18-1503

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This appeal arises from an unprecedented deployment of the federal wire fraud statute against a British national for his work on an arms-length, $3.5 billion foreign exchange transaction between his employer and a sophisticated counterparty. The transaction was executed consistently with the governing contract, and in a manner that violated no applicable law, regulation, rule, or industry norm. The government's own experts could not identify an alternative way to execute the transaction. This novel prosecution violates well-settled law and basic principles of due process and fair notice.

Appellant Mark Johnson was the global head of HSBC's foreign exchange trading desk. The supposed "victim" was Cairn Energy, a multi-billion-dollar U.K. public company. Cairn's multinational operations required it to conduct hundreds of millions of dollars in currency exchanges each year. Here, Cairn agreed to sell approximately $3.5 billion to HSBC in exchange for British pounds. To assist with the exchange, it engaged its own team of sophisticated corporate lawyers and investment bankers.

Cairn understood that there are various ways to convert such a large amount of currency. Guided by Rothschild, the London investment bank that served as its advisor, Cairn principally considered two methods. Under the first method, Cairn and HSBC would simply agree on a specific, guaranteed conversion

rate in advance. That kind of transaction would have required Cairn to pay a substantial premium. Cairn thus opted instead for what it believed would be a less expensive method that would be easier to explain to its shareholders. Under that method, the parties would use an exchange rate published at a particular time in the future, called the "fix." As Cairn knew, and as Johnson and Rothschild repeatedly told it, 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 number of pounds, HSBC's trading was likely to drive up the price of the pound. HSBC could then keep the difference between the price of the pounds it bought and those it sold to Cairn. HSBC was not otherwise charging Cairn any fee, and there was no other way for HSBC to earn a profit.

Cairn got what it bargained for, and then some. It received the transparency of a fixed exchange rate and incurred a cost that, by its own reckoning, was lower than what it would have paid using the other method. HSBC ultimately earned $7 million—a mere 0.2% of the $3.5 billion—the equivalent of a $100 commission on the sale of a $50,000 car.

Five years later, apparently without complaint by Cairn, the government alleged that HSBC's execution of the transaction constituted wire fraud. It relied on two theories: "misappropriation" and "right to control." But the conduct is not criminal under either one. The misappropriation doctrine is a species of insider

trading law rarely invoked outside that context, which has never been applied to a situation remotely like this, and for good reason. It requires a fiduciary or similar relationship, but there was none. This transaction involved two sophisticated corporations that confirmed in the governing agreement that HSBC was "not acting as a fiduciary or as an advisor" to Cairn. Moreover, even if there had been a fiduciary duty, that duty was never breached—Johnson fully disclosed that HSBC intended to profit by trading ahead of the fix. Cairn knew that HSBC was not otherwise earning a fee on this transaction, and it obviously did not expect HSBC to perform a $3.5 billion service for free.

Nor was there any cognizable fraud under the "right to control" doctrine. That theory does not apply where, as here, the alleged victim "received all [it] bargained for." *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006). It also fails because there was no evidence that Johnson engaged in any deceit or intended to harm Cairn, and because Cairn could not have saved any money had it chosen a different conversion method or bank.

This prosecution violated due process. The government has never been able to articulate any coherent theory as to what, exactly, was criminal about the execution of the transaction. It has invoked a series of shifting and contradictory rationales, which underscore the lack of fair notice. For example, the government argued to the jury that HSBC was prohibited from trading ahead of the fix, but then

claimed the opposite at sentencing—that HSBC did not trade ahead *enough*. The government has also repeatedly waffled about whether and to what extent HSBC was allowed to earn a profit, at times suggesting that HSBC was required to work for free, and never pointing to any ascertainable standard for determining how much was too much. This prosecution raises numerous questions, which the government itself seems unable to answer: How is a bank supposed to execute a fix transaction? Can a bank profit from such transactions, and, if so, how much profit is allowed? Can traders and banks rely on the contracts they sign with their sophisticated counterparties? Without clear answers to these questions, traders lack the notice required to satisfy due process. And, in any event, these questions should be answered through legislation and regulation, not by ensnaring unwary traders in criminal prosecutions.

This Court should not permit Johnson to be used as a guinea pig in the government's experiment to see how far it can stretch the wire fraud statute before it snaps. Johnson's conviction was secured in contravention of established, black-letter law and through the government's shifting and standardless theories of criminality. The conviction should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on May 10, 2018. (SPA-1). Johnson filed a notice of

appeal on May 17, 2018. (A-572). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED

1. Under the misappropriation theory of wire fraud, can a fiduciary or similar relationship arise between sophisticated parties operating at arms' length pursuant to a contract that expressly disclaims any such duty?

2. Can a defendant be guilty of wire fraud if he neither made nor participated in any material misrepresentation and the alleged victim received full disclosure?

3. Can a defendant contemplate tangible economic harm to an alleged victim when the supposed injury is a cost that the victim readily accepted prior to the transaction?

4. Can wire fraud be proven under the right-to-control theory where the alleged victim received the full benefit of its bargain?

5. Can wire fraud be proven under the right-to-control theory where there is no evidence that the victim could have saved money if it had used its assets differently?

6. Does the Due Process Clause preclude a wire fraud prosecution for trading ahead of the fix, when doing so was commonplace and standard in the

industry, violated no law or regulation, and the government is unable to articulate an ascertainable standard for when such trading ahead becomes criminal?

STATEMENT OF THE CASE

A. Procedural Background

Johnson appeals from the judgment of conviction entered in the United States District Court for the Eastern District of New York (Garaufis, J.), following a jury trial. The rulings at issue are unreported.

The indictment charged Johnson with conspiracy to commit wire fraud in violation of 18 U.S.C. §1349 (Count One) and wire fraud in violation of 18 U.S.C. §1343 (Counts Two through Eleven). (A-26). The government dismissed Count Seven before trial. (A-44).

The indictment invoked the "misappropriation theory" by alleging that Johnson used Cairn's confidential information to purchase pounds ahead of the fix. It labeled this "front-running." (A-26 ¶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.

Trial commenced on September 25, 2017 and lasted approximately four weeks. Johnson moved for a judgment of acquittal after the government rested and renewed his motion after the defense rested; the district court denied both motions. (A-192-96, A-240). On October 23, 2017, the jury returned a verdict of guilty on Counts One, Two, Four through Six, and Eight through Eleven. (A-448, A-260-62). The jury acquitted Johnson on Count Three. (*Id.*).

On April 26, 2018, Johnson was sentenced principally to 24 months' imprisonment, followed by three years' supervised release, and a $300,000 fine. (SPA-2-3, 7). The district court remanded Johnson *sua sponte*.

On June 19, 2018, this Court granted bail pending appeal.

B. Factual Background

Johnson put on a substantial defense at trial. He testified on his own behalf and called expert and character witnesses. (Tr.1533-2317).[1] Nevertheless, the facts recited below are drawn exclusively from the government's case, except where defense evidence was undisputed. It bears emphasis that HSBC recorded incoming and outgoing calls. Accordingly, most relevant facts are incontrovertible

[1] During the investigation, Johnson also met voluntarily with prosecutors for an eight-hour interview answering all questions put to him without seeking the protections of a proffer agreement. (A-190-91).

and were established by transcripts of the telephone conversations, emails, and other documents.

1. The Principals

In August 2010, Mark Johnson joined HSBC, a leading international financial institution, as global head of foreign exchange. (A-226). Based in London, Johnson had spent the previous two decades working in the foreign exchange business at other large banks and at his own currency management firm. (A-226-27). As the head of HSBC's $2.5 billion foreign exchange trading business, Johnson managed the risk of 65 currencies offered 24 hours a day at 32 trading sites around the world. (A-228-30). Approximately one hundred and fifty people reported to him. (A-231, A-349).

Cairn Energy is one of Europe's leading oil and gas companies, with income and assets in the billions. It is among the largest companies listed on the London Stock Exchange. (A-71, A-111). Cairn was also a sophisticated player in the foreign exchange market. Cairn treasurer Robert Scriven, who oversaw the transaction at issue here, led a finance department that routinely executed foreign exchange trades totaling nearly half a billion dollars annually. (A-113).

2. The Foreign Exchange Market

A foreign exchange transaction involves the exchange of one currency, such as the U.S. dollar, for the equivalent amount of another currency, such as the

British Pound Sterling, at an agreed upon price, or exchange rate. The price of currency, like the price of other commodities, is governed by the economic laws of supply and demand. (A-110). If demand exceeds supply, and a trader bids for a currency no one is selling at the bid price, the trader must pay a higher price to acquire the currency. (A-176-77, A-179-80).

