No. 18-1503-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

Mark Johnson,

Defendant-Appellant.

MOTION OF DEFENDANT-APPELLANT FOR BAIL PENDING APPEAL

Appeal from the United States District Court
for the Eastern District of New York, No. 16 Cr. 457
Before the Honorable Nicholas G. Garaufis

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Pursuant to Federal Rules of Appellate Procedure 9(b) and 27, and 18 U.S.C. §§3141(b) and 3143(b), Mark Johnson moves for an order granting bail pending appeal. After a jury trial before the Honorable Nicholas G. Garaufis, Johnson was convicted of eight wire fraud counts and one conspiracy count, and acquitted of one wire fraud count. On April 26, 2018, Johnson was sentenced principally to 24 months' imprisonment. Judge Garaufis denied bail pending appeal and remanded Johnson. Judgment was entered on May 10, 2018. Johnson filed a notice of appeal on May 17, 2018.

INTRODUCTION

This is a paradigm case for bail. The appeal raises substantial legal questions about whether Johnson's conduct was criminal, and whether Johnson, a British national, had fair notice that he could be prosecuted for this conduct.

The prosecution was completely unprecedented. Johnson was the global head of HSBC's foreign exchange trading. He was prosecuted for his participation in HSBC's execution of a single multi-billion-dollar foreign exchange transaction with a sophisticated counterparty. The execution of the transaction violated no law, rule or regulation. HSBC followed the standard industry practices of large international banks handling such transactions. Indeed, the government's expert could think of no alternative way to execute the counterparty's huge order.

The supposed "victim" was Cairn Energy, a multi-billion-dollar U.K. public company that retained HSBC to convert $3.5 billion into British pounds. There are various ways to convert such a large amount of currency. Cairn principally considered two methods, including one in which the parties would simply agree on a specific, guaranteed conversion rate in advance. However, it ultimately opted for what it believed would be a less expensive method, in which the parties instead would use an exchange rate published at a particular time later in the future, called the "fix." Under this latter method, as Johnson disclosed and Cairn repeatedly acknowledged, the bank would earn its profit, if any, by purchasing pounds ahead of the "fix" time. Because HSBC would have to purchase such an enormous amount of pounds, as Cairn well understood, HSBC's trading was likely to drive up the price of the pound. If that occurred, HSBC could keep the difference between the price of the pounds it bought and those it sold to Cairn. Because HSBC was not charging Cairn any fee, there was no other way for HSBC to earn a profit. HSBC ultimately earned $7 million (a mere 0.2% of the $3.5 billion). Cairn got exactly what it bargained for, and its cost was about $2.2 million lower than it would have paid under the other method.

The government alleged that this amounted to wire fraud under two theories: "misappropriation" and "right to control." To prove misappropriation, the government must show that the parties had a fiduciary or similar relationship. But

this case involves two arms-length corporations that confirmed in the governing agreements that HSBC was "not acting as a fiduciary or as an advisor" to Cairn. In addition, HSBC's disclosure of how it would profit forecloses liability under the misappropriation theory.

The right to control theory was similarly invalid. HSBC met all of its obligations under the governing agreements, and Cairn "received all [it] bargained for"—the timely conversion of $3.5 billion at a substantially discounted cost. *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006).

The government has deployed a series a shifting and contradictory rationales to compensate for the lack of any coherent theory of the case, which underscore the lack of fair notice here. The district court acknowledged that Johnson's appellate arguments "may be well advised on an appeal to the Second Circuit" and "it may be that you will prevail on appeal." (Ex.4 at 38).[1] That is because there are substantial questions about the dubious theories underlying the indictment and whether the resulting verdict can stand. Bail pending appeal should be granted.

BACKGROUND

On August 16, 2016, Johnson was indicted for wire fraud and conspiracy to commit wire fraud. The indictment invoked the "misappropriation theory" by

[1] Cited exhibits ("Ex.") are attached to the accompanying Declaration of Alexandra A.E. Shapiro; "Tr." signifies trial transcript pages attached as Exhibit 3 to that Declaration.

alleging that Johnson used Cairn's confidential information to purchase pounds ahead of the fix (purported "front-running"). (Dkt.1 ¶10(a)). Because Johnson "kn[ew] that the transaction would cause the price of [pounds] to increase," the acquisition of pounds allegedly "breach[ed] HSBC's duty of trust and confidence to [Cairn]." (*Id.* ¶10(a)).

