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.

REPLY IN SUPPORT OF 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

Frank H. Wohl
John R. Wing
LANKLER SIFFERT & WOHL LLP
500 Fifth Avenue
New York, New York 10110
(212) 921-8399

Alexandra A.E. Shapiro
Eric S. Olney
Jacob S. Wolf
SHAPIRO ARATO LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant Mark Johnson

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This appeal presents several substantial legal questions, including: Does the misappropriation doctrine apply to foreign exchange trading conducted pursuant to a written contract that expressly disclaimed any fiduciary relationship between sophisticated counterparties? Does prosecution for such trading even though it violates no law, rule, or regulation governing the foreign exchange market violate the Due Process Clause? Does the "right to control" theory of wire fraud apply when the purported "victim" got what it bargained for?

As the district court acknowledged (Ex.4 at 38), these questions each could "very well…be decided the other way," and are thus "substantial" under the bail statute. *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985). The government's attempt to reframe them as mere factual disputes does not withstand even minimal scrutiny. The government ignores the controlling authorities and cites inapposite ones. It offers up its umpteenth new theory of the "crime," only underscoring the serious due process problems and arbitrary nature of this prosecution.

Most disturbingly, the government blatantly distorts and mischaracterizes the record, hoping to distract the Court from the plainly substantial legal questions on appeal. To take just one example (there are too many to catalogue here), the government attaches the purported transcript of a call attributing statements it claims are false to Johnson. (GA01-04). In fact, this "transcript" is not in the

record, and the real transcript—Government Exhibit 168(T), attached to the Reply Declaration of Alexandra Shapiro—shows that *Cairn's advisor* made the statements the government falsely attributes to Johnson. These egregious errors, whether reckless or deliberate, only highlight the serious legal defects underlying this prosecution.

This Court should grant bail pending appeal.

I. There Is A Substantial Question Regarding Misappropriation[1]

A. The Law Forecloses Any Fiduciary Duty

Cairn disclaimed any fiduciary relationship with HSBC as a matter of law. The government (1) mischaracterizes this as a factual question for the jury, and (2) makes incorrect and legally irrelevant factual assertions.

1. "Contract interpretation" is a "question of law" that this Court "review[s] de novo." *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007). Where "the parties to the relevant agreements … have expressly disclaimed any sort of advisory, brokerage, or other fiduciary relationship … there is no factual issue," because any fiduciary duty is waived as a matter of law. *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 174 (2d Cir. 2011); *accord Cooper v. Parsky*, 140 F.3d 433, 439-40 (2d Cir. 1998)

[1] Contrary to the government's suggestion (Opp.11), whether an appeal raises a "substantial question" is reviewed *de novo*. *See, e.g.*, *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003).

(agreement that is "clear" that parties "were not … fiduciaries" is legally dispositive).

The parties confirmed in the Mandate Letter and ISDA incorporated by reference that they had no fiduciary relationship. (Motion, pp.7-8, 12). The Mandate Letter itself repeatedly disclaims any fiduciary or similar relationship. (Ex.13 at 2 (agreements "shall not be regarded as creating any form of advisory or other relationship," "HSBC is not responsible for providing [Cairn] with … specialist advice," and Cairn "is solely responsible for making its own independent appraisal")). The ISDA further confirms that HSBC was "not acting as a fiduciary." (Ex.16 at 23; *accord, e.g.*, *id*. (Cairn "has made its own independent decisions to enter into th[e] Transaction … based upon its own judgment" and "is capable of assessing the merits of" the transaction "on its own behalf or through independent professional advice")).

Consequently, as a matter of law, the parties "were not … fiduciaries." *Cooper*, 140 F.3d at 440; *see also Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 808-09 (5th Cir. 2017) (enforcing "agreement [that] 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 ignores these precedents, and misplaces its reliance on *United States v. Halloran*, 821 F.3d 321 (2d Cir. 2016). Unlike this case, *Halloran*, which considered whether Republican Party county chairs owed a fiduciary duty to the Republican Party, did not involve an unambiguous (or any) contractual disclaimer of a fiduciary relationship. Thus, "no legal principle bar[red] a jury" from finding a fiduciary relationship. *Id*. at 349. Here, there is an insurmountable "legal principle"—the interpretation of an unambiguous contract.

2. This conclusion is not altered by the government's erroneous and inapposite factual assertions.

First, the claim that the NDA and "sales pitch" post-date the ISDA (Opp.18) fails for multiple reasons. The Mandate Letter (dated October 24, 2011) post-dates the NDA and the pitch (dated October 4 and 7, respectively). (Motion, pp.5, 7). Yet the government completely ignores the language of the Mandate Letter itself, which—separate and apart from the ISDA—waives any fiduciary or similar relationship. *See Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522, 526 (2d Cir. 2011) ("It is well established that a subsequent contract regarding the same matter will supersede the prior contract."); *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 … d[id] not establish any 'best-pricing' agreement" because it was ultimately excluded from governing contracts).

