16-898(L)

16-939(CON)

IN THE

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

PAUL ROBSON, PAUL THOMPSON, TETSUYA MOTOMURA,
TAKAYUKI YAGAMI, LEE STEWART,

Defendants,

ANTHONY ALLEN, ANTHONY CONTI,

Defendants-Appellants.

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

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

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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 250 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 Anthony Allen and Anthony Conti ("Defendants"), urging reversal.[2] NYCDL has a particular interest in this case because NYCDL's core concerns include combatting the unwarranted extension of federal criminal statutes and promoting clear standards for the imposition of criminal liability. As shown below, the

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[1] Pursuant to Rule 29.1 of this Court's Local Rules, NYCDL certifies that (1) this brief was authored entirely by counsel for NYCDL, 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 Rule 29(a) of the Federal Rules of Appellate Procedure.

unprecedented expansion of the wire fraud statute urged by the Government and approved by the District Court in this case raises precisely these concerns.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government's legal theory in this case was extraordinary. The Government charged that Defendants committed wire fraud by making false and fraudulent representations: namely, LIBOR submissions to the British Bankers' Association ("BBA") estimating the interest rates at which their employer, Rabobank, could borrow in the interbank market. Yet the Government presented no evidence at trial that Defendants' LIBOR interest rate estimates were false, and instead took the position that it *did not matter* whether those estimates were accurate or whether the Defendants believed them to be accurate. The Government's novel theory found an enthusiastic champion in the District Court, which crafted jury instructions that effectively relieved the prosecution of its burden of proving falsity. As the District Court explained in denying Defendants' Rule 29 motions: "In 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." (SPA39; emphasis added.)[3]

Alarm bells should go off when the "accuracy or inaccuracy" of the defendant's representations in a fraud case – the very basis for the charge of fraud

[3] The District Court's decision is reported as *United States v. Allen*, __ F. Supp. 3d __, 2016 WL 615705 (S.D.N.Y. Feb. 16, 2016).

– is pronounced "[ir]relevant." As the District Court's remarkable assertion reveals, this was a fraud prosecution that lost sight of some of the most basic principles of criminal fraud liability. Instead of proving actionable misrepresentations, the Government sought, and the District Court allowed, conviction to be based solely on the "intent" with which Defendants allegedly made their LIBOR submissions. This holding improperly dispensed with an essential element of fraud liability – indeed, with the *actus reus* of the crime of fraud, which consists of the making of a false statement. Otherwise truthful representations cannot be transformed into fraudulent ones by the defendant's purportedly improper "intent."

The District Court reasoned that Defendants' convictions could be upheld on the ground that Defendants "effectively represented" that they acted "in good faith" in submitting LIBOR estimates. (SPA41.) But that rationale rests on the same untenable proposition that Defendants' *intent* can substitute for proof of an actual *misrepresentation*. And it is particularly problematic in light of the District Court's flawed assertion that a lack of "good faith" could consist merely of Defendants' seeking to promote the financial interests of their employer in transactions with parties to whom no fiduciary duty was owed.

The unprecedented theory of wire fraud asserted by the Government and accepted by the District Court would, if endorsed by this Court, have serious

adverse repercussions. It would expose business executives and employees to potential prosecution and imprisonment for issuing opinions and making estimates that are reasonable, accurate and honestly believed, simply because the opinion or estimate was influenced, in part, by their employer's financial interest. That is not, and should not be, the law. If it were, it 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.

This Court has not hesitated to repudiate similar misguided efforts to enlarge liability under the mail and wire fraud statutes. *See United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, __ F.3d __, 2016 WL 2956743 (2d Cir. May 23, 2016). As the Court has properly recognized, the long-established limits on these statutes must be enforced, and cannot be relaxed, accordion-like, to accommodate popular yearning for punishment of those perceived to have engaged in ethically questionable practices leading up to the financial crisis. This case calls upon the Court to vindicate once again this vital principle.

