No. 16-3017

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL COSCIA,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 14-cr-551
The Honorable Judge Harry D. Leinenweber

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT MICHAEL COSCIA

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3017

Short Caption: United States v. Michael Coscia

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Michael Coscia

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Thompson Coburn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Michael S. Kim Date: 9/6/2016

Attorney's Printed Name: Michael S. Kim

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ David H. McGill Date: 9/6/2016

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Attorney's Signature: s/ Jason Manning Date: 9/6/2016

Attorney's Printed Name: Jason Manning

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Attorney's Signature: s/ Melanie L. Oxhorn Date: 9/6/2016

Attorney's Printed Name: Melanie L. Oxhorn

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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Attorney's Signature: s/ Stephen J. Senderowitz Date: 9/6/2016

Attorney's Printed Name: Stephen J. Senderowitz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Marilyn B. Rosen Date: 9/6/2016

Attorney's Printed Name: Marilyn B. Rosen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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JURISDICTIONAL STATEMENT

In the proceedings below, the Government charged Appellant with violating 7 United States Code Sections 6c(a)(5)(C) and 13(a)(2) and 18 United States Code Section 1348. The District Court had jurisdiction over this case under 18 U.S.C. § 3231. Following a jury trial and sentencing hearing, the District Court entered judgment on July 15, 2016. Appellant filed a timely notice of appeal on July 25, 2016. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Could Coscia's trading activity constitute a fraudulent scheme under the federal commodity fraud statute (18 U.S.C. § 1348) where every order he placed was subject to genuine execution risk and no commodity futures trader of ordinary prudence could have expected that his orders would remain in the order book for any minimum amount of time?

2. Did Coscia have fair notice that the anti-spoofing provision (7 U.S.C. § 6c(a)(5)(C)) could be construed to criminalize the entry of orders that were exposed to execution risk, even though neither Congress nor the CFTC had clearly defined "spoofing" during the period at issue, confusion prevailed in the industry as to what conduct the law prohibited, and Coscia's trading activity was indistinguishable from commonly-accepted market practices?

3. Did the District Court err by adding a 14-point loss enhancement to the sentencing guidelines range calculation where the Government failed to establish that Coscia had caused pecuniary losses or that substituting gain for loss would be reasonable?

PRELIMINARY STATEMENT

Michael Coscia, a 54-year old commodity futures trader, became the first person indicted for "spoofing," a newly-created offense that neither Congress nor the U.S. Commodity Futures Trading Commission had defined clearly prior to Coscia's actions at issue. The Government charged Coscia with six counts of spoofing based on six trades from which he allegedly profited by US $1,070. It also charged six counts of commodity fraud based on the same conduct.

The Government's theory was that Coscia, over a ten-week period, committed crimes by entering and then cancelling electronic orders for commodity futures contracts with the intention to deceive other traders. The Government promised to prove at trial that Coscia's orders were "false" and "deceptive," and that he placed them with the intent to "immediately cancel them" before they could be executed. But the trial evidence showed otherwise.

Uncontroverted evidence in the record establishes that Coscia's orders were subject to genuine risk of execution and entered and cancelled in a manner consistent with commonplace trading behavior. Further, none of the sophisticated traders who testified at trial expressed

an expectation that Coscia's orders would remain open in the market for any length of time. To the contrary, the trial evidence showed that these traders expected, consistent with prevailing market conditions and industry practice, that the vast majority of orders entered into the marketplace would be cancelled before execution, often within milliseconds of being placed.

The Government compensated for these evidentiary shortcomings by persuading the District Court to instruct the jury on a sweeping definition of spoofing that criminalized the common trading practices engaged in by Coscia, which no reasonable person would have recognized to be illegal during the relevant time. The District Court also instructed the jury that any orders "capable of influencing" other traders could constitute a material fraudulent scheme, an exceptionally low bar in the commodity futures trading context. After receiving these instructions, the jury convicted Coscia on all counts within approximately one hour of receiving the case.

Relying on an overly broad construction of the commodity fraud statute, and based on reasoning that conflated spoofing with fraud and manipulation, the District Court then upheld the jury verdict. At sentencing, the Government requested and received a 14-point loss enhancement based solely on Coscia's total alleged gains from the ten-week period. Remarkably, the Government did so despite failing to prove

that Coscia caused any quantifiable losses and after conceding that his counterparties might just as likely have made, rather than lost, money.

STATEMENT OF THE CASE

I. Statement of Facts

a. The Relevant Commodity Futures Contracts And Markets

A commodity futures contract is an agreement between two parties to complete a specific transaction in the future. These contracts involve either an actual commodity, such as a bushel of wheat, or a financial instrument, such as an obligation to make a payment indexed to wheat's market price. Each futures contract obligates the parties either to complete delivery (for physical commodities) or settle in cash (for financial instruments) on a specified future date. Orders to buy and sell contracts are referred to as bids and offers, respectively. These orders are "filled" when a bid and an offer are matched in the marketplace. Traders can also cancel their orders before they are filled.

The particular contracts at issue include (among others) copper, soybean, and foreign currency futures. They are traded on electronic exchanges operated by the CME Group, Inc. and regulated by the U.S. Commodity Futures Trading Commission.[1] Under CME's rules, traders submit anonymous bids and offers through an electronic platform, which

[1] The Government also introduced evidence at trial related to Coscia's commodity futures trading on the Intercontinental Exchange, Inc. ("ICE").

matches them through an automated process. Tr. 214.[2] Although the orders appear anonymous to the marketplace, CME assigns each registered trader and firm an alphanumeric identifier that allows the CME to track their activity. Tr. 360.

Commodity futures serve an essential economic function by assisting farmers, producers, and other entities in hedging risks associated with commodity price fluctuations. *See* Tr. 626-27. Speculators also use these markets as an opportunity to trade for profit and, in doing so, provide helpful liquidity to the commodity futures markets. Tr. 1125-26. The volume of activity on these markets is enormous: during the relevant ten-week period, 1.2 billion orders were submitted for the 17 CME futures contracts at issue. Dkt. 156-1 ¶ 9.

b. The Nature Of Algorithmic Trading

"High-frequency trading," or algorithmic trading, has become an increasingly common form of futures trading. By 2011, it comprised approximately 65% of all market activity. Tr. 1143. High-frequency traders use pre-programmed computer algorithms that place, cancel, or execute orders within milliseconds. *See* Tr. 239, 668-70, 743-44. These algorithms take into account more factors than any of the Government's witnesses could count. Tr. 718, 744-45, 761, 770. As discussed below,

[2] Citations to "Dkt. _" are to the District Court record. Citations to "Tr. _" are to the consecutively numbered pages of the trial transcript. Citations to "RSA _" are to the required short appendix bound with this brief. Citations to "Gov't Ex." and "Def. Ex." refer to the parties' trial exhibits.

three characteristics of algorithmic trading are particularly significant here: (1) orders are commonly entered with the hope (and, in most cases, the expectation) that they will never be executed; (2) orders are commonly canceled within milliseconds of being placed; and (3) the true level of supply and demand at any given moment in the marketplace is deliberately obfuscated by "hidden orders" and other common trading techniques deemed lawful.

c. The Prevalence Of Orders Designed To Cancel Quickly

High-frequency traders often enter a large volume of orders designed to cancel under certain circumstances. The SEC Commissioner stated in 2010, "We know that, in the ordinary course, many high-frequency trading firms cancel 90 percent or more of the orders they submit to the markets." Dkt. 27-3, Speech by U.S. Securities and Exchange Commission Chairman Mary Shapiro (September 7, 2010). A CME Executive Director similarly testified that high-frequency trading is characterized by high cancellation rates. Tr. 239. Indeed, trial testimony showed that high-frequency traders in the relevant markets cancel 98% of their orders before execution. Tr. 1164-65, 1237-38.

Order types that cancel quickly based on certain conditions include "fill-and-kill" orders, which are programmed to cancel if not filled immediately, and "good-till-date" orders, which are programmed to cancel within a defined period of time. Tr. 1165. These orders are designed to reduce the trader's risk that the order will be filled in

unanticipated market conditions. Reflecting the reality that market conditions can—and often do—change significantly even *within a second*, the time limit on these orders often is measured in milliseconds. Tr. 1159-60; Def. Ex. 504 (showing 89 different market prices within one second for CME Gold Futures).

Partial-fill orders contribute to high cancellation rates as well. These orders are programmed to cancel the balance of the order as soon as a specified portion of it is filled. For example, an order to purchase 100 contracts can be programmed to cancel as soon as even two contracts are purchased from anyone (rendering the other 98 buy orders unfilled and cancelled). *See* Tr. 238, 1149-50. Ping orders, which are small orders used purely to test (or "ping") market demand at a particular moment in time, are another common type of order designed to cancel quickly. Tr. 1156.

Future traders commonly place other orders types with not just the expectation but the *hope* that they will be cancelled before execution. For example, a stop-limit order is an order to buy or sell a position only if market prices move in an adverse direction. Tr. 1166-67. Similarly, futures traders commonly place orders to hedge (or offset) established positions in other markets. Tr. 1125. Because stop-limit and hedge orders are only filled under undesirable conditions, when placing such orders, traders "certainly hope" that they will be cancelled before execution. *See* Tr. 1166-67.

The CME officially authorizes all of these order types, which are recognized as economically rational and legitimate. Tr. 237-38, 1156, 1165-66; Def. Ex. 207. Accordingly, orders are constantly entered and quickly cancelled on the CME futures markets on which Coscia traded: indeed, nearly *630 million* orders were cancelled *within a second* on these markets during the ten weeks at issue. Dkt. 156-1 ¶ 13.

d. The Nature Of The Order Book

The frequent entry and cancellation of orders described above implies that the level of apparent supply and demand (also known as "market depth") in the CME futures markets constantly changes. Moreover, even the momentary snapshot of all the orders open in the market (known as the "order book") does not reflect the true level of market depth in that moment. Partial fill orders, for instance, appear to be large orders but actually reflect supply or demand for fewer contracts. *See* Tr. 1149-50. Fill-and-kill orders, on the other hand, do not appear in the order book at all, enabling the traders who use them to mask their intended supply or demand from the order book. Tr. 1085.

Further, traders commonly (and lawfully) utilize "iceberg orders" which, as the name suggests, are designed to obscure the true extent of supply or demand that lurks beneath the order book. According to Government witness Andrew Vrabel, "[t]he trader that places an iceberg order is able to keep secret from other traders the trader's own intentions about the size of the orders." Tr. 231-32. The CME also authorizes these

types of orders and, aptly, refers to them as "Hidden Quantity" orders. *See* Def. Ex. 207.[3] Due to the prevalence of iceberg orders, the CME's published guidance explains that "displayed liquidity" does not represent "true liquidity." Tr. 1155-56.

e. The Enactment Of The Disruptive Practices Provision

Against this backdrop, in July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Act"), became law. As relevant here, Section 747 of the Dodd-Frank Act, ultimately codified at 7 U.S.C. § 6c, amended the Commodity Exchange Act ("CEA") to proscribe certain "disruptive practices," including:

> any trading, practice, or conduct that . . . is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).

7 U.S.C. § 6c(a)(5)(A)-(C). These disruptive practices are subject to civil and criminal enforcement. 7 U.S.C. § 6c(a)(5)(C); 7 U.S.C. § 13(a)(2).

Although Congress typically creates new felony offenses based on fact-finding and public debate, the disruptive practices provision was inserted into the Dodd-Frank Act without any Congressional deliberation. Its sole reference in the Act's extensive legislative history is a single statement entered into the record by one Senator: "The CFTC requested, and received, enforcement authority with respect to . . . disruptive trading practices." 156 Cong. Rec. S5922 (daily ed. July 15,

[3] ICE permits iceberg orders as well. Tr. 350.

2010) (written statement of Sen. Lincoln). Confusion about the meaning of "spoofing," a term neither defined in the statute nor discussed in Congressional debate, manifested itself right away.

f. The Uncertainty Surrounding "Spoofing"

The CFTC began a rulemaking process to clarify the disruptive practices provision (including the anti-spoofing provision) by publishing an Advance Notice of Proposed Rulemaking (the "CFTC's 2010 Notice") in November 2010. *See* 75 Fed. Reg. 67,301 (Nov. 2, 2010). The CFTC's 2010 Notice invited public comment on four questions related to the anti-spoofing provision, including how the CFTC should distinguish "spoofing" from "legitimate trading activity" and "the submission, modification, and cancelation of orders that may occur in the normal course of business." *Id.* at 67,302. The CFTC's 2010 Notice also asked whether certain practices—including "[s]ubmitting or cancelling multiple bids or offers to cause a material price movement" or "to create an appearance of market depth that is false"— should "be considered a form of 'spoofing'" prohibited by the anti-spoofing provision. *Id.*

To address the questions raised in the CFTC's 2010 Notice, the CFTC hosted a public roundtable in December 2010, during which a panel of market professionals indicated that the term "spoofing" had no accepted meaning in the futures markets. For example, Gregory Mocek, the former CFTC Director of Enforcement, stated on behalf of the Commodity Markets Council, "I'm not quite sure I know what spoofing

is." Dkt. 27-2, CFTC Staff Roundtable on Disruptive Trading Practices (Dec. 2, 2010) ("CFTC Roundtable") at 171. The panelists that attempted to define "spoofing" or identify core spoofing activity all did so in different ways. *Id.* at 21-22, 51-52, 81-82, 90-93, 97, 102-03, 104-05, 107-08, 213-14, 228-29. One panelist asked, "if you're putting orders out that are taking risk, can you be defined as spoofing?" *Id.* at 111. The two panelists from academia, Professors Joel Hasbrouck (New York University) and Andrew Lo (Massachusetts Institute of Technology), were as puzzled by the anti-spoofing provision as the industry panelists. *Id.* at 105, 166. Gary DeWaal, Senior Managing Director of Newedge, one of the world's largest futures brokerage firms, captured the confusion aptly: "I'm not sure [i]f the definition of spoofing can be agreed upon by the ten people around this table." *Id.* at 64.

