

United States District Court  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USA,  
  
Plaintiff,  
  
v.  
  
ROBERT BOGUCKI,  
  
Defendant.

Case No. [18-cr-00021-CRB-1](#)

**ORDER GRANTING  
DEFENDANT'S RULE 29 MOTION**

On Thursday, February 28, 2019, after the Government rested, Defendant Robert Bogucki orally moved for relief under Federal Rule of Criminal Procedure 29 as to all counts in the superseding indictment against him. Minute Order (Dkt. 213). The parties have filed subsequent written filings on this motion. U.S. Response to Def.’s Mot. for Judgment of Acquittal (Dkt. 214); Def. Response to U.S.’s Opp. to Rule 29 Mot. (Dkt. 216). For the reasons that follow, the Court GRANTS that Motion and enters a judgment of acquittal as to all counts.

**I. BACKGROUND**

Defendant is charged with one count of conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349, and six counts of wire fraud affecting a financial institution, in violation of 18 U.S.C. §§ 1343 and 2, and associated forfeiture allegations. Superseding Indictment (Dkt. 54).

The parties agree that the charges of wire fraud affecting a financial institution requires the Government to prove five elements. United States Proposed Jury Instructions at 16 (Dkt. 162); Defendant Proposed Jury Instructions at 39 (Dkt. 164); see 18 U.S.C.

1 § 1343; Ninth Circuit Model Jury Instruction 8.124. First, the defendant must have  
 2 knowingly participated in, devised, or intended to devise a scheme or plan to defraud, or a  
 3 scheme or plan for obtaining money or property by means of false or fraudulent pretenses,  
 4 representations, or promises or omitted facts; second, the statements made or facts omitted  
 5 as part of the scheme were material; third, the defendant acted with the intent to defraud,  
 6 that is, the intent to deceive or cheat; fourth, the defendant used, or caused to be used, an  
 7 interstate or foreign wire communication to carry out or attempt to carry out an essential  
 8 part of the scheme; fifth, the scheme affected a financial institution. See United States  
 9 Proposed Jury Instructions at 16; Defendant Proposed Jury Instructions at 39; see 18  
 10 U.S.C. § 1343; Ninth Circuit Model Jury Instruction 8.124.

11 The parties stipulated prior to trial that the alleged affected a financial institution.  
 12 Stipulation as to Scheme “Affecting” a Financial Institution (Dkt. 191). Nor is there any  
 13 dispute that the alleged scheme involved the use of an interstate wire communication.  
 14 Stipulation Regarding Interstate Wire Communications (Dkt. 174). The parties do dispute  
 15 the other elements of Defendant’s wire fraud and conspiracy to commit wire fraud charges.  
 16 Specifically, Defendant has argued that there is insufficient evidence to permit a  
 17 reasonable jury to find that the Government has met its burden on the first, second, or third  
 18 elements.

## 19 **II. LEGAL STANDARD**

20 To evaluate a motion under Federal Rule of Criminal Procedure 29, the Court “must  
 21 determine whether, viewing the evidence in the light most favorable to the government, the  
 22 jury could reasonably find the defendant guilty beyond a reasonable doubt.” United States  
 23 v. Merriweather, 777 F.2d 503, 507 (9th Cir. 1985) (quoting United States v. Hazeem, 679  
 24 F.2d 770, 772 (9th Cir.), cert. denied, 459 U.S. 848 (1982)); see also Fed. R. Crim. P. 29.

25 The Court is primarily concerned with Defendant’s argument that the Government  
 26 has not satisfied the second element of wire fraud, which requires the Government to prove  
 27 that the statements Defendant made to Hewlett-Packard (“HP”) were “material.” See Ninth  
 28 Circuit Model Jury Instruction 8.124; 18 U.S.C. § 1343.