Currency exchange rates are constantly moving. (A-114). They "fluctuate, they change minute to minute all around the clock depending [on] how much demand there is in the market for certain currencies at certain prices." (A-45). Exchange rate movements are measured in "pips," or "points in percentage." One hundred pips is the equivalent of one penny. (A-50). For example, in this transaction, Cairn bought pounds and paid for them in U.S. dollars. On a $3.5 billion transaction, a 100 pip (one penny) increase in the exchange rate would cause a $22 million increase in the cost of pounds. (A-123). In 2011, the average daily volatility or range of movement in the pound/dollar exchange rate was 140-150 pips. (A-51, A-212-13).

There are different ways to exchange currency. Two are primarily implicated here: (1) a "full-risk transfer" and (2) a "fixing" transaction. (A-106).[2]

[2] A third possibility, known as an "at best" transaction or "work order," gives the bank the discretion to purchase the currency slowly over time at favorable exchange rates. (A-278). Cairn quickly "dismissed" this methodology because it "le[ft] little control for Cairn over either the timing

In a full-risk transfer, the bank guarantees an exchange rate and thereby assumes the risk of unfavorable exchange rate movement as it purchases the pounds. (A-52-54, A-199, A-208). Here, for example, the bank would guarantee a certain number of pounds before it actually purchased the pounds. If the dollar subsequently weakened, the bank would have to pay a higher rate and make up the difference using its own funds. (A-53, A-198-99). To compensate for this risk, banks demand substantial risk premiums for full-risk transfers. (A-200, A-307). HSBC would have required Cairn to pay a premium of 100 pips, or "$22 million." (A-99, A-123, A-125).

The second methodology is called a "fixing" transaction. "Fixes" are benchmark exchange rates. WM/Reuters ("WMR"), a financial services company, published hourly "fix" rates for various currencies by calculating the average price of trades executed in a one-minute window beginning 30 seconds before the hour and ending 30 seconds after the hour. (A-279). In a fix transaction, the parties agree to buy or sell a specific currency at the "fix" rate to be calculated by Reuters at a specific time in the future. For example, a customer might contact a bank at 2pm and ask to exchange dollars for a specific amount of pounds using the 3pm "fix" rate. (A-47). The bank then accumulates the requisite pounds between 2pm

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of completion" of the exchange "or the price at the time of execution." (A-306).

and 3pm and sells them to the customer at the published 3pm rate. (A-56, A-204, A-234-35). Public companies often prefer this "transparent" methodology because they can "clearly demonstrate" to shareholders "that [they] achieved the exact market rate at a particular time." (A-306, A-201).

Banks do not charge a fee for a fix. (A-55-57, A-202). Instead, normal practice is to try to make money by "beating the fix." (A-127-28, A-391). If the bank buys £2.25 billion in the open market during the 2pm-3pm time window, that will likely move up the price of the pound. (A-58-59). By 3pm, the customer will need to pay more dollars for the £2.25 billion than the bank paid between 2pm and 3pm. In that case, the bank would sell its pounds to the customer at the higher price and keep the extra dollars as its profit. (A-56, A-136-37).

This practice is known as "trading ahead" of the fix. The government pejoratively labels it "front-running," but it is undisputed that trading ahead was a perfectly legal, standard practice for a bank to manage its risk and seek a profit, and was not prohibited by any U.S. or U.K. law or regulation. (A-59, A-95-96). The government's expert confirmed that this was "the normal way in 2011 that banks executed these trades." (A-59). Nor is it certain that banks will profit by trading ahead of the fix. To the contrary, as the government's expert testified, banks incur risk in every such transaction, because they agree to sell currency to

the customer at an exchange rate that has yet to be determined. (A-56-57). If the rate moves *against* the bank, it will sell to the customer at a loss. (*Id.*).

3. Cairn Hired Rothschild To Coordinate Selecting A Bank To Conduct The $3.5 Billion Exchange

In August 2010, Cairn publicly announced that it would be selling a majority interest in its Cairn India subsidiary, and subsequently revealed that a substantial portion of the approximately $4 billion in proceeds would be distributed to Cairn's shareholders. (A-410-43, A-311, A-65-66, A-77-82, A-115-17). Because Cairn's shares traded on the London Stock Exchange, it needed to convert that amount to British pounds before making the distribution. (A-436, A-222, A-70-71, A-111).

Cairn retained Rothschild & Co. ("Rothschild"), one of London's "premier investment banks," as its "financial advisor" for the currency exchange. (A-72-73, A-107, A-233). Rothschild had previously advised Cairn on a similar transaction in which a large currency exchange was needed to make a shareholder distribution. (A-73, A-118-20). Francois Jarrosson was the Rothschild partner principally responsible for the Cairn engagement. (A-84-85).

In early October 2011, Cairn "did a selection process to find the best bank" to execute its multi-billion-dollar exchange. (A-105). It sent a Request for Proposal ("RFP") to nine major banks, including HSBC. (A-267). Rothschild "r[an] the RFP process" for Cairn. (A-267). It conducted calls with banks to gather information, hosted meetings with them at Rothschild's offices, analyzed

the various proposals, and provided its recommendations to Cairn. (A-267, A-304, A-314, A-322, A-376, A-444).

Each bank participating in the RFP process signed an identical non-disclosure agreement ("NDA"). (A-74-76, A-264). The NDA provided that "Confidential Information" was being given to the banks "solely for the purposes … set out in the RFP." (A-264 §1(ii)). The RFP stated that the purpose of this information was "to assist the [] banks in their analysis of the proposed currency exchange transaction," so that Cairn could "[o]btain feedback" before "select[ing]" a bank. (A-267, A-270). The NDA thus prohibited banks from using the confidential information supplied during the RFP process for any purpose other than their "analysis" of the transaction. (A-68, A-264, A-270). However, most of the information Cairn supplied to the banks was not confidential because it had already been disclosed in press releases and in various financial publications. (A-414-43).

HSBC signed the NDA and submitted a 32-page Powerpoint in response to Cairn's RFP. (A-267, A-272). Dipak Khot of HSBC's sales department prepared the presentation and labeled it a "financial promotion." (A-303). It discusses the currency exchange methodologies described above, among others. (A-278-79, A-282). The presentation warns of a tradeoff between "transparency for

shareholders," which the fix would provide, "versus the … exchange rate achieved" by other methodologies. (A-274).

The presentation suggested that Cairn "choose a [bank] [with] a track record" of avoiding "excessive market volatility" and that HSBC "would like to execute this [transaction] in the best interest of the company." (A-274, A-276). However, the presentation was clear that Cairn "should not rely on any information in the document"; the fix "fully exposed [Cairn] to any adverse [foreign exchange] movements"; was among "the riskiest of the strategies to consider"; and that Cairn would be "taking" on "risk by trading against a fix." (A-277, A-279, A-303). The pitch also advised that "[n]either HSBC nor any of its affiliates are responsible for providing [Cairn] with … specialist advice" and that Cairn was "solely responsible for making [its] own independent appraisal of and investigation into the … transaction[]." (A-303). Cairn's Scriven later characterized the presentation as merely a "sales pitch" designed by Khot to win Cairn's business. (A-140-41).

Neither the NDA nor the sales pitch were shown to Johnson.[3] (A-121-22, A-232). Khot admitted that he did not know and had not worked with Johnson before the Cairn transaction. (A-93).

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[3] Although Khot claimed he communicated with Johnson about preparing the pitch, no document or recording corroborates his claim, and Khot couldn't remember a single subject or a single part of the proposal that he might have discussed with Johnson. (A-91-92, A-97-98, A-100).

4. Cairn Was Well Aware That HSBC Would Profit By Accumulating Pounds Ahead Of The Fix

After hearing each bank's pitch, Rothschild conducted a rigorous analysis of each currency exchange methodology, its advantages and drawbacks, and how much each bank would charge. (A-403, A-305). Rothschild balked at the premiums associated with a full-risk transfer and determined that it was "[l]ikely to be the most expensive option." (A-307-08, A-133-34). The fixing methodology was not only cheaper than the full-risk transfer, but it made the "most sense … for [Cairn's] shareholders" because it would preclude "shareholder scrutiny/questioning" of the exchange rate by relying upon a rate published by WMR. (A-403). Rothschild, which "deeply … underst[ood] [the] fixing methodology," thus recommended that methodology because: (1) the cost to Cairn would be cheaper than a "full risk transfer"; and (2) the fix provided "optimal transparency as fixings [are] publicly available." (A-305-07, A-406, A-403). Rothschild nevertheless warned Cairn that it would not control the timing of the trades that HSBC would make prior to the fix, and there was a "[r]isk of market disruption owing to a compressed execution window." (A-307).

On October 13, 2011, during the selection process, Rothschild's Jarrosson called Johnson on a recorded line and asked numerous questions about what would happen if Cairn chose a fix. Johnson explained that in that situation HSBC would accumulate pounds ahead of the fix, and HSBC would make money based on the

difference between the price it paid for the pounds and the eventual fix price. (A-386-87). Because HSBC was otherwise earning no fee, that was the only way for HSBC to earn a profit, and "[its] business" "clearly" is "to make … money." (A-387). He further advised that the extent of HSBC's profits depended in part on when HSBC began trading. If HSBC "gradually buil[t] … up" its position ahead of the fix, it would "accumulate" the pounds "more quietly" and create less upward pressure on the fix rate. (A-386-87). Johnson recommended that Cairn provide "a minimum of two hours" "notice," in which case HSBC would likely "make a small amount of money." (A-387). Providing HSBC with less than two hours' notice would require it to trade more aggressively, creating more "noise" in the market and more upward pressure on the fix rate. (*Id*.).

Johnson also explained that HSBC would purchase most of the pounds in a relatively short period of time prior to the fix. (A-387-88 ("If you told us two days before that you were going to do it … on Monday … I'd wait until Monday morning.")). That is because holding the pounds for longer increases the bank's "risk" of the market moving adversely. (A-385). As Johnson advised Jarrosson, "the random walk of the markets can mean it could be anywhere," and Jarrosson agreed. (A-388).

The government claimed in its summation that on this call, Johnson made "a promise" that "HSBC isn't going to ramp the fix." (A-250). But the transcript of

that call reflects nothing of the sort. To the contrary, everyone involved knew that buying the extraordinary amount of pounds necessary to fill Cairn's enormous order would in all likelihood ramp up the price of the pound. Cairn's Scriven knew HSBC's trading would "pressure the fixing" in the manner Johnson described, and admitted that he "expect[ed] [HSBC] would make money on the trade" by "beat[ing] the fix." (A-397, A-136; *accord* A-105 (Scriven acknowledging that a "transaction" this "large" could "mov[e] the market")). Khot likewise testified that Johnson "expressly advised" Scriven and Jarrosson that HSBC would profit by "buying ahead." (A-95-96, A-102). Khot "didn't believe there was anything wrong with that" since there was no "law or regulation that prohibited" this practice. (A-95-96). Scriven even asked Rothschild to "get HSBC to [do] a [profit] sharing" on the "fix," *i.e.*, share some of its profits with Cairn. (A-397-98). Rothschild then asked whether Cairn could "share some [of the] upside" that Cairn expected HSBC to achieve by beating the fix. (A-389). Johnson refused, thus confirming that HSBC would keep all of those profits. (*Id.*).[4]

[4] The government claims this discussion entailed a "promise" not to "ramp the fix." (A-250). The recording shows this is simply untrue. What actually transpired was that *Jarrosson* observed that in his experience, the banks that agree to return a portion of the profit to the customer "simply push the fixing a little bit" higher to make an additional profit that offsets what is owed to the customer. (A-389). Johnson agreed and opined that such profit-sharing "doesn't make much sense" for the customer. (*Id.*).

Cairn selected HSBC as its counterparty bank for the currency exchange. Cairn decided on its "fix" strategy and the amount of the transaction in October 2011 and knew of the specific timing by December 1, 2011. (A-305, A-409). However, Scriven acknowledged that he and his Rothschild advisor, Jarrosson, withheld all of that information from HSBC until the afternoon of December 7, 2011. (A-317, A-325, A-126, A-142-43). Scriven said he was trying to give the banks "as little information as possible." (A-124, A-126, A-138-39).

5. The Governing Agreements Disclaimed Any Fiduciary Relationship

Before it would commit to proceeding with HSBC, Cairn insisted that HSBC sign an agreement setting forth the parties' respective rights and obligations. (A-447 (Cairn's "final decision on bank choice [wa]s subject to agreeing [to] this mandate letter"); A-103, A-129). On October 24, 2011, Cairn and HSBC entered a letter agreement the witnesses referred to as a "Mandate Letter." (A-309, A-103, A-129). The Mandate Letter was drafted by Rothschild and scrutinized by Cairn's internal and external counsel. (A-103, A-129-30, A-396, A-444).

The Letter committed HSBC to execute a spot foreign exchange transaction from dollars to pounds at Cairn's request for an amount up to $4 billion and gave Cairn the option to choose among several execution methodologies, including a "full risk transfer" and "fixing." (A-309). If Cairn chose the former, it was obligated to pay HSBC a risk premium of "100 pips," or $22 million. (A-309, A-

123). If Cairn chose a fixing transaction, it was required to give HSBC "2 hours notice prior to [the] fixing." (A-309).

The Mandate Letter further provided that "[a]ny transaction undertaken will be governed by the terms of the ISDA [International Swap Dealers Association Master Agreement] in place between HSBC and Cairn." (A-309). Both the Mandate Letter itself and the ISDA make clear that HSBC "[was] not acting as fiduciary for or as an adviser to [Cairn]." (A-373; *accord, e.g.*, A-310 (agreement "shall not be regarded as creating any form of advisory or other relationship")). The ISDA also provided under a "Non-Reliance" heading that "[n]o communication (written or oral) received from the other party will be deemed to be an assurance or guarantee as to the expected results of that Transaction." (A-373).

Nothing in the Mandate Letter or the ISDA required HSBC to (1) act in Cairn's "best interest," (2) refrain from "buying ahead," (3) avoid adverse market impact to Cairn or (4) limit HSBC's profit.

6. HSBC Conducted The Transaction In Accordance With The Governing Agreements

On December 7, 2011, Cairn received the dollar proceeds of its India sale. By this time, Cairn had publicly disclosed the plan to provide its shareholders with most of the proceeds of the sale in a series of press releases, and the market was anticipating a massive foreign exchange transaction. (A-410, A-414-43, A-311, A-

77-83, A-115-17). The market was only unaware of precisely when the transaction would occur and what the exact amount would be.

At 1:51pm, Cairn 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 was obliged to give. At 2:25pm, 35 minutes before the fix rate was to be set, Cairn placed a second order, which replaced the first and directed HSBC to purchase £2.25 billion. (A-325). Cairn gave these instructions despite Rothschild's warning that there was a "[r]isk of market disruption owing to a compressed execution window" and Johnson's warning that less than two hours' notice would be "likely to create turbulence on the market" and "a lot of noise" that would push up the price of the pound. (A-307, A-396, A-386-87).

Johnson, who was in New York on December 7, was unable to manage the Cairn trade, and assigned that responsibility to a London colleague, Stuart Scott.[5] Frank Cahill, a London trader working at Scott's direction, was tasked with purchasing most of the pounds that HSBC would use to fill Cairn's order. (*See, e.g.*, A-160-61, A-402). Scott also directed other traders situated in London to assist, which was standard industry practice. (A-160). Those traders purchased approximately £350 million of the £2.25 billion ultimately sold to Cairn. (A-160-

[5] The indictment charges Scott as a co-conspirator. (A-26). He has remained in England and is contesting extradition.

61, A-399). All of the pounds were purchased using HSBC's "franchise" or its "proprietary" books, which meant that any profits went to HSBC alone. (*See, e.g.*, A-214-15).[6]

Johnson spoke with Scott at 2:54pm and learned that a substantial number of pounds had yet to be purchased. He suggested that Scott tell Cahill not to let his buying "ramp" the price higher than what a full-risk transfer would have cost Cairn. (A-335). Johnson also told Scott he could "go short some," in order to reduce upward pressure on the price and avoid further increasing the exchange rate for Cairn. (A-335-36; *see also id.* ("we can afford to go short"); A-157-59).

Although Cahill didn't receive Johnson's last instruction (A-157-158), HSBC achieved Cairn's stated objectives. Specifically, Cairn received the "transparency" of a fixing transaction at a cost that Cairn concedes was less than what a "full-risk" transfer would have cost—indeed, at least $2 million cheaper. (A-133, A-111, A-181, A-209-10).

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[6] The government complained that HSBC profited from the sale of some pounds to third parties, but the vast majority (£2.25 billion) were sold to Cairn. To the extent the record reflects a small amount of sales to third parties, most of them benefitted Cairn because they occurred at or before the 3pm fix window, thus "providing downward pressure" on the fix price and making pounds cheaper for Cairn to purchase at the 3pm fix. (A-218, A-225, A-401). The remaining pounds were purchased for unrelated purposes at least two days before the fix was set and were sold shortly after the fix window. It was undisputed that these trades had no effect on the fix rate. (A-49, A-188).

