19-3806-cr(L)

19-3944-cr(CON), 19-3945-cr(XAP), 19-3964-cr(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

—against—

MATTHEW CONNOLLY, GAVIN CAMPBELL BLACK,

Defendants-Appellants-Cross-Appellees.

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

BRIEF FOR *AMICUS CURIAE* THE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 350 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL files this *amicus* brief in support of Defendants-Appellants Gavin Campbell Black and Matthew Connolly ("Defendants"), urging reversal.[2] NYCDL has a particular interest in this case because it directly implicates NYCDL's core concerns with combatting the unwarranted extension of criminal statutes and promoting clear standards for the imposition of criminal liability.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), NYCDL certifies that (1) this brief was authored entirely by its counsel, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money intended to fund preparing or submitting the brief; and (3) apart from NYCDL and its counsel, no other person contributed money intended to fund preparing or submitting the brief.

[2] The Government and Defendants have consented to the filing of this *amicus* brief. Accordingly, this brief may be filed without leave of court, pursuant to Fed. R. App. P. 29(a)(2).

PRELIMINARY STATEMENT

This appeal raises questions of fundamental importance concerning the application of the federal criminal fraud statutes to statements of opinion. The alleged fraudulent representations in this case are estimates of the interest rates at which Defendants' then-employer, Deutsche Bank AG ("Deutsche Bank"), could borrow funds in the interbank market. It is undisputed that these estimates were a matter of opinion; that the rates submitted were all reasonable estimates of Deutsche Bank's anticipated borrowing costs; and that Defendants never caused or intended to cause Deutsche Bank to submit a rate that was false, *i.e.*, that did not represent a reasonable estimate of Deutsche Bank's hypothetical borrowing costs.

The Government's position, in this and other LIBOR-related prosecutions, is that it *does not matter* whether the rate estimates were false or even whether the Defendants believed them to be false. Instead, the Government's theory of prosecution is that the Defendants committed fraud by causing Deutsche Bank to submit estimates that—while reasonable—were modified to take account of the bank's trading positions. The District Court endorsed this theory, holding that Defendants could be convicted even if they expressed and intended to express "reasonable, defensible, or even truthful" estimates. (SPA-6-10).[3]

[3] The District Court's opinion is published as *United States v. Connolly*, No. 16 Cr. 370 (CM), 2019 WL 2125044 (S.D.N.Y. May 2, 2019).

This is not, and has never been, the law. Fundamental to a charge of criminal fraud is the defendant's making of a false statement while knowing or believing it was false. Where the statement is one of opinion, this means that the Government must establish that the defendant knew the opinion was false or, at the very least, lacked a reasonable basis. Only upon proof of such circumstances has this Court (and other courts) sustained a conviction for fraud based on a statement of opinion. In this case, the Government did not even attempt to prove that Deutsche Bank's LIBOR estimates were false or unreasonable or that the Defendants believed them to be so—indeed, the Government's own witnesses acknowledged that the estimates *were reasonable*. It therefore follows that the Government failed to prove that the Defendants participated in a scheme to issue fraudulent LIBOR estimates.

Evidence that Defendants requested that Deutsche Bank adjust its estimates higher or lower, and did so hoping to obtain a financial benefit for Deutsche Bank, does not change that conclusion. Otherwise reasonable and truthful statements of opinion cannot be transformed into fraudulent misrepresentations based on the speaker's purported financial interest in the opinion. None of the cases cited by the District Court stands for that proposition. To the contrary, courts have repeatedly rejected such an unsound rationale for imposing fraud liability, even in the civil context.

The novel theory of wire fraud asserted by the Government and accepted by the District Court would upend the law of liability for opinions and has potentially far-reaching implications. It would expose business executives and employees to prosecution and imprisonment for issuing opinions and making estimates that are reasonable, accurate and honestly believed, simply because the opinion or estimate was influenced by their employer's financial interest. Such an unwarranted extension of liability would give the wire fraud statute the sort of amorphous scope and standardless sweep that core principles of fair notice and due process forbid in the context of a criminal sanction.