1 Under United States v. Lindsey, 850 F.3d 1009 (9th Cir. 2017), a false statement  
 2 satisfies the materiality element of wire fraud “if it has ‘a natural tendency to influence, or  
 3 [is] capable of influencing, the decision of the decisionmaking body to which it was  
 4 addressed.” Id. at 1013; see also Neder v. United States, 527 U.S. 1, 16 (1999). It need not  
 5 actually have influenced a decisionmaker. Id. Whether or not a statement is so capable is  
 6 evaluated objectively. Id. In addition, materiality must be assessed in the context in which  
 7 the communications occurred; in consequence, industry practices, agreements between the  
 8 parties, and other information known to the parties at the time of the allegedly false  
 9 statements are relevant to assessing those statements’ materiality. See United States v.  
 10 Green, 698 F. App’x 879, 880 (9th Cir. 2017).

### 11 **III. DISCUSSION**

12 Here, there are two pieces of evidence that are crucial to understand the context in  
 13 which the allegedly materially false statements that Defendant provided to HP occurred: an  
 14 International Swaps Dealers Association agreement between HP and Barclays, also known  
 15 as an “ISDA,” Trial Transcript at 481:6-8, and the generally-understood industry practice  
 16 of “pre-positioning.”

17 The ISDA between HP and Barclays expressly stated that both HP and Barclays  
 18 entered into “each Transaction as principal (and not as agent or in another capacity,  
 19 fiduciary or otherwise).” Trial Exh. 149 at 28. It further stated that:

20 This agreement and each transaction have been entered into by  
 21 each party in reliance only upon its judgment in order to  
 22 accomplish legitimate business needs. Neither party holds itself  
 23 out as advising, or any of its employees or agents as having any  
 24 authority to advise, the other party as to whether or not it should  
 25 enter into this agreement or any transaction. Neither party is  
 receiving any compensation from the other party for providing  
 advice in respect of this agreement or any transaction, and any  
 such advice provided to such other party will not form the  
 primary basis for the investment decision of such other party.

26 Id.; Trial Transcript at 483:10-23. Put simply, the ISDA establishes that the backdrop of  
 27 the unwind was that HP and Barclays were engaged as principals at opposite sides of an  
 28 arms-length transaction.

1 In his testimony, Zac Nesper, an HP employee who during the relevant period was  
2 the manager of HP's foreign exchange team and was the primary point of contact between  
3 HP and Barclays, Trial Transcript at 238:19-23, reinforced this understanding. He agreed  
4 that the ISDA was the "master agreement" governing transactions between HP and  
5 Barclays. *Id.*; Trial Exh. 149; Trial Transcript at 481:9-13. Nesper also stated that he was  
6 aware that the ISDA governed HP's relationship with Barclays in 2011 when the events at  
7 issue in this trial occurred. Trial Transcript at 522:21-523:5. Most relevantly, he confirmed  
8 that the ISDA "accurately describe[d] [his] own thinking about [his] relationship with  
9 Barclays when it came to the unwind," stating that he "was making [his] own decision  
10 about what was best for HP." Trial Transcript at 483:24-484:4. Indeed, Nesper  
11 acknowledged that he "bluffed" or was "BS-ing" Barclays during the parties'  
12 interactions—that is, he was not entirely truthful with Barclays—about the prices Nesper  
13 was seeing from other banks. Trial Transcript at 452:2-455:16, 455:17-457:20. He also  
14 indicated that he understood some of what Barclays told him to be "posturing," rather than  
15 entirely honest. Trial Transcript at 375:1-3; 451:11.

16 The ISDA, HP's corresponding understanding of the relationship between HP and  
17 Barclays and HP's own dishonesty are not the only background conditions in place at the  
18 time that are necessary to understand whether Defendant's allegedly false statements were  
19 capable of influencing an entity in HP's position to part with money or property. As the  
20 Ninth Circuit has instructed, the "standards generally applied in the lending industry at the  
21 time" are relevant to the materiality inquiry. *Green*, 698 F. App'x at 880.

