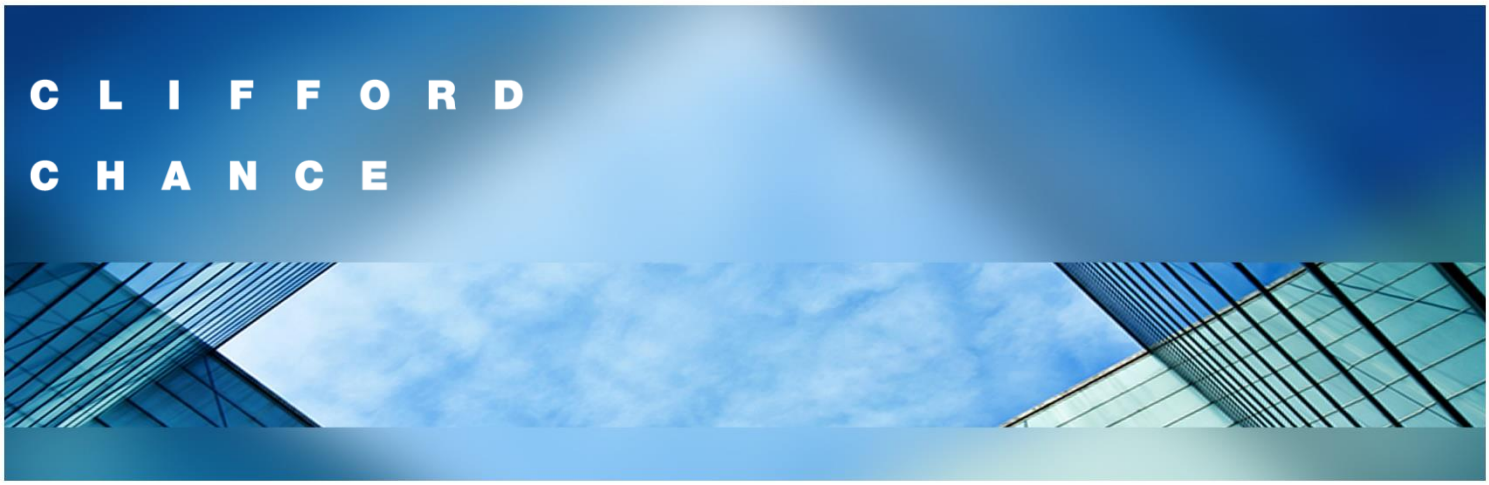

U.S. COURT ACQUITS FX TRADER OF ALLEGED FRONTRUNNING

An FX Trader was acquitted of charges that he had fraudulently traded ahead of a counterparty, based on a California federal court's finding that he and the counterparty had traded at arms-length and that the trader had not violated any assurances or otherwise misled the counterparty. Rather than allow the case to go the jury, the court took the unusual step of acquitting the trader after the government had finished presenting its evidence. The acquittal, which comes less than two years after the conviction of an FX trader for broadly similar conduct, provides valuable guidance for FX dealers and other dealer businesses. Most importantly, it underscores the need for dealers engaging in principal-to-principal trading to provide proper disclosures to their counterparties and to ensure that their contracts, including ISDA Master Agreements and standard terms of business, clearly set forth that they will be trading at arms-length.

In an order published March 4, a California federal court issued a judgment acquitting defendant Robert Bogucki of all charges in a criminal case alleging wire fraud in connection with a 2011 sale of foreign exchange options.[1] In 2011, Bogucki, a senior FX trader at a large bank, sold £6 billion of GBP – USD options to a large corporate counterparty, which was seeking to convert Dollars to Sterling in connection with a contemplated acquisition.[2] The counterparty ultimately elected not to use these options for the acquisition, and went to Bogucki to unwind the options in several tranches.[3] Because of changes in volatility and in the Sterling-Dollar exchange rate, the counterparty lost several million dollars in the purchase and unwind.[4]

In a January 2018 indictment and a March 2018 superseding indictment, the government alleged that Bogucki had committed wire fraud by trading ahead of the counterparty.[5] Bogucki had allegedly shorted GBP – USD options prior to unwinding one of the tranches, which had allegedly depressed the GBP – USD

[1] Order Granting Def.'s Rule 29 Mot., *United States v. Bogucki*, 3:18-CR-00021 (N.D. Cal. Mar. 4, 2019), ECF No. 217.
[2] Superseding Indictment ¶ 22, *United States v. Bogucki*, 3:18-CR-00021 (N.D. Cal. Mar. 27, 2018), ECF No. 54
[3] *Id.* ¶ 25.
[4] *Id.* ¶¶ 30–55.
[5] *Id.* ¶¶ 56–60; Indictment ¶¶ 55–59, *United States v. Bogucki*, 3:18-CR-00021 (N.D. Cal. Jan. 16, 2018), ECF No. 1.

exchange rate to the counterparty's detriment.[6] The government alleged that Bogucki had assumed a duty not to trade ahead of his counterparty by virtue of his receipt of the counterparty's confidential information, and further alleged that Bogucki had assured the counterparty that he would not trade ahead in various recorded communications.[7] After trial, the court issued a judgment of acquittal, dismissing all charges against Bogucki before the case went to the jury.[8] The court's decision hinged on three factors.

