

## **Securities Regulation Daily Wrap Up, ENFORCEMENT—N.D. Ill.: Computer programmer charged in spoofing scheme may be facing a hung jury, (Apr. 9, 2019)**

Securities Regulation Daily Wrap Up

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By [Brad Rosen, J.D.](#)

With government attorneys clashing over an aggressive defense in a novel application of Dodd-Frank's anti-spoofing provision, the jury may be unable to render a unanimous verdict.

In an epic federal courtroom battle in the Northern District of Illinois, the fate of software developer Jitesh Thakkar is squarely in the hands of the jury. The closing arguments in [U.S. v. Thakkar](#), one of the most significant criminal spoofing trials in recent years, often turned contentious and strident as opposing attorneys charged each other with deceiving the jury and engaging in unprofessional conduct.

As of press time, and after one day of deliberations, according to sources at the courthouse, the jury reported to the court that it was hung. Judge Robert Gettleman instructed the jury to continue deliberating.

The lead counsel for the U.S. Attorney's Office is Mark John Cipolletti. Renato Mariotti of Thompson Coburn represents Jitesh Thakkar. Mariotti had previously served as an assistant U.S. Attorney and was the lead trial counsel in the landmark spoofing case [U.S. v. Coscia](#). The *Thakkar* case marks the first time ever that a non-trader has been criminally charged with engaging in spoofing.

**Background.** Thakkar was charged in a three-count criminal indictment with one count of conspiracy to commit spoofing, and two counts of spoofing for aiding and abetting trader Navinder Sarao in his criminal spoofing activity. At the close of testimony, Judge Gettleman threw out the conspiracy charge, saying there was no evidence that Thakkar conspired with Sarao to break the law.

Thakkar, and his company Edge Financial Technologies, designed a custom "Back-of-Book" function which automatically and continuously modified Sarao's spoofing orders by one lot to move them to the back of relevant order queues so as to minimize their chance of being executed. This utility also cancelled all such orders at one price level as soon as any portion of an order was executed.

In November 2016, Sarao pleaded guilty to criminal charges for allegedly engaging in manipulative conduct through spoofing-type activity involving E-mini S&P futures contracts traded on the CME between April 2010 and April 2015. He ended up paying over \$38.6 million in criminal and civil monetary penalties. According to evidence adduced at trial, Sarao netted nearly \$13 million from his illegal spoofing activities in connection with Edge's computer consulting services. Meanwhile, Edge received initial consulting fees in the amount of \$24,200 for its services. Other Edge company employees also worked on the Sarao engagement.

**Answering an early morning knock at the door.** Thakkar's painful legal odyssey began with an early morning surprise visit from the FBI in 2017, whose agents were asking about Sarao. At trial, Mariotti asserted that Thakkar was tricked by the FBI and was lied to by its agents. Thakkar was never informed that he had a right to an attorney, and he fully cooperated with the federal agents by answering all their questions. The agents queried Thakkar about specific emails from five years prior, but did not provide him with copies of those documents. At trial, the government claimed that Thakkar had lied about those communications and attempted to deceive the FBI agent.

The FBI's visit was a prelude of more to come. In January 2018, Thakkar got caught up in [the sweeping anti-spoofing initiative](#) where the [DOJ](#) and the [CFTC](#) brought charges against three banks and eight individuals (including Thakkar).

**Closing arguments and the burden of proof.** Thakkar, having been acquitted on the conspiracy count, still faces two remaining counts in connection with the charges of having aided and abetted Sarao's spoofing. Before the jury was brought into the courtroom, Judge Gettleman reminded the attorneys that it was the government's burden to prove beyond a reasonable doubt that Thakkar had actual knowledge of the Sarao's spoofing scheme and acted in its furtherance. The government was barred from arguing that the lesser "ostrich" standard applied where it could assert Thakkar consciously avoided knowledge of wrongdoing (sticking his head in the sand so to speak) or that he could have or should have known of the wrongdoing.