22 Here, the Government's expert testified that banks like Barclays engage in "pre-  
23 positioning," also known as "hedging," wherein the bank changes its position prior to  
24 taking on an asset. Trial Transcript at 181:11-14. Such "pre-positioning" could  
25 "[p]otentially" mean that "the bank would act in advance of a transaction," that is, "place  
26 trades in advance of that transaction." Trial Transcript at 181:15-20. Indeed, Barclays'  
27 compliance manual expressly distinguishes between impermissible "frontrunning" and  
28 permissible "bona fide hedges." Trial Exh. 195 at 8. That compliance goes on to state that  
"[p]ositions may be established that are bona fide hedges (opposite side of the market) of  
either proprietary positions or the risk that is assumed or agree to be assumed in facilitating

1 the execution of a related transaction.” Id. at 8. The parties agree that there are no rules or  
 2 regulations, beyond banks’ internal policies and any agreement that may be formed  
 3 between two particular parties, that regulate pre-positioning, pre-hedging, or front-running  
 4 of the type at issue here. Trial Transcript at 1020:19-23. So, evening assuming that FX  
 5 options trading falls within the gambit of conduct prohibited by the rule against  
 6 frontrunning—and the Government has offered no evidence for its intent-based reading of  
 7 “bona fide,” see U.S. Response to Defendant’s Motion for a Judgment of Acquittal (Dkt.  
 8 214) at 7 n.3—there are undisputedly some types of pre-positioning that are permitted.<sup>1</sup>

9 All of this matters because someone in Nesper’s position would evaluate the  
 10 statements Bogucki made to him against this backdrop. And so the statements the  
 11 Government argues satisfy the materiality element must also be evaluated in this context.  
 12 The Court must thus determine whether, taking the facts in the light most favorable to the  
 13 Government, a reasonable jury could conclude beyond a reasonable doubt that the  
 14 statements the Government alleges were false or misleading would have been objectively  
 15 capable of influencing someone in Nesper’s position to part with money or property.

16 The Government has presented two alternative theories of guilt. It contends that  
 17 Defendant committed wire fraud by either misappropriating confidential information, in  
 18 violation of a duty of trust and confidence, or that he deprived HP of its property through  
 19 material misrepresentations and half-truths. See, e.g., U.S. Proposed Jury Instructions at  
 20 41. The crux of the Government’s first theory is that Barclays received confidential  
 21 information about HP’s plan to unwind its options that was not revealed to other banks,  
 22 and the sharing of that information created a duty of trust and confidence.

23 The Court is unpersuaded that a reasonable jury could find that Defendant had a  
 24 duty of trust and confidence from the evidence the Government has provided. There is  
 25 nothing in the record to suggest that the mere fact that HP shared information with  
 26 Barclays was sufficient to create such a duty of trust and confidence. And the cases that the

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27 <sup>1</sup> The Government’s expert’s, William Martin, did not testify to the contrary. He specifically  
 28 testified that he was unfamiliar with the Barclays’ code of conduct, which, as discussed, did  
 permit some forms of pre-hedging. See Trial Transcript at 859:1-13. There is thus no dispute that  
 Defendant was, at the time, permitted to engage in at least some pre-positioning or pre-hedging.

1 Government relied on in the Rule 29 hearing for that position in fact proves the opposite.

2 In United States v. Johnson, Judge Garaufis permitted a case involving wire fraud  
3 allegations arising from an FX transaction to go to a jury on a misappropriation theory.  
4 2017 WL 5125770, at \*3-\*4 (E.D.N.Y. Sept. 21, 2017). That decision, crucially, turned on  
5 the fact that the parties to the FX transaction at issue had entered into a variety of written  
6 agreements, including a non-disclosure agreement and a request for proposal. Id. at \*1. So  
7 too with the cases that the Government relies on in its most recent filing. In Carpenter v.  
8 United States, 484 U.S. 19 (1987), the defendant violated an official newspaper policy and  
9 practice, id. at 2; see U.S. Response to Defendant’s Motion for a Judgment of Acquittal at  
10 18, and in United States v. Hedaithy, 392 F.3d 580 (3d Cir. 2004), the test-takers were  
11 required to sign a confidentiality statement, which they then violated, id. at 595.