The Supreme Court and this Court have not hesitated to repudiate similar misguided efforts to enlarge liability beyond the traditional limits of the mail and wire fraud statutes, recognizing that federal prosecutors may not use these criminal laws to enforce their own standards of integrity or business morality. *See, e.g.*, *Kelly v. United States*, 590 U.S. ___, No. 18-1059, 2020 WL 2200833, at *2, 7 (U.S. May 7, 2020); *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 661-62 (2d Cir. 2016); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1179-80 (2d Cir. 1970). This case calls upon the Court to exercise that vital function once again.

ARGUMENT

I.

THE CONVICTIONS CANNOT STAND ABSENT PROOF DEFENDANTS BELIEVED THE ESTIMATES WERE UNTRUE OR UNREASONABLE

The wire fraud statute prohibits schemes to deprive another of money or property "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. The *sine qua non* of this offense is a false statement made knowingly and with intent to defraud. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 22 (1999) ("well-settled meaning of fraud require[s] a misrepresentation or concealment of material fact") (internal quotations and emphasis omitted); *Countrywide*, 822 F.3d at 656 (equating fraud with "a knowingly false statement, made with intent to defraud"); *United States v. Rybicki*, 354 F.3d 124, 146 (2d Cir. 2003) (en banc) ("[a] material misrepresentation is an element of the crime") (emphasis omitted); *First City Nat'l Bank & Trust Co. v. FDIC*, 730 F. Supp. 501, 513 (E.D.N.Y. 1990) (McLaughlin, J.) ("Violations of federal mail and wire fraud statutes . . . require a showing of knowing misrepresentation.").[4]

In this case, the representations in question were Deutsche Bank's LIBOR submissions to the British Bankers' Association ("BBA"). The sole

[4] In certain circumstances, a mail or wire fraud prosecution can be predicated on an actionable omission rather than an affirmative misrepresentation. That was not the Government's theory in this case, however. (JA 4105:9-11 (Government's concession at charging conference that "[t]his is not an omission case")).

statement made in those submissions was Deutsche Bank's estimate of "the rate at which it could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size just prior to 1100 [a.m.]." (JA-4916). It is undisputed that the rates submitted were estimates or opinions of Deutsche Bank; they were not statements of historical fact reflecting the rates at which the bank had borrowed funds or received offers to borrow funds.

It is well established that statements of opinion stand on a different footing from statements of historical fact for purposes of determining whether they constitute an actionable misrepresentation. The truth or falsity of a statement of historical fact (*e.g.*, the rate at which Deutsche Bank actually borrowed money in the interbank market at a given point in time in the past) rests on objectively verifiable information. By contrast, an opinion or estimate (*e.g.*, the rate at which Deutsche Bank believes it could borrow money in the interbank market if it sought to do so) typically will not admit of a single correct answer. Rather, there will be a range of reasonable opinions or estimates, particularly when a numerical value is ascribed, such as the valuation of an asset, a company's projections of its future financial performance, or, as in this case, the anticipated cost of borrowing money.

This Court, in reversing convictions in a prior LIBOR case founded on the same legal theory relied on by the Government here, recognized precisely this point. The Court noted that "as 'estimates,' LIBOR submissions were

necessarily imprecise even when there was decent market information, such that, at any given time, there existed a 'range' of reasonable LIBOR submissions." *United States v. Allen*, 864 F.3d 63, 75 (2d Cir. 2017) (internal citations omitted).[5]

Where, as here, the alleged misrepresentation is a statement of opinion, the requirement of a knowing misrepresentation can only be satisfied by proof that the defendant's actual opinion was otherwise—that he knew or believed the stated opinion was untrue or (if directed to a future event) would not come true. No such finding can be made, however, where the defendant believed the opinion had a reasonable basis or was within the range of reasonable opinions.

This has been the law from the inception of liability in fraud for opinions. As Justice (then-Judge) Gorsuch has explained, while common law authorities generally "took a dim view of opinion liability," courts came to recognize that in offering an opinion, "a speaker is making the factual statement that *he believes* something." *MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109, 1112-13 (10th Cir. 2014) (emphasis in original). This statement of belief could give rise to a claim for misrepresentation where the opinion was "known to the utterer to be untrue," *id.* at 1113 (citation omitted)—or, as Judge Learned Hand put it, where the speaker expressed a "*consciously false*

[5] The Court in *Allen* reversed the convictions in that case on other grounds without reaching the viability of the Government's legal theory.

opinion." *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (L. Hand, D.J., sitting by designation) (emphasis added).[6]