Written responses to the CFTC's 2010 Notice similarly observed that (i) "spoofing" in fact had no commonly accepted meaning in the futures markets, despite the statute's use of quotation marks which appeared to assume incorrectly that "spoofing" was a recognized term of art; and (ii) the anti-spoofing provision did not provide a clear demarcation between permitted and prohibited conduct. The Futures Industry Association ("FIA"), whose members execute more than 80% of all regulated futures transactions, wrote that "the term 'spoofing' is not one that has been commonly used in the futures and derivatives markets and there is no generally understood or accepted meaning of the term in

this context." Dkt. 27-2, Letter from John M. Damgard, President of the FIA, at 1, 3, 6 (Dec. 23, 2010). Similarly, the Managed Funds Association ("MFA"), representing the majority of the world's largest hedge fund groups, wrote, "'spoofing' is not a term that has ever been commonly used in the futures and derivatives markets. Securities markets have their own concept of 'spoofing,' but its application in the futures and derivatives markets is not at all clear." Dkt. 27-3, Letter from Stuart J. Kaswell, General Counsel of the MFA, at 7 (Dec. 28, 2010). Presciently, DeWaal warned, the "lack of clarity is particularly troubling since certain violations . . . could potentially result in criminal action." Dkt. 27-2, Letter from Gary DeWaal, Senior Managing Director of Newedge, at 5 n.5 (Jan. 5, 2011).

g. The CFTC's Response

The CFTC did not resolve the confusion expressed by the industry following the CFTC's 2010 Notice, despite having received Congress' grant of statutory authority to do so. *See* 7 U.S.C. § 6c(a)(6). Instead, the CFTC abandoned its rulemaking efforts and issued a non-binding "proposed interpretive order," which was the subject of an open meeting held by the CFTC in February 2011. Proposed Interpretive Order, 76 Fed. Reg. 14,943 (Mar. 18, 2011). There, CFTC Commissioner Jill Sommers summarized the industry's concerns about the vagueness of the new law as follows:

> When the draft language of Section 747 was first discussed among Commission staff, it was my view and the view of others in the building that the language was too vague. We suggested that in order to remedy the vagueness, the Commission would need to promulgate rules to put the public and market participants on notice of what conduct was prohibited. . . . That's also the message we received from the public in response to the [CFTC's 2010 Notice] and the roundtable that we held on this subject. I'm disappointed that we do not have proposed rules before us today and I do not believe that the proposed interpretive order is sufficient to take the place of rules. [The] disruptive trading practices statutory language is vague and this proposed [guidance] does not cure that vagueness. . . the Commission's first priority must always be to provide the public and market participants with clear parameters distinguishing prohibited conduct from legitimate trading activity. The goal should not be to retain maximum flexibility for Commission staff to investigate and prosecute alleged wrongdoing. This is what this order does and I cannot support that approach.

Dkt. 27-3, CFTC Open Meeting on the Twelfth Series of Proposed Rulemakings Under the Dodd-Frank Act 12 (Feb. 24, 2011). Commissioner Sommers voted against the 2011 Proposed Interpretive Order accordingly. Two other Commissioners, while supporting the order, nevertheless explicitly acknowledged the widespread vagueness concerns. *Id.* at 7, 23.

In issuing the Proposed Interpretive Order in March 2011, the CFTC recognized that the industry had requested that it define "spoofing" and "describe, with specificity, what trade practices constitute spoofing." Proposed Interpretive Order at 14,945, 14,947 n.48. Nevertheless, the CFTC chose *not* to define "spoofing." Nor did it adopt as the definition of

spoofing the parenthetical phrase found in the anti-spoofing provision of the statute – "(bidding or offering with the intent to cancel the bid or offer before execution)". Instead, the CFTC stated that "the Commission distinguishes between legitimate trading and 'spoofing' by evaluating all of the facts and circumstances of each particular case, including a person's trading practices and patterns." *Id.* at 14,974. The CFTC then invited additional comment and noted that its Proposed Interpretive Order would not bind it or anyone else. *See* Dkt. 27-3, CFTC Q&A - Proposed Interpretive Order on Disruptive Trading Practices.[4]

In May 2013—two years after the May 2011 deadline for public comment on the 2011 Proposed Interpretive Order, 22 months after the anti-spoofing provision became operative, and 18 months *after* Coscia's trading at issue—the CFTC issued another order to address the disruptive practices provision, including the anti-spoofing provision. *See* CFTC Antidisruptive Practices Authority, 78 Fed. Reg. 31,890 (May 28, 2013) ("2013 Final Guidance"). In doing so, the CFTC acknowledged the concerns that had persisted after the Proposed Interpretive Order of March 2011, including the continued requests for guidance as to how the anti-spoofing provision would be interpreted and applied. *Id.* at 31892.

[4] In response to the 2011 Proposed Interpretive Order, leading industry trade groups continued to criticize the anti-spoofing provision's vagueness. *See* Dkt. 27-3, Letter from John M. Damgard, President of the FIA, and Kenneth E. Bentsen, Jr., Executive Vice President of SIFMA, at 6 (May 17, 2011); *see also* Dkt. 27-3, Letter from Stuart J. Kaswell, General Counsel of the MFA, at 5-6 (May 16, 2011).

This 2013 order constituted the CFTC's final guidance and policy statement. *Id.*

h. Coscia's Trading

Coscia had a long career as a trader before the trading at issue, which occurred between August and October 2011. Beginning in 1988, he traded on the New York Mercantile Exchange floor for nearly 20 years. He left in 2006 to establish his own trading company, Panther Energy Trading, where he and the few employees traded futures contracts electronically.

In August 2011, Coscia began using a new trading algorithm for commodity futures listed on CME and ICE exchanges.[5] He developed this program based on his observation that "lopsided markets" encouraged trading. *See, e.g.*, Tr. 558, 599, 875-78. He used this trading program for only ten weeks. The basic elements of this program were: the algorithm would first place an order on one side of the market at the best available price, and then place a set of larger orders on the other side (thereby creating a "lopsided market").[6] The larger orders would be placed at levels approaching the best price in the market: the first order would be two levels away, the second order would be one level away, and the third order would be at the best price displayed in the

[5] Two iterations of the program were named "Flash Trader" and "Quote Trader" by Coscia's computer programmer. Tr. 455-56, 919, 999.

[6] The Government's witnesses observed that simultaneously placing orders on both sides of the market is a routine trading strategy. Tr. 325.

market. As Coscia testified at trial, sequencing trades to "approach the market" is a common strategy to transact at the best value. Tr. 881-82, 885. Each order placed by Coscia, as the Government's witnesses confirmed, was available for execution. *See, e.g.*, Tr. 234.

Coscia's program, like most trading programs, included a cancellation protocol. Tr. 882-84, 1160. If the smaller order was executed, the program would cancel the remaining orders and enter another series of orders in the opposite direction to re-establish a lopsided market. The large orders also were programmed to cancel if they were partially filled or after they had been available in the market to trade for 100 to 450 milliseconds, which is a long time by high-frequency trading standards. *See* Tr. 1142-43 (A. Warren) (testifying that leaving an order open for 100 milliseconds entails "substantial risk"); *see also* Tr. 744, 768-69. In sum, the algorithm cancelled the large orders if any of three conditions were met—the passage of time, the partial fill of the large orders, or the full fill of the small order. *See* Tr. 460, 465, 468-69, 1002, 1028. All of these conditions are common to algorithmic trading generally. *See supra* 5-8. There was no ICE, CME, or CFTC prohibition in place prohibiting such trading. Nevertheless, when ICE and CME raised concerns about Coscia's trading, he promptly stopped using the algorithms at issue.

II. The District Court Proceedings

On October 1, 2014, the U.S. Attorney's Office (N.D. Ill.) brought a criminal case against Coscia based on his 2011 trading activity. Relying on six transactions, the Government charged Coscia with six counts of spoofing and six counts of commodity fraud. The same factual allegations supported both sets of charges. Coscia moved to dismiss the indictment.

a. The Government Alleges "Deception" And "Intent To Immediately Cancel"

Coscia asserted that the indictment, among other things, failed to offer any coherent theory as to how Coscia misled other market participants. Dkt. 28 at 30-31. In resisting his motion to dismiss, the Government promised to prove at trial that Coscia's large orders were "false" and "deceptive" and he placed them intending to "immediately cancel them." Dkt. 31 at 4. Specifically, the Government promised to prove that Coscia "created a false impression regarding the number of contracts available in the market and created false price and volume information that he used to trick other traders." *Id.* at 18 (internal citation and quotation marks omitted). The District Court, on the basis of the Government's statements about what the trial evidence would show, denied the motion.

b. The Trial Evidence Does Not Show Deceptive Conduct or Immediate Cancellation

At trial, the Government did not prove that Coscia's larger orders were false or deceptive or that he intended to cancel them "immediately." Rather, the undisputed evidence demonstrated that Coscia exposed his large orders to market risk and, in many cases, they were filled by other traders. *See* Gov't Ex. CME Summ. Chart 2; Def. Ex. 522. Indeed, the Government itself calculated that Coscia's large orders traded in full or in part over 8,000 times on CME exchanges. Tr. 417. Although most of Coscia's large orders were cancelled without being filled, expert trial testimony also showed this to be consistent with market practices. Tr. 1164-65, 1237-38; Gov't Ex. CME Summ. Chart 2. And various Government witnesses confirmed that Coscia's large orders were, in fact, subject to legitimate market risk including the possibility of being filled. *See, e.g.,* Tr. 234, 679-681, 745-46.

The testimony of Coscia and his computer programmer also showed that Coscia did not cancel his large orders immediately. Rather, the large orders were only canceled when one of three conditions were satisfied: the partial fill of the order, the fill of other orders, or the passage of a defined period of time. *See supra* 5-8.[7] Other trial testimony showed that cancellation based on these conditions is widely

[7] Coscia's computer programmer, Jeremiah Park, also testified that Coscia never communicated to him that he intended to commit fraud, manipulate prices, or otherwise do anything inappropriate. Tr. 547-49.

viewed as legitimate. Government witness Dermenchyan, for example, acknowledged that it is "routine" for trading algorithms to "include an automatic cancellation element either via the passage of time or because something else trades in the market or because of other conditions." Tr. 676-77. And the Government did not proffer any evidence indicating that the amount of time that Coscia's orders remained open fell short of any industry practices, let alone any applicable rules. To the contrary, Government witnesses testified that there was no meaningful guidance regarding how long orders had to remain open before cancellation. Tr. 720, 769.

The trial also demonstrated that Coscia's orders could *not* have deceived other traders. Coscia's orders did not mislead the market as to whether they were bona fide: the Government's own witnesses confirmed that they were available to be traded at their quoted prices and sizes. *See, e.g.*, Tr. 679-81, 746-48. The Government's trader witnesses also testified that Coscia's orders did not mislead other market participants as to how long they would remain open. *See, e.g.*, Tr. 676 (agreeing that "[w]hen you see an order in the market, you don't know how long it's going to be resting in the market before it's withdrawn"), 768-69. Rather, these sophisticated traders—characterized by the Government as the "victims" of Coscia's alleged scheme—understood that orders were not

obligated to remain open for any period of time. *See, e.g.,* Tr. 720, 769.[8] Their testimony likewise revealed that they were capable of observing Coscia's orders and choosing not to make any decisions based on them. *See, e.g.,* Tr. 618-19, 750. At most, the testimony of the Government's trader witnesses showed that some of their algorithms had reacted to Coscia's orders in ways the traders found sub-optimal, causing them to modify their algorithmic trading strategies in response. *See* Tr. 637, 644, 656, 696-98, 742, 765.

Although Coscia's orders were consistent with industry norms, the Government argued that Coscia was an outlier in the marketplace and, by implication, a wrongdoer. To this end, the Government introduced various charts portraying Coscia as having cancelled his large orders at an unusually high rate, and having entered an unusually high amount of large orders. *See* Tr. 299-300, 400-03; Gov't Exs. ICE Summ. Charts 2-3; Gov't Ex. CME Summ. Chart 5. The Government emphasized this evidence in its closing statement, telling the jury, "[t]he numbers you saw, first of all, was that defendant cancels more than 98 percent of his large orders on both the Chicago market [CME] and the London market [ICE]," and "[h]e enters so many more large orders than everyone else,

[8] All of the purported victims who testified for the Government were sophisticated commodity futures investors. Tr. 609 (C. Roenbaugh) (largest corn consumer in the United States); 639 (A. Twells) (multi-billion dollar trading firm); 671 (H. Dermenchyan) (trading firm operated "hundreds and hundreds" of algorithms); 713 (A. Gerko) (multi-billion dollar trading firm); 733-34 (J. Shaw) (market-making proprietary trading firm); 759-61 (J. Eddy) (multi-billion dollar trading firm).

and he cancels them more than everybody else out there..." Tr. 1447. The District Court later described this evidence as "a very strong element" of the Government's case. *See* Dkt. 148 at 7. [9]

The Government's "outlier" evidence has since been discredited as a factual matter. *See* Dkt. 156 at 10-16 (detailing the myriad ways in which Coscia had been inaccurately portrayed as an outlier). For example, contrary to what the Government argued, Coscia's cancellation rate was, in fact, lower than the average cancellation rate for the market, and in nearly all markets Coscia placed fewer large orders than the firm that placed the most large orders. *Id.* Between the verdict and sentencing, the Government abandoned its argument that Coscia was an outlier. *See* Dkt. 149 at 7.

c. <u>The Trial Evidence Does Not Show That Coscia Caused Losses</u>

The trial also produced no credible evidence that anyone actually lost money because of Coscia:

- Three of the Government's six trader witnesses testified that they did not lose money trading with Coscia. Tr. 616-19, 623, 741-742, 748.
- Anand Twells of Citadel claimed $480 of alleged losses in connection with two trades with Coscia "*[i]f* we take these trades in isolation." Tr. 635 (emphasis added). But he also admitted that Coscia's large orders were merely "a factor … one part of our model that we used to estimate fair value of the contracts." Tr. 636

[9] Neither the District Court nor the Government ever explained how engaging in otherwise lawful conduct more frequently than the norm renders that conduct criminal.