The indictment also alleged that Johnson "executed" the transaction "in a manner designed to cause the price of [the pound] to spike," after purportedly representing that there would be no "adverse market impact" to Cairn. (*Id.* ¶10(b)). This allegation was apparently intended to invoke the "right to control theory."

The evidence at trial demonstrated that both theories failed as a matter of law.

1. Cairn, an oil and gas conglomerate, is one of the largest companies listed on the London stock exchange. (Tr.176, 214-15). In August 2010, Cairn publicly announced that it would be selling its Indian subsidiary, and subsequently revealed that $3.5 billion of the proceeds would be distributed to Cairn's shareholders. (Tr.177-78, 225, 229). Before issuing the dividend, Cairn needed to convert the $3.5 billion to British pounds. (Tr.775).

Cairn had routinely exchanged foreign currencies on its own; here it also employed Rothschild & Co., "the Goldman Sachs of Europe," as its "financial

advisor." (Tr.217, 818-20, 1869). In early October 2011, Cairn and Rothschild "did a selection process to find the best bank" to exchange the $3.5 billion. (Tr.775). They issued a request for proposal ("RFP") to various banks, each of which signed a non-disclosure agreement ("NDA") to keep confidential information that Cairn had supplied "to assist the … banks in their analysis of the proposed currency exchange transaction." (Ex.5; Ex.6 at 4).

HSBC sent Cairn a "sales pitch" in response to the RFP, and met with Cairn at Rothschild's offices. (Ex.7; Tr.564-65, 845, 933). Johnson did not attend this meeting or see the NDA or pitch materials. (*See* Tr.456, 832, 845; Ex.8 at 14).

2. There are various ways to exchange currency, but Cairn focused on two. The first is a "full-risk transfer," in which the bank guarantees an exchange rate and thereby assumes the risk of unfavorable exchange rate movement as it purchases the pounds. (Tr.128-29, 132, 842-43, 1563, 1634). Here, for example, the bank would guarantee a certain number of pounds in exchange for $3.5 billion before it actually purchased the pounds. If the dollar subsequently weakened, the $3.5 billion would purchase fewer pounds, and the bank would be required to make up the difference using its own funds. (Tr.129, 1563). To compensate for this risk, banks demand risk premiums for full-risk transfers. (Tr.1564; Ex.9 at 3). HSBC would have charged Cairn a "$22 million" premium. (Tr.495, 843, 859).

The second method is called a "fixing" transaction. WM Reuters publishes exchange rates at certain hours; a "fix" is an agreement to perform a currency transaction using the rate posted at an agreed time. (Tr.105, 1564-65). For example, at 2pm a customer might ask a bank to exchange dollars for pounds using the published 3pm "fix" rate. (Tr.105). The bank makes the requisite trades to acquire the pounds and sells them to the customer at that rate. (Tr.134, 1571, 1875-76). This allows "transparency" in that public companies can "clearly demonstrate" to shareholders that they "achieved the exact [published] market rate at a particular time." (Ex.9 at 2; Tr.1565).

Banks do not charge any premium for a fixing transaction. (Tr.133-35, 1566). Instead, they can make money by "beating the fix"—*i.e.*, buying pounds at a rate lower than the fix rate at which they sell them. (Tr.874-75; Ex.8 at 16). In the example above, if the bank uses dollars to buy £2.25 billion between 2-3pm, that transaction will probably move the price of each currency, making pounds costlier and dollars cheaper. (Tr.149-50, 1567). As a result, if the parties agreed to the 3pm "fix," the bank sells the £2.25 billion to the customer at the fix rate, which is higher than the bank's average purchase price, and the bank keeps the profit. (Tr.134, 919, 1566). Of course, with any large fix transaction there is also a risk that the fix rate will be lower than the bank's purchase price, in which case the bank would lose money.

3. Rothschild (Cairn's adviser) rigorously analyzed these options and recommended the fix methodology because it (1) provided "optimal transparency" and (2) was "cheaper" than a "full risk transfer." (Ex.9 at 1-3; Exs.10-12).