- First, the court found that the parties intended to trade at arms-length, citing language in the ISDA master governing the transaction that the parties were trading on a principal-to-principal basis and similar disclaimer language that appeared in multiple communications between Bogucki or his colleagues and the counterparty.[9]
- Second, the court disagreed that Bogucki's receipt of confidential counterparty information created a duty not to trade ahead of the counterparty.[10] Instead, the court found that neither Bogucki nor his employer had entered into a confidentiality agreement or any similar agreement with the counterparty restricting their ability to trade in anticipation of the unwind.[11]
- And finally, the court found that the counterparty could not have been materially misled by any statements in which Bogucki allegedly assured the counterparty that he would not trade ahead, in part because the counterparty's head of FX testified that he considered much of what Bogucki told him to be bluffing, and that he had himself engaged in similar posturing in his communications with Bogucki.[12]

The court's decision underscores the need for FX dealers and other dealer businesses to provide disclosure to their counterparties, when applicable, explaining that trading is being done on an arms-length, principal-to-principal basis. Ideally, such disclosures should also detail the ways in which the dealer might use the counterparty's information to trade ahead. Trading ahead of a counterparty's anticipated or actual order is not, by itself, illegal. Rather, trading ahead can amount to illegal frontrunning when it is done fraudulently, *i.e.*, when it is done in violation of a duty and causes damage to the counterparty. Robust disclosures help to ensure that there is no mistake regarding the scope of the duties undertaken by a dealer.

Dealers should also ensure that all uses of counterparty information align with any assurances in their contracts with those counterparties, including master agreements, and with their standard terms of business. A key difference between Bogucki's case and the case of Mark Johnson, an FX trader who was convicted of front-running a counterparty by a New York federal court in 2017, is that Johnson's employer had entered a confidentiality agreement with the counterparty in which it

[6] Superseding Indictment, *supra* note 2, ¶¶ 33–39; Indictment ¶¶ 32–38, *United States v. Bogucki*, 3:18-CR-00021 (N.D. Cal. Jan. 16, 2018), ECF No. 1.
[7] Superseding Indictment, *supra* note 2, ¶¶ 26–28, 32.
[8] Order Granting Def.'s Rule 29 Mot., *supra* note 1, at 1:18–19.
[9] *Id*. at 3:17–4:9, 6:18–22.
[10] *Id*. at 5:21–24.
[11] *Id*. at 6:11–13.
[12] *Id*. at 10:10–11:18.

expressly agreed to use the counterparty's confidential information only for the purpose of executing the counterparty's trade.[13] Confidentiality agreements and similar agreements can create duties for dealers, the violation of which can potentially form the basis of a fraud case, based on a theory of frontrunning or something similar.

Finally, dealers should avoid giving "best-execution" or similar assurances to counterparties that are incompatible with the concept of arms-length trading. The *Bogucki* court found that the counterparty could not reasonably have been misled by statements allegedly made by Bogucki that he would not trade ahead of the counterparty's position, based in part on the industry practice of "bluffing" or making misleading statements. However, dealers in 2019 should not take comfort from the fact that a dealer in 2011 may have been able to "get away with" allegedly misleading his counterparty. In the last few years, the FX Global Code has been widely adopted, and includes requirements, among other things, to handle orders "fairly" and "communicate in a manner that is clear, accurate, professional, and not misleading."[14] In the wake of these changes, courts will be less likely to conclude that counterparties do not expect dealers to be truthful.

[13] *See* Indictment ¶¶ 12–14, *United States v. Johnson*, 1:16-CR-00457 (E.D.N.Y. Aug. 16, 2016), ECF No. 9.
[14] *See, e.g.*, FX Global Code Principles 9–11 and 21, https://www.globalfxc.org/docs/fx_global.pdf (last updated August 2018).

CONTACTS

David Yeres
Senior Counsel

T +1 212 878 8075
E david.yeres
@cliffordchance.com

David Felsenthal
Partner

T +1 212 878 3452
E david.felsenthal
@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck
@cliffordchance.com

Celeste Koeleveld
Partner

T +1 212 878 3051
E celeste.koeleveld
@cliffordchance.com

Robert Rice
Partner

T +1 212 878 8529
E robert.rice
@cliffordchance.com

Daniel Silver
Partner

T +1 212 878 4919
E daniel.silver
@cliffordchance.com

Benjamin Peacock
Associate

T +1 212 878 8051
E benjamin.peacock
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

Clifford Chance US LLP

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