- Hovannes Dermenchyan claimed that one of Teza Technologies' programs lost $10,000 because it "was induced" by Coscia's large orders. Yet he did not show any specific transaction in which Teza lost money, and conceded that he had no basis to expect Coscia's orders would remain open for any length of time or under any particular conditions. Tr. 655-56, 674-77.

- Alex Gerko's testimony of his firm's losses did not withstand cross-examination:

> Q: Sir, when you just testified that you lost several hundred thousand dollars, you have no idea who the counter-parties to those trades were that caused you to sustain those loses, right?
> A: No.
> Q: So you can't say under oath that the defendant Michael Coscia had anything to do with that, can you?
> A: No, I cannot.

Tr. 710-11.

d. The District Court Largely Adopts the Government's Proposed Jury Instructions

At the close of trial, the Government requested and received a jury instruction on spoofing that criminalized the entry of any order with the intent to cancel before execution (arguing that Congress intended the parenthetical clause in the spoofing provision to be the definition of spoofing). Dkt. 85 at 25-26; Dkt. 62 at 28. This instruction stands in contrast with the District Court's subsequent ruling on Coscia's post-trial motions that equated spoofing with fraud and market manipulation. *See supra* 36-39. The District Court also rejected Coscia's requested instruction on commodity fraud, instructing the jury that: "a scheme to defraud must be material, which means it is capable of influencing the

decision of the person to whom it is directed." Dkt. 85 at 21. Based on these instructions, the jury convicted Coscia on all counts.

e. The District Court Denies Coscia's Post-Trial Motions

Following the jury's verdict, Coscia moved for a judgment of acquittal under Rule 29 or, alternatively, a new trial under Rule 33 ("Post-Trial Motions"). In denying the Post-Trial Motions (the "Post-Trial Order"), the District Court defined the prohibition against spoofing differently than in the previous iterations used by it and the Government in earlier proceedings: "The purpose is clear: to prevent abusive trading practices that artificially distort the market. That, in turn, *only* occurs when there is *intent to defraud* by placing illusory offers (or put another way, by placing offers with the intent to cancel them before execution)." RSA 74 (emphasis added). Having thus defined spoofing as requiring an intent to defraud, the District Court further characterized spoofing as a subspecies of market manipulation: "as the Court indicated in its previous discussion of wash trading, statutory prohibitions against specific forms of market manipulation are nothing new." *Id.* Relying on this interpretation of the anti-spoofing provision, and the same interpretation of the commodities fraud statute reflected in the jury instructions, the District Court denied the motion.

f. The District Court Applies A 14-Point Loss Enhancement

The Government's sentencing submission proposed a 14-point loss enhancement in the guidelines range calculation, even though the

Government had not quantified the purported victims' losses, nor proven any pecuniary losses caused by Coscia. The Government pursued this enhancement even as it conceded that it was possible that any other party who traded with Coscia could have made or lost money. Dkt. 156 at 26-30; Dkt. 157 at 8-10; RSA 23-25.

At sentencing, the District Court once again conflated spoofing with manipulation and went on to theorize that Coscia's orders had changed market prices, stating, "That was what the charge is, that he manipulated the market, that it caused the market for a specific lot to go up one tick." RSA 17. In weighing the proposed loss enhancement, the District Court articulated a belief that Coscia's profits must have been the product of a "zero sum" game in which Coscia gained because of changes in prices and other parties necessarily incurred similar losses. RSA 25 ("For someone to have made a $1,400,000 in ten weeks' time that [means] somebody must have lost."). There was no basis in the record to support this incorrect theory that the commodity futures markets work in a "zero-sum" manner. The District Court thereby determined that Coscia's purported US $1.4 million gain was an appropriate substitute for loss.

The disputed loss enhancement led to a 70 to 87 month guidelines range. The District Court departed downwards from the guidelines range to impose 36 months incarceration. This appeal followed.

SUMMARY OF THE ARGUMENT

1. The District Court erred in concluding that the evidence was sufficient to prove that Coscia's order activity constituted a material fraudulent scheme. Coscia's orders were real, executable orders that were not deceptive as a matter of law, and the District Court applied the wrong legal standard in assessing whether the trial produced sufficient evidence of a fraudulent scheme. Because no rational juror could have concluded beyond a reasonable doubt that Coscia's orders were "reasonably calculated to deceive persons of ordinary prudence" in the futures markets, Coscia's commodity fraud conviction must be reversed.

2. Coscia's spoofing conviction cannot stand because the anti-spoofing provision is impermissibly vague as applied in this case. The District Court's shifting interpretations of the anti-spoofing provision demonstrate the confusion over its meaning and the corresponding lack of notice to the public regarding what activity it proscribed in 2011. Ultimately, none of the various constructions of the anti-spoofing provision articulated by the District Court can be squared with the provision itself or the surrounding statutory framework. The application of these various interpretations to Coscia's trading activity violated his due process right to be afforded fair notice of what conduct is prohibited, and the trial evidence confirmed that Coscia's conditional-trading logic did not constitute spoofing under the definition provided to the jury. Accordingly, the judgment of conviction for spoofing must be reversed.

3. If the Court does not reverse Coscia's commodity fraud and spoofing convictions, it must vacate his sentence because the District Court erroneously applied a 14-point loss enhancement. That error inflated the guidelines range from 12-18 months to 70-87 months based on insufficient proof that Coscia caused any actual losses and a corresponding failure to establish that his gain would be a reasonable proxy for loss.

ARGUMENT

I. The Commodity Fraud Conviction Must Be Reversed

The District Court upheld the jury's verdict based on a flawed construction of the commodity fraud statute. As set forth below, application of the appropriate legal standards to the trial evidence compels the reversal of Coscia's commodity fraud conviction.

a. Legal Standard

The Court of Appeals reviews questions of statutory interpretation *de novo*. *United States v. Thornton*, 539 F.3d 741, 745 (7th Cir. 2008). Title 18, Section 1348(1) of the U.S. Code provides that it is a crime to "to defraud any person in connection with any commodity for future delivery." 18 U.S.C. § 1348(1).[10] In order to sustain a fraud charge under Section 1348(1), there must be (a) proof of deceptive conduct, and (b) proof that the deception is "material." *See United States v. Hatfield*, 724

[10] The Government indicated its intent to proceed under Section 1348(1) of the commodity fraud statute before trial. Dkt. 53 at 2-3.

F. Supp. 2d 321, 324 (E.D.N.Y. 2009). No Court of Appeals has defined the materiality standard in the context of the commodity fraud statute.[11]

This Court has held that there is no scheme to defraud unless the scheme is "reasonably calculated to deceive persons of ordinary prudence." *United States v. Giles*, 246 F.3d 966, 973 (7th Cir. 2002) (mail fraud); *United States v. Britton*, 289 F.3d 976, 981 (7th Cir. 2001) (same). Similarly, in construing analogous federal criminal fraud statutes, other appellate courts have held that an alleged deception is only material if "there is a substantial likelihood that a reasonable investor would consider [the deceptive conduct] important in making a decision." *United States v. Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004) (securities fraud) (citation omitted); *United States v. Vilar*, 729 F.3d 62, 88 (2nd Cir. 2013) (same).

b. Coscia's Orders Were Not Deceptive—They Were Real And Executable

The Government's commodity fraud charges fail because, contrary to its repeated argumentation that Coscia entered "illusory" orders, the trial evidence demonstrated that Coscia's orders were fully executable and subject to legitimate market risk. Indeed, these orders were left open in the market long enough that other traders could—and often did—trade against them, leading to thousands of completed transactions

[11] The commodity fraud prong of 18 U.S.C. § 1348 was added to the previously existing securities fraud statute in 2009. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1618 (May 20, 2009).

at the prices offered by Coscia. *See* Tr. 417, 1234; Def. Ex. 522. Moreover, the traders who transacted with those orders did so at the best price available in the market. *See, e.g.,* Tr. 642-44, 771-72, 830. Accordingly, these orders were not fraudulent or "illusory" as a matter of law. *See United States v. Radley*, 659 F. Supp. 2d 803 (S.D. Tex. 2009), *aff'd on other grounds,* 623 F.3d 177 (5th Cir. 2011).

In *Radley*, the Government charged the defendants with price manipulation and wire fraud in connection with their trading of TET Propane, a natural gas commodity.[12] The Government's theory was that the defendants "misled the market" about the true supply of TET Propane by placing multiple bids and offers and thereby "creating the impression that multiple counterparties wished to buy propane." *Id.* at 807. The District Court, however, held that these allegations did not constitute misrepresentations or deceptive conduct actionable as fraud. As here, the allegedly misleading bids "were actually bids, and when they were accepted, defendants actually went through with the transactions." *Id.* at 815. Accordingly, the District Court concluded: "other counterparties may have assumed that the 'stacked bids' came from multiple parties, but defendants did not perpetuate or cause this misconception. *Since defendants were willing and able to follow through on all of the bids, they were not misleading.*" *Id.* (emphasis added).

[12] The Government charged the alleged fraud as wire fraud because the underlying conduct pre-dated the enactment of the commodity fraud statute.

The same reasoning applies here. Irrespective of the manner in which Coscia's bids and offers were sequenced, it is undisputed that *all* of his orders were open and available for execution in the marketplace, and that he followed through with the transactions whenever his orders were filled by other traders. Accordingly, there was nothing deceptive about Coscia's trading activity, and no rational juror could have concluded otherwise.

c. Reasonable Traders Could Not Be Deceived By Coscia's Orders

The Government failed to adduce sufficient evidence to support its theory that Coscia's large orders deceived other traders. The Government's commodity fraud charges depended upon proof of "a scheme to defraud by intentionally misleading market participants about price and volume information in the commodities markets through sham quote orders." RSA 70. Under the Government's theory, which was adopted by the District Court, (i) Coscia's large orders were materially misleading "shams" because Coscia intended to cancel them (if possible) before execution and (ii) other traders would be "misled" because they would observe those orders and make decisions based on an expectation that those orders would not be cancelled quickly. *See* Tr. 165-66.

In assessing whether the trial produced sufficient evidence to support the Government's theory, the District Court, in accordance with its flawed instruction to the jury, erroneously framed the required materiality inquiry as a question of whether the purported scheme was

"capable of influencing the person to whom it was addressed." RSA 74. This materiality standard, drawn from the Seventh Circuit's Pattern Criminal Jury Instructions, reflects the law applicable to certain other federal fraud statutes, including false statements under 18 U.SC. § 1001. But it is not an appropriate standard for commodity fraud. In the commodity futures markets, as shown by the Government's trial witnesses, nearly any market activity could be deemed "capable of influencing" algorithms that react to countless factors to varying degrees. *See, e.g.*, Tr. 718, 744-45, 761. In this context, the "capable of influencing" standard of materiality provides no standard at all.

The materiality standard for commodity fraud is more appropriately drawn from securities fraud cases that are more analogous to commodity futures trading. Under this standard, the purportedly deceptive conduct can only be material if "there is a substantial likelihood that a reasonable investor [or trader] would consider [the deceptive conduct] important in making a decision." *See Tarallo*, 380 F.3d 1174; *Vilar*, 729 F.3d at 88.

Similarly, under this Court's decision in *Giles*, the Government had to demonstrate that Coscia's large orders were "reasonably calculated to deceive persons of ordinary prudence" to prove that Coscia's conduct constituted a scheme to defraud. *Giles*, 246 F.3d at 973. To do so in this case, the Government had to adduce evidence that market participants held a reasonable expectation that Coscia's orders would

remain in the order book for a minimum amount of time to which he failed to adhere. Without that evidence, there would be no basis for the jury to conclude that these orders were reasonably calculated to deceive, or that market participants "of ordinary prudence" could have been misled by them.

Yet the testimony cited by the District Court in its Post-Trial Order did not show that any individual could have reasonably expected Coscia's large orders to remain exposed for any particular time. Rather, the testimony merely showed that certain automated trading algorithms had been programmed in a way that made them responsive to the existence of large orders, including Coscia's large orders.[13] There is no evidence that any trader, regardless of how he had designed his algorithm, had a reasonable basis to assume that the trader who placed large orders would keep them open for any length of time or under any specific set of circumstances. This evidentiary shortfall is dispositive. *See United States v. Finnerty*, 474 F. Supp. 2d 530, 538-39 (S.D.N.Y. 2007), *aff'd*, 553 F.3d 143 (2d Cir. 2008).

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[13] Tr. 636-37 (A. Twells) (a Citadel algorithm "used many factors to estimate fair value" and "orders in the order book" were "one part of our model"); Tr. at 656 (H. Dermenchyan) (one of Teza's algorithms was "induced" by Coscia's large orders); *id.* at 696 (A. Gerko) (automated strategy "was interpreting this imbalance as basically a signal to buy, and it was trading on the offer"); *id.* at 765 (J. Eddy) (Coscia's orders were "*likely* a significant factor" in the "computer program's decision" to place an order) (emphasis added).

In *Finnerty,* the defendant, a New York Stock Exchange "specialist," had transacted with customers using his own account rather than brokering transactions directly between customers (a practice known as "interpositioning"). *Id.* The jury found the defendant guilty of securities fraud, and he moved to set aside the conviction. The District Court held that "the Government could not prove that interpositioning was deceptive without showing what the investing public expected." *Id.* at 539. Because the Government failed to adduce evidence that the defendant's conduct was contrary to his customers' expectations, the District Court acquitted the defendant. *Id.* at 547. Its decision was affirmed by the Second Circuit. *Finnerty,* 553 F.3d at 133.

This Court reached a similar decision in *Sullivan & Long, Inc. v. Scattered Corp.* 47 F.3d 857 (7th Cir. 1995). The plaintiffs there had asserted securities law claims predicated on the defendant having entered into short sales of stock in an amount that exceeded the total shares outstanding. *Id.* at 863. This Court held that securities fraud could not be sustained when "the plaintiffs could not count on the volume of short sales being capped at the total number of shares outstanding," and the defendant "was not required to disclose the number and the plaintiffs were not entitled to assume that [the defendant] would not sell more shares than were outstanding." *Id.; see also United States v. Davis,* 989 F.2d 244, 247 (7th Cir. 1993) (reversing

bank fraud conviction in the absence of proof that the alleged misrepresentations were material).

