

# A Closer Look At Novel Jury Instruction In Forex Rigging Case

By **Michael Longyear, John Siffert and Zachary Shemtob** (February 12, 2024)

The recent conviction of Neil Phillips, a U.K.-based hedge fund executive, for commodities fraud highlights the issue of whether the court's novel jury instruction incorrectly defined the level of intent required to support a conviction for open market manipulation under the Commodity Exchange Act.

In *U.S. v. Phillips*, the U.S. District Court for the Southern District of New York instructed the jury that it could find that the alleged transaction was manipulative only if it "would not have been done at the same time and in the same manner" as a legitimate trade, "except for the intent to mislead."<sup>[1]</sup>

This instruction — the substance of which is still being litigated in the parties' post-trial briefing — should inform both the government and defense counsel in future open market manipulation cases.<sup>[2]</sup>

## Case Background

On Sept. 1, 2022, an indictment was unsealed in the Southern District of New York charging Phillips with, among other things, commodities fraud, in violation of Title 7 of the U.S. Code, Section 9, and conspiracy to commit commodities fraud, in violation of Title 18 of the U.S. Code, Section 371.

Phillips, the co-founder and co-chief investment officer of Glen Point Capital, focused on forex trading of currency pairs, in which one currency's value is compared to the value of another currency. Phillips had traded the currency pair of U.S. dollars to the South African rand.

As part of his trading strategy, Phillips also purchased an option for the dollar/rand currency pair so that if the exchange rate fell below 12.50 at any point prior to a particular date, Phillips' fund would receive a \$20 million payment.

The government alleged that, on Dec. 26, 2017 — several days before the option was set to expire — Phillips manipulated the foreign currency exchange market to cause the dollar/rand exchange rate to fall below 12.50 by selling \$725 million U.S. dollars in exchange for the rand, thereby triggering the \$20 million payment under the option.

Phillips advanced several arguments in his defense at his eight-day trial before U.S. District Judge Lewis J. Liman. Among them, Phillips denied that his trade was motivated by an intent to trigger the option payout, as opposed to for legitimate economic reasons.

According to Phillips, such transactions were commonly entered into by traders to manage internal risk, and Phillips faced a delta — a risk in price movement — of \$759 million concerning the option.



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At trial, the government characterized these justifications as cover stories, arguing that Phillips' goal was not to manage risk, but to trigger the \$20 million option payout by driving down the exchange rate.

### **The Contested Jury Instruction**

The question of whether Phillips traded for legitimate or manipulative purposes (that is, to manage internal risk or drive down the USD/ZAR exchange rate) was not only argued as a factual question to the jury, it also was a central disagreement at the charging conference.

Phillips submitted requests to charge that commodities fraud required a jury finding that he "traded solely to affect the USD/ZAR exchange rate, and not for any investment purpose."<sup>[3]</sup>

Under Phillips' proposed instructions, the jury should have been informed that it could not convict if there was any legitimate economic rationale for Phillips' actions, such as to manage the hedge fund's internal exposure. According to Phillips, if he had traded for both legitimate and manipulative purposes, then he had not acted with the requisite intent to defraud.

Phillips provided authority for his proposed sole-intent standard. In December 2017,<sup>[4]</sup> U.S. District Judge Paul Gardephe instructed the jury in *U.S. v. Tuzman*, a market manipulation case brought under the Securities Exchange Act, that it must find the defendant had engaged "in conduct with the sole intent to ... create a false impression of market activity."<sup>[5]</sup>

Phillips argued that this position was also supported by a 2007 case in the Southern District of New York, *U.S. Securities and Exchange Commission v. Masri*.<sup>[6]</sup> In *Masri*, U.S. District Judge Richard Holwell conducted an exhaustive analysis of the requisite intent necessary for the SEC to prove market manipulation, concluding, according to Phillips, that it must show "that the [defendant's] sole intent [is] to artificially affect the price of the stock."<sup>[7]</sup>