ARGUMENT

DEFENDANTS' WIRE FRAUD CONVICTIONS REST ON A NOVEL AND INSUPPORTABLE LEGAL THEORY THAT CONFLICTS WITH BEDROCK PRINCIPLES OF CRIMINAL FRAUD LIABILITY

A. The Theory of Prosecution Improperly Dispensed With the Fundamental Requirement of Proof of a Misrepresentation

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 misrepresentation, *i.e.*, a representation that is false or misleading. *See Countrywide Home Loans*, 2016 WL 2956743, at *10 ("on the affirmative misrepresentation theory charged to the jury, the Government needed to show false or misleading statements made with fraudulent intent"); *United States v. Rybicki*, 354 F.3d 124, 146 (2d Cir. 2003) (a "fundamental principle[] of the law of fraud" is that "[a] material misrepresentation is an element of the crime") (emphasis omitted); *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000) (fraud statutes are violated "by affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose"); *see also Neder v. United States*, 527 U.S. 1, 22 (1999) ("well-settled meaning" of fraud "require[s] a

misrepresentation or concealment of material fact"). Without proof of a misrepresentation, there was no basis for a fraud conviction in this case.[4]

In this case, the representations in question were Rabobank's LIBOR submissions. The sole statement made in those submissions was Rabobank's answer to the question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11am?" (SPA39.) It was undisputed at trial that the rates provided were estimates or opinions of Rabobank; they were not statements of historical fact reflecting the rates at which Rabobank had borrowed funds or received offers to borrow funds. (*See* Dkt. 196 at 3-4.)

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 Rabobank 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 Rabobank

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[4] In certain circumstances, as indicated above, 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. Accordingly, the District Court struck language about "misleading omissions" from the proposed jury charge defining a scheme to defraud. (JA324, 326.) As the District Court noted in its Rule 29 ruling, "the Government did not ultimately proceed on a theory that defendants had *omitted* certain factors from the representations they made." (SPA41 n. 2; emphasis in original.)

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.

To be actionable as fraud, a statement of opinion must be false in two senses – it must both lack a reasonable basis and be subjectively disbelieved by the speaker. This has long been the law, and is as true in the context of a mail or wire fraud prosecution as in any other. *See, e.g., Autuori*, 212 F.3d at 118-19 (affirming mail/wire fraud conviction based on financial projections where evidence showed that company would be unable to meet projections and that defendant's statements did not reflect his honest view); *United States v. Morris*, 80 F.3d 1151, 1164-65 (7th Cir. 1996) (to prove mail or wire fraud based on a statement of opinion, government must show that defendant "did not truly believe in" the opinion and that opinion "was not supported by the available facts"); *Restatement of Contracts* § 474 (1932) (statement of opinion is not fraud unless made by "one whose manifestation is an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion").

The Government's theory of fraud in this case departed from these fundamental precepts. The Government did not contend, or attempt to prove, that

Defendants' LIBOR submissions were not accurate or fair estimates of the rate at which Rabobank could, in fact, borrow in the interbank market. To the contrary, the Government's position was that whether Rabobank's LIBOR submissions were within the range of reasonable estimates was irrelevant. (JA339 (arguing to jury that Defendants committed fraud "[r]egardless of whether the submission was inside or outside some so-called range" of reasonable rates).) And as noted above, the District Court endorsed this theory, holding that "the relevant issue was not the accuracy or inaccuracy of defendants' LIBOR submissions." (SPA39.)

In so doing, the Government and the District Court allowed Defendants to be convicted of wire fraud without proof of the most basic element of fraud: a misrepresentation. *Neither* of the two facts required to establish the falsity of a statement of opinion was proven at trial. First, the Government did not prove that the LIBOR submissions were objectively false, in the sense of being unreasonable estimates of the rates at which Rabobank could borrow. To the contrary, the proof showed that the rates submitted were reasonable estimates of Rabobank's borrowing costs supported by information available in the market. (JA215, 267-69, 286-88, 450, 457.)