Here, the Government failed to adduce any evidence showing that market participants had any expectations regarding how long Coscia's orders would remain open before cancellation or under what circumstances they would be cancelled. To the contrary, the record demonstrates that traders held no such expectations. For example, Hovannes Dermenchyan of Teza conceded, "[w]hen you see an order in the market, you don't know how long it's going to be resting in the market before it's withdrawn." Tr. 676; *see also,* Tr. 768-69 (J. Eddy). Similarly, a Government witness from CME agreed that "traders are not obligated to inform other traders how long they intend to keep their contracts available for execution" and "there's not really a way to do so." Tr. 238. These observations flow from the reality that commodity futures trading occurs in an environment in which there are no rules requiring that orders remain open for any particular period of time, and more than 98% of orders are cancelled before execution. *See supra* 6-7, 19.

Traders "of ordinary prudence" likewise understand that the market depth reflected in the order book simply does not reflect the market's true supply and demand. For example, fill-and-kill orders distort the order book's reflection of the market's supply and demand because they enable traders to enter orders while bypassing the order book. *See supra* 6-9. Iceberg orders—officially named "Hidden Orders"

by the CME—are also "frequently used," and they also allow traders to hide their true supply or demand from the market. *See supra* 8-9; Tr. 232-33.

Because of these widely understood market realities, none of the supposed "victims" who encountered Coscia's orders could have been misled by them as a matter of law. As Chris Roenbaugh, the only manual ("point-and-click") trader to appear at trial, acknowledged, Coscia's activity "didn't affect our strategy as far as what prices we wanted to buy at." Tr. 618-19.

Finally, the sophistication of the purported victims also bears on whether they reasonably could have been deceived by Coscia's orders. Indeed, courts have held in the context of criminal securities fraud cases, "whether conduct may fairly be viewed as deceptive will generally depend upon the circumstances of the particular person or class allegedly deceived, their knowledge and perceptive faculties. In other words, before the court can ask 'Was the conduct deceptive?', it must first ascertain 'To whom?'" *Finnerty*, 474 F. Supp. 2d at 538-39 (citing *Klamberg v. Roth*, 473 F. Supp. 544, 550 (S.D.N.Y. 1979)). Here, all of the purported victims who testified for the Government were sophisticated, professional commodity futures traders. *See supra* 20, n. 8. As such, they were knowledgeable about the markets in which they were operating—including the prevalence of extremely high cancellation rates and orders cancelled within a second. Indeed, one of the supposed

victims testified to cancelling one of his own orders within *three milliseconds* of placing it. Tr. 725-26; *see also* Tr. 239, 1568. These undisputed facts foreclose any reasonable inference that Coscia's orders were materially misleading, or that any of the supposed victims were, in fact, misled.

II. The Anti-Spoofing Provision Is Unconstitutionally Vague As Applied To The Trading Activity At Issue

Applying the anti-spoofing provision to Coscia's conduct would violate Coscia's right to fair notice, and adopting the definition of "spoofing" provided to the jury would authorize unconstitutional arbitrary enforcement as well. Moreover, even under the overly-broad definition of "spoofing" incorporated into the District Court's jury instruction, Coscia's conviction would still need to be reversed because no rational jury could conclude that he entered orders with an unconditional intent to cancel them before execution.

a. Legal Standard

Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Upton v. S.E.C.*, 75 F.3d 92, 98 (2d Cir. 1996) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). When neither the statutory text nor the legislative history unambiguously establish Congressional intent, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," which "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota v. United States*,

471 U.S. 419, 427 (1985). A statute that authorizes arbitrary enforcement by "sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application," is also constitutionally impermissible. *Ashton v. Kentucky*, 384 U.S. 195, 199 (1966). To avoid unconstitutional vagueness, there must be minimal guidelines to govern the discretion of those who enforce the law in question. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Further, "criminal laws are more searchingly examined for vagueness," and a criminal law's scienter requirement *only* mitigates vagueness concerns when the scienter requires the defendant's knowledge that "what is done is unlawful or, at least, so wrong that it is probably unlawful." *Levas and Levas v. Vill. of Antioch, Ill.*, 684 F.2d 446, 452 (7th Cir. 1982) (citations and internal quotation marks omitted).

b. The District Court's Shifting Interpretations Of The Anti-Spoofing Provision Underscore Its Inherent Vagueness

In denying Coscia's Post-Trial Motions, the District Court erroneously equated the "intent" required by the anti-spoofing provision with "intent to defraud." RSA 74. It then compounded this error by characterizing spoofing as a subspecies of market manipulation. RSA 17-18, 74. The District Court thus construed the provision as criminalizing orders that, while subject to being filled, were nevertheless

entered with a subjectively improper purpose – to deceive market participants (fraud) or to create artificial prices (manipulation).

This peculiar construction of the provision lacks any basis in the statutory text and stands in irreconcilable tension with the CEA's overarching legislative framework. As the CEA's configuration confirms, Congress deliberately chose *not* to place the anti-spoofing provision within either the pre-existing fraud or manipulation statutes. *Compare* 7 U.S.C. § 6c(a)(5)(C) (anti-spoofing provision) *with* 18 U.S.C. 1348 (commodity fraud) *and* 7 U.S.C. § 9 (manipulation).[14] Indeed, the CFTC has acknowledged that it "interprets the prohibition in CEA Section 4c(a)(5) provisions to be distinct statutory provisions from the anti-manipulation provisions in section 753 of the Dodd Frank Act." *See* CFTC's 2013 Final Guidance, 78 Fed. Reg. at 31,890. Because Congress did not include any element of deceptive intent or price manipulation in the anti-spoofing provision, the District Court's reliance on those elements to distinguish Coscia's trading activity from other forms of commonly-accepted (and apparently lawful) trading activity runs contrary to well-established cannons of statutory construction. *See*

[14] Given that Congress took no corresponding legislative action to prohibit iceberg orders, which are specifically designed to obfuscate the true depth of supply or demand, it would be incongruous to infer that Congress intended the anti-spoofing provision to prohibit entering orders with the intent to cancel before execution on the theory that such orders mislead the market regarding supply or demand.

Oneida Indian Nation of NYS v. Oneida Cty., 719 F.2d 525, 540 n.21 (2d Cir. 1983).[15]

Further underscoring the lingering confusion surrounding the proper interpretation of the provision, the District Court's interpretation in the Post-Trial Order did not even align with its jury charge, which provided in relevant part:

> 'Spoofing' is defined as 'bidding or offering with the intent to cancel the bid or offer before execution.' To find this element satisfied, you must find that the government has proven beyond a reasonable doubt that, at the time Coscia entered the bid or offer specified in the Count that you are considering, he intended to cancel the entire bid or offer before it was executed, and that he did not place the bid or offer as part of a legitimate, good-faith attempt to execute at least part of that bid or offer.

Dkt. 85 at 25-26. This instruction differed from the District Court's post-trial interpretation of the provision insofar as it omitted any element of deceptive intent or artificial price. Ultimately, these evolving (and competing) interpretations of the anti-spoofing provision by the District Court illustrate how difficult it would have been for a person of ordinary intelligence to understand exactly what conduct Congress was intending to proscribe back in 2011, when there was widespread confusion as to

[15] To the extent that this Court upholds the District Court's interpretation of the anti-spoofing provision as a subspecies of market manipulation, the conviction must be reversed because the Government made no attempt to prove that Coscia's trading activity created an artificial price in the marketplace. Moreover, if this Court were to conclude that the provision incorporates an element of deceptive intent, a new trial would be warranted because Coscia was entitled to a jury instruction that was a fair and accurate statement of the law. *United States v. Perez*, 43 F.3d 1131, 1137 (7th Cir. 1994).

what constitutes "spoofing" and no final CFTC guidance available to the public. *See Stoller v. CFTC*, 834 F.2d 262, 267 (2d Cir. 1987) ("The fact that the [Government] abruptly changed its own interpretation in the middle of the proceedings in our judgment further demonstrates the need both for a clearer and more explicit interpretation and for appropriate notice thereof to the public as to what conduct is permissible.").

c. The Anti-Spoofing Provision Cannot Be Construed To Proscribe Entering Any Order With Intent To Cancel Before Execution

The construction of the anti-spoofing provision in the District Court's jury instructions (requiring, among other things, a "legitimate, good-faith attempt to execute at least part of that bid or offer") violates Coscia's due process rights. Indeed, no reasonable person in Coscia's position in 2011 would have had fair notice that the anti-spoofing provision could be interpreted as prohibiting any order entered with the intent to cancel before execution.

The Government's position is that Congress intended the parenthetical clause "(bidding or offering with the intent to cancel the bid or offer before execution)" to function as the definition of spoofing, and therefore what is criminal conduct. 7 U.S.C. § 6c(a)(5)(C). Such an interpretation would criminalize commonplace trading activity based purely on the subjective intent imputed to a particular trader. Indeed, as shown at trial, ordinary traders in the commodities futures markets in 2011 understood and expected that over 90% of orders would be

cancelled before being executed, and orders submitted with the intent to cancel before execution, such as hedge and stop-loss orders, were commonplace. *Supra* 5-8. Coscia could not have reasonably expected Congress to have subjected such a wide swath of previously-accepted conduct to the whims of prosecutorial discretion without providing clear notice. *See Stoller*, 834 F.2d at 266-67 (reversing the CFTC's order and holding that "the commonplace nature of [Stoller's] trading, combined with the absence of enforcement, would further buttress a reasonable inference that the conduct was permissible"). Moreover, as shown below, this expansive construction of the provision would be contrary to basic principles of statutory interpretation and the limited guidance that was available at the time.

i. Congress Did Not Intend To Define Spoofing Solely By Reference To The Parenthetical Provision

By placing "spoofing" in quotation marks and referring to a "commonly known" definition in the trade, Congress clearly signaled its (mistaken) belief that the definition of "spoofing" had been established in the industry as a term of art. *See Utah v. Evans*, 536 U.S. 452, 464-68 (2002) (stating that the quotation marks that surround "sampling" in 13 U.S.C. § 195 "suggest[ ] a term of art with technical meaning").[16] This approach follows from the CEA's "wash sale" prohibition, whose nearly

[16] The anti-spoofing provision proscribes "any trading, practice, or conduct that . . . is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)". 7 U.S.C. § 6c(a)(5)(C).

identical language and structure is analogous to the anti-spoofing provision. *Compare* 7 U.S.C. § 6c(a)(5)(C) *with* 7 U.S.C. § 6c(a)(2)(A)(i) (proscribing any transaction that "is, of the character of, or is commonly known to the trade as, a 'wash sale' or 'accommodation trade'").

Congress did not define "wash sale," but instead referenced an established meaning that was readily discernible from contemporaneous legislative history and judicial decisions. *See* 80 Cong. Rec. 6162 (1936) (statement of Sen. Pope) ("Wash sales. . . may be entered and recorded as real trades, but by agreement between the parties privately are either canceled or washed out by other trades"); *see also, e.g., United States v. Brown*, 79 F.2d 321, 323 (2d Cir. 1935). And courts have construed the "wash sale" prohibition based on that established meaning for years. *See, e.g.*, *Wilson v. CFTC,* 322 F.3d 555 (8th Cir. 2003). This parallel approach in statutory structure strongly suggests that Congress intended for the "spoofing" definition, like the "wash sale" definition, to be established by sources outside the statutory text.

Contrary to what the Government may contend, the parenthetical clause tacked to the end of the anti-spoofing provision does not imply that Congress defined "spoofing" within the parentheses. (Indeed, there would have been no need for quotation marks around the word "spoofing" if Congress were defining the same via the parenthetical that immediately followed). Rather, as the Supreme Court has explained, "[t]he use of parentheses emphasizes the fact that that which is within is

meant *simply to be illustrative*." *Chicksaw Nation v. United States*, 534 U.S. 84, 89 (2001) (emphasis added). As such, the parenthetical clause is most reasonably viewed as a shorthand illustration, rather than the definition, of a word which Congress incorrectly believed to be a term of common term of art in the industry.

ii. The CFTC Had Not Adopted The "Intent To Cancel Before Execution" Interpretation In 2011

The CFTC has *never* articulated that spoofing should be defined by the parenthetical phrase in the statute's text. *See* Proposed Interpretive Order, 76 Fed. Reg. at 14,945. It declined to define spoofing in this manner, even though industry participants had clamored for it to define the term clearly after Dodd-Frank was enacted. A reasonable person in 2011 certainly could not be expected to have assigned a sweeping interpretation to the provision that the CFTC had not itself adopted. *See Liparota*, 471 U.S. at 425-27 (declining to adopt the Government's proposed interpretation of the food stamp fraud statute, observing "Congress could have intended that this broad range of conduct be made illegal . . . [but] given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation."). For this reason alone, Coscia lacked fair notice of the interpretation of the anti-spoofing provision reflected in the jury charge.

iii. The "Intent To Cancel Before Execution" Interpretation Cannot Be Applied Without Fair Notice

The flaw in Congress's apparent plan to pin the definition of "spoofing" to the industry's common understanding was that no such understanding existed or could even be reached after a CFTC-sponsored discussion, as reflected by the public debate following Dodd-Frank. *See supra* 10-12. Moreover, at the time of the trading at issue, the CFTC still had not exercised its rule-making authority, leaving unanswered questions regarding whether various types of trading—including the types of orders used by Coscia—could constitute "spoofing." *See* 2013 CFTC Final Guidance, 78 Fed. Reg. at 31,896 (noting that in the March-May 2011 comment period, "[c]ommenters further requested that if a bid or offer has the risk of being hit or lifted by the market, for any period of time, such trading activity should be exempt from being classified as a 'spoofing' violation."). Without any legislative history, a recognized industry definition, or a CFTC rule to provide guidance, a person of ordinary intelligence could only speculate as to what definition Congress referred to when it placed "spoofing" in quotation marks. Coscia therefore lacked fair notice in 2011 as to what conduct the provision proscribed. *See Upton v. SEC*, 75 F.3d 92 (2d Cir. 1996).