Moreover, although the ISDA was initially entered in 2010, the Mandate Letter—drafted entirely by Cairn—provides that the transaction was "governed by the terms of the ISDA." (Ex.15 at 2). The ISDA thereby became "part of [the Mandate Letter] as if incorporated into the body of it." *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996); *accord Wachovia Bank, Nat'l Ass'n*, 661 F.3d at 167-68 (enforcing disclaimer of fiduciary relationship in ISDA that was "incorporated by reference" into final agreement).

The government also fails to rebut two independent reasons why neither the NDA nor the pitch matters: (1) neither purports to create a fiduciary relationship, and (2) the evidence established that Johnson never saw either document. (Motion, pp.13-14).[2]

Second, the government characterizes the ISDA's waiver of any fiduciary relationship as "boilerplate" that Cairn's treasurer supposedly didn't read. (Opp.18). But Cairn's lawyers scrutinized the ISDA, and Cairn made a point of incorporating it into the Mandate Letter. (Tr.248-49; Ex.15 at 2). A sophisticated party that insists upon contractual provisions obviously cannot pretend not to know what they say after the contract is signed. *See, e.g.*, 7 Corbin on Contracts § 29.8

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[2] In claiming Johnson knew about supposed "representations" in the pitch (Opp.16-17 n.5), the government misplaces its reliance upon (1) a transcript of a call that nowhere suggests Johnson saw the NDA or pitch (Ex.8), and (2) the testimony of HSBC salesman Dipak Khot, who admitted that he "did not" have "emails or conversations" with Johnson about either (Tr.456).

(2018) ("A party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding the instrument.").

Finally, the government claims HSBC was "way more sophisticated" and that Cairn supposedly needed HSBC's "advice." (*E.g.*, Opp.4 n.2, 18). The notion that Cairn— a multi-billion dollar energy conglomerate represented by sophisticated counsel and advised by one of Europe's "premier investment banks" (Tr.217)—could not fend for itself is laughable. And even if true, that would be irrelevant, because mere "superior knowledge, skill [or] expertise" does not "create[] a fiduciary bond." *Int'l Strategies Grp., Ltd. v. Ness*, 645 F.3d 178, 184 (2d Cir. 2011); *see also United States v. Litvak*, 889 F.3d 56, 70 (2d Cir. 2018) ("subjective trust" by one party in another does not create a fiduciary relationship); *de Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1307-08 (2d Cir. 2002) ("giving advice on particular occasions does not alter the character of the [non-fiduciary] relationship").

HSBC and Cairn were arms-length counterparties to a multi-billion-dollar transaction who confirmed multiple times over, in numerous ways, using language Cairn drafted and insisted upon, that there was no fiduciary or similar relationship.

B. Disclosure Precludes Misappropriation

The misappropriation theory also fails because Johnson disclosed that HSBC would make a profit by trading ahead of the fix. (Motion, pp.7, 14). Indeed,

Cairn's Treasurer testified that he "expected [HSBC] would make money…by beat[ing] the fix" and agreed that HSBC "could make a fair profit" in this manner. (Tr.918-19). The government has no response to these indisputable facts, so it has invented a brand new theory. For the first time in its opposition, the government asserts that Johnson's crime was concealing his intent to have traders personally profit from trades that they made in their "proprietary books." (Opp.19) (*accord id*. at 8 (claiming "traders … realized a profit"); *id*. at 21-22 (claiming traders traded "purely for their own gain"). Notably, the government cites no record material for this claim, because there is none to cite. Its new theory was not charged or argued below, and is demonstrably false.

First, this theory is nowhere to be found in the indictment or the prosecutors' arguments to the jury. What the government actually argued below was that Johnson concealed that *HSBC* intended to profit by trading ahead of the fix. It repeatedly asked 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 through lies and deception" (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, e.g.*, Tr.39, 41, 2402-07, 2414, 2646-47). As explained, the record irrefutably contradicts this theory, a point the government does not dispute.

Second, it is irrelevant that some of the trading occurred in the so-called "proprietary" books. The profit from these books all went to HSBC itself. (*See, e.g.*, Tr.1685-86 (both "P-book" and "franchise" book profits "all roll[] up into the profit of the Foreign Exchange department and thus to HSBC the institute")). Cairn did not impose any restriction on the type of trading book that HSBC would use, and would not have had any reason to micromanage an internal accounting mechanism within the bank.[3] Regardless, HSBC sold most of the pounds the traders purchased in the "P-books" to Cairn. (Tr.1601-05, 1796-97). Johnson received no personal gain, and there was no evidence that *any* HSBC trader traded in any personal account or made *personal* profits from any of the trades.[4]

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[3] The government's claim that Cairn didn't know HSBC would trade in the "P-books" also happens to be untrue, as the government knows. Notes from a Cairn board of directors meeting confirm that HSBC told Cairn that "HSBC [would] earn money on a fixing" by "trad[ing] the position as part of the proprietary trading book." (DX310). The district court erroneously excluded this document as hearsay, but it was admissible because its purpose was "to show that [Cairn] was on notice" and it was "not [offered] for the truth of the matter asserted." *George v. Celotex Corp.*, 914 F.2d 26, 30 (2d Cir. 1990).