Second, the proof likewise failed to establish that Defendants did not honestly believe that the rates they submitted were reasonable estimates of Rabobank's borrowing costs. The District Court erroneously relieved the

Government of its burden in this regard by instructing the jury that it could convict if it found that the LIBOR rate estimates "were not at the levels the defendants would have honestly submitted *otherwise*." (JA340; emphasis added.) The relevant question, however, was not whether Defendants believed that one rate within the range of reasonable rates was "more" reasonable or likely than another. So long as Defendants honestly believed that the rate submitted was a reasonable estimate of the rate at which Rabobank could borrow in the interbank market – and there was no proof that Defendants did not believe this – then their opinions were subjectively as well as objectively true.

Contrary to the District Court's view, the "accuracy or inaccuracy" of the alleged misrepresentation in a wire fraud case is *always* relevant. Indeed, proof beyond a reasonable doubt of the inaccuracy of the representation is an indispensable element of the prosecution's case. Lacking such proof, the Government's wire fraud charges here were invalid.

B. Otherwise Truthful Representations Cannot Be Transformed Into An Actionable Misrepresentation By Proof of Self-Interested Intent

In lieu of the customary proof required for a false statement of opinion, the District Court instructed the jury that it could find Defendants guilty of wire fraud if it agreed with the Government

> that the defendants participated in a scheme to manipulate and attempt to manipulate LIBOR interest rates to their advantage by submitting or causing to be submitted on behalf of Rabobank LIBOR rate

> estimates that were not at the levels the defendants would have honestly submitted otherwise *but were instead at levels reflecting, at least in part, an intent to benefit Rabobank's trading positions and thereby obtain profits that Rabobank might not otherwise realize*.

(JA340; emphasis added.) In its Rule 29 decision, the District Court reiterated its view that the jury could permissibly find that in making LIBOR submissions, the defendants "effectively represented that they were responding in good faith to the BBA's query," and that "this representation was false or fraudulent because defendants' submissions reflected, in material part, an intent to benefit Rabobank's trading positions." (SPA41.)

Thus, the District Court ruled that Defendants' otherwise truthful LIBOR estimates could be rendered "false or fraudulent" because Defendants acted with the intent to benefit the interests of their employer. Such a theory of fraud is, so far as we are aware, unprecedented. It is also plainly wrong, and flatly contradicted by the decisions of this Court and the Supreme Court.

Bad intent, even fraudulent intent, is insufficient to establish the crime of fraud. This Court reaffirmed that bedrock principle in its decision two months ago (issued after the trial and Rule 29 ruling in this case) in *United States ex rel. O'Donnell v. Countrywide Home Loans*, *supra*. In *Countrywide*, the Government alleged that the defendants violated the mail and wire fraud statutes by selling subprime mortgage loans in 2007 and 2008 to government-sponsored enterprises ("GSEs"), knowing that the loans were not investment quality and thus intending

to defraud the GSEs. 2016 WL 2956743, at *2. On appeal, this Court overturned the jury verdict in the Government's favor, holding that the Government had proven only that the defendants breached representations made in the relevant contracts with the GSEs, not that they had fraudulently intended to breach those representations at the time of contract execution. *Id.* at *12.

The Government in *Countrywide* argued that its proof was sufficient because it showed that the defendants acted with fraudulent intent when they subsequently transferred the poor-quality loans to the GSEs. This Court emphatically rejected that argument: "Of course, freestanding 'bad faith' or intent to defraud without accompanying conduct is not actionable under the federal fraud statutes; instead, the statutes apply to 'everything designed to defraud by *representations* as to the past or present, or *suggestions and promises* as to the future.'" *Id.* at *10 (quoting *Durland v. United States*, 161 U.S. 306, 313 (1896)). The Court further noted: "'Fraud never consists in intention, unless it be accompanied by some act.'" *Id.* (quoting *Starr v. Stevenson*, 91 Iowa 684, 60 N.W. 217, 218 (1894)). The Government's theory of fraud was therefore invalid, the Court held, because it relied on evidence of post-contractual fraudulent intent alone, without coupling it with evidence of a false post-contractual representation. *See id.* at *11 (noting that Government did not offer evidence of any false

representations that post-dated execution of the initial contracts and were made with fraudulent intent).