HSBC earned approximately $7 million, amounting to 0.2% of the $3.5 billion transaction. (A-210-11). Cahill—the trader largely responsible for this profit—was not charged with any criminal conduct or named as a co-conspirator or a fraud participant.[7] (A-26, A-67). His testimony confirms that he did not think he was conspiring with anyone to defraud Cairn, and that he never even spoke to Johnson about the Cairn trade. (A-149-50, A-174-75). Instead, it was obvious to Cahill that in a fixing transaction, "you sell to the client at a higher price from which you have bought." (A-153; *accord* A-154-56, A-162-63, A-172-74). He confirmed that he had done this "almost every day of my career" and he conducted the Cairn transaction "the same way [he] normally trade[s] fixes." (A-172-73). Cahill also testified that he used a number of strategies designed to *minimize* upward movement of the market price, including stopping his buying to let the market breathe after seeing the price go up. (A-164-66, A-171, A-206-07). He canceled most of his orders halfway through the fix window after it became apparent HSBC had enough pounds to fill Cairn's order. (A-167-70, A-185-87).

The government's experts could not identify any plausible alternative method for executing the transaction. (A-58, A-182-84). One of them, Ross

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[7] None of the twelve HSBC employees identified as co-conspirators and fraud participants other than Scott were charged with any criminal conduct, and only Khot, who denied involvement in or knowledge of any fraud by Johnson, testified at the trial. (A-93-94).

Waller, failed to answer repeated questions as to how HSBC might have conducted the transaction differently. (A-182-84). The other expert, David DeRosa, suggested only that HSBC might have purchased the pounds "after the fix" rate was set. (A-58). But that would require the bank to assume all of the risk of adverse rate movement following the fix. In other words, it would be a "full-risk transfer," but without the substantial premium that banks charge to compensate for their risk. (*Supra* at 10). HSBC obviously would not assume that same risk in a *fixing* transaction *free of charge*. DeRosa identified no fixing transaction in which a bank ever traded after the fix and agreed that the "normal way" to execute a fix was "by buying ahead of the customer." (A-59). As explained above, Cairn fully expected HSBC to trade ahead. (*E.g.*, A-135-37).

Neither Johnson nor any other HSBC trader personally profited. All of their trades were for and on behalf of the bank, and only the bank profited from those trades. (*See, e.g.*, A-162, A-214-15).

STANDARD OF REVIEW

This court reviews statutory interpretation questions, contract interpretation, sufficiency of the evidence challenges, and due process violations *de novo*. *United States v. Gayle*, 342 F.3d 89, 91 (2d Cir. 2003); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007); *Novak*, 443 F.3d at 157; *United States v. Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004).

SUMMARY OF ARGUMENT

1. The conviction must be reversed because the misappropriation theory does not apply. It requires the government to prove the existence of a fiduciary or similar relationship. But HSBC and Cairn were sophisticated, arm's length counterparties, and the governing agreement's unambiguous, binding contractual language repeatedly disclaimed any such relationship between Cairn and HSBC. The misappropriation theory separately fails because Johnson disclosed HSBC's intent to trade ahead of the fix, and because he contemplated no tangible economic harm to Cairn.

2. The government's other theory of prosecution—the right to control theory—is equally deficient. The right to control theory fails as a matter of law if "there was no discrepancy between [the] benefits reasonably anticipated" by the alleged victim and the "actual benefits received." *United States v. Starr*, 816 F.2d 94, 99 (2d Cir. 1987). HSBC complied with its obligations under the Mandate Letter and, in any event, Cairn got everything that it wanted from the transaction: the timely execution of a $3.5 billion currency exchange at a discounted cost using a fully transparent exchange rate. Moreover, as with the misappropriation theory, the government proved neither intent to harm nor any material deceit.

3. Reversal is also required because the conviction violated due process.

HSBC's trading strategy was not prohibited by any law or regulation. Indeed, it was widely considered to be in accordance with standard industry practices. Moreover, the government's theory was contingent on Johnson being aware of the purported fiduciary duty HSBC owed to Cairn. This would have required Johnson to ignore unambiguous contractual language disclaiming such a relationship in favor of an NDA or "sales pitch" that he never even saw, neither of which purports to create such a duty. Nor does the government offer any standards for how HSBC could have permissibly executed this transaction any differently. The prosecution therefore was unconstitutionally vague and standardless.

ARGUMENT

"The elements of wire fraud are … (i) a scheme to defraud, (ii) to get money or property, (iii) furthered by the use of interstate wires." *United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000). To prove a "scheme to defraud," the government must establish "(i) the existence of a scheme to defraud, (ii) the requisite scienter (or fraudulent intent) on the part of the defendant, and (iii) the materiality of the misrepresentations." *Id.* (citations omitted).

Fraudulent intent is "[e]ssential to a scheme to defraud." *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994). The proof "must show that some actual harm or injury was *contemplated* by the schemer." *Id.* (citation omitted); *Starr*, 816 F.2d at 98 (same). This harm must be "tangible economic harm" to the

victim. *United States v. Finazzo*, 850 F.3d 94, 111(2d Cir. 2017); *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994).

The government relied upon the misappropriation theory and the right to control theory in attempting to prove a "scheme to defraud." Neither theory applies to this case, and the government also failed to establish the requisite intent to defraud or material misrepresentations. The conviction should be reversed.

I. THE MISAPPROPRIATION THEORY DOES NOT APPLY

The "misappropriation theory" is a species of "insider trading liability." *United States v. O'Hagan*, 521 U.S. 642, 650-51 (1997). The theory "holds that a person … violates §10b [of the Securities Exchange Act] and [SEC] Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *Id.* at 652. The courts created the misappropriation doctrine to penalize non-corporate insiders (such as lawyers and financial advisers) who "breach a fiduciary duty to the source of the [confidential] information to gain personal profit in the securities market." *SEC v. Obus*, 693 F.3d 276, 284 (2d Cir. 2012). The duty is breached when the fiduciary feigns "loyalty to the principal while secretly converting the principal's information for personal gain" by "trading on such information." *O'Hagan*, 521 U.S. at 652-53.

Because "misappropriation" is a "theory of insider trading," *United States v. Falcone*, 257 F.3d 226, 230 (2d Cir. 2001), it is rarely, if ever, used outside the insider trading context. This is the first case in which the misappropriation theory has ever been applied to a foreign exchange transaction.[8]

To establish liability under the misappropriation theory, the government must show that the defendant had a "fiduciary … relationship" or "a similar relationship of trust and confidence" with the victim. *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991) (en banc); *accord O'Hagan*, 521 U.S. at 654 ("misappropriation" entails a "violation of a fiduciary duty"). "A 'similar relationship of trust and confidence'" is "the functional equivalent of a fiduciary relationship." *Chestman*, 947 F.2d at 568. The defendant acts "in a 'fiduciary capacity' when the business which he transacts, or the money or property which he handles, is not … for his own benefit" and the victim "depends on … the fiduciary [] to serve his interests." *Id*. at 568-69 (citation omitted). "[A]t the heart of the

[8] "Misappropriation" of confidential information may qualify as a "scheme to defraud" under the wire fraud statute in the insider trading context. *See Carpenter v. United States*, 484 U.S. 19, 24-25 (1987). We have identified only three non-insider trading cases from other Circuits that arguably rely upon the misappropriation theory. None remotely resembles the facts here. *See United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004) (hired test-takers' use of false names for TOEFL exam); *United States v. Poirier*, 321 F.3d 1024 (11th Cir. 2003) (financial advisor's sale of confidential proposals submitted by insurance underwriters); *United States v. Martin*, 228 F.3d 1 (1st Cir. 2000) (theft of intellectual property).

fiduciary relationship lies reliance" by the victim "and *de facto* control and dominance" by the fiduciary. *Id.* at 568 (citation omitted). Fiduciary duties are "not to be lightly implied," *United States v. Skelly*, 442 F.3d 94, 98 (2d Cir. 2006), because "an elastic and expedient definition of … relations of trust and confidence … has no place in the criminal law." *Chestman*, 947 F.2d at 570.

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

Here, the misappropriation theory fails because (1) Cairn and HSBC had the antithesis of a fiduciary relationship, (2) there was no deception, (3) there was no fraudulent intent, and (4) the unprecedented application of the theory, without fair notice or any standard to guide future conduct, violated due process (*see* Point III *infra*).

A. There Was No Fiduciary Relationship

1. The governing agreements confirm that HSBC was "not acting as a fiduciary for or as an adviser" to Cairn. (A-373). First, using language that was carefully reviewed by both Cairn's in-house "legal team" and "external legal counsel" (A-130), the Mandate Letter itself repeatedly disclaimed any "fiduciary" or "similar relationship of trust and confidence." *Chestman*, 947 F.2d at 566. It

provides that Cairn "agree[d] to be bound by" various "limitations" that make clear that HSBC was not Cairn's fiduciary. (A-310). For example, the Letter provides that it "shall not be regarded as creating any form of advisory or other relationship" between HSBC and Cairn. (A-310). This provision thus disclaims one of the hallmarks of a fiduciary relationship. *de Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1308-09 (2d Cir. 2002) (no "fiduciary duty" without "an express advisory contract" absent "transformative 'special circumstances'" such as "a client who has impaired faculties") (citation omitted).

The Letter further states that "HSBC is not responsible for providing" Cairn with "advice" and Cairn "is solely responsible for making its own independent appraisal" of the transaction. (A-310). Cairn's express acknowledgment of its independence from HSBC—which was already obvious given Cairn's reliance on Rothschild—also foreclosed any fiduciary relationship. As this Court has explained, "reliance" is "at the heart of the fiduciary relationship," and there is no such relationship if the client does not "depend[] on the fiduciary to serve his interests." *Chestman*, 947 F.2d at 568-69; *see also Kirschner v. Bennett*, 648 F. Supp. 2d 525, 534-35 (S.D.N.Y. 2009) (Lynch, J.) (no fiduciary duty where agreement "explicitly states that every FX customer entered into each transaction 'independent' of any advice or judgment offered" by the broker).

And the Letter provides that "HSBC" may not "be regarded as acting on behalf of" Cairn (A-310), disclaiming the longstanding requirement of any "fiduciary relationship" that "the business" the purported fiduciary transacts must not be "for his own benefit, but for the benefit of another person." *Chestman*, 947 F.2d at 568; *see also*, *e.g.*, *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1038 (4th Cir. 1997) (brokerage firm had no "fiduciary duty" when parties "conducted their business at arm's length in a principal-to-principal relationship"); *Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 798 (2d Cir. 1980) (no "fiduciary relationship" where alleged fiduciary "was never hired by" counterparty "to act on [counterparty's] behalf"). Indeed, the Mandate Letter provides that "HSBC may *only* be regarded as acting on behalf of [Cairn] as financial adviser or otherwise *following the execution of an engagement letter on mutually satisfactory terms*." (A-310) (emphasis added). It was therefore clear that HSBC could "only" become Cairn's fiduciary through a separate agreement. No such agreement was entered.

The ISDA likewise disclaims any fiduciary relationship. At Cairn's request, the Mandate Letter expressly incorporated "the terms of the ISDA." (A-444, A-309; *see also* A-86-87, A-130-31). This made the ISDA "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* 11 Williston on Contracts § 30:25 (4th ed.

2008) (when "a writing refers to another document, that other document … becomes constructively a part of the writing, and in that respect the two form a single instrument"). The ISDA, in turn, explicitly provides that HSBC was "not acting as fiduciary for or as an adviser" to Cairn. (A-373). It further specifies that HSBC was "acting for its own account" as opposed to Cairn's; that Cairn "has made its own independent decisions to enter into th[e] Transaction … based upon its own judgment"; and that Cairn "is capable of assessing the merits of" the transaction "on its own behalf or through independent professional advice." (*Id.*). At trial, Cairn's general counsel agreed that the ISDA disclaimers meant that "HSBC is not acting as a fiduciary for Cairn Energy." (A-88-90). One of the government's experts likewise conceded that the ISDA "established that the parties are sophisticated entities that do not rely on their counterparties' representations or advice when executing foreign exchange transactions." (A-60-64).

It is hard to fathom additional ways to disclaim a fiduciary relationship. Where, as here, "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 necessarily waived. *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, 440 (2d Cir. 1998)

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

Consequently, as a matter of law, HSBC and Cairn "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"); *Kirschner*, 648 F. Supp. 2d at 534-35 (no "fiduciary relationship" where a broker is entrusted with "the execution of foreign currency transactions upon receiving explicit customer instructions" and there is an agreement disclaiming a "fiduciary" or "advisor" relationship).

2. Independent of what the contracts say, the parties were sophisticated, multi-billion-dollar enterprises transacting at arms' length, which also forecloses any fiduciary relationship. *See, e.g.*, *Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214 (2d Cir. 2018); *In re Mid-Island Hosp., Inc.*, 276 F.3d 123, 130 (2d Cir. 2002) (sophisticated counterparties dealing "at arms length in a commercial transaction" have no "fiduciary relationship" "absent extraordinary circumstances"); *United States v. Hirsch*, 239 F.3d 221, 227 (2d Cir. 2001) (there

is "not a fiduciary" relationship where the parties "ha[ve] an arms-length contractual relationship").

In *Allen*, plaintiffs were sophisticated employee benefit plans alleging that defendant banks (including HSBC) acted as their "fiduciaries" when executing fix transactions for the plans. 895 F.3d at 214. Like the government here, they claimed that the banks breached their fiduciary duties by "amass[ing] large proprietary currency positions … just before or during the fixing window" in order to "manipulate the fixing rate." *Id*. at 220. The district court dismissed the complaint because the banks were not "performing a fiduciary function when they executed [the] FX transactions." *Id*. at 223. This Court agreed. A fiduciary must "control … the disposition of [its clients'] assets," and the banks in *Allen* did not exercise the requisite "unilatera[l]" "control." *Id*. at 224. Rather, transactions "were initiated" by "the Plans," which determined the amount to be traded, the currencies to buy and sell, the benchmark to use and the time at which the fix would be set. *Id*. These "arms' length dealings" between sophisticated investors and their banks "d[id] not admit an inference that the banks" were "fiduciaries." *Id*.

The same is true here. Cairn, like the *Allen* plaintiffs, determined whether to transact and dictated pertinent details. HSBC never even had possession of Cairn's money, and instead traded its own pounds for Cairn's dollars at the 3pm exchange

rate. (A-48, A-56, A-203-05). Because HSBC lacked control over Cairn's assets, it was an "arms length" counterparty, not a "fiduciary."

3. In attempting to establish a fiduciary duty, the government relied upon (1) its claim that HSBC was "way more" sophisticated than Cairn, (2) the HSBC "sales pitch" and (3) the NDA. (A-241-44). None of this is remotely sufficient to override the binding contractual disclaimers and arms' length nature of the parties' relationship.

First, it is well-settled that one party's 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). It therefore makes no difference whether HSBC was more sophisticated. Were the law otherwise, HSBC would owe fiduciary duties to virtually every counterparty, including large public companies like Cairn and top investment banks like Rothschild—even where, as here, they expressly disclaim such a duty. That is obviously not the law. *See, e.g.*, *Allen*, 895 F.3d at 225; *Cooper*, 140 F.3d at 440.

In any event, there is no serious dispute that Cairn was highly sophisticated and capable of fending for itself. Cairn is a multi-billion-dollar oil conglomerate that routinely executes large currency transactions without the assistance of a bank. (A-71, A-111-14). Cairn was also represented by experienced in-house and

outside counsel, and advised by Rothschild, "the Goldman Sachs of Europe." (A-73, A-112-14, A-233). It is well-settled that no "fiduciary relationship" exists where a party is "relying upon the advice and counsel of their own engineers, lawyers, and executives to protect [its] best interests." *Grumman Allied Indus. Inc. v. Rohr Indus., Inc.* 748 F.2d 729, 739 (2d Cir. 1984). The government's repeated attempts to downplay Cairn's sophistication were disingenuous at best.

Second, the single bullet point in the 32-page pitch deck stating that HSBC "would like to execute this [transaction] in the best interest of the company" (A-276) plainly does not create a duty of trust and confidence. The pitch predated the Mandate Letter (A-271 (HSBC sending pitch on October 7, 2011); A-309 (Mandate Letter dated October 24, 2011)) and could not override the contractual disclaimers to which Cairn ultimately agreed. *See, e.g.*, *Jacked Up, L.L.C.*, 854 F.3d at 808-09.

Indeed, the Fourth Circuit has rejected a similar argument, holding that an 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. *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 979 (4th Cir. 1993). Moreover, the pitch actually *disclaims* a fiduciary relationship by warning that "[n]either HSBC nor any of its affiliates are responsible for providing [Cairn] with … specialist advice" and that

Cairn was "solely responsible for making [its] own independent appraisal of and investigations into the … transaction[]" (A-303). *See, e.g.*, *Chestman*, 947 F.2d at 568-69; *Kirschner*, 648 F. Supp. 2d at 534-35. Where, as here, "the terms of a contract are unambiguous, the obligations it imposes are to be determined without reference to extrinsic evidence" like a sales pitch. *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1278 (2d Cir. 1989).

Even if that were not the case, the statement that HSBC "would like to execute" the transaction "in the best interest of the company" could not create any fiduciary-like relationship. As this Court has confirmed, mere "wishes" or "desires" are "not actionable promises." *Economu v. Borg-Warner Corp.*, 829 F.2d 311, 314-16 (2d Cir. 1987); *accord Rubenstein v. Clark & Green, Inc.*, 395 F. App'x 786, 788 (2d Cir. 2010) (statement that one would "like to" undertake future conduct is not a promise to do so and does not "form[] a binding contract"); 1 Corbin on Contracts § 1-15 (2018) (aspirational language does not create a contractual right). Indeed, the pitch clearly warned of the risks associated with a fix transaction and advised Cairn not to "rely on any information" in the presentation. *See, e.g.*, *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002) (alleged misrepresentations immaterial where accompanied by "adequate cautionary language").