[4] Contrary to the government's suggestion (Opp.6), there was nothing sinister about Johnson's use of "code words." Trading floor supervisors routinely

Because Johnson "disclosed" *HSBC*'s intent to profit, "there [wa]s no 'deceptive'" conduct, and thus no "misappropriation." *United States v. O'Hagan*, 521 U.S. 642, 655 (1997).[5]

C. Due Process Was Violated

The government reiterates the same bogus argument in response to Johnson's due process claim. Again, it pretends that it never argued "that Johnson misappropriated Cairn's confidential information" by purchasing "pounds in advance of the fix," and only claimed that Johnson "tipped other traders" who traded in their "proprietary trading accounts purely for their own gain." (Opp.21-22). Once again, these assertions are unsupported by any record citations, and squarely contradicted by the citations in *supra* Point I.2.

The opposition is just the latest example of the seemingly-endless evolution of the government's theory of prosecution. Its inability to stick to any consistent theory of criminality illustrates just how unconstitutionally vague, standardless, and arbitrary this prosecution was. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). How are foreign exchange traders supposed know what trading constitutes

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use this kind of code for *any* transaction of this magnitude to ensure that their traders keep it confidential. (Tr.1687, 1751).

5 The government does not dispute that the alleged misreprestations post-dating the transaction are immaterial as a matter of law. (Motion, p.9). Regardless, the government uses a doctored transcript to erroneously attribute these supposed "lies" to Johnson.

wire fraud when the government cannot even answer that question for itself? The government's ever-shifting theory, coupled with its failure to explain how a bank can permissibly execute a fix transaction (Motion, p.16), continues to leave traders "in the dark about what the law demands," *Dimaya*, 138 S. Ct. at 1223-24 (Gorsuch, J. concurring in part and in judgment), with no conceivable way to "conform [their] conduct to the law," *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). *Cf. United States v. San Juan*, 545 F.2d 314, 319 (2d Cir. 1976) (reversing conviction where "confusion in the Government's theory of the case" "worked a fundamental unfairness on" defendant).

II. There Is A Substantial Question Regarding Right To Control

The validity of the right to control theory raises another substantial question. The government disputes that Cairn got what "it bargained for" by "pa[ying] less than it would have for … a 'full risk transfer.'" (Opp.25-26). But it ignores that Cairn's key witness confirmed that Cairn had only two objectives: "transparency for [its] shareholders" and "achiev[ing] [a cost] better than … a full risk" transfer. (Tr.897; *see* Motion, p.20)). That is why "there was no discrepancy between" what Cairn "reasonably anticipated" and what it "received," and why the government's "right to control" theory fails. *United States v. Starr*, 816 F.2d 94, 99 (2d Cir. 1987). Nor was there any intent to cause economic harm to Cairn. The

government itself admits (Opp.7) that Johnson was adamant that the cost of the fixing transaction not exceed the cost of a full-risk transfer.

III. There Is No Risk Of Flight

The government has no credible risk of flight argument. Though Johnson is a U.K. citizen with no immigration status here (Opp.13-14), that has been true throughout these proceedings. The government concedes Johnson was permitted to return home four times, including twice post-conviction, and complied with all release conditions. (*Id.*). He now "faces the certainty of a 24-month sentence," but this hardly provides a new, "concrete incentive to flee." (Opp.14). Johnson returned for his sentencing despite facing 7-9 years (PSR at 18) knowing he could be remanded, despite suffering a debilitating leg injury that requires surgery. If anything, his relatively short sentence provides Johnson with a "concrete incentive" *not* to flee.

Nor does Johnson have "substantial means" to conduct "further international travel." (Opp.14). Unemployed since 2016, he supports his wife and five children, and his encumbered residence and cash bail, which he would lose if he were to flee, comprise virtually his entire net worth. (PSR at 14; Dkt.31). These are among the reasons the district court had previously found "by clear and convincing evidence" that Johnson was not a flight risk. (Dkt.192 at 4). Nothing permits a different conclusion now.

CONCLUSION

This Court should grant bail pending appeal.

Dated: New York, New York
June 11, 2018

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Eric S. Olney
Jacob S. Wolf
SHAPIRO ARATO LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Frank H. Wohl
John R. Wing
LANKLER SIFFERT & WOHL LLP
500 Fifth Avenue
New York, New York 10110
(212) 921-8399

Attorneys for Defendant-Appellant Mark Johnson

CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Date: June 11, 2018

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

CERTIFICATE OF SERVICE

I hereby certify that, on June 11, 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:

Emily Berger
Lauren H. Elbert
Brian R. Young

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro