what "concerned" Cairn was "the *public* disclosure of [its] confidential information." (G.Br.50) (emphasis added). Cairn fully expected HSBC's own traders to know about this transaction, and Johnson breached no "confidence" by telling them. (Tr.189, 258). The

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[5] Johnson vigorously objected to instructing the jury to consider the misappropriation theory *at all* because it was foreclosed by law (*e.g.*, Dkt.153 at 8-20; Tr.2251), but did not challenge the instructional language, which correctly articulated the legal standard precluding his conviction. (*See* Br.27-28).

government complains about the number of traders who purchased pounds, but the Mandate Letter imposed no limit on that number. To the contrary, Cairn's Scriven confirmed that Cairn did not care how many HSBC traders were involved "as long as the trade got done," "whether it was 1 or 15" traders.[6] (A-140, Tr.786).

Third, as explained (Br.37-38), the NDA's only purpose was to allow banks to analyze the transaction at the RFP stage, and all of the information produced at that stage was public by December 7, 2011. (A-264, A-267, A-270). The NDA makes clear that it does not apply to the execution of the transaction. The government does not dispute this, but nevertheless refuses to accept the NDA as written, claiming it does not "make[]…sense" to the government. (G.Br.46-47). But the terms of an agreement between sophisticated foreign counterparties do not require the Department of Justice's stamp of approval, even if they are more limited than some prosecutors would apparently prefer.[7] *See John Hancock Mut. Life*, 22 F.3d at 462; *Ore Cargo*, 544 F.2d at 82.

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[6] There is nothing nefarious about "code words." (G.Br.55). They are used to prevent HSBC personnel from disseminating information about a trade to third parties (exactly what Cairn sought to prevent). (*See, e.g.*, Tr.795-96, 1751, 1971). The government suggests no other possible reason for their use, let alone a fraudulent reason, because there is none.

[7] NDA Section 7 provides it "shall remain in full force and effect…until two years after" its execution. (A-265). This does not somehow expand its scope as the government suggests. (G.Br.50). Likewise, whether "the specific governs the general" (*id.*) is irrelevant because the NDA never applied to the forex transaction and the Mandate Letter superseded the NDA.

Finally, although the government claims that "a written confidentiality agreement is…sufficient" to create a fiduciary or similar duty (G.Br.39), it points to no evidence that Johnson knew of the NDA, *i.e.* the "written confidentiality agreement" at issue. Instead the government relies upon Johnson's testimony that "common sense" would have prevented him from "misus[ing]" information he received from Cairn. (GA-85-90). But "common sense" is not a legal duty—let alone one memorialized in any "written agreement"—and Johnson never suggested that he had any legal duty or that he "misused" information by relaying it to his traders. (*Id.*)

Nor does the government point to any case in which a fiduciary-like relationship was predicated entirely upon a confidentiality agreement. In both *Carpenter v. United States*, 484 U.S. 19 (1987), and *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001), the fiduciary duty was based upon an employment relationship.[8] *See also United States v. O'Hagan*, 521 U.S. 642, 654 (1997) (confirming *Carpenter* involved "violation of a fiduciary duty," not a nondisclosure agreement). That well-established duty stands in stark contrast to this case, where the parties disclaimed any such duty under circumstances in which

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[8] The only other case the government cites is a district court decision specific to "the context of Rule 10b-5" involving a marital relationship governed by provisions in SEC Rule 10b5-2 that do not apply here. *United States v. Corbin*, 729 F. Supp. 2d 607, 614-19 (S.D.N.Y. 2010).

this Court has repeatedly refused to recognize one. *See, e.g.*, *Allen*, 895 F.3d at 220, 223; *Negrete*, 2019 WL 80773, at *3.

B. Disclosure Precludes Misappropriation

The misappropriation theory also fails because Johnson disclosed that HSBC would profit by trading ahead of the fix. (Br.15-18, 39). Now the government concedes that Johnson made this disclosure, and attempts to salvage the conviction with brand new and equally unsupportable deceit theories.

1. The government argued below that Johnson concealed HSBC's intent to profit by trading ahead of the fix. It told the jury to convict Johnson because he allegedly:

- "plotted to profit off the client's confidential information by buying up pounds before…the price spiked," selling "to the client at that inflated price" and "hid[ing] [this] scheme from the client" (Tr.37);
- "made sure that his team took advantage of buying at a cheaper price so they could sell back to the client at a higher price" "to make money" at Cairn's expense (Tr.40); and
- concealed from Cairn that "HSBC was going to trade ahead of the [fix] and…move up the price of [the pound], because doing so would cost money to [Cairn]" (Tr.2428).