Cairn's Scriven admitted that HSBC's aspiration to execute "in the best interest" of Cairn was nothing more than a "sales pitch." (A-140-41). Such "salesman's banter" is legally insufficient to transform "an arms-length relationship" into "one of special trust." *Litvak*, 889 F.3d at 69 n.13; *see also Lasker v. New York State Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996) (optimistic statements to investors were mere "puffery" that have been "consistently held to be inactionable").

Third, the NDA does not advance the ball for the government. Like the pitch, it predated the Mandate Letter (A-264 (NDA dated October 3, 2011); A-309 (Mandate Letter dated October 24, 2011)), and "it is well established that a subsequent contract regarding the same matter will supersede the prior contract." *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522, 526 (2d Cir. 2011). The Mandate Letter therefore trumps any fiduciary-like relationship that might have arisen under the NDA.

The NDA was never intended to govern how HSBC executed the transaction. That was what the Mandate Letter was for. The NDA, by contrast, was signed by every bank that received the RFP. The NDA specifies that it was entered "solely for the purposes … set out in the RFP," *i.e.*, "to assist [the] banks in their *analysis* of the proposed currency exchange transaction," so that Cairn could obtain "feedback" before "select[ing]" a bank. (A-264, A-267, A-270

(emphasis supplied)). The "analysis" of the transaction occurred at the RFP stage; the execution was a separate matter entirely.

Finally, there is *no* evidence that Johnson was even *aware* of the NDA—there are no communications concerning the NDA on which he is copied and no witness testified that he received it. He obviously cannot be held criminally liable for breaching an agreement that he never even saw. *See, e.g.*, *Chestman*, 947 F.2d at 567 ("[A] fiduciary duty cannot be imposed unilaterally.").[9]

In sum, the government's arguments turn the law on its head. The unambiguous (and superseding) contractual disclaimers, entered by sophisticated arms' length counterparties, are dispositive and preclude any fiduciary or similar relationship.

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[9] The government also argued that Johnson violated HSBC's internal policy concerning the use of confidential information. (A-245, A-248). That is neither relevant nor true. It is irrelevant because this Court has repeatedly "declined to infer legal duties from internal 'house rules.'" *de Kwiatkowski*, 306 F.3d at 1311; *accord United States v. Finnerty*, 533 F.3d 143, 150 (2d Cir. 2008) (judgment of acquittal affirmed where defendant's conduct violated internal NYSE policy). And Johnson violated no policy. Without actually introducing HSBC's policy as evidence, the government suggested that it forbade forex traders who were exposed to confidential information about a transaction from participating in the trading. But if that were true, who would execute the transaction? In reality, the policy only prevents the bank's employees from trading the *stock* of a client that does foreign exchange business with the bank. (A-216, A-219-21, A-237-38).

B. The Trading Methodology Was Fully Disclosed

Johnson's disclosure to Cairn that HSBC would profit by trading ahead of the fix provides an additional, independent basis for reversing the conviction. *See O'Hagan*, 521 U.S. at 655 ("[F]ull disclosure forecloses liability under the misappropriation theory."). Indeed, Johnson was explicit that HSBC would trade ahead because it was otherwise earning no fee and "[its] business" "clearly" is "to make … money." (A-387). Johnson also recommended that Cairn provide "a minimum of two hours" "notice"; anything less would require more aggressive trading that would create more "noise" in the market and upward pressure on the fix. (A-386).

Cairn's Scriven knew that given the size of the transaction, HSBC's trading would "pressure the fixing," and he admitted that he "expect[ed] [HSBC] would make money on the trade" by "beat[ing] the fix." (A-397; A-136). Cairn even asked Johnson whether it could "share some [of the] upside" if HSBC "beat the fix," but Johnson declined. (A-389-90). 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.

C. There Was No Proof That Johnson Intended To Harm Cairn

Nor did the government prove that Johnson intended to cause "actual harm or injury" to Cairn. *D'Amato*, 39 F.3d at 1257. The only "injury" posited by the

government was HSBC's desire to profit from the transaction. But HSBC customers are not entitled to receive the bank's services free of charge, and HSBC is under no obligation to perform charitable works on their behalf. The government ignored these basic commercial realities when attempting to portray HSBC's profit motive as an "intent to harm" Cairn. And Cairn fully accepted the cost of a fixing transaction because of its transparency and because Rothschild determined that it was Cairn's cheapest option. (A-307). Put simply, there was no actual or intended "tangible economic harm," which is yet another reason why the misappropriation theory fails and 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 fares no better than its misappropriation theory, for several independent reasons. First, as explained above, the government failed to prove that Johnson intended to defraud Cairn, an essential element of wire fraud. Second, Cairn received everything it was entitled to under the governing contract, which defeats the charges as a matter of law. Indeed, it received more. Third, the government failed to prove that Johnson made or participated in any material misstatements to Cairn. Finally, as explained *infra* in Point III, due process bars application of the right to control doctrine here.

A. The "Right To Control" Theory Is Legally Invalid Because Cairn Received The Full Benefit Of Its Bargain With HSBC

Wire fraud requires proof "that the alleged scheme contemplated depriving another of money or property." *Finazzo*, 850 F.3d at 108. "[O]btaining money or property" is in all cases "a necessary element of the crime." *Carpenter v. United States*, 484 U.S. 19, 25 (1987). This Court has stated that "property" may include "intangible interests such as the right to control the use of one's assets," and that this intangible property interest may be injured when "a victim is deprived of potentially valuable economic information it would consider … in deciding how to use its assets." *Finazzo*, 850 F.3d at 108.

The Court has held that there can be no such injury, and thus has "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). Put differently, wire fraud 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 is true even if the services were "dishonestly completed." *Novak*, 443 F.3d at 159; *see also United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007) (schemes that merely "cause their victims to enter into transactions they would otherwise avoid" do not constitute mail or

wire fraud; any "misrepresentation" must implicate "an essential element of the bargain").

Here, Cairn got everything it bargained for. The terms of the bargain were expressly set forth in the Mandate Letter, a document drafted by Rothschild and scrutinized by Cairn's inside and outside counsel. HBSC "commit[ted] to … [e]xecute a Spot … Transaction at Cairn's request, for an amount of up to USD4bn" in which it would pay British pounds for Cairn's dollars. (A-309). Cairn also had the right to choose among several options for calculating the exchange rate, including, *inter alia*, a "full risk transfer execution" at a "prevailing screen rate … plus, at most 100pips," or a rate "equivalent to one (or several) publicly available fixing(s)" and "no higher than the mid fixing(s) level…." (*Id.*).

Cairn chose £2.25 billion, *i.e.*, approximately $3.5 billion, as the amount of the transaction and elected to set the exchange rate using the 3pm fix on December 7, 2011. HSBC complied with its obligations by delivering the British pounds to Cairn based upon that 3pm fix rate. That was all HSBC was required to do under the Mandate Letter. Critically, the Mandate Letter neither restricted how HSBC acquired the pounds to fill Cairn's order nor limited HSBC's profits in any way. Cairn knew that if it wanted to impose such limitations it would need to bargain for them in the governing agreements. Before entering the Mandate Letter, Cairn tried to do just that by seeking a provision that would have required HSBC to return a

portion of any profit to Cairn. (A-389). Johnson flatly refused, and yet Cairn elected to enter the Mandate Letter and proceed with the transaction anyway, knowing full well that there was no limitation on whether, how or to what extent HSBC would profit.

Indeed, Cairn got even *more* than it bargained for in the Mandate Letter. Cairn's Scriven testified that Cairn's only goals were (1) to receive a "transparen[t]" exchange rate (2) at a cost "better than" that of a "full-risk transfer." (A-133). Though the contract did not guarantee Cairn's hope of achieving a cost better than that of a full-risk transfer, and HSBC was not legally obligated to provide Cairn with such a savings, Cairn actually achieved both goals. (*See, e.g.*, A-111 (Scriven admitting Cairn "would have paid more" "for a full-risk transfer"); A-132-33 ("fixing" provided "benefit" of "transparency for [Cairn's] shareholders")). In addition, as a courtesy to Cairn, HSBC voluntarily used an exchange rate slightly more favorable (by 2.5 pips) to Cairn than the 3pm fix rate. (A-340).