So too here, the District Court's theory of fraud was fatally flawed because it allowed the jury to convict on the basis of Defendants' purported "freestanding 'bad faith' or intent to defraud" alone, without coupling it with a false or misleading statement. In substance, the District Judge impermissibly relied on Defendants' alleged improper intent to *create* the requisite false and misleading statement, instead of first requiring the Government to prove, and the jury to find, the existence of a false and misleading statement *made* with fraudulent intent. That was just as erroneous as the kindred error made in *Countrywide*.

Indeed, the District Court's theory of fraud in this case was even more of a stretch, because an "intent to benefit Rabobank's trading positions" is *not* the equivalent of an intent to defraud. There is nothing inherently wrongful in taking action intended to benefit the financial interests of one's employer; employees are supposed to promote their employer's financial interests, and indeed have a fiduciary obligation to do so. Making the intent to benefit one's employer the pivot for a charge of criminal fraud, as the District Court did here – in essence, defining acting in one's employer's self-interest as fraudulent conduct – would blur the line between legal and illegal behavior beyond recognition.

Nor is the District Court's theory salvaged because Defendants may have acted to obtain profits for Rabobank at the expense of Rabobank's counterparties. 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); *accord McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992) ("[N]ot every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud.") (internal quotation marks omitted). For a scheme to fall within the mail or wire fraud statutes, "the victim's money must be taken from him by deceit," *Fasulo*, 272 U.S. at 628, which in this case required proof of a misrepresentation. Here, even assuming, *arguendo*, that the proof at trial showed that Defendants' intent to benefit Rabobank'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 Rabobank could, in fact, borrow. The requisite misrepresentation was therefore not proven.

To endorse the District Court's novel approach in this case would violate one of the first principles of our criminal law, which has always required

both a *mens rea* and an *actus reus* to support a conviction. *See, e.g., United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982) ("not only has a criminal state of mind, or mens rea, been a general condition of penal liability, but the imposition of the criminal sanction has required a guilty act, or actus reus, by the person sought to be held liable"). In the context of a criminal fraud charge, this requires proof beyond a reasonable doubt of both fraudulent intent (*mens rea*) and a false representation (*actus reus*). *See United States v. Whiteside*, 285 F.3d 1345, 1353 (11th Cir. 2002) (reversing conspiracy to defraud conviction for failure to prove "the *actus reus* of the offense – actual falsity as a matter of law"). As this Court's decision in *Countrywide* teaches, one of these without the other is not enough to prove a violation of the wire fraud statute. The Government failed to prove both here.

C. Defendants Could Not Properly Have Been Found Guilty for Making an "Implied" Or "Effective" Misrepresentation

Attempting to ground Defendants' convictions in a theory that at least *sounded* like fraud, the District Court's Rule 29 decision, quoting from the Government's post-trial brief, asserted that Defendants could have been convicted of fraud because each LIBOR submission made an "implicit statement" that "the number submitted was calculated according to the [BBA] definition." (SPA40.) But, as Defendants' brief on appeal has demonstrated, during the period when the LIBOR submissions involved in this case were made, there was no "BBA definition" pursuant to which banks "calculated" their rate estimates. (Defts. Br.