(*See also* Tr.39, 41, 2402-07, 2414, 2646-47).

Now the government does an about-face, abandoning the theory of deceit on which Johnson was convicted. It admits that "[i]t was obvious…that HSBC wanted to profit from the transaction," that Cairn "understood that a $3.5 billion

order would naturally cause the price of [the pound] to rise," and that HSBC was "entitled to earn a profit" in this manner. (G.Br.56).

2. Rather than concede there was no deceit, the government manufactures new theories on appeal. It erroneously claims that (1) HSBC traders personally profited, (2) HSBC promised to use the "drip feed" methodology, (3) HSBC harmed Cairn by selling pounds to third parties, and (4) alleged misrepresentations pre-dating "settlement" are material. (G.Br.12-13, 30-31, 52-55). These allegations are nowhere in the indictment or the prosecutors' jury arguments, and none withstand the slightest scrutiny.

First, the government repeatedly insinuates that Johnson's crime was concealing his intent to have traders *personally* profit from trades in their "proprietary books." (*E.g.*, G.Br.13 (arguing "Johnson earned substantial profits in *his own* P-book"); *id*. at 15 (HSBC traders "made substantial profits by selling their positions"); *accord* G.Br.14, 17, 26, 53). But profits from the "proprietary" books go "to HSBC" itself; no HSBC trader personally profits from them. (*See, e.g.*, A-214-16). The government buries an admission that "the profits from the[se] trades went []to…HSBC and not to the conspirators personally" in a footnote toward the back of its brief, and offers no evidence that Cairn cared whether any trades happened in proprietary books. (G.Br.37 n.15). Because only HSBC profited, and Johnson indisputably "disclosed" his employer's profit motive (A-

386-87, A-397), "there was no decepti[ve]" conduct and thus no "misappropriation." *O'Hagan*, 521 U.S. at 655.

Second, during the RFP stage, HSBC did raise the *possibility* of "drip feed[ing] the market." (A-276). But the Mandate Letter does not mention "drip feeding," because *Cairn rejected* this method—since (in Rothschild's words) it "le[ft] little control for Cairn over either the timing of completion" of the exchange "or the price at the time of execution." (A-306, Tr.545). Cairn instead instructed HSBC to use the fix and sell the entire $3.5 billion in one hour—violating the Mandate Letter's two-hour notice requirement (A-309)—fully aware that this would "create turbulence" and "market disruption owing to a compressed time window." (A-307, A-396).

Third, the government now complains that 3% of the pounds HSBC purchased were sold to third parties and not Cairn. (G.Br.53-54; A-218). The suggestion appears to be that the HSBC currency traders—who trade billions of dollars worth of currency with thousands of counterparties each day—were not allowed to sell pounds to anyone else while the Cairn deal was pending. But Cairn bargained for no such restriction, and HSBC would never have agreed to one. Moreover, as explained (Br.21 n.6), most of the third-party sales occurred at or before the 3pm fix window, and it is undisputed that these trades "provid[ed] downward pressure" on the fix. (A-218, A-225, A-401). Nor does the government

deny that the remaining handful of pounds were purchased long before the fix (on November 30 and December 5)—meaning that they did not impact the exchange rate on December 7—and sold after 3pm that day, which means they had no effect whatsoever on the 3pm fix rate. (A-49, A-188). The government thus concedes that the miniscule number of third-party sales achieved a better exchange rate for Cairn, and certainly caused it no harm. That renders their supposed "nondisclosure" immaterial as a matter of law. *See United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000) (to prove a "scheme to defraud," the government must establish "materiality of [any] misrepresentations").

Finally, to be "material," a misstatement must also be "capable of influencing" the "decision" of the person or entity "to which it was addressed." *United States v. Finazzo*, 850 F.3d 94, 109 n.16 (2d Cir. 2017). The government argues for the first time on appeal that other HSBC employees' alleged misstatements satisfy this standard even though they were made after the 3pm fix, because they supposedly induced Cairn to "settle" the transaction by formally exchanging the currency two days later. (G.Br.30; *see* Tr.91 (explaining "settlement")). But this erroneously assumes that Cairn was entitled to withhold its

dollars after placing the orders mandating HSBC to deliver £2.25 billion at the 3pm fix rate. Cairn had no such right.[9]

"The proper date…to determine materiality" is "when the parties to the transaction are committed to one another," and not "the formal closing date." *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 890-91 (2d Cir. 1972). "Commitment is a simple and direct way of designating the point at which…the parties obligated themselves to perform," and occurs when "there was a meeting of the minds of the parties…even if the formal performance of their agreement is to be after a lapse of time." *Id*. at 891. "This rule holds even if the later exchange of money [or] securities is contingent upon the occurrence of future events," so long as the occurrence is not "extremely speculative." *Vacold LLC v. Cerami*, 545 F.3d 114, 122 (2d Cir. 2008).