Conversely, the speaker's statement of belief would be "true and non-misleading" if the opinion was "one founded upon what *appears to the defendant* to be reasonable and certain grounds," as "[t]he presence of an *objectively reasonable basis*" shows "the sincerity of the defendant's belief." *MHC*, 761 F.3d at 1116-17 (citations omitted and second emphasis added); *see also Restatement of Contracts* § 474 (1932) (statement of opinion may be fraud if it is "an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion").[7]

Modern case law concerning fraud liability for opinions, projections and predictions adheres to the same principles—namely, there is no liability if the speaker believed the opinion to be true and to have a reasonable basis. *See, e.g.*, *Kleinman v. Elan Corp., plc*, 706 F.3d 145, 154 (2d Cir. 2013) ("[W]here a defendant's competing analysis or interpretation of data is itself reasonable, there is no false statement."); *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1131 (2d

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[6] *See also, e.g., People v. Peckens*, 153 N.Y. 576, 591 (1897) (statements of opinion as to value or quality may constitute fraud where made by a person "knowing them to be untrue" and with intent to deceive).

[7] The common law meaning of fraud is presumed to be incorporated into the mail and wire fraud statutes unless it is inconsistent with those statutes. *Countrywide*, 822 F.3d at 657.

Cir. 1994) (statement of opinion or belief actionable under the securities laws "if the speaker knows the statement to be false"); *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 286 (1987) (common law fraud claim may lie based on allegations that defendants "made the projections knowing that they were false and unreasonable and that they were not based on [the company's] actual financial condition"); *IKB Int'l S.A. v. Bank of Am.*, No. 12 Civ. 4036 (LAK), 2014 WL 1377801, at *1 (S.D.N.Y. Mar. 31, 2014) (expression of opinion actionable in appropriate case "because the speaker either did not in fact hold the opinion stated or because the speaker subjectively was aware that there was no reasonable basis for it"), *aff'd*, 584 F. App'x 26 (2d Cir. 2014).[8]

Most importantly here, these same limitations have been applied in federal criminal prosecutions under the mail and wire fraud statutes. This Court has sustained fraud convictions predicated on allegedly false opinions *only* where the government proved beyond a reasonable doubt that the defendant knew the opinion lacked a reasonable basis and hence was false.

[8] As Judge Kaplan has also noted, the two prongs of this formulation—that the speaker either did not believe in the accuracy of the opinion or knew there was no reasonable basis for it—"amount[] to much the same thing." *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 928 F. Supp. 2d 705, 717 (S.D.N.Y. 2013). In other words, if the defendant issues an opinion or estimate he or she believes to be *reasonable*, it is difficult to conceive of a circumstance in which the defendant could be said to have believed the opinion or estimate was *false*.

In a series of decisions, Judge Hand effectively applied, in the mail fraud context, his ruling that a "consciously false opinion," *Vulcan Metals Co.*, 248 F. at 856, can constitute fraud. *See United States v. Grayson*, 166 F.2d 863, 866 (2d Cir. 1948) (jury could have concluded that defendant and his confederate, in selling "royalties" as highly desirable investments, committed mail fraud because they "did not believe what [they] professed to believe about the 'royalties'" and lured customers with "hopes of profit which the confederates did not themselves entertain"); *United States v. Rowe*, 56 F.2d 747, 748-49 (2d Cir. 1932) (affirming conviction where evidence showed that defendants "attributed a higher value to the [real estate] lots than they believed them to have, and said that they could sell them in a short time at an increased price, knowing they could not"); *Van Riper v. United States*, 13 F.2d 961, 964 (2d Cir. 1926) (evidence sufficient to show that defendants had "no belief that the stocks had the value which they ascribed to them" and "had no belief in the possibility of striking oil or in the gasoline plant's becoming a valuable asset, but thought it the merest gamble").[9]

In *United States v. Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977), the defendants similarly were convicted of fraud for marketing a real estate scheme as

[9] As summarized in one leading treatise, cases such as these stand for the proposition that predictions and opinions "can be the basis for a criminal fraud action in instances in which *the defendant knew he had no reasonable basis for his prediction or the opinion*." Harold S. Bloomenthal & Samuel Wolff, *Securities & Federal Corporate Law* § 20:3 (citing, *inter alia*, *Grayson*) (emphasis added).