During the selection process, in a recorded call with Rothschild, Johnson explained that HSBC expected to accumulate pounds ahead of the fix and make money based on the difference between the price it paid for the pounds and the eventual fix price. (Ex.8 at 11-12). Rothschild asked whether Cairn could "share some [of this] upside," but Johnson said no. (*Id*. at 14). Johnson also warned that HSBC needed a "minimum of two hours" "notice before" the time when the "fix" rate would be set, because exchanging billions of dollars in less than two hours created a "[r]isk of market disruption owing to [the] compressed execution window" that would increase the price of pounds. (*Id*. at 11-12; Tr.900).

Cairn selected HSBC to perform the trades. Cairn Treasurer Robert Scriven, who oversaw currency conversions, acknowledged that he "expect[ed] [HSBC] would make money on the trade" by "beat[ing] the fix," and agreed that HSBC "could make a fair profit" in this manner. (Tr.918-19).

4. On October 24, 2011, Cairn and HSBC entered a letter agreement governing the transaction, reflecting Cairn's "mandate" to HSBC. (Ex.13). This "Mandate Letter" was drafted by Rothschild and scrutinized by Cairn's internal and external counsel. (Tr.654, 879, 882, 887; Exs.14-15). It confirmed that HSBC

must receive "2 hours notice prior to [the] fixing" (Ex.13 at 1), and that "[c]hanges in rates of exchange … may have an adverse effect" on the number of pounds delivered to Cairn (*id* at 2). The Mandate Letter, and the International Swaps and Derivatives Association ("ISDA") agreement incorporated by reference, also make clear that HSBC "[was] not acting as a fiduciary for or as an adviser to [Cairn]." (Ex.16 at 23; Ex.13 at 1-2).

5. On December 7, 2011, Cairn received the dollar proceeds of its India sale. At 1:51pm, it instructed HSBC to exchange approximately $1.2 billion for pounds at the 3pm fix rate, providing only about one hour's notice, instead of the two hours it had promised to give. At 2:25pm, 35 minutes before the fix rate was set, Cairn placed a second order, which replaced the first and directed HSBC to purchase £2.25 billion. (Ex.17).

Johnson, who was in New York on December 7, was in communication with Stuart Scott, his London colleague who oversaw HSBC's trading. After HSBC had bought approximately £1.1 billion, and the price of the pound was increasing, Johnson told Scott he could "go short some," to ease upward pressure on the price and avoid further increasing the exchange rate for Cairn. (Ex.18 at 1-2; *see also id.* ("we can afford to go short"); Tr.1073-75). Although the HSBC traders buying the pounds didn't receive Johnson's instruction (Tr.1073-74), HSBC in fact achieved

Cairn's stated objectives of transparency and a price approximately $2.2 million less than what a full-risk transfer would have cost.

The government claimed that there were a few misstatements to Cairn. However, even assuming the statements were false (which was not proven), most were made by other people (with no proof that Johnson knew they were untrue), and after the transaction was executed. None were material. *See, e.g.*, *United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc).

ARGUMENT

A court "shall order" bail pending appeal if there is clear and convincing evidence that the defendant is not likely to flee or pose a danger to public safety, and "the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in … reversal [or] an order for a new trial." 18 U.S.C. § 3143(b). When a defendant satisfies that standard, bail is "mandatory." *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004).

To be "substantial," a question need only be "one of more substance than would be necessary to a finding that it was not frivolous"—in other words, "a 'close' question or one that very well could be decided the other way," or one that is "novel, which has not been decided by controlling precedent." *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985). A defendant need not prove that he is

likely to succeed on the substantial questions he raises; it is sufficient that if he does succeed, reversal or a new trial is likely. *Id*. at 124-25.

Johnson easily meets this standard.

I. There Is A Substantial Question Regarding The Misappropriation Theory

"[M]isappropriation" is a judge-made "theory of insider trading." *United States v. Falcone*, 257 F.3d 226, 230 (2d Cir. 2001). To our knowledge, it has rarely before been deployed in any other context, and never in circumstances remotely resembling these. It holds "that a person … violates [Securities Exchange Act] §10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes in breach of a duty owed to the source of the information." *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).