In *Upton*, the SEC determined that Upton's conduct violated the Commission's then Customer Protection Rule, 17 C.F.R. § 240.15c3–3(e), which required financial institutions to calculate certain reserve

balances. The Second Circuit, however, noted that "there was substantial uncertainty in the Commission's interpretation of Rule 15c3–3(e)" at the time of Upton's conduct. *Id.* at 98. And, despite this uncertainty, the SEC did not take sufficient steps to advise the public that Upton's conduct "was questionable until . . . after Upton had already stopped the practice." *Id.* The Second Circuit reversed Upton's censure accordingly. *Id.*

The same due process principles apply here. To the extent this Court construes that anti-spoofing provision to have criminalized even executable orders if entered with the intent to cancel before execution, the anti-spoofing provision is unconstitutionally vague as applied to Coscia because of the CFTC's failure in 2011 to advise the public of what would have been a market-transformative ban on a massive amount of commonplace activity.[17]

iv. The "Intent To Cancel Before Execution" Interpretation Would Encourage Arbitrary Enforcement

The "intent to cancel before execution" interpretation also suffers from the constitutional infirmity of enabling the Government arbitrarily to determine whose conduct is lawful and whose is criminal. Trial testimony showed that high-frequency traders cancel *98%* of orders

[17] For the purposes of this case, the Court need not address whether applying this interpretation of the anti-spoofing statute to conduct occurring after the 2013 Final Guidance's publication would violate a defendant's due process rights.

before execution in the largest futures markets. Tr. 1164-65, 1237-38. Yet neither Congress, nor the CFTC, nor the U.S. Department of Justice promulgated any prohibitions on cancelling "too quickly" or "too often."[18] (To this day, there are no limitations on how quickly or often a trader can cancel orders.) Nor did they provide any tangible parameters to distinguish Coscia's purported intent from that of the other traders who collectively entered nearly *630 million orders that were cancelled within a second.* Dkt. 156-1 ¶ 13. Instead, the Government justified Coscia's conviction to the jury using a seemingly-arbitrary "outlier" theory to distinguish between his conduct and conduct it apparently deems lawful.

Undisputed trial testimony showed that Coscia's algorithm cancelled his large orders based on three conditions, each of which is common in the industry. *See supra* 5-8, 16. Indeed, even the Government's purported victims engaged in these practices. *Id.* Against this backdrop of arbitrary enforcement, the former Chief of Enforcement for the CFTC recently wrote, "[t]he reality is that every trader is potentially vulnerable to a post-facto allegation that he or she has intended to cancel his or her bids or offers before they were executed."[19] It thus appears that the unfettered prosecutorial discretion warned of by

[18] Neither CME nor ICE had done so either. Tr. 233-34,769.

[19] Gregory Mocek and Jonathan Flynn, *'Spoofing' - A New, Amorphous Crime with Domestic & International Implications for Traders*, Commodities Now (Feb. 2016).

Commissioner Sommers in 2011 has come to pass, with Coscia as its first target.

The Supreme Court, however, has held that Congress cannot enact a vague statute that leaves "to the executive and judicial branches too wide a discretion in its application." *Ashton*, 384 U.S. at 199. And this Court has not hesitated to act on that principle when necessary. For example, in *Record Head Corp. v. Sachen*, this Court struck down an ordinance criminalizing the sale of drug paraphernalia because the factors defining an unlawful "instrument," which would also be used to show the defendant's unlawful intent, "were fuzzy, contradictory and dangerously open to erratic and after-the-fact interpretation." 682 F.2d 672, 678 (1982) (internal citations omitted). As the trial testimony proved, the anti-spoofing provision similarly allows prosecutors to single out for punishment conduct seemingly indistinguishable from legitimate conduct based on arbitrary, after-the-fact interpretation. To apply such a standard to Coscia would violate his due process rights. *Id.; Skilling v. United States*, 561 U.S. 358, 402-03 (2010); *see also Cunney v. Bd. of Trs. of Vill. of Grand View, N.Y.* 660 F.3d 612 (2d Cir. 2011) (holding zoning ordinance unconstitutionally vague).[20]

[20] In *Record Head Corp*, this Court observed that allowing vague statutes to stand "encourages legislators to evade difficult decisions that would otherwise subject them to political pressures and accountability." 682 F.2d at 678 (citations omitted). Here, permitting the Government to enforce the anti-spoofing provision with unfettered discretion would likewise encourage Congress to evade its legislative responsibility to an

v. Coscia's Conviction Cannot Stand Even Under The "Intent To Cancel Before Execution" Interpretation

Even if the Court were to hold that the provision constitutionally criminalized entering *any* order with the intent to cancel it before execution, Coscia's spoofing conviction still could not be sustained.

Undisputed evidence showed that Coscia's large orders were cancelled under three circumstances, none of which show an unconditional intent to cancel before execution. First, cancelling his large orders after his small orders were filled is fundamentally conditional and consistent with rational economic behavior, as evidenced by the Government's own witness who testified that it would be "routine" for an algorithm to cancel an order "because something else trades in the market." Tr. 676-77. Second, cancelling a large order after a subset of the order is filled evinces intent to accept a partial fill, and the Court's own jury instructions make clear that partial fills are lawful. Dkt. 85 at 25-26. Third, cancelling large orders after a certain amount of time passes is both conditional and commonplace. Tr. 658, 676-79. Even if Coscia had hoped that his large orders would cancel out, in the same way traders hope to cancel stop-loss or hedge orders, there would still be no evidence that he harbored an *unconditional* intent to cancel his trades before execution. Accordingly, his spoofing conviction cannot stand even

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industry that, unlike the marginal drug paraphernalia trade, plays a critical role in our nation's economy.

under this sweeping construction. *United States v. Moses,* 513 F.3d 727, 733 (7th Cir. 2008).

d. The Anti-Spoofing Provision Could Be Limited To Prohibit Orders Not Subject To Market Risk

Consistent with the rule of lenity, interpreting the anti-spoofing provision as proscribing only those orders that are entered with intent to cancel before becoming at risk for execution would avoid the constitutional problems of arbitrary enforcement and lack of fair notice. *Skilling*, 561 U.S. at 406; *Liparota*, 471 U.S. at 425-27. In *Skilling*, the Supreme Court determined that the honest services fraud statute would be unconstitutionally vague unless the Court narrowed its construction to the "core" conduct that Congress had intended to proscribe (bribes and kickbacks). *Skilling*, 561 U.S. at 404-07. The "core" of what Congress intended to proscribe here, based on the regulatory context and the prevailing market realities, appears to consist of orders not subject to genuine execution risk.

Prior to the enactment of the anti-spoofing provision, the improper entry and cancellation of orders during the pre-opening period when orders cannot be executed was squarely within the crosshairs of market regulators. For example, the CFTC settled two enforcement actions based on pre-Dodd Frank conduct in which the defendants entered orders that were "not true and bona fide" because the defendants "had no intention of allowing the orders to be executed." *In re Gelber Group,*

LLC, CFTC Docket No. 13-15, 2013 WL 525839, at *1, *3 (Feb. 8, 2013); *In re Bunge Global Markets, Inc.*, CFTC Docket No. 11-10, 2011 WL 1099346, at *1 (Mar. 22, 2011). Similarly, CME resolved two contemporaneous disciplinary actions based on orders that were entered and cancelled during the pre-opening period. Gelber Group, LLC, CME File No. 09-06442-BC (Nov. 17, 2011); Kyle McBain, CBOT File No. 10-04622-BC (Nov. 14, 2011). The timing of this enforcement activity suggests that, in enacting the anti-spoofing provision, Congress was responding to the CFTC's desire for an additional enforcement tool to police improper trading activity during the pre-opening period.[21]

Consistent with this conclusion, comment letters responding to the CFTC's 2011 Proposed Guidance demonstrate that reasonable traders believed that the anti-spoofing provision would not reach executable orders. 2013 Final Guidance, 78 Fed. Reg. at 31,896 ("Commenters further requested that if a bid or offer has the risk of being hit or lifted by the market, for any period of time, such trading activity should be exempt from being classified as a 'spoofing' violation."). And such an interpretation would also be consistent with the rule of lenity because it would limit the provision's ambit to conduct that the marketplace had been fairly warned was illegal. *See Liparota*, 471 U.S. at 427-28; *United*

[21] The CFTC pursued these actions pursuant to 7 U.S.C. § 6c(a)(2), which requires that the conduct caused a non bona fide price to be reported. The anti-spoofing provision's enactment authorized the Government to target these orders without showing any impact on price.

States v. Scialabba, 282 F.3d 475, 477-78 (7th Cir. 2002) (construing the federal money laundering statute narrowly to avoid "catching people by surprise").

The marketplace reality of hundreds of millions of orders that—like the orders at issue here—are both executable and cancelled within milliseconds favors this statutory construction as well. By interpreting Congress's intent in the anti-spoofing provision to be prohibiting orders placed with intent to cancel *before* becoming subject to execution risk (as distinguished from *executable* orders) this Court would limit the provision's reach to orders that are obviously non bona fide. *See Skilling*, 561 U.S. at 408. This construction would appropriately limit the provision's reach in a manner consistent with the statutory scheme, in which spoofing is proscribed separate from the pre-existing manipulation and fraud statutes. *Compare* CEA Section 4c(a)(5) *with* 7 U.S.C. 9 and 18 U.S.C. 1348. And it would also give effect to Congress's intent, as reflected in the "wash sale" provision, to police orders entered into the markets without being exposed to execution risk. *See supra* 40-42.

Applying this interpretation here would require Coscia's spoofing conviction to be reversed. The undisputed evidence showed that Coscia's large orders were universally subject to market risk and filled at a higher rate than those of other high-frequency traders. *See* Tr. 417, 1234; Def.

Ex. 522. And, if properly instructed, no rational jury could have concluded otherwise.[22]

III. Coscia's Sentence Is Tainted By An Erroneous Guidelines Calculation

As shown below, the District Court's decision to apply a 14-point loss enhancement at sentencing was predicated on erroneous findings concerning the reasonableness of using Coscia's alleged US $1.4 million gain as a proxy for losses and the proof of loss adduced at trial.

a. Legal Standard

For a loss enhancement to apply, the Government must show by a preponderance of the evidence that the defendant's conduct was the "but for" and proximate cause of victims' losses. *United States v. Whiting*, 471 F.3d 792, 802 (7th Cir. 2006). The defendant's gain may be substituted for loss if (1) there were losses, (2) that cannot reasonably be calculated, (3) and the defendant's gain is a reasonable proxy for loss. *See* U.S.S.G. § 2B1.1 cmt. 3(C); *United States v. Natour*, 700 F.3d 962, 976 (7th Cir.

[22] If the Court reverses the spoofing conviction but does not reverse or vacate Coscia's commodity fraud charges on independent grounds, a new trial on those charges would be warranted based on the "spillover prejudice" from evidence introduced in support of the reversed spoofing count. *United States v. Rooney*, 37 F.3d 847, 855-56 (2d Cir. 1994); *see also, United States v. Dale*, 429 Fed. App'x. 576, 579 (6th Cir. 2011); *United States v. Livingston*, 63 Fed. App'x. 106, 108 (4th Cir. 2003). The jury would have viewed Coscia's trading with a dramatically different lens if it were not instructed that entering orders with the intent to cancel before execution is a crime, particularly given the absence of any evidence that a reasonable trader could have expected Coscia's orders to remain open for any period of time or to cancel under any particular conditions. *See supra* 29-35.

2012). The District Court's sentencing procedures, including the reasoning supporting its determination of loss, are subject to *de novo* review. *United States v. Domnenko*, 763 F.3d 768, 775 (7th Cir. 2014) (reversing application of 14-point loss enhancement). Improperly calculating the guidelines range is a "significant procedural error" that requires vacatur of the District Court's sentence. *Gall v. United States*, 552 U.S. 38, 51 (2007).

b. Substituting Loss For Gain Was Unreasonable

In applying a 14-point loss enhancement at the Government's urging, the District Court based its decision on its theory that Coscia's alleged gains must have been the product of a "zero sum" game in which other parties necessarily incurred similar losses. RSA 25. ("For someone to have made a $1,400,000 in ten weeks' time that [means] somebody must have lost."). On that basis, it substituted Coscia's gain for losses the Government claimed it could not prove. RSA 25. The premise that Coscia had caused price changes was contradicted by testimony from Government witnesses that Coscia's impact on price (if any) was unknown (in addition to the absence of any evidence proving that Coscia caused any market price movements). Tr. 323. Moreover, this reasoning fundamentally misapprehends the nature of futures markets.

First, futures market participants typically purchase contracts from one party and then sell them to another, at a different time in different market conditions. As such, the gain or loss from any

particular position is typically determined from two separate transactions, most often with distinct counterparties. *Second*, futures market participants frequently establish positions as hedges to positions in the cash market. For these traders, the decision to enter or exit a futures position is frequently determined in the context of price movements in the cash market, and their gains and losses do not arise in the vacuum of the futures market.[23] *Third*, parties submit their orders not to individual counterparties but to the entire market simultaneously.[24] Simply put, the "zero sum" theory is contrary to the realities of the futures markets at issue, and cannot serve as the basis for substituting gain for loss here, as required under the Guidelines. *See United States v. Schneider*, 930 F.2d 555, 559 (7th Cir. 1991) (reversing District Court's adoption of loss theory that was "simple" but "bore no relation to economic reality"). And since the Government has provided "no means of determining whether [the defendant's] gain is a reasonable estimate of that loss," the Court should not accept Coscia's gains as a proxy for loss. *United States v. Vitek Supply Corp.*, 144 F.3d 476, 490

[23] *See* Pablo Calderini, *Systematic Global Macro: Performance, Risk and Correlation Characteristics* (April 2013), at 9, *available at*: http://www.cmegroup.com/education/files/gcm-systematic-global-macro.pdf (last accessed: September 6, 2016).

[24] *See* Ronald B. Shelton, *Gaming the Market: Applying Game Theory to Create Winning Trading Strategies* (New York: Wiley, 1997) at 25-26.