a "safe and profitable investment," when the evidence showed they knew that the key assumptions behind their rosy predictions—that urban growth would create a booming resale market—were in fact untrue. *Id.* at 542-44. The Court affirmed the convictions on the ground that "[t]he expression of an opinion not honestly entertained is a factual misrepresentation," *id.* at 544, which has since become the standard formulation of the rule for determining criminal fraud liability in an opinion case. The articulation of this rule, however, in no way suggests (as the District Court here erroneously assumed, *see* SPA-8) that a fraud conviction can stand absent proof that the defendant believed the opinion was untrue or at the very least unreasonable—any more than the requirement of a knowingly false statement can be dispensed with in any criminal fraud case.

United States v. Autuori, 212 F.3d 105 (2d Cir. 2000), cited by the District Court (SPA-8), demonstrates the same thing. In *Autuori*, the Court applied the "not honestly entertained" rule set forth in *Amrep* in affirming a mail and wire fraud conviction based on fraudulent financial projections. 212 F.3d at 118-19. But the basis for liability in *Autuori* was the same as in every other case in which an opinion has been held to be an affirmative misrepresentation—the evidence

showed that the defendant continued to tout the projections after he knew that the company would be unable to meet them. *Id.*[10]

As this plentiful authority makes abundantly clear, the District Court here erred in asserting that, because "opinions are not scientifically right or wrong," they can give rise to fraud lability "even when the statements uttered are reasonable, defensible or even truthful." (SPA-8). As in any fraud case, fraud liability for opinions depends, *inter alia*,[11] on whether the defendant knowingly made a false statement, and to satisfy that requirement, the Government must prove that an opinion was untrue or unreasonable and that the defendant knew or believed that to be the case.

As set forth in the Defendants' briefs on appeal (*see* ECF No. 78 at 17-19, 25-36; ECF No. 82 at 23-31), the record in this case is devoid of any such proof. There is no evidence the Defendants knew or believed that the LIBOR estimates submitted by Deutsche Bank did not reflect the rates at which Deutsche Bank could actually borrow funds in the interbank market. And there is no

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[10] Other circuits are in accord. *See, e.g.*, *United States v. Morris*, 80 F.3d 1151, 1164-65 (7th Cir. 1996) (to prove mail or wire fraud based on statement of opinion, government "must show" that the defendant "did not truly believe in" the opinion and that opinion "was not supported by the available facts").

[11] Although this *amicus* brief is limited to the falsity issue, the Government's peculiar theory of fraud in this case also led to defects in proof on the elements of materiality and intent to defraud, which are addressed in Defendants' briefs.

evidence the Defendants knew or believed that the LIBOR estimates were unreasonable or outside the range of reasonable estimates.[12] To the contrary, the Government's own cooperating witnesses testified that the estimates submitted were reasonable, even when they received a request from a derivatives trader for a slightly higher or lower rate. (*See* ECF No. 78 at 35-36). Under these circumstances, Defendants' wire fraud convictions are invalid as a matter of law.[13]

II.

THE DISTRICT COURT'S WATERED-DOWN STANDARD OF FRAUD LIABILITY IMPROPERLY RELIEVED THE GOVERNMENT OF ITS BURDEN TO PROVE A KNOWINGLY FALSE STATEMENT

The Government's falsity-free theory of fraud liability sanctioned by the District Court does not withstand scrutiny. The District Court postulated that, if the Defendants changed the LIBOR estimates intending to benefit their trading positions at the expense of their counterparties, that would suffice even if the

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[12] The District Court seemed to deny that there could be a reasonable range of LIBOR estimates (SPA-10-11), but such a range is inherent in the nature of a numerically expressed opinion (*e.g.*, financial projections or an estimated value)—as this Court, as noted above, recognized in *Allen* specifically with regard to LIBOR estimates.

[13] The District Court held in the alternative that Defendants' convictions could be upheld on the theory that Defendants breached an "implicit certification" that the LIBOR estimates were "determined according to the BBA's rules." (SPA-9-10). But as shown in Defendants' briefs, the BBA *had no rules* at the time prescribing how LIBOR estimates should be determined and did not adopt such rules until 2013, long after the conduct in question. (*See* ECF No. 78 at 9-13, 37-43; ECF No. 82 at 12, 23-26).

estimates ultimately submitted were—and were believed by the Defendants to be—"reasonable, defensible, or even truthful." (SPA-7-9). In support of this view, the court below cited a handful of allegedly "analogous" cases from this Court and other Circuits. (*Id.* at 8-9). But its reading of those cases is simply mistaken.