The government must show that the defendant had either a "fiduciary … relationship" or a "similar relationship of trust and confidence" with the alleged victim. *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991) (en banc); *accord O'Hagan*, 521 U.S. at 654. "A 'similar relationship of trust and confidence' … must be the functional equivalent of a fiduciary relationship." *Chestman*, 947 F.2d at 568. A fiduciary obligation may not "be lightly implied," *United States v. Skelly*, 442 F.3d 94, 98 (2d Cir. 2006), because "an elastic" definition "has no place in the criminal law," *Chestman*, 947 F.2d at 570.

"[D]eception" is "essential to the misappropriation theory." *O'Hagan*, 521 U.S. at 655. "[I]f [a] fiduciary discloses to the source that he plans to trade on nonpublic information, there is no 'decept[ion].'" *Id*. Consequently, "full disclosure forecloses liability under the misappropriation theory." *Id*. at 655.

The misappropriation theory does not apply here, because (1) Cairn contracted away any fiduciary-like relationship; (2) Johnson fully disclosed HSBC's intent to profit by trading ahead of the fix; and (3) Johnson lacked fair notice that his conduct could be criminal.

1. Cairn and HSBC had the antithesis of a "fiduciary or similar relationship." *Chestman*, 947 F.2d at 567. They were sophisticated, multi-billion-dollar enterprises transacting at arms-length. *See, e.g.*, *In re Mid-Island Hosp., Inc.*, 276 F.3d 123, 130 (2d Cir. 2002) (parties dealing "at arms length in a commercial transaction" have no "fiduciary relationship" "absent extraordinary circumstances"). Cairn was also being advised by an investment bank (Rothschild) and sophisticated corporate counsel. *See, e.g.*, *Grumman Allied Indus. Inc. v. Rohr Indus., Inc.* 748 F.2d 729, 739 (2d Cir. 1984) (no "fiduciary relationship" where party was "relying upon the advice and counsel of their own engineers, lawyers, and executives to protect [its] best interests"). The district court recognized that the government did not contest that fix transactions were "principal-to-principal transactions as a general matter." (Dkt.184 at 4-5).

Most importantly, the governing agreements confirm that HSBC was "***not acting as a fiduciary or as an adviser***" to Cairn. (Ex.16 at 23; *id.* (Cairn "made its own independent decision[s]" "through independent professional advice," and HSBC was "acting for its own account"); Ex.13 at 2 (Mandate Letter "shall not be regarded as creating any form of advisory or other relationship"). As a matter of law, these sophisticated parties did not have the fiduciary relationship that their written agreement expressly disclaims. *See, e.g.*, *Cooper v. Parsky*, 140 F.3d 433, 439-40 (2d Cir. 1998) (enforcing agreement that parties "were not to be held to the ordinary standard of care applicable to fiduciaries"); *Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 808-09 (5th Cir. 2017) (same where "agreement itself disclaims a fiduciary relationship"); *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1021-22 (8th Cir. 2001) (where parties "expressly disclaimed any [fiduciary or agency] relationship in their contract," that "precludes claim for breach of fiduciary duties").

The government claimed that HSBC's "sales pitch" and the NDA created a duty of trust and confidence, but neither document could trump Cairn's express disclaimer of any such duty.

First, the sales pitch and NDA cannot override sophisticated parties' express disclaimer of a fiduciary relationship. *See, e.g.*, *Jacked Up, L.L.C.*, 854 F.3d at 808-09; *see also United States v. Litvak*, --- F.3d ----, 2018 WL 2049677, at *1 (2d

Cir. May 3, 2018) (reversing fraud conviction because "evidence of the idiosyncratic and erroneous belief" of counterparty that defendant owed fiduciary duty was irrelevant and erroneously admitted). Courts have rejected similar arguments in other cases involving foreign exchange transactions. *See, e.g.*, *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 979 (4th Cir. 1993) (investment bank's representations that it "could offer the best pricing on foreign currency instruments … d[id] not establish any 'best-pricing' agreement" because it was ultimately excluded from the governing contracts).

Second, there is no evidence that Johnson was ever informed of the contents of the sales pitch or NDA. Obviously, he could not be guilty of fraud based on an alleged breach of a duty he was unaware of, and never accepted. *See, e.g.*, *Skelly*, 442 F.3d at 98; *S.E.C. v. Lyon*, 605 F. Supp. 2d 531, 545 (S.D.N.Y. 2009).

Third, neither the "pitch" nor the NDA purports to create a fiduciary relationship. The "pitch" claims only that HSBC "would like to execute this [transaction] in the best interest of the company." (Ex.7 at 5). That is not a promise to do *anything*, *see* 1-1 Corbin on Contracts § 1-9 ("aspirational" language "does *not* create a contractual right"), let alone a promise to act as a fiduciary. As Cairn's Scriven admitted, that was just a "sales pitch." (Tr. 933-34). Such "salesman's banter" is insufficient to transform "an arms-length relationship" into "one of special trust." *Litvak*, 2018 WL 2049677, at *11 n.13.

Likewise, the NDA on its face concerns the bank-selection process, not how the bank Cairn ultimately selected would execute the transaction. (Ex.5; Ex.6 at 4). Neither document satisfies the federal criminal law's exacting requirements for creating a fiduciary duty. *See, e.g. Skelly*, 442 F.3d at 98; *Chestman*, 947 F.2d at 568-69.

2. Johnson's "disclosure" of HSBC's intent to make money by trading ahead of the fix also "forecloses liability under the misappropriation theory." *O'Hagan*, 521 U.S. at 655. Scriven admitted that he "expect[ed] [HSBC] would make money on the trade" by "beat[ing] the fix." (Tr.918). Cairn even asked Johnson whether it could "share some [of the] upside" if HSBC "beat the fix," but Johnson declined. (Ex.8 at 14). It could not have been any clearer to Cairn that HSBC—which was not otherwise earning a fee for this $3.5 billion transaction—would keep any profits from that trading.

3. Application of the misappropriation theory here also violated the Due Process Clause, which prohibits "a criminal law so vague that it [1] fails to give ordinary people fair notice of the conduct it punishes, or [2] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *accord Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). The government's theory fails in both respects.

First, Johnson lacked fair warning because what the government calls "front-running" is legal in the foreign exchange market. One of the government's experts conceded there is no rule prohibiting trading ahead of a fix, that this was "the normal way in 2011 that banks executed these trades," and that banks "profit" by "buying [currency] cheaper than they're selling it." (Tr.134, 150); *cf. United States v. Finnerty*, 533 F.3d 143, 148-51 (2d Cir. 2008) (front-running of securities is not "manipulative" or "deceptive"). Neither of the government's experts offered any alternative method for executing a fix transaction that did not risk massive financial losses to the bank. (Tr.149, 1305-07).

Johnson had no reason to suspect that this transaction might implicate the misappropriation theory. That would have required him to know that HSBC owed a duty of trust and confidence to Cairn. But Cairn was an arms-length counterparty that expressly disclaimed any such duty. *See, e.g.*, *United States v. Brennan*, 183 F.3d 139, 149-150 (2d Cir. 1999) (prosecution of defendant insurer for mail fraud was "seriously problematic" because defendant lacked "fair notice" of alleged "fiduciary duty" since parties were "sophisticated corporations in arms-length contractual" relationships). Moreover, the misappropriation theory is intended to prevent a fiduciary from stealing information and "secretly" using it to trade. *O'Hagan*, 521 U.S. at 653. Here, the *entire point* of hiring HSBC was for it to

trade using the information Cairn supplied. The government's "novel" extension of the misappropriation theory requires bail. *Randell*, 761 F.2d at 125.

Second, the government does not and cannot explain when trading ahead becomes criminal. The government cannot seriously claim that fix transactions are inherently criminal or that banks are not entitled to profit on fix transactions,[2] but it articulates no standard for determining how banks can legally execute a fix transaction, or how much profit is "too much." Such a vague and arbitrary proscription leaves foreign exchange traders and banks with no standards for how to "conform [their] conduct to the law," *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999), and at grave risk of "arbitrary prosecution," *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (warning against relying "upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language").

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), is instructive. There, a statute criminalized charging "*any unjust* or *unreasonable* rate or charge" for certain goods. *Id*. at 86. The Supreme Court struck down the statute as unconstitutionally vague because language this broad provided no "ascertainable standard of guilt." *Id.* at 89. As the language "forbids no specific or definite act,"

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[2] Remarkably, it did assert at sentencing that *all* of HSBC's profits were ill-gotten gains. (Dkt.217 at 8-9).

enforcement would impermissibly "penalize[] and punish[] all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Id.*

Here, similarly, no "ascertainable standard of guilt" can be discerned. The government offered no guidance on how the transaction should have been executed, and its shifting and contradictory theories about what, exactly, Johnson supposedly did wrong, further reinforce the vagueness problem. For instance, on the one hand, the government argued that it was improper to trade ahead of the fix. (Tr.2389, 2428). On the other hand, it claimed that HSBC should have done just that, and slowly accumulated pounds ahead of the fix instead of aggressively purchasing pounds shortly before the fix (the so-called "ramping"). (Dkt.217 at 11). This prosecution thus represents precisely the sort of "exercise of arbitrary power" that offends due process, by "leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." *Dimaya*, 138 S. Ct. at 1223-24 (Gorsuch, J. concurring in part and in judgment).

There are, at a minimum, substantial questions about whether the misappropriation theory applies here—an issue the district court acknowledged was "knotty" (Tr.2242)—and whether this conviction violated due process.

II. There Is A Substantial Question Regarding The Right To Control Theory

The government's misplaced reliance on the right to control theory raises another substantial question warranting bail.

Wire fraud requires proof "that defendants contemplated some actual harm or injury to their victims." *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987). That contemplated injury must involve "depriving another of money or property." *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017). "Property" can include "the right to control the use of one's assets" when "a victim is deprived of potentially valuable economic information it would consider … in deciding how to use its assets." *Id*. "However, not every non-disclosure or misrepresentation that could affect someone's decision of how to use his or her assets" can establish "mail or wire fraud …. The fraudulent scheme must implicate *tangible economic harm*." *Id.* (citing *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994)).

In its summation, the government invoked the "right to control" theory, claiming that Johnson concealed that HSBC (1) "was going to trade ahead" of the fix and (2) misrepresented that it would not "ramp [] up the spot price" of the pound. (Tr.2389, 2419, 2427-28). The government did not explain how Cairn would have used its assets any differently, but Scriven claimed that Cairn "potentially" would have either (1) chosen a different bank, or (2) asked HSBC to

perform a full-risk transfer instead of a fixing transaction even though Cairn "would have paid more" (*i.e.*, an extra $2.2 million) under that method. (Tr.809-10, 817).

Neither suggestion would support a conviction for fraudulently depriving Cairn of its right to control its assets. As explained above, Cairn fully expected HSBC to "beat the fix" by trading ahead and understood that the additional demand created by its huge trade would likely move up the price of the pound. (*See, e.g.*, Tr.918-19; Ex.8 at 16). But that was still significantly "cheaper" than the alternative (a $22 million full-risk transfer). (Ex.11; Tr.897). Thus, the entire premise of the government's right to control theory—that HSBC concealed how it would profit from the transaction—is indisputably false.

Furthermore, "[a]n intent to defraud" is "not demonstrated" where the supposed victims "received exactly what they paid for" and "there was no discrepancy between benefits 'reasonably anticipated' and actual benefits received." *Starr*, 816 F.2d at 99. This Court "ha[s] repeatedly rejected application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015). This is true even if "the services contracted for were dishonestly completed," or the defendant made affirmative misrepresentations. *Novak*, 443 F.3d at 159 (reversing wire fraud conviction despite kickback scheme because

purported victim "received all it bargained for"); *Starr*, 816 F.2d at 98-100 (same where customers received what they paid for although defendants defrauded third party).

Here Cairn got a *better* deal than what it bargained for. Its goal was to convert the $3.5 billion at a cost "better than" the cost of "a full-risk transfer" (Tr.897), with the transparency of the published fix rate. Although Cairn was not contractually entitled to a price better than the full-risk transfer price, that is precisely what it received. Because Cairn "received all it bargained for … the [g]overnment failed to carry its burden of establishing" the requisite harm. *Novak*, 443 F.3d at 159. This, at a minimum, raises a substantial question as to the legal validity of the right to control theory.