(7th Cir. 1998) (upholding District Court's refusal to substitute gain for loss).[25] The sentence must be vacated accordingly.[26]

c. The Government Did Not Prove That Coscia Caused Losses

The District Court's application of a loss enhancement to Coscia at sentencing also depended upon an erroneous finding that the Government had adduced adequate proof of losses caused by Coscia. In fact, the Government did not demonstrate at sentencing that Coscia caused victims' losses.[27] Nor could it: the trial record contains only threadbare and conclusory evidence on this issue.

Just one trader, Anand Twells of Citadel, claimed specific losses attributable to trades with Coscia, claiming that Citadel lost US $480 on September 2, 2011 by selling 24 contracts to Coscia and, less than a

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[25] The Government had every opportunity to prove losses by analyzing the trading records available from CME, but chose not to do so. Its failure to undertake any effort to prove losses here stands in contrast to the approach taken by the Government in analogous cases. *See, e.g., United States v. Walsh*, 723 F.3d 802, 806-09 (7th Cir. 2013) (upholding the Government's loss calculation that was "derived from an analysis of the Metatrader trading platform records"); *United States v. Moses,* F. App'x 847, 850-51 (11th Cir. 2007) (upholding the Government's loss calculation based on expert examination of voluminous stock trading data).

[26] The District Court stated at sentencing that Coscia committed a "very serious crime" by providing "inaccurate information" to the market. RSA 55. If the Court reverses Coscia's commodity fraud conviction but does not reverse his spoofing conviction, remand for resentencing would be required because the District Court's consideration of the "nature and circumstances of the offense" would be materially different without Coscia's fraud conviction. 18 U.S.C. § 3553(a).

[27] The jury's verdict does not speak to loss, which was not an element of either charge. Dkt. 85 at 23, 25-26.

second later, buying another 24 contracts from him at a lower price. Tr. 633-36. Twells' attribution of loss depended on pairing these two trades as a single, losing transaction. Tr. 646 ("*If* we're referring to these two specific trades, yes, *this round trip of transactions would be a losing trade*") (emphasis added). Similarly, during sentencing proceedings, the Government characterized these two trades as a single "spoofing cycle." RSA 20-21. But these two transactions actually involved two separate Citadel traders executing two different sets of trades. Dkt. 156-1 ¶¶ 31-32. As such, the contracts that Citadel purchased from Coscia may have been subsequently sold for a profit by the first trader, and the contracts Citadel sold to Coscia may have been purchased at a lower price by the second trader. And there is no evidence in the record as to how the second leg of each transaction cycle played out for each individual Citadel trader. Accordingly, the trial did not produce sufficient evidence of a specific loss attributable to trades with Coscia.

Moreover, Twells' testimony did not establish that Citadel's trades (whether they led to losses or otherwise) were *caused* by Coscia. Rather, Twells testified that Coscia's orders were just a "factor influencing our decision" that impacted "one part of our model." Tr. 635-36. Similarly, the two other witnesses who testified to losses also did not establish causation: one could not say whether Coscia's conduct had "anything to do with" his claimed losses, whereas the other provided no explanation (as opposed to speculation) linking his claimed losses to Coscia. Tr. 655-

56, 664, 710-711. The Government relied entirely on these three witnesses to sustain its proof of loss, admitting at sentencing that that it was possible that any other party who traded with Coscia could have made or lost money. RSA 24-25. Consequently, the Government did not establish the necessary "but for" and proximate causation. *Whiting*, 471 F.3d at 802 (holding that the district court improperly applied a loss enhancement without determining that the defendant's false statements had caused loss).

The Government's failure to prove loss is a natural byproduct of its flawed case theory. In the Government's view, traders were fraudulently induced into transacting with Coscia's small orders because they were misled by his large orders. Yet the Government cannot dispute that all of these transactions were executed at the best available price. Tr. 642-43. Nor can it offer any credible theory as to why these transactions necessarily led to unprofitable positions for Coscia's counterparties. Thus, the Government cannot meet its burden of showing "reasonably foreseeable pecuniary harm that resulted from the offense," and a loss enhancement should not have been applied. U.S.S.G. § 2B1.1 cmt. 3.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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Dated: September 6, 2016
Chicago, Illinois

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016 service of the foregoing document was made to all counsel of record via ECF.

Upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause fifteen copies of the brief and required short appendix to be transmitted to the Court within 7 days of that notice date.

Dated: September 6, 2016
Chicago, Illinois

KOBRE & KIM LLP

By: /s Michael S. Kim
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CERTIFICATE OF COMPLIANCE WITH FED. R. App. P. 32(A)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,536 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Bookman Old Style, Font Size 12.

Dated: September 6, 2016
Chicago, Illinois

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CIRCUIT RULE 30(d) STATEMENT

I hereby certify that all materials required by Circuit Rules 30(a) and 30(b) are bound with this brief in the Required Short Appendix.

Dated: September 6, 2016
Chicago, Illinois

KOBRE & KIM LLP

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REQUIRED SHORT APPENDIX

15

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA

v.

Michael Coscia

JUDGMENT IN A CRIMINAL CASE

Case Number: 14 CR 551 - 1

USM Number: 47609-424

Stephen Jay Senderowitz
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §1348	Commodities Fraud	10/31/2011	1 - 6
18 U.S.C. §6c(a)(5)(C) and 13(a)(2)	Spoofing	10/31/2011	7- 12

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

July 13, 2016
Date of Imposition of Judgment

Signature of Judge

Harry D. Leinenweber, Judge
Name and Title of Judge

July 14, 2016
Date

DEFENDANT: MICHAEL COSCIA
CASE NUMBER: 14 CR 551 - 1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
THIRTY-SIX (36) MONTHS on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Indictment.
Said term of imprisonment on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at on
- ☐ as notified by the United States Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ☒ before 2:00 pm on September 30, 2016
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows: _____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL COSCIA
CASE NUMBER: 14 CR 551 - 1

MANDATORY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3583(d)

Upon release from imprisonment, you shall be on supervised release for a term of:
TWO (2) YEARS on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Indictment.
Said term of Supervised Release on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 to run concurrently with each other .

You must report to the probation office in the district to which you are released within 72 hours of release from the custody of the Bureau of Prisons. The court imposes those conditions identified by checkmarks below:

During the period of supervised release:

☒ (1) you shall not commit another Federal, State, or local crime.
☒ (2) you shall not unlawfully possess a controlled substance.
☐ (3) you shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, if an approved program is readily available within a 50-mile radius of your legal residence. [Use for a first conviction of a domestic violence crime, as defined in **§ 3561(b).**]
☐ (4) you shall register and comply with all requirements of the Sex Offender Registration and Notification Act **(42 U.S.C. § 16913)**.
☒ (5) you shall cooperate in the collection of a DNA sample if the collection of such a sample is required by law.
☒ (6) you shall refrain from any unlawful use of a controlled substance AND submit to one drug test within 15 days of release on supervised release and at least two periodic tests thereafter, up to 104 periodic tests for use of a controlled substance during each year of supervised release. [This mandatory condition may be ameliorated or suspended by the court for any defendant if reliable sentencing information indicates a low risk of future substance abuse by the defendant.]

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3563(b) AND 18 U.S.C § 3583(d)

Discretionary Conditions — The court orders that you abide by the following conditions during the term of supervised release because such conditions are reasonably related to the factors set forth in § 3553(a)(1) and (a)(2)(B), (C), and (D); such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in § 3553 (a)(2) (B), (C), and (D); and such conditions are consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to **28 U.S.C. 994a**.
The court imposes those conditions identified by checkmarks below:

During the period of supervised release:

☐ (1) you shall provide financial support to any dependents if financially able.
☐ (2) you shall make restitution to a victim of the offense under § 3556 (but not subject to the limitation of § 3663(a) or § 3663A(c)(1)(A)).
☐ (3) you shall give to the victims of the offense notice pursuant to the provisions of § 3555, as follows:
☐ (4) you shall seek, and work conscientiously at, lawful employment or pursue conscientiously a course of study or vocational training that will equip you for employment.
☐ (5) you shall refrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances; (if checked yes, please indicate restriction(s)) .
☐ (6) you shall refrain from knowingly meeting or communicating with any person whom you know to be engaged, or planning to be engaged, in criminal activity and from:
  ☐ visiting the following type of places: .
  ☐ knowingly meeting or communicating with the following persons: .
☐ (7) you shall refrain from ☐ any or ☐ excessive use of alcohol (defined as ☐ having a blood alcohol concentration greater than 0.08; or ☐), or any use of a narcotic drug or other controlled substance, as defined in **§ 102** of the Controlled Substances Act (**21 U.S.C. § 802**), without a prescription by a licensed medical practitioner.
☐ (8) you shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
☐ (9) ☐ you shall participate, at the direction of a probation officer, in a substance abuse treatment program, which may include urine testing up to a maximum of 104 tests per year.
  ☐ you shall participate, at the direction of a probation officer, in a mental health treatment program, which may include the use of prescription medications.
  ☐ you shall participate, at the direction of a probation officer, in medical care; (if checked yes, please specify: .)
☐ (10) (intermittent confinement): you shall remain in the custody of the Bureau of Prisons during nights, weekends, or other

DEFENDANT: MICHAEL COSCIA
CASE NUMBER: 14 CR 551 - 1

intervals of time, totaling [no more than the lesser of one year or the term of imprisonment authorized for the offense], during the first year of the term of supervised release (provided, however, that a condition set forth in § **3563(b)(10)** shall be imposed only for a violation of a condition of supervised release in accordance with **§ 3583(e)(2)** and only when facilities are available) for the following period .

☐ (11) (community confinement): you shall reside at, or participate in the program of a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of supervised release, for a period of months.

☐ (12) you shall work in community service for hours as directed by a probation officer.

☐ (13) you shall reside in the following place or area: , or refrain from residing in a specified place or area: .

☒ (14) you shall remain within the jurisdiction where you are being supervised, unless granted permission to leave by the court or a probation officer. **(Court allowed that defendant to reside in New Jersey and work in New York)**

☒ (15) you shall report to a probation officer as directed by the court or a probation officer.

☒ (16) ☒ you shall permit a probation officer to visit you ☐ at any reasonable time or ☐ as specified: .
☒ at home ☐ at work ☐ at school ☐ at a community service location
☒ other reasonable location specified by a probation officer

☐ you shall permit confiscation of any contraband observed in plain view of the probation officer.

☒ (17) you shall notify a probation officer promptly, within 72 hours, of any change in residence, employer, or workplace and, absent constitutional or other legal privilege, answer inquiries by a probation officer.

☒ (18) you shall notify a probation officer promptly, within 72 hours, if arrested or questioned by a law enforcement officer.

☐ (19) (home confinement): you shall remain at your place of residence for a total of months during nonworking hours. [This condition may be imposed only as an alternative to incarceration.]

☐ Compliance with this condition shall be monitored by telephonic or electronic signaling devices (the selection of which shall be determined by a probation officer). Electronic monitoring shall ordinarily be used in connection with home detention as it provides continuous monitoring of your whereabouts. Voice identification may be used in lieu of electronic monitoring to monitor home confinement and provides for random monitoring of your whereabouts. If the offender is unable to wear an electronic monitoring device due to health or medical reasons, it is recommended that home confinement with voice identification be ordered, which will provide for random checks on your whereabouts. Home detention with electronic monitoring or voice identification is not deemed appropriate and cannot be effectively administered in cases in which the offender has no bona fide residence, has a history of violent behavior, serious mental health problems, or substance abuse; has pending criminal charges elsewhere; requires frequent travel inside or outside the district; or is required to work more than 60 hours per week.

☐ You shall pay the cost of electronic monitoring or voice identification at the daily contractual rate, if you are financially able to do so.

☐ The Court waives the electronic/location monitoring component of this condition.

☐ (20) you shall comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by you for the support and maintenance of a child or of a child and the parent with whom the child is living.

☐ (21) (deportation): you shall be surrendered to a duly authorized official of the Homeland Security Department for a determination on the issue of deportability by the appropriate authority in accordance with the laws under the Immigration and Nationality Act and the established implementing regulations. If ordered deported, you shall not reenter the United States without obtaining, in advance, the express written consent of the Attorney General or the Secretary of the Department of Homeland Security.

☒ (22) you shall satisfy such other special conditions as ordered below.

☐ (23) (if required to register under the Sex Offender Registration and Notification Act) you shall submit at any time, with or without a warrant, to a search of your person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, by any law enforcement or probation officer having reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by you, and by any probation officer in the lawful discharge of the officer's supervision functions (see special conditions section).

☐ (24) Other:

SPECIAL CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C. 3563(b)(22) and 3583(d)

The court imposes those conditions identified by checkmarks below:

During the term of supervised release:

☐ (1) if you have not obtained a high school diploma or equivalent, you shall participate in a General Educational Development (GED) preparation course and seek to obtain a GED within the first year of supervision.

☐ (2) you shall participate in an approved job skill-training program at the direction of a probation officer within the first 60 days of placement on supervision.

DEFENDANT: MICHAEL COSCIA
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☐ (3) you shall, if unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or lay-off from employment, perform at least 20 hours of community service per week at the direction of the U.S. Probation Office until gainfully employed. The amount of community service shall not exceed hours.

☐ (4) you shall not maintain employment where you have access to other individual's personal information, including, but not limited to, Social Security numbers and credit card numbers (or money) unless approved by a probation officer.

☐ (5) you shall not incur new credit charges or open additional lines of credit without the approval of a probation officer unless you are in compliance with the financial obligations imposed by this judgment.

☐ (6) you shall provide a probation officer with access to any requested financial information necessary to monitor compliance with conditions of supervised release.

☒ (7) you shall notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

☒ (8) you shall provide documentation to the IRS and pay taxes as required by law.

☐ (9) you shall participate in a sex offender treatment program. The specific program and provider will be determined by a probation officer. You shall comply with all recommended treatment which may include psychological and physiological testing. You shall maintain use of all prescribed medications.