12 There are no analogous documents here. In fact, the only written agreement  
13 governing this deal was the ISDA, which expressly stated that each party acted as a  
14 “principal (and not as agent or in another capacity, fiduciary or otherwise).” Trial Exh. 149  
15 at 28. In other words, the terms of the contract here are precisely the opposite of the  
16 contracts that applied in Johnson and Hediathy. Moreover, in contrast to the cases on  
17 which the Government relies, Nesper testified that he understood part of what Bogucki told  
18 him to be “posturing,” that is, not truthful. Trial Transcript at 458:17-459:11. The only  
19 possible understanding of that statement is that Nesper, and by extension HP, did not  
20 expect Barclays to be entirely forthright and honest. The evidence presented in this case  
21 has shown that, far from a fiduciary-like relationship, HP and Barclays operated as arms-  
22 length principals engaged in interactions for their own mutual benefit. Thus, no reasonable  
23 jury could conclude that Barclays, or Defendant, had acquired a duty of trust or confidence  
24 with HP.

25 As to the Government’s second theory, that Defendant obtained HP’s money or  
26 property via material misrepresentations and half-truths, the Government argues that the  
27 evidence shows that several statements Bogucki provided to Nesper “were lies” and that  
28 those lies were material. Trial Transcript at 1015:8-11. At the Rule 29 hearing and in its  
briefing on the issue, the Government pointed to five pieces of evidence of discussions  
between Bogucki and HP that, it argues, satisfy the element of materiality on this theory of

1 guilt.

2 The first is a chat transcript between Defendant and Nesper on the day after HP sold  
3 Barclays the first tranche, September 29, 2011. Trial Transcript at 1015:13; Trial Exh. 125.  
4 In that chat, Nesper observed that the volatility was “down pretty big this morning” which  
5 he “assum[ed] was [Barclays].” Trial Exh. 125 at 1. In the ensuing conversation, Bogucki  
6 told Nesper that “[w]e are still long a little bit of vega.” *Id.* The Government further points  
7 to a phone call Bogucki participated in with another Barclays employee, Gugesh  
8 Gugeswaran, at the same time as the chat between Nesper and Bogucki. In that phone  
9 call, Gugeswaran told Bogucki that Barclays was, at that point, in fact “short.” Trial  
10 Transcript at 568:9-15; Trial Exh. 124 at 2.

11 The parties dispute whether Gugeswaran was referring in his statement to  
12 Barclays’ overall book or only to only to cable, see Trial Transcript at 1015:3-15, but even  
13 assuming favorably to the Government that both Gugeswaran and Defendant were  
14 referring specifically to cable in their statements—thus making Bogucki’s statement to  
15 Nesper at odds with Gugeswaran’s statement to Bogucki—Bogucki’s statement to  
16 Nesper did not objectively have the capability of influencing Nesper, and by extension HP.  
17 The Government has offered no evidence, and indeed no explanation, of why someone in  
18 Nesper’s position, who was himself engaged in “bluffing” and “BS-ing” Barclays, would  
19 have had reason to believe that Bogucki was, unlike Nesper himself, being truthful about  
20 Barclays’ position in the context of their arms-length negotiations. And so there is no  
21 evidence to support the Government’s theory that this statement was capable of  
22 influencing HP. As a result, this statement is insufficient to permit a reasonable jury to  
23 conclude beyond a reasonable doubt that Bogucki’s statement that Barclays was “short”—  
24 even if false—would have been objectively material to a person in Nesper’s position in  
25 persuading him to part with his money or property. That is, Nesper’s own dishonesty and  
26 understanding that Barclays was at times “posturing,” coupled with the lack of any  
27 evidence that Nesper or HP had reason to believe that Bogucki or Barclays were not  
28 engaging in their own, corollary, dishonesty, would prevent any reasonable jury from  
concluding that the statement that Barclays was “long” was material for the purposes of a  
criminal wire fraud prosecution.