* * * * * *

If this Court ultimately finds both fraud theories deficient, the convictions must be reversed. *See, e.g.*, *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012). Even if only one theory is held legally invalid, vacatur and a new trial would be necessary, because there was a general verdict (*see* Tr.2807-10), and it would be "impossible to tell" whether the jury relied on an "invalid" theory. *United States v. Szur*, 289 F.3d 200, 208 (2d Cir. 2002). Either way, bail is required.

III. There Is No Risk Of Flight

Johnson has no criminal history and poses no flight risk. Indeed, the district court has permitted him to travel home to Britain four times to visit his wife and five children, including twice *after* his conviction. (Dkt.34, 49-50, 192, 201). During the nearly two-year pendency of this case, he has scrupulously complied with all release conditions. (PSR at 5, 12). This includes boarding a flight to New York two months ago for a court appearance, on crutches, the day after a painful knee injury that was later diagnosed as a torn ACL requiring surgery. (Dkt.213). Were he to flee, Johnson would risk losing his family's home, which secures his $1 million bond, and $300,000 cash bail. (Dkt.31).

The government opposed the two post-conviction trips, principally because it sought a seven-year sentence. (Dkt.191 at 3; Dkt.217 at 7-8). Nevertheless, the district court found that Johnson had established "by clear and convincing evidence" that he was "not likely to flee," citing "the serious harm that such flight would inflict on Defendant's wife and children … who stand to lose their home if he attempts to flee"; "the potential sentencing and appellate consequences of any flight"; and Johnson's "demonstrated … willingness to comply with the conditions of his release" during prior trips abroad. (Dkt.192 at 4).

The only circumstance that has changed since those findings further underscores that there is no flight risk. Johnson returned to the U.S. twice when he

faced a far longer potential prison sentence of at least seven years (the PSR's guidelines range was 87-108 months). He now knows that, at worst, he will serve a short term of imprisonment. Yet inexplicably, apparently based on a misunderstanding of the bail standard, the district remanded Johnson following sentencing, for two reasons: (1) Johnson "has been sentenced to a prison sentence and to a substantial fine," and (2) "it is the general policy of this Court to, under these circumstances, to deny bail." (Ex.4 at 76).

The first flatly contradicts the judge's own previous finding that the risk of a far longer sentence (seven years or more) was *not* an incentive for Johnson to flee. This Court has previously rejected similarly flawed reasoning. In *United States v. Levin*, No. 16-1386 (2d Cir. 2016), this Court granted bail pending appeal to another defendant inexplicably remanded following sentencing. Like Johnson, that defendant had complied with all bail conditions, his actual sentence (168 months) was substantially shorter than what he faced when he appeared for sentencing (293 months), and yet the district court cited the sentence to justify remand. *See Levin*, Dkt.109 (Order), and 82 at 19-20 (describing circumstances). Johnson's sentence was seven times shorter than Levin's, and accentuates that he poses no risk of flight. *Cf. United States v. Friedman*, 837 F.2d 48, 50 (2d Cir. 1988) ("[W]e have required more than evidence of the commission of a serious crime and the fact of a potentially long sentence to support a finding of risk of flight.").

The district court's second ground—its purported "policy"—was legally invalid. The bail statute provides that the court "*shall* order" bail if the defendant shows lack of flight risk and a substantial question on appeal. 18 U.S.C. §3143(b). District courts are not free to maintain their own general "policies" to remand defendants after sentencing. Where, as here, the statutory requirements are met, bail is "mandatory." *Abuhamra*, 389 F.3d at 319.

CONCLUSION

If this Court denies bail, and Johnson prevails on appeal, he will likely already have served a substantial portion of his sentence. For the reasons set forth above, this Court should grant bail pending appeal.

Dated: New York, New York
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I hereby certify that:

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Date: May 24, 2017

/s/ Alexandra A.E. Shapiro
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CERTIFICATE OF SERVICE

I hereby certify that, on May 24, 2018, an electronic copy of this Motion of Defendant-Appellant for Bail Pending Appeal was filed with the Clerk of Court using the ECF system and thereby served upon the following counsel:

David C. James

/s/ Alexandra A.E. Shapiro
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