- ☐ You shall comply with the requirements of the Computer and Internet Monitoring Program as administered by the United States Probation Office. You shall consent to the installation of computer monitoring software on all identified computers to which you have access. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. You shall not remove, tamper with, reverse engineer, or in any way circumvent the software.
- ☐ The cost of the monitoring shall be paid by you at the monthly contractual rate, if you are financially able, subject to satisfaction of other financial obligations imposed by this judgment.
- ☐ You shall not possess or use any device with access to any online computer service at any location (including place of employment) without the prior approval of a probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or email system.
- ☐ You shall not possess any device that could be used for covert photography without the prior approval of a probation officer.
- ☐ You shall not view or possess child pornography. If the treatment provider determines that exposure to other sexually stimulating material may be detrimental to the treatment process, or that additional conditions are likely to assist the treatment process, such proposed conditions shall be promptly presented to the court, for a determination, pursuant to **18 U.S.C. § 3583(e)(2),** regarding whether to enlarge or otherwise modify the conditions of supervision to include conditions consistent with the recommendations of the treatment provider.
- ☐ You shall not, without the approval of a probation officer and treatment provider, engage in activities that will put you in unsupervised private contact with any person under the age of 18, or visit locations where children regularly congregate (*e.g.*, locations specified in the Sex Offender Registration and Notification Act.)
- ☐ This condition does not apply to your family members: [Names]
- ☐ Your employment shall be restricted to the district and division where you reside or are supervised, unless approval is granted by a probation officer. Prior to accepting any form of employmentyou shall seek the approval of a probation officer, in order to allow the probation officer the opportunity to assess the level of risk to the community you will pose if employed in a particular capacity. You shall not participate in any volunteer activity that may cause you to come into direct contact with children except under circumstances approved in advance by a probation officer and treatment provider.
- ☐ You shall provide the probation officer with copies of your telephone bills, all credit card statements/receipts, and any other financial information requested.
- ☐ You shall comply with all state and local laws pertaining to convicted sex offenders, including such laws that impose restrictions beyond those set forth in this order.

☐ (10) you shall pay any financial penalty that is imposed by this judgment that remains unpaid at the commencement of the term of supervised release. Your monthly payment schedule shall be an amount that is at least $ or % of your net monthly income, defined as income net of reasonable expenses for basic necessities such as food, shelter, utilities, insurance, and employment-related expenses.

☐ (11) you shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

☐ (12) you shall repay the United States "buy money" in the amount of $ which you received during the commission of this offense.

☐ (13) if the probation officer determines that you pose a risk to another person (including an organization or members of the community), the probation officer may require you to tell the person about the risk, and you must comply with that instruction. Such notification could include advising the person about your record of arrests and convictions and

substance use. The probation officer may contact the person and confirm that you have told the person about the risk.

☐ (14) Other:

DEFENDANT: MICHAEL COSCIA
CASE NUMBER: 14 CR 551 - 1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals	$1,200.00	$waived	$

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to **18 U.S.C. § 3664(i)**, all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:			

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant **to 18 U.S.C. § 3612(f)**. All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to **18 U.S.C. § 3612(g)**.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the .

☐ the interest requirement for the is modified as follows:

☐ The defendant's non-exempt assets, if any, are subject to immediate execution to satisfy any outstanding restitution or fine obligations.

* Findings for the total amount of losses are required under **Chapters 109A, 110, 110A, and 113A of Title 18** for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL COSCIA
CASE NUMBER: 14 CR 551 - 1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $1,200.00 due immediately.

☐ balance due not later than , or

☐ balance due in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal *(e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if Appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 14 CR 00551
	)	
MICHAEL COSCIA,	)	Chicago, Illinois
	)	July 13, 2016
Defendant.	)	9:38 a.m.

TRANSCRIPT OF PROCEEDINGS - SENTENCING

BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

For the Plaintiff: HON. ZACHARY T. FARDON
United States Attorney
BY: MR. SUNIL R. HARJANI
Assistant United States Attorney
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For the Defendant: DENTONS US, LLP
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stephen.senderowitz@dentons.com

ALSO PRESENT: MS. NAOMI STALBAUM,
United States Probation Department

Court Reporter: Judith A. Walsh, CSR, RDR, F/CRR
Official Court Reporter
219 S. Dearborn Street, Room 1944
Chicago, Illinois 60604
(312) 702-8865
judith_walsh@ilnd.uscourts.gov

(Proceedings heard in open court:)

THE CLERK: 14 CR 551, United States versus Michael Coscia.

MR. HARJANI: Good morning, your Honor. Sunil Harjani for the United States.

MR. SENDEROWITZ: And Stephen Senderowitz, your Honor, for Mr. Coscia.

THE PROBATION OFFICER: Good morning, your Honor. Naomi Stalbaum from U.S. Probation.

THE COURT: Good morning. Are you ready for sentencing?

MR. HARJANI: Yes, your Honor.

MR. SENDEROWITZ: Yes, sir.

THE COURT: All right. The Court has received the -- wait a minute. Let me get some of this stuff out of here. I'll be right back. I have to get the presentence report.

(Pause.)

THE COURT: I have received the presentence report prepared by Ms. Stalbaum which is dated March 23rd of this year. I have received a letter of corrections from Mr. Senderowitz which also included a -- two medical reports. I received the United States' position on sentencing factors in response to defendant's memorandum; the sentencing memorandum from Mr. Coscia; and a -- I believe there's 79 letters.

Anything else I should have?

MR. HARJANI: No, your Honor.

THE COURT: All right. Counsel, have you reviewed the presentence report?

MR. SENDEROWITZ: Yes, your Honor.

MR. HARJANI: Yes, your Honor.

THE COURT: Have you discussed it with your client, Mr. Coscia?

MR. SENDEROWITZ: Yes. And your Honor, for the record, Mr. Coscia is present in court.

THE COURT: Mr. Coscia, have you read the presentence report?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed it with your attorneys?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. I understand you disagree with the calculations in the guidelines, but you supplied me with a list of -- I believe there's two pages of factual corrections. Other than that, is it accurate?

MR. SENDEROWITZ: Yes, your Honor. Mr. Harjani and I resolved most of the factual issues that needed to be corrected in the presentence report. We dispute -- we have a dispute concerning the applicability of certain enhancements, which I believe we're both going to --

THE COURT: Yes.

MR. SENDEROWITZ: -- address in our presentations here.

THE COURT: The corrections then on your letter of July 12th, are those the ones that are agreed to?

MR. HARJANI: Yes, your Honor. Their corrections to Mr. Coscia's personal characteristics, we have no objection.

THE COURT: So the first one is on Paragraph 10. I don't know if we need to go through each one. This has been furnished to the probation officer?

MR. SENDEROWITZ: Has the letter gone to the probation officer, your Honor?

THE COURT: Yes.

THE PROBATION OFFICER: Yes, your Honor. Probation has the letter.

MR. SENDEROWITZ: We're tendering it now, your Honor. I'm sorry. We should have done it before today.

THE COURT: All right. I suppose we should go through them just one after the other. The first one is Paragraph 10, Mr. Coscia hired Mr. Park in 2007 rather than 2011. Is that correct?

MR. SENDEROWITZ: Yes, your Honor.

THE COURT: Okay. We'll make that change.

Paragraph 45, the interview with Mr. Coscia's wife took place on March 26th; is that correct?

MR. SENDEROWITZ: Correct.

THE COURT: All right. Paragraph 46, Mr. Coscia's mother resides in Hazlet, New Jersey. Basically, that's a spelling problem, correct?

MR. HARJANI: Correct.

THE COURT: Paragraph 47, Theodore Gallo resides in North Bergen, New Jersey. His brother and sister's father name is Theodore Gallo. All right.

Paragraph 48, Mr. Coscia's mother's husband's name was Lewis Niccoli.

Paragraph 49, Robin Shallis does not trade the small amount of stock; rather, she manages their investment account. Okay.

Paragraph 51, Mr. Coscia's house has four bedrooms and four bathrooms and is not located in a gated community.

54, takes numerous prescription medications which are listed in Paragraph 57, also suffers from numerous medical issues as listed in Paragraphs 55, 56, and 60. The paragraphs should be corrected. All right. You can do that. 67 --

MR. SENDEROWITZ: Your Honor, did you receive the medical letters along with this?

THE COURT: I did. I said that I received two medical records, I'll say that, from Dr. Cynthia R. Pfeffer and one from Robert P. Hershkowitz, M.D., and that was -- came along with the correction letter.

And let's see. 55 -- let's see. We took care of that. There's a small central disk herniation, mild spinal stenosis, and mild to moderate foraminal stenosis, we can add that.

Page 67, he's not a stock trader. He is a futures trader.

69 and 70, monthly income, zero. He does not earn a monthly salary. "Zero" is not correct. Is the government satisfied with "unknown" on Page 69 and 70?

MR. HARJANI: I think the -- an even better answer is, it varies given that his income changes from month to month.

THE COURT: Is that satisfactory, "varies"?

MR. SENDEROWITZ: Yes.

THE COURT: Okay. 73, Mr. Coscia is a donor to the Michael Coscia Family Trust, we'll make that.

Paragraph 84, net worth of over 15 million but in Paragraph 71 indicates net worth is 9 million. His -- which one is accurate; 71, Paragraph 71?

MR. HARJANI: Yes, your Honor. I have talked to the probation officer about this. The calculation of 9 million appears on the bottom of Page 16.

THE COURT: We'll make -- other than those -- after we make those changes, is the report acceptable?

MR. SENDEROWITZ: Yes, your Honor, in terms of the

factual statements contained.

MR. HARJANI: Yes, your Honor.

THE COURT: Is the government satisfied with it?

MR. HARJANI: Yes, your Honor.

THE COURT: All right. So now, we will now undergo calculation of the guidelines. The base offense level is 7. There is substantial disagreement -- I mean, there's agreement to that; is that correct?

MR. SENDEROWITZ: Yes, your Honor.

MR. HARJANI: Yes, your Honor.

THE COURT: All right. So then the first issue that needs to be decided is the enhancement for the amount of loss. And the government and the author of the presentence report have utilized the -- as a proxy the gain that Mr. Coscia made during the period of time in which the indictment charges him with spoofing; is that correct?

MR. HARJANI: Correct, your Honor.

THE COURT: All right. It's been fairly exhaustively briefed. I guess since you're trying to upset it, counsel, do you want to give your argument as to why you believe that there should not be a 14-level increase?

MR. SENDEROWITZ: Yes, your Honor. Although the jury found that Mr. Coscia violated the criminal anti-spoofing law, the government did not prove that my client's large orders were the cause, in fact, of the specific victim loss, yet the

government justifies a long prison term, your Honor, by suggesting a loss enhancement based upon the profits which Mr. Coscia long ago forfeited. As --

THE COURT: Is it profits or gain?

MR. SENDEROWITZ: Gain.

THE COURT: I don't know if there's a substantial difference between profits and gain. Are you talking about gain?

MR. SENDEROWITZ: "Gain" would be the correct statement, your Honor.

THE COURT: All right.

MR. SENDEROWITZ: As we noted in our submission that you've referenced, in order to apply any loss enhancement, the government must prove the loss amount by a preponderance of the evidence. The government has not established that Mr. Coscia's subject trading strategies are the cause, in fact, your Honor, of any loss whatsoever.

The prosecution in submission to the probation office said the government is unable to offer evidence by a preponderance of the evidence about the number of victims. In the same submission, the government said it believes the offense involved more than 10 victims, but it didn't specify who they were.

In fact, as the government acknowledged in its submission, as to the actual traders who testified at the

trial before your Honor about having lost money, the most the government could say about those specific traders, the only ones that were identified in the course of these proceedings before your Honor, was that they lost, quote, thousands of dollars, not specified in any way whatsoever.

Now, your Honor, there was nothing preventing the government from specifically tallying the losses suffered by the testifying traders or any other people that they might think may have been victims, but it chose not to do so.

THE COURT: Let me ask you a question. Maybe you can respond. I've been puzzled over this. Why isn't defendant's gain an adequate proxy for other people's loss? Let me give you an example. Suppose I bought a tick from the defendant -- excuse me, bought a lot from the defendant which was one tick above the market prior to manipulation and when I sell that, no matter how I sell it, aren't I -- isn't my base higher than it would be if I bought it at the market? Why isn't that a good proxy?

MR. SENDEROWITZ: Well, what's interesting about one of the words you used, your Honor, was "manipulation" which is --

THE COURT: That was what the charge is, that he manipulated the market, that it caused the market for a specific lot to go up one tick and, therefore, he was able to sell high. Now, the buyer then bought low presumably, didn't

he?

MR. SENDEROWITZ: Actually, they didn't charge market manipulation, your Honor. Market manipulation is a Commodity Exchange Act statute that is very specific and involves proof of an artificial price. Nowhere during the course of this case was that statute charged.

THE COURT: Well, whether you call it market manipulation or spoofing --

MR. SENDEROWITZ: It's a big difference.

THE COURT: That could be but still, why -- the fact that as a result of the spoofing, I paid one tick more in buying this lot, why isn't that a loss to me because I could have bought it for a tick less, and when I sell it, no matter when I sell it or if you go on the other side of the equation, Mr. Coscia buys from me at one tick below the market would have been without the spoofing, then haven't I just lost a tick?

MR. SENDEROWITZ: Well, your Honor, theoretically, if they had -- if they had charged manipulation and had proved the case as you described which they didn't nor did they have to to get a conviction for spoofing and they demonstrated that there was an artificial price which is required in a prosecution for manipulation, then you'd be right, but they didn't demonstrate that there was --

THE COURT: Well, forget manipulation. Just say

spoofing. As a result of the spoofing, he was able to sell or buy or sell, depending on where you are in the thing, either a tick higher or a tick lower than it would have been absent the spoofing.

MR. SENDEROWITZ: First of all, that was not an element of their proof. The only element -- and I would suggest that that wasn't proved. That specific statement was not proved beyond a reasonable doubt. The only element of their proof as to spoofing, your Honor, is whether or not Mr. Coscia, when he entered the trade, when he entered the order, he did not have the intent to execute or, put another way, he intended that the order be canceled before it could be executed.