12-16, 76-78.) Nor did Defendants make any statements suggesting how they went about calculating the LIBOR rate estimates; Rabobank answered the BBA's question simply by providing the requested rates. Accordingly, there is no basis for a finding that Defendants made any "implied" representation about how the LIBOR estimates were calculated – let alone a representation that the estimates were prepared in accordance with a non-existent "BBA definition."[5]

The District Court's assertion that Defendants could have been properly convicted for "effectively represent[ing]" that they "were responding in good faith to the BBA's query" (SPA41) fares no better. This is merely another way of saying that Defendants could be convicted of wire fraud for acting with improper intent alone – which, for the reasons discussed above, is not the law. Criminal liability cannot turn on so amorphous and elastic a concept as "good faith." Good faith is a *defense* to many criminal charges, including fraud offenses. *See United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998). But we are aware of no authority holding that a defendant's failure to act in "good faith" can be the

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[5] Notably, in 2012, *after* the relevant LIBOR submissions involved in this case were made, the LIBOR process was reformed and a detailed "roadmap" was issued with guidelines regarding the calculation of LIBOR rate estimates. ICE Benchmark Association, *Roadmap for ICE LIBOR*, *available at* https://www.theice.com/publicdocs/ICE_LIBOR_Roadmap0316.pdf ("*Roadmap*"). But nothing like this existed when the LIBOR submissions here were made. In fact, as the current LIBOR administrator admits, "conflicts of interest" inherent in the LIBOR submission process "were not addressed" by the system in place back then. *Roadmap* at 5.

basis for a criminal charge. Just the opposite: This Court has specifically held that "freestanding 'bad faith' . . . *is not actionable* under the federal fraud statutes." *Countrywide*, 2016 WL 2956743, at *10 (emphasis added). Indeed, invoking "so shapeless" a standard of criminal liability as "good faith" to condemn someone to prison for up to 20 years raises serious due process concerns. *See McDonnell v. United States*, __ S.Ct. __, 2016 WL 3461561, at *18 (U.S. June 27, 2016) (internal quotation marks omitted).

The District Court's attempt to justify criminal liability based on an "effective representation" of "good faith" was all the more troubling in light of the Court's definition of "good faith." In the District Court's view, the representation of "good faith" would be breached if Defendants acted, in part, with the intent of promoting their employer's financial interests. (SPA41.) That extraordinarily capacious definition of "good faith" has no place even in the civil liability context. *See, e.g., L-7 Designs, Inc. v. Old Navy, LLC*, 964 F. Supp. 2d 299, 307 (S.D.N.Y. 2013) ("Acting in one's financial self-interest . . . does not constitute bad faith") (Chin, J.); *see also Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 279 (7th Cir. 1996) ("Self-interest is not bad faith") (Posner, J.). It is completely out of bounds as a trigger for the imposition of criminal sanctions.

In substance, the District Court used concepts of "implied" and "effective" representations to impose a standard of commercial morality that could

serve as the basis for conviction. That approach misapprehends the province of the wire fraud statute. *See, e.g., United States v. Weimert*, 819 F.3d 351, 357 (7th Cir. 2016) ("Not all conduct that strikes a court as sharp dealing or unethical conduct is a 'scheme or artifice to defraud.'") (internal quotation marks omitted).

D. The District Court's Theory Threatens to Criminalize Legitimate Business Conduct and Offends Due Process Principles

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 carries with it an implicit "good faith" representation that the speaker, in forming the opinion or estimate, has not, "at least in part," taken into account his financial self-interest or that of his employer. (JA340.)

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 motivation to bolster their

company's stock price or obtain a higher price from an acquiring firm, they would have otherwise selected less favorable 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 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 salesmen 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).

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*, 2016 WL 3461561, at *18 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

Beyond this, the District Court's exercise in creative 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).

CONCLUSION

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

Dated: New York, New York
July 13, 2016

Respectfully submitted,

NEW YORK COUNCIL OF DEFENSE LAWYERS

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the word processing program, this brief contains 4528 words, including headings, footnotes and quotations, but excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and therefore is in compliance with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B). 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 it has been prepared in proportionately spaced typeface using Microsoft Word 2010 and in 14-point Times New Roman font.

Dated: New York, New York
July 13, 2016

Respectfully submitted,

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