United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991), does not hold that statements may be deemed fraudulent even where they are designed to be "factually defensible." (*See* SPA-8). In *Helmsley*, the Government presented "overwhelming" proof of the Helmsleys' scheme to falsely charge personal expenses to their business entities in order to reduce their federal and state income taxes. 941 F.2d at 76, 93. This Court merely held that the Government's failure to show an actual tax deficiency to New York was immaterial, "because success of a scheme to defraud is not required." *Id.* at 94; *see also id.* (noting that "an actual tax debt is not an element of the mail fraud offense," as the statute "punishes the *scheme*, not its success") (emphasis in original) (citing *United States v. Bucey*, 876 F.2d 1297, 1311 (7th Cir. 1989)).

That well-settled principle of mail and wire fraud law is irrelevant here. The fundamental flaw in the Government's legal theory in this case is that—unlike in *Helmsley*—the Government never proved (or even attempted to prove) that Defendants made any false statement to begin with. Nothing in *Helmsley*

(which did not even involve statements of opinion) suggests a defendant can be convicted for issuing an opinion he believes to be reasonable and truthful.

Equally unavailing, and for the same reason, is *United States v. Vest*, 116 F.3d 1179 (7th Cir. 1997). (*See* SPA-8-9). In *Vest*, a doctor was convicted of mail fraud for ordering medically unnecessary tests based on false entries in the patients' records. The Seventh Circuit upheld the trial court's exclusion of other patient records, which the defendant proffered even though he had not seen them when he ordered the tests. The court reasoned that, even if it turned out, in hindsight, that the tests actually were medically necessary, that would not negate the proof that the defendant *thought at the time* that they were not medically necessary and hence acted with fraudulent intent. 116 F.3d at 1184.[14] Thus, *Vest* simply affirms that a defendant may be convicted of fraud where the proof shows that he *believed* his stated opinions were false—precisely the proof that is lacking in this case and that the District Court erroneously held is unnecessary.

Nor does *United States v. Dula*, 39 F.3d 591 (5th Cir. 1994), support the proposition that fraud liability can attach for uttering a truthful statement. (*See* SPA-9). The defendant in *Dula* was convicted of making "material misrepresentation[s]" by substituting cheaper or outdated products for the ones

[14] As this Court did in *Helmsley*, the Seventh Circuit, in reaching this conclusion, also cited *Bucey* for the proposition that whether the tests were actually necessary went only to the ultimate success of the scheme. *Id.*

ordered and then "using false labeling or certificates of compliance with military specifications to conceal the fraudulent substitutions." 39 F.3d at 592-93 & n.10. Similar to the decision in *Vest*, the court merely held (in the context of a *Brady* claim asserted in a habeas petition) that subsequent evidence from customers suggesting that the products performed adequately was a matter of mere happenstance and, hence, "non-exculpatory." *Id.* at 593-94 & n.10.

Finally, this Court's decision in *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939), is wholly inapposite. (*See* SPA-8). The charges against Judge Manton—unlike the charges here—were not based on any affirmative misrepresentation (let alone a statement of opinion); indeed, he was not charged with mail fraud at all. Rather, he was charged with, and convicted of, "conspiracy to obstruct the administration of justice and to defraud the United States" by accepting money and loans from litigants in cases pending before him. 107 F.2d at 836-37. In affirming Manton's conviction, the Court rejected his argument that the jury should have been instructed that it could consider whether the decisions rendered in those cases were correct, based on the common-sense notion that "[j]udicial action, whether just or unjust, right or wrong, is not for sale." *Id.* at 845-46. But that holding has nothing to do with any of the issues in this case.