The "wire fraud statute[]" has no "application" where, as here, the "purported victim received the full economic benefit of its bargain." *Binday*, 804 F.3d at 570. Accordingly, this Court should reverse Johnson's conviction. *See, e.g.*, *Novak*, 443 F.3d at 159 (reversing because alleged victims "received all they bargained for" and defendant's deceit "did not affect an essential element of those

bargains"); *Starr*, 816 F.2d at 98 (same); *United States v. Regents Office Supply*, 421 F.2d 1174, 1179 (2d Cir. 1970) (same).

B. The Right To Control Theory Fails Because There Was No Evidence Of Any Material Deceit

The right to control theory separately fails because the government failed to prove that Johnson made any material misstatement or omitted any material information he had a duty to disclose.

"Deceit" is an essential element of mail or wire fraud. *Binday*, 804 F.3d at 570. In a "right to control" case, the government must establish (1) "the withholding or inaccurate reporting of information" that was (2) material, *i.e.* "could impact" the alleged victim's use of its assets. *United States v. Wallach*, 935 F.2d 445, 462-633 (2d Cir. 1991). It failed to do so here.

In its summation, the government invoked the "right to control" doctrine because Johnson supposedly made a false promise not to "ramp the fix," and "did not tell [Cairn] that HSBC was going to trade ahead" of the fix and thereby "move up the price" of the pound. (A-250, A252-53). As explained, the opposite is true: Johnson disclosed, and Cairn was well aware, that HSBC would "trade ahead" of the fix and that the price of pounds would likely rise as a result, especially if HSBC received less than two hours' notice before the transaction. Moreover, the government presented no evidence that at the time of this discussion Johnson intended to mislead Cairn about how HSBC would execute the transaction. A

promise of future performance cannot be mail or wire fraud unless the representation was "made with the contemporaneous intent to defraud." *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 658, 662 (2d Cir. 2016); *see also id.* ("only" if "promise is made with no intent ever to perform it can the promise itself constitute a fraudulent misrepresentation").

The government also relied on alleged misstatements by *other* HSBC employees. (A-251). These included a Dipak Khot remark overstating the size of a transaction HSBC executed the previous day. (A-339, A-342). But Johnson was not even present for this remark, and when Khot repeated it on a post-transaction call with Cairn that did include Johnson, Johnson *corrected* him. (A-339 (Johnson advising that "[w]e didn't buy as much … yesterday" and "there wasn't the same magnitude" as Khot had claimed)).

The government also cited two statements that Stuart Scott made *after* the transaction was complete: that HSBC "started" trading five minutes before the fix and that the "Russian Central Bank['s]" transactions impacted the fix rate. (A-339, A-246-47, A-249). Yet the government failed to explain how *Johnson* could be held responsible for *Scott's* alleged misstatements. And misstatements that post-date the transaction are immaterial as a matter of law. To be "material," a misstatement must be "capable of influencing" the "decision" of the person or

entity "to which it was addressed," *Finazzo*, 850 F.3d at 109 n.16, and there is no "decision" left to make once the transaction is over.

The government also failed to show how additional disclosures would have caused Cairn to use its assets any differently and thereby saved money. Scriven testified that Cairn might have employed a full-risk transfer instead of a fixing transaction or chosen a different bank to exchange the $3.5 billion. (A-108). But neither of these possibilities supports a conviction under the right-to-control theory. It is undisputed that Cairn "would have paid more" under the full-risk method, which shows that no economic harm could possibly have resulted from its decision to have HSBC carry out a fixing transaction. (A-108-09, A-111). And there is no evidence that another bank would have achieved a better rate for Cairn using the fix methodology.

Thus, the right to control theory cannot salvage the verdict.[10]

* * *

We recognize that the panel hearing Johnson's appeal is bound by this Court's decisions holding that the "right to control" one's assets is itself "property"

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[10] The conspiracy count fails for the same reasons the substantive wire fraud counts are invalid. "As a matter of law, the crime of conspiracy must involve the agreement of two or more persons to commit a *criminal* act or acts." *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998) (emphasis added). As Points I and II demonstrate, Johnson neither intended nor agreed to do anything "criminal."

under the mail and wire fraud statutes. As explained, the charges against Johnson fail under those decisions. But if the Court holds otherwise, Johnson preserves for further review the argument that the "right to control" theory itself is invalid because it contravenes the language of the statute and Supreme Court precedent interpreting it.[11]

Specifically, the federal mail and wire fraud statutes are violated only if the defendant seeks to "obtain[]" "money or property" through fraud. 18 U.S.C. §§ 1341, 1343. The "right to control" theory cannot be reconciled with this language. First, only traditional, transferrable "property" interests can be "obtained" by the defendant. The mail and wire fraud statutes do not reach schemes to deprive an individual or entity of amorphous, intangible property rights like the "right to control." *See generally Skilling v. United States*, 561 U.S. 358, 400 (2010); *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also Sekhar v. United States*, 570 U.S. 729, 734 (2013) ("property" under Hobbs Act must be "transferable"); *but see Finazzo*, 850 F.3d at 105. For similar reasons, the Sixth and Ninth Circuits have expressly rejected a right to control theory of fraud. *See United States v. Sadler*,

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[11] There are even decisions in this Circuit that are in tension with "right to control" theory. *See, e.g.*, *Mittelstaedt*, 31 F.3d at 1217 ("disagree[ing]" that "the loss of the ability to make a fully informed decision" alone constitutes wire fraud).

750 F.3d 585, 591 (6th Cir. 2014) (the "ethereal right to accurate information … fall[s] outside th[e] [wire fraud] statute"); *United States v. Bruchhausen*, 977 F.2d 464, 470 (9th Cir. 1992) ("[I]ntangible interest … is not 'property' of the kind that Congress intended to reach in the wire fraud statute.").

Second, in order to violate the statute, the defendant must "obtain" *the victim's* property. As the Supreme Court explained in *Skilling*, "the victim's loss of money or property" must "supply the defendant's gain, with one the mirror image of the other." 561 U.S. at 400. In other words, it is "essential" that there be "an actual" or "potential transfer of property *from the victim to the defendant*." *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (Easterbrook, J.) (emphasis added). That requirement is not satisfied here, nor could it be in any "right to control" case. The theory posits that a defendant can commit fraud by "den[ying] the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *Binday*, 804 F.3d at 570 (citation omitted). But nobody contends that Cairn's ability to control its assets was transferred to Johnson or HSBC. What HSBC obtained was something completely different, namely a small profit on a foreign exchange transaction. This type of asymmetry will always occur when the victim's alleged loss is the right to control, because that right is not something the defendant can plausibly

obtain for himself and, therefore, will never be "transfer[red] from the victim to the defendant." *Walters*, 997 F.2d at 1224.

III. THE PROSECUTION VIOLATED DUE PROCESS

Applying the wire fraud statute to Johnson's conduct violated the Due Process Clause under both of the government's theories. It is well-established that the government may not deploy a "criminal law so vague that it [1] fails to give ordinary people fair notice of the conduct it punishes, or [2] [is] 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). This prosecution fails in both respects.

1. Johnson lacked fair warning because what the government calls "front-running" is legal in this 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 are allowed to "profit" by "buying [currency] cheaper than they're selling it." (A-56, A-59); *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. (A-58, A-182-84).

Johnson had no reason to suspect that the execution of the transaction might constitute federal wire fraud under either of the government's theories. The misappropriation theory applies only if HSBC owed Cairn a fiduciary or similar duty. As this Court's decision in *United States v. Brennan*, 183 F.3d 139, 150 (2d Cir. 1999), demonstrates, there is "no precedent for criminal liability" under circumstances like those present here. The defendant in *Brennan* was employed by an insurance company that supposedly breached "fiduciary duties" to its counterparty, a "sophisticated compan[y] with experience in the industry." *Id.* at 150-51. Because these parties transacted at "arms-length," there was "substantial reason" for the defendant "to conclude that the relationship[] at issue w[as] not fiduciary." *Id*. at 150. This, in turn, "substantially undercut the notion that he had fair notice" of the alleged fiduciary relationship, rendering the charges "seriously problematic." *Id*. at 149-50. The same is true here, which is why Johnson's alleged "nondisclosure" cannot "constitute a crime under the federal mail [and wire] fraud statute." *Id.* at 149-51.

"Misappropriation" also must involve a fiduciary 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. It is not "secret" or "deceptive" to trade on information given to you for that very purpose. Nor was there any reason for Johnson to suspect that the misappropriation doctrine

would apply to currency exchanges. The Supreme Court defined the doctrine in the specific context of "the purchase or sale of securities," *O'Hagan*, 521 U.S. at 652; *see also Carpenter*, 484 U.S. at 23-24, and it has never been extended to foreign exchange trading. Because "neither the statute nor any prior judicial decision" would have "fairly disclosed" the government's "novel construction" of the misappropriation theory of wire fraud, that construction is barred by due process. *United States v. Lanier*, 520 U.S. 259, 266 (1997).