**The government's argument.** The U.S. attorney portrayed Thakkar as an expert in computer programming and financial markets who knowingly enabled Sarao's spoofing crimes and made them possible. The government also asserted that the evidence shows that Thakkar knew of the illegal spoofing scheme. Some of their key points included:

- Thakkar built, refined and unleashed the computer program which made cheating and victimization of other market participants possible. He knew spoofing was the only thing the program could be used for. This "spoofing machine" made it possible to trick and deceive the market;
- Thakkar described himself as an industry leader, architect, and visionary. He was part of a CFTC advisory committee. He knew what he was doing;
- The program's Back-of-Book function enabled orders to always to be moved to the back of the exchange's book, with the intention of never actually trading. The Back-of-Book function made it certain an order did not get filled. Moreover, in the event of a partial fill, the function cancelled the remaining order. The prosecution asked, "How do you design something you do not understand?";
- When Sarao's orders were filled on occasion, he complained about bugs in the program. Thakkar went back and forth to perfect the program such that undesired fills would not occur again;
- On February 2, 2013, and March 8, 2013, spoof orders for 570 and 571 S&P E-mini contracts, respectively, were entered on the CME. Each of these spoofed orders represented approximately \$43 million in value and resulted in significant gains for Sarao to the detriment of other market participants;
- Thakkar's interview with the FBI in 2017 contained lies and inconsistencies which thereby demonstrate Thakkar's guilty consciousness and state of mind.

**The defense's forceful response.** Defense attorney Mariotti began his closing remarks to the jury asserting that the government was trying to transform an ordinary business transaction into a criminal scheme. "The government has tried to manufacture a crime, and it has failed," declared Mariotti. In rebuffing the government's argument, Mariotti contends that the government failed to carry its burden of proof beyond a reasonable doubt by demonstrating Thakkar had a criminal state of mind and tried to make the crime happen. Some of the defense's key points included:

- The government's biggest lie was asserting there was a criminal conspiracy between Thakkar and Sarao;
- Sarao made approximately \$40 million trading from his bedroom in his parent's house in England. \$13 million of that amount was made through fraudulent trading, and he faces up to 30 years in prison. Hence the jury should consider his testimony with due caution;
- Sarao is a serial liar. He lied to the CFTC, the English regulator, and CME. Moreover, the government dropped 20 counts in exchange for his cooperation. He is an unreliable witness;
- Sarao testified that he engaged in spoofing for years before meeting Thakkar, and most of his spoofing was done without the Edge Financial Technology program. He worked with other programmers, and discussed the same trading program with them;
- There was nothing special about Thakkar's relationship with Sarao. Sarao sent identical emails regarding trading program requirements to others; and no one expressed moral or legal objections;

- Even though Sarao made \$40 million trading, he said \$15,000 was "a hell of a lot of money" for consulting services, thereby deceiving Thakkar into thinking he was a small-time trader;
- There was no discussion about spoofing between Thakkar and Sarao;
- There was nothing sinister about the consulting agreement with Sarao. It mentioned "Fill or Kill" orders, which is what was going on here, and which are a legitimate order type on the CME; and,
- Thakkar was not aware of the allegedly illegal spoof orders on February 25, 2013, and March 8, 2013, which are specified in the indictment. As he was unaware of the entry of these orders, Thakkar cannot be held criminally liable in this regard.

After Judge Gettleman initially provided the jury with instructions and released them to begin their deliberations, he observed that this is a very difficult case and that it was very hard fought by skilled attorneys. Although this comment was made out of the jury's presence, it is an assessment with which they could certainly agree.

The case is [No. 18-CR-36](#) (R.Gittleman).

Attorneys: Mark John Cipolletti, United States Department of Justice. Patrick Morgan Mott, United States Attorney's Office. Renato Mariotti (Thompson Coburn LLP) for Jitesh Thakkar

Companies: Edge Financial Technologies

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