1 Second, the Government points to a phone call between Bogucki, Nesper, and  
2 several others, prior to the unwind of the first tranche. In that phone call, Bogucki told  
3 Nesper that his “guys are not touching the market. They’re not doing anything.” Trial Exh.  
4 115 at 23; Trial Transcript at 1025:10-13. But the Government’s own expert testified that  
5 Bogucki’s statement that they were “not touching the market” should not be interpreted to  
6 mean that Barclays was not engaging in any trading, because Barclays was a market  
7 maker, meaning that Barclays’ “business is to make markets; and when customers come in,  
8 they want—part of their job is to offer offers, places where customers can buy, and offer  
9 bids or places where customers can come and sell cable options.” Trial Transcript at  
10 868:25-869:6. That is, Barclays’ business model required it to touch the market, a fact of  
11 which Nesper was well aware. And, as with the first piece of evidence the Government  
12 points to, Nesper admitted that he was “generally bluffing” about prices he was receiving  
13 from other banks—information that was central to his negotiations with Barclays, in this  
14 specific conversation. Trial Transcript at 451:5, 451:24-452:20. Strikingly, Nesper  
15 recounted that he viewed other statements that Bogucki made in that very conversation as  
16 “posturing,” Trial Transcript at 459:11, indicating that he did not take Bogucki’s  
17 statements to be truthful or completely honest. Given Nesper’s lack of honesty with  
18 Barclays, the evidence that Nesper believed that Barclays was likewise not being fully  
19 honest in its negotiations, and the lack of any evidence that Nesper would have had reason  
20 to believe that Barclays was not engaging in the market making which was part of its  
21 business, no reasonable jury could conclude that the statements contained in exhibit 115  
22 were objectively capable of influencing HP or Nesper.

23 Third, the Government points to the transcript of a phone call on September 30  
24 between Bogucki, Nesper, and another Barclays employee. Trial Exh. 139; Trial Transcript  
25 at 1025:14-18. The Government characterizes this exhibit as Bogucki telling Nesper that if  
26 HP determined that it did not want to unwind the second tranche with Barclays, none of  
27 Barclays’ traders would “go near the market.” Trial Transcript at 1025:14-18. But even on  
28 the Government’s interpretation of that exhibit, the alleged misrepresentation is only a  
conditional: Barclays was telling HP that if HP went elsewhere, then Barclays would take,  
or not take, certain action. But HP did not go elsewhere. It unwound the second tranche



1 with Barclays. And the Government has offered no evidence or caselaw to support the  
2 argument that a conditional statement about a series of events that did not come to pass  
3 could permit a reasonable jury to conclude that, as a matter of criminal law, that  
4 conditional statement was materially false. A hypothetical is a thin reed indeed on which to  
5 hang criminal charges.

6 Fourth, the Government points a PowerPoint presentation that the Government  
7 claims Barclays showed to HP prior to either tranche of the unwind. Trial Transcript at  
8 1025:19-24; Trial Exh. 112-B; see also Trial Exh. 112-A; Trial Transcript at 143:1-144:13.  
9 The first slide of that presentation contained a bullet point that stated that “[t]he benefit of  
10 confidentiality should, in [HP’s] opinion, outweigh the effect of including multiple dealers.  
11 At a minimum, this confidentiality will be critical when executing the implied volatility  
12 component of the options.” Trial Exh. 112-B at 1. This is an even shakier foundation for  
13 the Government’s case. Not only is it unclear how that statement is false—after all, it  
14 merely offers Barclays’ “opinion” and does not on its face make any promise or  
15 representation—to the extent that the Government is arguing that it was not only false but  
16 materially so, it is itself cabined by a statement on a later page in that presentation that  
17 Barclays is “not [HP’s] advisor or fiduciary with respect to FX hedges contemplated.”  
18 Trial Exh. 112-B at 11. It also warned HP that in any resulting FX transaction, Barclays  
19 “would act as a principal.” Trial Exh. 112-B at 11. Put simply, giving this evidence the  
20 view most favorable to the Government, the presentation simply opines that confidentiality  
21 is important and then cautions that Barclays would continue to pursue its own interest. No  
22 reasonable jury could conclude that an isolated statement in a PowerPoint presentation,  
23 particularly when cabined by the disclaimer here, is objectively capable of materially  
24 misleading someone to part with money or property.