Here, *nothing* in the Mandate Letter authorized Cairn to walk away from the deal, let alone withhold payment based upon how HSBC accumulated pounds. Cairn's obligation was straightforward—to purchase a specified number of pounds from HSBC "at a Spot execution price equivalent to…[the] publicly available fixing" which Cairn set for 3pm on December 7, 2011. (A-309 §3). The parties had a "meeting of the minds," and were thus "committed," when, pursuant to the

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[9] Cairn's orders imposed enormous risk on HSBC by obligating it to deliver so many pounds. HSBC relied on Cairn's commitment when seeking to mitigate that risk by purchasing so many pounds before the fix.

Mandate Letter, Cairn placed its orders mandating HSBC to sell it £2.25 billion at the 3pm fix.[10] *Radiation*, 464 F.2d at 891. The purported misstatements came afterward and are therefore immaterial.[11]

Nor is there evidence that HSBC could have purchased the £2.25 billion with less influence on the fix within the time allowed by Cairn's orders. Critically, the government does not dispute that *its own experts* were unable to offer any alternative method. (Br.22-23; *see also* G.Br.32 (government conceding it has no evidence of "alternative method of transaction")). Thus, even if the Mandate Letter somehow entitled Cairn to withhold performance (it doesn't), the record supplies no basis for doing so.

C. There Was No Intent To Harm

The government appears to suggest that HSBC deprived Cairn of some hypothetical better deal, claiming that Cairn might not "have selected HSBC" or might "have traded the order differently" had Cairn received additional disclosures.

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[10] *United States v. Rutigliano*, 790 F.3d 389 (2d Cir. 2015) (cited G.Br.30) is totally inapposite. It addressed whether there were "substantial contacts" with the SDNY for purposes of "venue," *id*. at 395-98, not materiality.

[11] The government claims that on a call the day after the transaction, Johnson acknowledged the falsity of Scott's post-transaction statements about the Russian Central Bank. (G.Br.30 n.12). But both defendants' statements after the transaction were immaterial as a matter of law. Nor does the government point to any evidence that Johnson knew or had reason to believe that Scott's statements about the Russian bank were even false.

(G.Br.27). But what would Cairn have done differently? The answer is nothing. There is no evidence of another bank or exchange methodology that would have achieved a better rate for Cairn. (*See* Br.22-23, 46). And the government now concedes that it lacks actual "proof" of "an alternative method of transaction or a different bank to execute the trade." (G.Br.32).

The government also claims that certain of HSBC's profits were "unnecessary," because even if some "natural[]" price movement was inevitable, HSBC "[un]naturally" increased the price by buying pounds too close to the 3pm fix. (G.Br.33, 56). But the contract did not restrict when or how HSBC bought pounds, and this Court recently confirmed that "absent an *explicit agreement to the contrary*," a bank "ha[s] no fiduciary obligation to provide [a customer] with the best execution for [an] FX trade[]." *Negrete*, 2019 WL 80773, at *3 (emphasis added). The government cannot force banks to assume the risk of holding currency longer, thereby subjecting them to adverse exchange rate movements, without compensation or any contractual obligation to do so, let alone terms dictating how much to purchase and when.

The absence of any actual or intended "tangible economic harm" is yet another reason why the conviction must be reversed. *Finazzo*, 850 F.3d at 111.

II. THE RIGHT TO CONTROL THEORY FAILS

The government's "right to control" theory is equally deficient. As the opening brief explained (at 40-46), the government failed to establish intent to harm, prove that Cairn was deprived of the benefit of its bargain, or identify any material misrepresentation that induced Cairn to reveal proprietary information. The government has no meaningful response.

1. As explained *supra* Point I.C, the government failed to prove intent to defraud, an essential element under any wire-fraud theory.