Likewise, the right to control theory requires the government to prove that Cairn did not receive the benefit of its bargain with HSBC. As explained, the currency exchange was carried out consistently with the terms of the governing contract. Furthermore, HSBC earned only $7 million—or 0.2 %—on a $3.5 billion transaction. How was Johnson supposed to know that this miniscule profit violated HSBC's bargain with Cairn, when the governing agreement does not purport to oblige HSBC to carry out the exchange in any particular way or prohibit trading ahead, much less limit HSBC's profits? How could Johnson have predicted that the U.S. government would insinuate itself in a deal between a British bank and a British oil company, and seek to punish HSBC's British employees, on the theory that the bank was required to work for free? Or if the bank was entitled to earn some lesser amount, how could Johnson have known how much it was allowed to earn, when no rule, regulation or statute addresses that question?

2. Second, the conviction is unconstitutionally standardless because the government is unable to explain when a fix transaction becomes criminal wire fraud. *See City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). The government cannot plausibly assert that fix transactions—which have been permissible and commonplace in the forex market for years—have suddenly become inherently criminal despite no intervening law or regulation saying this. And it cannot reasonably argue that banks are not allowed to earn any profit through their execution of fix transactions.

Yet the government fails to articulate how banks *can* lawfully 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," *Morales*, 527 U.S. at 58, 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 (emphasis added). 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," 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 provided no coherent guidance on how the transaction should have been executed, and instead relied upon a constant stream of shifting and contradictory claims. For example, the government repeatedly criticized Johnson for trading ahead, claiming that he defrauded Cairn because he "did not tell them that HSBC was going to trade ahead of the [3pm fix]" and thereby "move up the price of [the pound], because doing so would cost money" to Cairn. (A-253). Then, at sentencing, the government faulted HSBC for not trading ahead *enough*, arguing that HSBC should have "commenc[ed] execution" of the trades "earl[ier]" than it did. (A-462). The government also flipped-flopped about whether and to what extent HSBC was entitled to profit from the transaction:

- The government conceded in its opening statement that HSBC was allowed to "try to earn a little bit" (A-46), without explaining why 0.2% of the transaction total would not qualify as a "little bit" or, if not, what would qualify as a small enough "little bit" to not be too much.
- In its initial summation, the government argued 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"); *accord* A-252-53).

- In its rebuttal, the government backtracked, claiming its concern was limited to the size of the supposedly "big fat profit"—again without explaining what made the profit excessive or how much profit would be acceptable to the government. (A-255-58).

- At sentencing, the government was back to arguing that "the entire profit generated by the Cairn FX transaction, approximately $6.7 to $7.5 million" was obtained via fraud. (A-458).

- In its opposition to Johnson's motion for bail pending appeal before this Court, the government changed its tune entirely, claiming for the first time that Johnson's crime involved not the profits he helped make for the bank, but instead his supposed intent to have traders trade "purely for their own gain"—even though no trader personally profited from the transaction. (A-597-98).

The government's ever-shifting theories, coupled with its failure to explain how a bank can permissibly execute a fix transaction, 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); *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). This is the type of "standardless" crime that the Supreme Court has repeatedly warned is unconstitutional, compelling reversal. *See, e.g., Johnson*, 135 S.Ct. at 2556-57 (crimes that are "standardless" violate "the first essential of due process").

* * *

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 if this Court finds just one of the theories to be legally invalid, a new trial would be required, because the jury was instructed on both theories and returned a general verdict (A-260-63), making it impossible to tell which theory (or theories) the jury relied upon. "Where a jury is presented with multiple theories of conviction, one of which is invalid, the jury's verdict must be overturned if it is impossible to tell which theory formed the basis for conviction." *United States v. Szur*, 289 F.3d 200, 208 (2d Cir. 2002); *accord McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016) (requiring new trial because it was "possible" that the jury convicted on invalid theory); *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993) ("if any of the theories was legally insufficient, then the verdict must be reversed").

CONCLUSION

The judgment should be reversed and the case remanded with instructions to enter a judgment of acquittal. In the alternative, the judgment should be vacated and the case remanded for a new trial.

Dated: New York, New York
August 30, 2018

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

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 12,895 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font of Times New Roman.

Dated: August 30, 2018

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

SPECIAL APPENDIX

TABLE OF CONTENTS

PAGE

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
MARK JOHNSON

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 16-0457 (NGG)
USM Number: 81220-053
Frank H. Wohl, Esq.
Defendant's Attorney

THE DEFENDANT:

X was convicted by jury verdict on COUNTS ONE (1), TWO (2), FOUR (4), FIVE (5), SIX (6), EIGHT (8), NINE (9), TEN (10) AND ELEVEN (11) OF THE INDICTMENT.

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1349 and 18 U.S.C. § 1343	CONSPIRACY TO COMMIT WIRE FRAUD	12/2011	1
18 U.S.C. § 1343	WIRE FRAUD	12/2011	2, 4-6 & 8-11

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant was found not guilty on Count 3 of the Indictment.

X Count 7 of the Indictment was dismissed before trial on the motion of the United States.

Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 26, 2018
Date of Imposition of Judgment

s/Nicholas G. Garaufis
Signature of Judge

NICHOLAS G. GARAUFIS, U.S.D.J.
Name and Title of Judge

May 10, 2018
Date

AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: MARK JOHNSON
CASE NUMBER: CR 16-0457 (NGG)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **TWENTY-FOUR (24) MONTHS (CAG) ON COUNTS ONE (1), TWO (2), FOUR (4), FIVE (5), SIX (6), EIGHT (8), NINE (9), TEN (10) AND ELEVEN (11) OF THE INDICTMENT WHICH SHALL RUN CONCURRENTLY.**

X The court makes the following recommendations to the Bureau of Prisons:
THE COURT RECOMMENDS THAT, IF CONSISTENT WITH BUREAU OF PRISONS POLICY AND PRACTICE, THE DEFENDANT BE DESIGNATED TO FEDERAL MEDICAL CENTER, DEVENS, FOR MEDICAL EVALUATION AND TREATMENT, AND THEN TRANSFER HIM TO FEDERAL CORRECTIONAL INSTITUTION, ALLENWOOD LOW, TO SERVE OUT THE REMAINDER OF HIS SENTNECE.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: MARK JOHNSON
CASE NUMBER: CR 16-0457 (NGG)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **THREE (3) YEARS ON COUNTS ONE (1), TWO (2), FOUR (4), FIVE (5), SIX (6), EIGHT (8), NINE (9), TEN (10) AND ELEVEN (11) OF THE INDICTMENT WHICH SHALL RUN CONCURRENTLY.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: MARK JOHNSON
CASE NUMBER: CR 16-0457 (NGG)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B(Rev. 02/18) Judgment in a Criminal Case
Sheet 3D — Supervised Release

DEFENDANT: MARK JOHNSON
CASE NUMBER: CR 16-0457 (NGG)

SPECIAL CONDITIONS OF SUPERVISION

1. **The defendant shall not possess a firearm, ammunition or destructive device;**

2. **The defendant shall cooperate with and abide by all instructions of immigration authorities;**

3. **If the defendant is removed, he may not re-enter the United States illegally;**

4. **The defendant shall comply with any fine and/or forfeiture order(s) imposed by the Court;**

5. **Upon request, the defendant shall provide the U.S. Probation Department with full disclosure of his financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, the defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Department. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income and expenses. The defendant shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Department access to his financial information and records;**

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 4B — Probation

DEFENDANT: MARK JOHNSON
CASE NUMBER: CR 16-0457 (NGG)

SPECIAL CONDITIONS OF SUPERVISION

6. The defendant is to refrain from engaging in any employment in the financial industry, and he is to assist the U.S. Probation Office in verifying the job description of any employment he secures while under supervision;

7. If the defendant changes employment while under supervision, he will notify the U.S. Probation Office of such a change immediately. Moreover, he will provide all information to assist the Probation Office in verifying the job description of any new employment;

8. The defendant shall cooperate with the U.S. Probation Office in the investigation and approval of any position of employment, including any independent, entrepreneurial, or freelance employment or business activity. If approved, the defendant shall provide the U.S. Probation Office with full disclosure of his employment and other business records, and any other relevant documents requested by the U.S. Probation Office;

9. The defendant is to electronically submit supervision reports (MSRs) to the U.S. Probation Office on a monthly basis.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: MARK JOHNSON
CASE NUMBER: CR 16-0457 (NGG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 900.00	$ N/A	$ 300,000.00	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: MARK JOHNSON
CASE NUMBER: CR 16-0457 (NGG)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X special assessment of $ 900.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Fine payment schedule::

A FINE IN THE AMOUNT OF $300,000.00 IS DUE IMMEDIATELY, WITHIN SEVEN DAYS AFTER EXONERATION OF BAIL.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.