25 Fifth and finally, the Government points to a presentation sent to Barclays on  
26 September 6. U.S. Response to Defendant’s Motion for a Judgment of Acquittal at 10-11;  
27 Trial Exh. 173-B; Trial Transcript at 137:21-144:14. In that presentation, Barclays  
28 recommended that HP unwind its options in three to four tranches and execute a “quiet  
execution.” Trial Exh. 173-B. The Government argues that this advice could reasonably  
have led HP to infer that Defendant was promising not to drive down the market. U.S.

1 Response to Defendant’s Motion for a Judgment of Acquittal at 10. But, that presentation  
2 also warned HP that it should “[p]rovide knowledge of the unwind to banks on a need-to-  
3 know basis and only the banks, such as Barclays, that are capable of being aggressive in  
4 size.” Trial Exh. 173-B; Trial Transcript at 142:5-7. In other words, Barclays was warning  
5 HP that it was capable of doing the very thing that the Government alleges it did here:  
6 being “aggressive.” And the presentation expressly alerted HP to that possibility and  
7 cautioned HP against sharing information unnecessarily. Nor does the presentation exclude  
8 Barclays from that warning—it warns HP about “banks”—not “other banks.” Trial Exh.  
9 173-B. No reasonable jury could find that such a warning could have materially misled  
10 HP.

11 So where does that leave the Court? None of the five pieces of evidence the  
12 Government has produced in its case in chief can sustain a finding that a reasonable jury  
13 could conclude beyond a reasonable doubt that Defendant made false statements or  
14 material omissions that were capable of influencing a person in Nesper or HP’s position to  
15 part with money or property. None of these facts, thus, can satisfy the materiality  
16 requirement for the charges of wire fraud and conspiracy to commit wire fraud.

17 Nor does any of the other evidence on which the Government bases its case satisfy  
18 the materiality requirement of wire fraud. The Government has introduced evidence of  
19 phone calls between Defendant and Nesper on the morning of September 28, exhibit 119,  
20 and October 3, exhibit 140, and a chat between Bogucki and Nesper on October 4, Trial  
21 Exh. 145, which, the Government argues, contained material half-truths because Defendant  
22 attributed the drop in volatility to the external forces rather than to any action by Barclays.  
23 The Government further argues that these exhibits contained misleading statements about  
24 what actions Barclays was taking in the market between the first and second tranche. Trial  
25 Exh. 119; Trial Transcript at 72:17-274:11; see also Trial Exh. 140; Trial Exh. 145. But  
26 any half-truths in these statements were not material. Again, Nesper expected Barclays to  
27 be engaged in some trading, and took no actions to expressly limit what trading Barclays  
28 could take. Indeed, Nesper never even asked Barclays what its position was or attempted to  
impose any limits on how Barclays could position itself during this period. See Trial  
Transcript at 508:10-509:21. Nor was there any expectation of full disclosure between the

1 parties, as evidenced by Nesper’s own lies to Barclays, his disbelief as to portions of what  
 2 Barclays was telling him, and the terms of the ISDA that governed this transaction. Indeed,  
 3 all of the chat transcripts between Bogucki and Nesper on which the Government relies  
 4 contained a form disclaimer that Barclays was “a market participant acting in several  
 5 capacities which may adversely affect any product’s performance.” See Trial Exh. 145 at  
 6 1; Trial Exh. 125 at 1. No reasonable jury could conclude beyond a reasonable doubt that,  
 7 in this context, these half-truths could, objectively, have induced a person in Nesper’s or  
 8 HP’s position to part with money or property.