2. The right to control theory separately fails because "there was no discrepancy between" what Cairn "reasonably anticipated" and what it "received." *United States v. Starr*, 816 F.2d 94, 99 (2d Cir. 1987). Cairn received all it bargained for because (1) HSBC complied with the terms of the Mandate Letter, which neither restricted how HSBC acquired the pounds to fill Cairn's order nor limited HSBC's profits, and (2) yet more, because it also achieved its goal—a "transparen[t]" rate that was "better" than that of "a full risk" transfer—which was not even guaranteed by the contract (A-133). (Br.42-43). The government's feeble responses contravene the controlling authorities and the trial record.

First, this Court's precedents foreclose the government's argument that "the right to control theory requires *only* that the victim be deprived of potentially

valuable economic information." (G.Br.32) (emphasis added). Almost 25 years ago, this Court rejected this exact theory:

> The government…argues that the test…[is] whether "the concealed information had the reasonable potential to affect an economic decision"....According to the government, it does not matter whether the [alleged victim] would have suffered some economic loss if the scheme had been successful, because the loss of the "right to control" the expenditure of [its] funds, through the loss of the ability to make a fully informed decision, is sufficient to constitute mail fraud under §1341. *We disagree*.

United States v. Mittelstaedt, 31 F.3d 1208, 1217 (2d Cir. 1994) (emphasis added). The *Mittelstaedt* Court went on to hold that, to convict, "the government had to establish that the [non-disclosure] caused (or was intended to cause) actual harm" "of a pecuniary nature or that the [victim] could have negotiated a better deal for itself if it had not been deceived." *Id*. In subsequent cases, this Court has "repeatedly" confirmed that it will "reject[] [the] application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain." *Binday*, 804 F.3d at 570; *accord, e.g.*, *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006) (reversing where alleged victims "received all they bargained for"); *Starr*, 816 F.2d at 99 (same). Cairn's receipt of the full benefit of its bargain is hardly "irrelevant," as the government claims (G.Br.32); it is the entire ballgame, foreclosing right-to-control fraud.

Second, the government concedes that the Mandate Letter "neither restricted how HSBC acquired the pounds…nor limited HSBC's profits in any way."

(G.Br.32; *see also* Br.42-43). But it claims that "nothing in the Mandate Letter contradicted the abundant evidence that the essence of Cain's [sic] bargain" required HSBC to "execute the transaction without causing an unnecessary increase in the exchange rate." (G.Br.32-33). Apparently the government thinks that to ascertain the agreement between two sophisticated parties, one must first divine the "essence" of the bargain using extrinsic evidence and, if the contract itself does not "contradict" the so-called "essence of [the] bargain," then it becomes binding upon the parties, regardless of what the contract actually says. The reality, of course, is that the contract *is* the bargain, and courts may not consult extrinsic evidence if the contract is clear. *John Hancock*, 22 F.3d at 462; *Ore Cargo*, 544 F.2d at 82.

Finally, the government claims that the "rate that Cairn paid could not have been less 'transparent' to Cairn thanks to Johnson and his co-conspirators' deceptive scheme." (G.Br.31). This assumes that there was a "deceptive scheme" when, for all of the foregoing reasons, there was none. And as explained (Br.11, 15), the government misunderstands Cairn's goal. Cairn merely sought (in Rothschild's words) the transparency provided by a public fixing to "clearly demonstrate" to shareholders "that [they] achieved the exact market rate at a particular time." (A-306, A-133, A-201). It is beyond dispute that Cairn achieved this objective.

3. To defend its right to control theory, the government also repeats many of the unpersuasive theories of deceit refuted above (at 10, 14-19). (G.Br.25-33). Its additional arguments about deceit are equally meritless. For instance, the government simply misrepresents what transpired on the October 13, 2011 call between Johnson and Jarrosson. (G.Br.27-28). There was no "promise" not to "ramp" the fix. Rather, as the opening brief explained (Br.16-17), Johnson was making the point that profit-sharing agreements between banks and their customers are self-defeating, because the banks will "simply push the fixing a little bit" higher to compensate. (A-389). Moreover, the government does not address, let alone explain, Cairn's numerous contemporaneous acknowledgements that HSBC would "pressure the fixing" and thus "make money" by "beat[ing] the fix." (A-136, A-391, A-397). These acknowledgements show not only that there was no misrepresentation, since Cairn understood exactly what Johnson said, but also that any misrepresentation was immaterial as a matter of law. *See United States v. Wallach*, 935 F.2d 445, 462-63 (2d Cir. 1991).