The District Court's theory is, moreover, flatly contradicted by cases considering—and rejecting—similar claims challenging an opinion as fraudulent

because the issuer modified it to take into account its own financial interests. For example, Judge Preska dismissed a claim for common law fraud against rating agencies, holding that "the fact that the Rating Agencies may have given higher—but not untruthful—ratings to retain business does not render the opinions of the Rating Agencies actionable." *In re Merrill Lynch Auction Rate Sec. Litig.*, No. 09 MD 2030 (LAP), 2011 WL 536437, at *12 (S.D.N.Y. Feb. 9, 2011), *aff'd sub nom. Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98 (2d Cir. 2012); *accord Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Accept. Corp.*, 632 F.3d 762, 775 & n.16 (1st Cir. 2011) (allegations that rating agencies "produced high ratings aimed at keeping business," including admissions by executives that they "intentionally inflated" ratings for that reason, were insufficient to state claim for fraud in the absence of allegations that defendants "believed that their companies' ratings were false or were unsupported by [rating] models").

Similarly, Judge Pollack dismissed a fraud claim alleging that stock analyst recommendations were skewed because the defendants had a financial "motive to garner investment banking fees" from the issuers, as such allegations were insufficient to show that the defendants "did not hold the opinion or had no reasonable basis for believing the opinion" reflected in the recommendations. *In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 372-73 (S.D.N.Y. 2003), *aff'd in part and rev'd in part on other grounds Lentell v. Merrill Lynch & Co.,* 396 F.3d 161

(2d Cir. 2005); *accord In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 49-50 (1st Cir. 2005) ("while the plaintiffs' allegations regarding the obvious conflicts of interest and general state of corruption within CSFB's analyst ranks may be enough to turn the stomach of an ethically sensitive observer, they are insufficient" to state a fraud claim because plaintiff failed to plead that defendants "did not believe th[e] particular opinion to be true when uttered"), *overruled on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

Courts considering whether financial projections are actionable as false or fraudulent statements have reached the same conclusion. *See, e.g.*, *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 516 (7th Cir. 1989) ("Any firm generates a range of estimates internally or through consultants. It may reveal the projection it thinks best while withholding others, so long as the one revealed has a 'reasonable basis'—a question on which other estimates may reflect without automatically depriving the published one of foundation."); *Freedman v. Value Health, Inc.*, 135 F. Supp. 2d 317, 333 (D. Conn. 2001) (finding that, where plaintiffs provided no evidence suggesting that company's publicly disclosed estimated loss on contract "was false or unreasonable," the fact that the initial internal projection showed a higher loss was insufficient to state claim), *aff'd*, 34 F. App'x 408 (2d Cir. 2002) ; *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1487 (N.D. Cal. 1992) ("The fact that defendants had contradictory projections available

to them cannot, by itself, support an inference that the disclosed projection was unreasonable at the time it was made."), *aff'd*, 11 F.3d 865 (9th Cir. 1993).

In effect, the District Court's theory attempts to use what the Court perceived as an improper or dishonest intent underlying Defendants' conduct in generating the LIBOR estimates as a substitute for the core element of a wire fraud prosecution: a knowingly false statement.[15] But bad intent, even fraudulent intent, does not establish the crime of fraud. As this Court has squarely held: "Of course, freestanding, 'bad faith' or intent to defraud" untethered to what "the Government need[s] to show" in an affirmative misrepresentation case—*i.e.*, a knowingly false statement—"is not actionable under the federal fraud statutes." *Countrywide*, 822 F.3d at 663; *see also Restatement of Contracts* §§ 471, 474 (1932) (expression of opinion that does not involve intentional misrepresentation is not fraud even though made with the intent to induce another to enter into a transaction).

Indeed, nearly a century ago, the Supreme Court rejected the proposition that every scheme that is "calculated to injure another or to deprive him of his property wrongfully" falls within the scope of the mail fraud statute. *Fasulo v. United States*, 272 U.S. 620, 628-29 (1926). For a scheme to fall within

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[15] *See also United States v. Allen*, 160 F. Supp. 3d 698, 701-02 (S.D.N.Y. 2016) (similarly holding that, "[i]n the Court's view, the relevant issue was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which these submissions were made").

the mail or wire fraud statutes, "the victim's money must be taken from him by deceit," *id.* at 628, which in this case required a misrepresentation. Here, even assuming, *arguendo*, that the proof at trial showed that Defendants' intent to benefit Deutsche Bank's trading positions resulted in a LIBOR estimate *different* from the estimate that would have otherwise been provided, it nonetheless did not show that this intent resulted in a *false* estimate—*i.e.*, one that was, and was perceived by Defendants to be, outside the range of reasonable estimates of the rates at which Deutsche Bank could, in fact, borrow. The Government therefore failed to establish a violation of the wire fraud statute, and the District Court's conclusion to the contrary should be reversed.