9 Undeterred, the Government also contends that even if no individual piece of  
 10 evidence meets the materiality standard, “[t]hat entire course of dealing and all of those  
 11 communications can be fairly read by a jury to be a suggestion and representation by Mr.  
 12 Bogucki to Mr. Nesper that ‘We are not going to trade on this information in a way that is  
 13 going to disadvantage you.’” Trial Transcript at 1027:6-10. But the Government’s holistic  
 14 analysis fails for precisely the same reason its piecemeal analysis does. Viewing the  
 15 evidence in the light most favorable to the Government, there is simply no evidence in the  
 16 record that, in the context of an arms-length transaction in which the parties bluffed and  
 17 “BS-[ed]” each other, operated as principals, looked out for their own interests, and  
 18 understood the other party to be “posturing,” rather than providing strictly true  
 19 information, someone in HP’s position could, objectively, be induced by the statements in  
 20 this case to part with money or property.

21 Nor does Nesper’s subjective belief alter this conclusion. Trial Transcript at 335:15-  
 22 24. As the Government has repeatedly pointed out to the Court, under Lindsey, the  
 23 standard for materiality is objective.<sup>2</sup> Whether Nesper or HP were gullible, guileless,  
 24 naïve, or actually took Defendant to be representing that Barclays would not take action  
 25 that undermined the value of HP’s options, in light of the relationship of the parties, the  
 26 agreement governing their interactions, industry practice, HP’s own dishonesty, and

27 <sup>2</sup> Even if Nesper’s subjective intent were central to the materiality inquiry—which under Neder, it  
 28 is not, see 527 U.S. at 16—Nesper did not testify that the allegedly false statements were material.  
 Rather, he testified that if he had learned that Barclays was short when he believed it to be long, he  
 “didn’t even know what [he] would have done,” and that it was “hard to speculate” on whether he  
 would have behaved differently. Trial Transcript 282:1-14.

1 Nesper's expectations as to Barclays' dishonesty, no reasonable jury could conclude  
 2 beyond a reasonable doubt that it was objectively reasonable for HP to be influenced by  
 3 the statements the Government has identified.

4 The Government argues that whether or not Nesper was bluffing is irrelevant to  
 5 whether the contested statements were material. It points to a case in which the victims of  
 6 a fraud were themselves attempting to defraud the defendant, and the Court nevertheless  
 7 affirmed the defendant's convictions for wire and mail fraud. U.S. Response to  
 8 Defendant's Motion for a Judgment of Acquittal at 20; United States v. Brugnara, 2015  
 9 WL 5915567, at \*12 (N.D. Cal. Oct. 9, 2015), aff'd, 856 F.3d 1198 (9th Cir. 2017). But  
 10 the import of Nesper's own dishonesty and expectations regarding Barclays' honesty is not  
 11 that it shows HP to have been attempting to defraud Barclays—and to be perfectly clear,  
 12 the Court does not hold the view that HP was attempting to defraud Barclays—but rather  
 13 that it shows what expectations the parties had for one another, and thus whether even false  
 14 statements had the capability of influencing HP's decision-making. And for the reasons  
 15 this Court has already described, nothing in the evidence suggests that HP was capable of  
 16 being influenced to part with money or property by any the statements the Government has  
 17 identified.

18 A touchstone of our criminal law is that no person “shall be held criminally  
 19 responsible for conduct which he could not reasonably [have] understand to be  
 20 proscribed.” United States v. Lanier, 520 U.S. 259, 265 (1997). Here, the Government has  
 21 pursued a criminal prosecution on the basis of conduct that violated no clear rule or  
 22 regulation, was not prohibited by the agreements between the parties, and indeed was  
 23 consistent with the parties' understanding of the arms-length relationship in which they  
 24 operated. The Court cannot permit this case to go to the jury on such a basis.

#### 25 **IV. CONCLUSION**

26 For the foregoing reasons, The Court therefore concludes that, pursuant to Federal  
 27 Rule of Criminal Procedure 29, no jury could reasonably find that Defendant Robert  
 28 Bogucki made material false or fraudulent pretenses, representations, or promises. As a

1 result, the Court GRANTS the Defendant's Rule 29 Motion as to all counts in the  
2 superseding indictment and enters a judgment of acquittal as to all counts.

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4 **IT IS SO ORDERED.**

5 Dated: March 4, 2019



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6 CHARLES R. BREYER  
7 United States District Judge

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United States District Court  
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