The government's reliance on the 1:35pm call is also misplaced. (G.Br.28-29). It claims that on this call, Johnson "portrayed [himself] as concerned that Cairn's order not be manipulated." (G.Br.29). That is false; this supposed "concern" appears nowhere in that transcript, and certainly does not appear in the

form of any actionable misrepresentation. (A-324). Nor would any such misstatement be material for the reasons set forth above.

Finally, the government claims, without a scintilla of evidence, that Johnson "instructed" Frank Cahill to "ramp" the price of the pound (G.Br.56), when in fact Cahill testified that he "didn't…discuss this Cairn trade with Mark Johnson at all." (A-175). Johnson instead suggested that Scott "go short some" (A-335-36), which Cahill said "would have…put less upward pressure on the price" of the pound (A-158). Cahill was the one who decided to "aggressive[ly]" purchase pounds (*see* G.Br.27); he testified that he "trade[d] the order [on December 7] the same way that [he] did…[a]lmost every day of [his] career," believed that the basic "dynamics of a fix causes the market to go higher," and "didn't" think he was "conspiring with anybody to defraud Cairn" because this is how one "normally trade[s] fixes," *i.e.*, to "become more aggressive" as the fix time approaches. (A-154, A-172-75). Similarly, the government's claim that Cahill "waited to purchase approximately £2 billion of the £2.25 billion order until…ten minutes before the 3 p.m. fix" (G.Br.18) is simply false, as the exhibit that the government cites (A-399) itself shows. And the government's assertion (at 54) that other traders "drain[ed]" Cahill's account is yet another fabrication—they *filled* Cairn's order. (GA151-52, GA158-59, A-402).

4. The opening brief explained why the "right to control" theory contravenes Supreme Court precedents. (Br.46-49). The government erroneously contends that this argument is unpreserved. (G.Br.33-34). But Johnson made a general motion for acquittal below, arguing that the government failed to prove that he committed any crime. (A-192-96, A-240). Having done so, he is entitled to elaborate upon *all* the reasons why in his appeal. *See, e.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534-35 (1992) (where a "claim is properly presented, a party can make any argument in support of that claim" on appeal; "parties are not limited to the precise arguments they made below"); *accord United States v. Litvak*, 808 F.3d 160, 175 n.17 (2d Cir. 2015); *see also United States v. Hoy*, 137 F.3d 726, 729 (2d Cir. 1998) ("general motions pursuant to Rule 29" preserve more specific arguments for appeal).

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A finding that both the misappropriation and right to control theories lack merit would require a reversal with instructions to enter a judgment of acquittal. *See, e.g.*, *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012). And because the government's misappropriation and right to control theories are "legally insufficient," a new trial is required if this Court reverses on either (but only one) theory. *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993).

The government disputes the latter proposition, claiming that Johnson's challenge is entirely factual, and not legal. (G.Br.57-58). Here again, the government disregards the legal issues raised in this appeal. Both the misappropriation and right to control theories are foreclosed by the governing agreement. (*See* Br.28-32, 42-43). Contract interpretation is not a "question of fact," as the government erroneously contends (at 38), but rather "a matter of law for the court to decide." *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275 (2d Cir. 2000); *see also K. Bell & Assocs. Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir. 1996); *Hunt*, 889 F.2d at 1277-78. And as explained above, the government also ignores additional precedent foreclosing the misappropriation and right to control theories as a matter of law. (*See, e.g.*, *supra* at 8 (disregarding *Allen*, 895 F.3d at 220, 223); 21 (disregarding benefit of bargain requirement established in *Novak*, 443 F.3d at 159; *Starr*, 816 F.2d at 99)).

Finally, there is no dispute that a finding that the conviction violated Johnson's due process rights would also mandate reversal.[12] *See, e.g.*, *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (reversing conviction where it was "impossible to say" if the jury convicted on an unconstitutional theory); *Bachellar*

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[12] The government misplaces its reliance upon *United States v. Rutkoske*, where the defendant only "argue[d] that the evidence was insufficient," and raised none of the legal issues present here. 506 F.3d 170, 176 (2d Cir. 2007).

v. Maryland, 397 U.S. 564, 561 (1970) ("[S]ince petitioners' convictions may have rested on an unconstitutional ground, they must be set aside.").