Phillips also argued that the cited precedents made good sense and were consistent with sound policy. The sole-intent standard was appropriate because it would always be difficult, if not impossible, for a finder of fact to distinguish whether one acted on a legitimate or manipulative purpose when both trading rationales were seemingly present in a person's mind. Moreover, "principles of due process, fair notice, and the rule of lenity militate[d]" in his favor.<sup>[8]</sup>

The government disagreed. According to the government's proposed instructions, it "need not prove that the intent to defraud was the only intent of the defendant."<sup>[9]</sup> Rather, a "defendant may have the required intent to defraud even if the defendant was motivated by other lawful purposes as well."<sup>[10]</sup>

The government argued that this was simply black-letter law; in practically no other offense could one escape criminal liability because he also had noncriminal motivations for his actions.<sup>[11]</sup>

The government further contended that Judge Gardephe had been mistaken in *Tuzman*, citing U.S. Court of Appeals for the Second Circuit cases involving, among other crimes, wire fraud.<sup>[12]</sup>

The prosecutors also argued that *Masri* did not support a sole-intent standard, but instead

required a determination of manipulation where "the actor would not have engaged in the same conduct 'but for' the forbidden intent." [13]

### **Judge Liman's Middle Path**

Judge Liman recognized that there may be both legitimate and manipulative motivations for a given transaction, and a defendant does not necessarily act with an intent to defraud if motivated by both purposes. Nevertheless, the court instructed the jury that "if the transaction would not have been done at the same time and in the same manner, except for the intent to mislead," the transaction was improper. [14]

In other words, "if but for an intent to deceive, the defendant would not have conducted the transactions in the dollar-rand foreign exchange spot market at the times and in the amounts he did, then those transactions were manipulative." [15]

On Oct. 25, 2023, following a day of deliberations, the jury found Phillips guilty of commodities fraud and acquitted him of conspiracy to commit commodities fraud.

### **Implications**

Judge Liman's adoption of a "but for" standard in Phillips has several important takeaways for defense counsel.

First, defense counsel should be vigilant to cite Phillips if the government persists in advocating that a judge should instruct the jury that a dual intent satisfies the scienter standard. Dual intent not only was rejected by Judge Liman, but we have also found no court in any district that has adopted this standard in cases involving open market manipulation.

Second, defense counsel should note, as Phillips' attorneys correctly recognized, that Judge Gardephe had previously adopted the sole-intent instruction in Tuzman, although the Second Circuit has not had an opportunity to rule on the correct standard.

Third, the dual intent and "but for" instructions may be in tension with the government's burden to prove scienter beyond a reasonable doubt.

Where the facts establish that the defendant had a legitimate reason as well as an improper reason, the "but for" or dual intent instruction could be seen as an invitation for the jury to divine the defendant's motive for the conduct, as opposed to whether the defendant formed the requisite criminal intent.

Indeed, in such cases, counsel might argue that the guilty verdict was as much a result of confirmation bias as it was the result of the jury deciding that the improper purpose was the prevailing reason for the charged conduct.

The sole-intent standard avoids this conjecture, and puts the government to its proper burden at trial to prove beyond a reasonable doubt that the defendant acted with the intent to defraud.

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[1] United States v. Neil Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), Oct. 24, 2023, Trial Transcript ("Tr.") at 1351.

[2] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 102. The defendant's motion for acquittal was filed on December 8, 2023. *Id.*, ECF No. 94.

[3] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 54 at 21.

[4] No. 15 Cr. 536 (PGG) (S.D.N.Y. Jan. 11, 2018).

[5] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 57 at 4.

[6] 523 F. Supp. 2d 361 (S.D.N.Y. 2007).

[7] Masri, 523 F. Supp. 2d at 372; Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 57 at 2.

[8] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 57 at 6.

[9] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 50 at 12-13.

[10] *Id.*

[11] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 56 at 13 (citing United States v. Technodyne LLC, 753 F. 3d 368 (2d Cir. 2014) (collecting cases)).

[12] *Id.* (citing United States v. Gatto, 986 F.3d 104 (2d Cir. 2021) (concerning a violation of 18 U.S.C. § 1343)).

[13] *Id.* at 14.

[14] Tr. at 1351.

[15] *Id.* at 1351-52.