III.

THE DISTRICT COURT'S THEORY THREATENS TO CRIMINALIZE LEGITIMATE BUSINESS CONDUCT AND OFFENDS DUE PROCESS

If upheld, the District Court's novel interpretation of the wire fraud statute would have far-reaching and detrimental consequences beyond the factual circumstances of this case. Under the District Court's theory, a statement of opinion or estimate may constitute a criminally fraudulent act if it was influenced by the speaker's financial self-interest or that of his or her employer.

Business executives are called upon to issue estimates and state opinions to third parties on a regular basis and in a wide variety of contexts. For example, companies routinely issue financial projections to stockholders, lenders,

potential acquirers, and others. Typically management receives a range of projections reflecting different underlying assumptions, some more optimistic than others. If management selects an optimistic set of projections, believing that the projections are reasonable, they should not be at risk of criminal prosecution simply because it could be said that, but for their intent to bolster their company's stock price or obtain a higher price from an acquiring firm, they would have otherwise selected less optimistic projections.

As another example, consider employees who must estimate the value of a company or of certain assets, in circumstances where their employer may stand to benefit from the value ascribed. If the employees determine a valuation that they believe is fair and reasonable, supported by the information available to them, they should not be subject to an accusation of criminal fraud simply because it could be said they would otherwise have selected a lower valuation that was also fair and reasonable.

The list could be broadened to include ordinary commercial actors outside of the financial markets: a real estate broker who reasonably opines that a larger and more expensive apartment is more suitable for a purchaser's needs (motivated in part by the prospect of a larger commission); a car salesman who pressures customers to buy one car instead of another citing his reasonably held belief that it will get better gas mileage (while also knowing that he will receive a

rebate from the manufacturer for selling that car); a physician who prescribes a battery of medical tests that she believes meet the test of medical necessity (but that also generate profits for her hospital or practice). In each instance, one can hypothesize the existence of internal company e-mails suggesting that, but for the speaker's financial interest, he or she might not have rendered the opinion in question; but that, again, should not be grounds for a charge of fraud if the opinion was honestly believed to be a reasonable one.

Contractual counterparties and other market participants who receive opinions may require representations that the opinion was prepared using a certain methodology, and where those representations are knowingly false, they may form the basis for a fraud claim. But the BBA did not, at the time, instruct panel banks to prepare their LIBOR submissions in any particular way or forbid input from derivatives traders or consideration of the bank's trading positions. It would be grossly unfair to hold Defendants criminally liable for failing to adhere to procedures that were not required by the BBA or Deutsche Bank's counterparties.

Criminal statutes must be written, and interpreted, "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (internal quotation marks omitted). "[N]o citizen should be held accountable for a violation of a statute

whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008). The District Court's interpretation of the wire fraud statute in this case is antithetical to those principles. "Under the 'standardless sweep' of the [District Court's] reading," ordinary employees making day-to-day decisions in their employers' interests "could be subject to prosecution, without fair notice, for the most prosaic interactions." *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

Beyond this, the District Court's expansive interpretation of the wire fraud statute runs afoul of one of the foundational principles underlying our system of federal criminal law—that "[b]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). As the Supreme Court emphasized just last week, the federal fraud statutes do not criminalize all "wrongful[]" conduct, nor may federal prosecutors use those laws to enact their own norms of "integrity." *Kelly*, 2020 WL 2200833, at *2, 7; *see also Regent Office Supply*, 421 F.2d at 1179 (reversing convictions where defendants' conduct, although "repugnant to 'standards of business morality,'" fell outside scope of mail fraud statute).

Even if one believes that the LIBOR submission process was flawed and ripe for reform due to the potential for self-interested behavior by panel banks, it does not follow that those individuals who offered truthful opinions about their bank's borrowing costs, and who made no false statement, should be subjected to criminal prosecution for pursuing the bank's self-interest in a way that some may find distasteful or even "intuitive[ly] . . . wrongful[]." (SPA-12). That is not fraud.

CONCLUSION

For the reasons stated above, the Court should reverse the judgments of conviction.

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