III. THE CONVICTION VIOLATES DUE PROCESS

The government's brief is Exhibit A of the due process problem pervading this prosecution. It remains unclear, apparently even to the prosecutors, just what Johnson's crime was. They have abandoned their central argument to the jury: that Johnson supposedly concealed HSBC's intent "to trade ahead [of the fix] and…move up the price of [the pound], because doing so would cost money to [Cairn]." (Tr.2428; *see also* A-241, 252-53). Now the government concedes, as it must, that this "was obvious" and something Cairn "understood." (G.Br.56). The government here repeatedly insinuates that traders personally profited in something resembling an insider trading scheme—but admits in the fine print that they didn't profit at all. (*Compare* G.Br.12-15, 17, 26 *with* G.Br.37 n.15). Then the government posits that "what makes the scheme criminal…is that Johnson and Scott…placed trades ahead of Cairn" that were "not for the purpose of filling Cairn's order" (G.Br.56-57), even though these trades either had no effect on or improved the exchange rate for Cairn (*see supra* at 15-16), and a trading methodology that benefits the victim obviously is not a crime.

The government also continues to flip-flop about whether and to what extent HSBC could profit from the transaction. (Br.53). It told the jury that HSBC's

entire profit was fraudulently obtained. (A-241 (by "net[ting]…over $6 million in profit…Mr. Johnson cheated Cairn out of its valuable property" and committed "fraud")). But elsewhere, the government claimed its concern was limited to the size of the profit. (A-255 (asserting HSBC could make "like hundreds of thousands of dollars" but "[n]ot [a] ten million dollars [sic] bonanza")).

On appeal, the government continues to vacillate. Sometimes it argues that the entire profit was ill-gotten. (*See, e.g.*, G.Br.32 ("the fraudulent scheme increased the price for Pounds that Cairn paid to HSBC, and the government had no further burden…"). But it elsewhere suggests that the problem is that HSBC profited "unnecessarily." (G.Br.56). Yet the government does not even attempt to resolve these contradictions.

Moreover, the wire fraud statute nowhere purports to define what is "necessary" and what is "unnecessary" profit. Nor does any other rule, regulation, or law provide such guidance. Nor does anything in the contract governing the transaction remotely purport to limit HSBC's profit in any way. The government's suggestion that criminality turns on whether profit results from "natural" price movements or is "unnecessary" (G.Br.56) is quintessially vague. It invites exactly the "arbitrary and discriminatory enforcement" enabling "prosecutors[] and juries to pursue their personal predilections" that violates the Due Process Clause. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). It fails to provide clear notice of

what is illegal. Traders would be forced to guess as to what amount of profit a prosecutor might later conclude was "unnecessary." Particularly for multi-billion dollar transactions occurring over a short time, which by their nature require aggressive trading, there would be no way to determine when "aggressive" trading crosses the line from permissible to criminal. "Unnecessary" as a "standard of guilt" is no more "ascertainable" than the statute criminalizing "any unjust or unreasonable rate or charge" struck down as unconstitutionally vague in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). (*See* Br.52-53).

For the first time on appeal, the government claims that "there would be no dispute that th[e] profit was earned honestly" had the pounds been accumulated "in several tranches" (G.Br.56)—even though HSBC *did* purchase the pounds in multiple tranches. (*See, e.g.*, A-399-402). Indeed, elsewhere in its brief, the government admits that HSBC staggered its purchasing and even claims that this is what made Johnson's conduct *criminal*. (G.Br.13-15, 52-56). The government also leaves key questions unanswered, like how many tranches are required, how spaced out must they be, whether tranches are only required for big fix transactions, and if so, how big. Nor does the government explain why a bank should have to purchase in tranches where, as here, no law, rule or regulation requires it, the counterparty never asked for it, the governing agreement says

nothing about it, and the idea has surfaced for the very first time in the DOJ's appellate brief.

The government's assertion that this case "is nowhere near as novel as Johnson portrays it," is belied by its own citations. It identifies only *four* non-insider trading misappropriation cases from the past *50 years*, and none of them have anything to do with foreign exchange fix transactions or bear any other resemblance to this one. (G.Br.36; Br.27 n.8). The charges against Johnson are unprecedented, and the reason for that is clear: the government is "shoehorning [Johnson's conduct] into statutory sections where it does not fit." *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). The government is unable to define the supposed crime "with sufficient definiteness that ordinary people can understand what conduct is prohibited," *Skilling v. United States*, 561 U.S. 358, 402–403 (2010), and has instead left market participants "in the dark about what the law demands," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J. concurring in part and in judgment). This prosecution violates due process.

CONCLUSION

The judgment should be reversed with instructions to enter a judgment of acquittal, or at least vacated and remanded for a new trial.

Dated: New York, New York
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1. The undersigned counsel of record for Defendant-Appellant Mark Johnson certifies pursuant to Federal Rules of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016.

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Dated: January 17, 2019

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