That's the proof of the crime. They didn't prove manipulation. They didn't prove artificial price. They didn't prove that the price that the people bought the small orders at were not fair market prices, real market prices nor, your Honor, which is the second point that you have to consider, nowhere in the record is any statement of the positions, the specific positions that these opposite traders had and as to whether or not the price that they received when they entered the order to offset an existing position may not have been a price that they wanted or within the range of prices they wanted.

There was no proof of that, and that's why you can't

substitute. This is not a manipulation case. It's not an artificial price case. There's no analysis of the profit and losses. There's no testimony as to whether or not the prices that were obtained were not within the range of prices that were being sought by the traders at the time they went into the marketplace.

May I continue, your Honor?

THE COURT: Yes.

MR. SENDEROWITZ: There is nothing preventing the government, your Honor, from specifically tallying the losses suffered by the testifying traders or any others that they might contend were victims, but it chose not to do so. Instead, it said, in essence, in their sentencing submission that they felt it was too hard to do and the Court should simply substitute for enhancement purposes Mr. Coscia's gain of 1.4 million.

However, your Honor, I would suggest that for everything I've said in response to your questions and my prepared comments that the government has not established any losses in this matter and that the loss enhancement should not be applied. Thank you.

MR. HARJANI: Your Honor, the government agrees with your analysis. I think that is certainly one way to look at why gain is appropriate here. While the defense can claim we didn't prove manipulation or we didn't prove artificial price,

what we did prove besides spoofing is commodities fraud. In the indictment and during trial, what we proved was that the defendant moved the market to a place, to a price that had not existed in the order book prior to his spoofing strategy which is what you saw on those charts during trial. When the price was 15, after defendant's spoofing trades, the price became 16, for example. That one-tick gain to him results in a one-tick loss to somebody else who was fraudulently induced to enter the market at a price that had not existed before. So that analysis that your Honor stated is a reasonable analysis as to why gain is appropriate.

The bottom line, your Honor, is the guidelines only require that the loss cannot reasonably be determined, and the key word is "reasonably." As we explain in our memo, there's so many different ways and so much difficulty in assessing what traders lost having been fraudulently induced by defendant's spoofing scheme.

Whether they were caught in a spoofing cycle, whether they were caught in half a spoofing cycle, whether they were forced to exit the markets, it requires not only the data, it requires understanding each of the trader's trading strategies to determine if they lost money or gained money. That cannot reasonably be determined. As a result, the guidelines provide another option; that is, the gain which we know, which was undisputed, was 1.4 million. And it is a good way to analyze

what the severity of the crime is here, which is all the guidelines really are getting towards.

What the defense asks for is zero enhancement in the face of a loss because traders did testify they lost money. We attached transcripts to our government's version of three of the victim traders who said they lost money in the defendant's spoofing cycle. Combined with the proof that there's a gain, we submit, your Honor, that a 14 loss enhancement is appropriate.

MR. SENDEROWITZ: Your Honor, may I respond?

THE COURT: Yes.

MR. SENDEROWITZ: Your Honor, the government -- government counsel made actually some points that favored me on this argument. He said they don't know if the people that entered orders opposite my client gained money or lost money. He just said that. He just said that they don't know if they gained money or lost money.

Under those circumstances, how can you possibly substitute Mr. Coscia's gain for their losses when they may not have had any? And in fact, the losses that they enumerate by the traders were at most a few thousand dollars. One of them, I think, was $480. And even he testified that he wasn't sure that was accurate. But most importantly, government counsel just admitted that he doesn't know if these people gained money or lost money. They could have bought from my

client at one price and sold higher at another and made money. They entered the market obviously knowing --

THE COURT: They would have made more money perhaps.

MR. SENDEROWITZ: But there's no proof of that, your Honor. And your Honor, as to the 1348 charge, there is no doubt, there is no doubt that the 1348 charge in this case is totally, totally based upon the spoofing activity. And spoofing does not require, does not require anything other than what I said earlier. And the prosecutor has admitted he doesn't know if these people gained money or lost money.

MR. HARJANI: May I --

MR. SENDEROWITZ: He doesn't know if they could have sold at one tick higher. He doesn't know if they could have done that. This is all speculation. And these guidelines are not supposed to be based upon speculation, especially when the enhancement that they're seeking is seeking to change a sentencing range of four to ten months to 70 to 80 months. Are we going to do that based on speculation?

MR. HARJANI: May I respond, your Honor? I need to clarify the record because as your Honor knows, and I said this in my memorandum, what we're talking about is a defendant -- a victim trader who bought at a price that had not existed in the order book on a half cycle, just bought but did not sell it back to defendant.

That individual that bought at a price that had not

existed, it's certainly possible he lost money. It's certainly possible, and I'm giving the benefit of the doubt to the defense, that he could have gained money but the reality is, it cannot reasonably be determined without investigating each of those trader's trading strategy.

What we do know is that there is a loss because three victim traders testified here that there was a loss, that they lost money based on the defendant's trading. That is all that is needed for the Court to go to the defendant's gain as a result.

MR. SENDEROWITZ: Your Honor, not only has that testimony been called into question in our submission at Pages 28 and 29 but at most, it amounts to several thousand dollars. If that's the proof they want to rely upon, fine, but to talk about some horde of unknown people whose records they haven't analyzed to come before you to try and multiply by 20 the sentence my client is exposed to when they have no analysis, no numbers, no identify of the victims, no review of their records, no testimony from those people, it makes no sense.

If they want to rely upon the people they called to testify before you, fine. Let's calculate their losses. They've already admitted it's a few thousand dollars, but they can't just go out into the ether zone and say, oh, there must be other people out there who may have a gain or a loss and we just don't know who they are, what they traded, what their

strategy was, or whether they got the price that they wanted.

THE COURT: All right. I'm going to rule in favor of the 13-level enhancement for the following reasons. One is that I think it's clear to me that it makes sense that there was -- had to be a loss somewhere. For someone to have made a $1,400,000 in ten weeks's time that somebody must have lost. And there were individuals who testified that he did lose.

And as the government pointed out, to have to interview every single customer who traded at the time of the spoofing would be impractical, so it -- the alternative is that if the loss cannot reasonably be determined, then the gain is the proxy for it, so the Court will overrule the objection and enhance by 14 levels.

The next one is the special skill enhancement. Is there objection to that?

MR. SENDEROWITZ: I don't believe the special --

MR. HARJANI: No, your Honor. There were no objections to that.

MR. SENDEROWITZ: I think it was the sophisticated means.

THE COURT: Okay. The next one is --

MR. SENDEROWITZ: I'm sorry to interrupt, your Honor. There was an objection to the sophisticated means.

THE COURT: Yes. I'm just going on down the list.

MR. SENDEROWITZ: I see. I'm so sorry.

THE COURT: The next one was two levels enhancement for special skill, which there's no objection to. The next one is role in the offense, abused a position of public or private trust, used a special skill in the matter, and there is an objection to that.

Counsel, do you want to make your argument?

MR. HARJANI: Your Honor, special skill, there is no objection, as I understand it.

THE COURT: Oh, there wasn't? Wait a minute. Let's see.

MR. HARJANI: There is, Paragraph 25 and 26 --

THE COURT: I'm talking -- let's see.

MR. HARJANI: -- and 27.

THE COURT: The role of the offense, which is 3B1.3, adjustment for role in the offense, abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission of or concealment of the offense, there's an objection to that?

MR. HARJANI: No, your Honor, there isn't.

THE COURT: There is not?

MR. HARJANI: Paragraph 30 which is what you're reading from, there is no objection. However, as I understand it, Paragraph 25, 26, and 27, the plus two -- it carries over to the next page, so it is a little confusing.

THE COURT: Oh, okay. Special characteristics. I'm

sorry. Sophisticated means, there's an objection to that.

MR. SENDEROWITZ: That's correct, your Honor.

THE COURT: Go ahead, counsel. Make your --

MR. SENDEROWITZ: Very briefly, your Honor, as we argued about the loss enhancement, our position on sophisticated means is that it should not be applied because Mr. Coscia's trading program was not more sophisticated than other trading algorithms in the marketplace. Even in closing arguments, the government stated, quote, "The scheme makes -- the scheme, make no mistake, in this case is straightforward and simple," unquote.

And your Honor, we -- in our sentencing submission, we discussed sophisticated means in greater detail, and I'll rely upon our brief.

THE COURT: Okay.

MR. HARJANI: And your Honor, I think the standard is that it is more than the garden variety-type offense. And I think defendant's spoofing algorithm certainly falls within that category: his use of large orders, small orders --

THE COURT: I agree that the fact that he hired a computer programmer to put together his trading program seems to me certainly goes well beyond a lack -- sophisticated means, so the Court will increase by two levels. And object -- excuse me.

Adjustment for obstruction of justice, is there

objection to that?

MR. SENDEROWITZ: Yes, there is.

THE COURT: Okay. Proceed.

MR. SENDEROWITZ: Your Honor, the last enhancement that the government seeks that we have an issue with is the enhancement for obstruction of justice. The government contends essentially that Mr. Coscia falsely testified at trial. In part, the government contends that his false testimony is apparent from the fact that the jury convicted him and, therefore, it could not have believed him, yet the jury verdict standing alone is insufficient. It's an insufficient basis for application of the obstruction of justice enhancement. This court must independently find that Mr. Coscia's testimony was willfully false by a preponderance of the evidence.

Indeed, in United States versus Seward, the Seventh Circuit held, quote: "The obstruction enhancement is not warranted merely because the defendant took the stand and the jury did not believe his testimony."

The government has not shown that Mr. Coscia knowingly and deliberately lied at all and, thus, the enhancement should not apply. If you look at the quotes from his testimony that they put in their submission, your Honor, for your review in support of their position, to add this enhancement, you will note that basically, those questions and

answers relate to perceptions. And it's quite clear, I would suggest to the Court, that whereas the prosecutors had one perception, it would not be inappropriate for Mr. Coscia to testify that he had a different perception. And that's not perjury, and that's not a basis to apply this enhancement.

Finally, your Honor, as detailed in our submission, the posttrial analysis revealed that some of the testimony the government relied on to undermine Mr. Coscia's testimony was inaccurate and at a minimum, these inaccuracies arguably may have tainted the jury's perception of Mr. Coscia's credibility which further weighs against imposing the obstruction of justice enhancement.

MR. HARJANI: Judge, if you recall, when Mr. Coscia took the stand, the defense counsel pulled out the indictment and went paragraph by paragraph and asked him, "Did you do this," and his answer was, "No. I wanted to trade large orders. I didn't induce anyone to trade with me. I intended for every order to be filled. I never tricked anybody."

It is not possible for the jury to have believed Mr. Coscia and convicted him at the same time on all 12 counts.

THE COURT: All right. I agree that there was obstruction of justice. Specifically, the issue in the case was the intent on each of the large orders whether or not they were to be canceled prior to -- at the time they were made

that the intention was to have them canceled prior to them being filled. He was specifically asked if that was his intention. He said it was not, that he intended to have each of them filled. And the jury obviously, in order to find the -- decide the case would have had to conclude that he was not testifying truthfully, so the Court will enhance by two.

Acceptance of responsibility, is there objection to no enhance -- no credit for that? The last one is -- so the total offense level would be 27 which is the same as recommended by the probation office.

So let me do my paperwork here. Total offense level 27, criminal history category 1. The guideline provision is 70, not fewer than 70 months to more than 87. Supervised release, two to five years for Counts 1 through 6 and one to three years, Counts 7 to 12. The fine is between 12,500 and 6 million. Restitution, not applicable. And special assessments would be 1200.

Mr. Harjani, do you wish to make a recommendation as to the appropriate sentence?

MR. HARJANI: Yes, your Honor. I have a short presentation. Your Honor, the government asks for a sentence of between 70 and 87 months imprisonment and a sentence within the guideline range for defendant, Michael Coscia.

Your Honor, our capital markets thrive because we are a nation of laws. We regulate our markets so they operate

with honesty, transparency, and integrity. Today our trading occurs faster than ever, in milliseconds and microseconds, but despite those technological innovations, the concepts that the market needs to be fair for everyone has always and will always be of paramount importance.

When the public hears about someone spoofing in the markets, manipulating the market by playing with supply and demand, it affects the public's overall confidence in the market. It leads to a sense that the system is rigged against the ordinary investor. It provides the appearance that the market does not work for everyone.

Spoofing is a crime that is disruptive to the markets. It is manipulative and erodes market integrity. It was so disruptive that Congress passed a specific statute addressing the matter in 2010. It is alleged in numerous regulatory actions by the SEC and CFTC over the last few years and has resulted in criminal prosecutions.

Defendant, Michael Coscia, was a spoofer, period. The jury unanimously found him to be so. The defendant can continue to claim he operated a legitimate trading strategy and he can continue to advance his statistics, but the reality is, the merits of the case have been adjudicated in a fair trial in this courtroom, a trial where defendant launched a full defense and testified for hours before the jury.

The nature and circumstances of defendant's offense

are serious. They are serious because defendant's conduct was calculated, it was planned, and it was intentional. With his 25 years of trading experience both in the CME pit and electronically, defendant knew exactly what he needed to do to move the markets: Extremely large bait orders, larger than was seen on the market during those two months. At one point, his large orders was the entire market.

He knew exactly what he had to do to avoid those large orders from being traded: A cancellation prodigal that pulled those orders if they were touched in any way. He knew his bait orders would fraudulently induce others to trade his small order on the opposite side at a price that had not existed before and that was available to him.

Your Honor, his bait-and-switch scheme was set up perfectly to steal one tick each two-thirds of a second. And in the world of high-speed trading where one day is considered a long time, defendant's ten-week scheme was an eternity. Defendant knew exactly what he was doing: creating the false impression of market depth -- market depth.

Now, his trading scene was seen by certain astute victims who saw the algorithms suck into defendant's spoofing cycle. These are real businesses. They are real victims trading the market. Your Honor heard from some of them at the trial about how defendant's trading was disruptive, about how they lost money, and how they were forced to exit the markets

because of defendant's flash trading.

The defendant essentially flooded the order book with lies, orders that were illusory because there was no intent to execute on them. And your Honor heard also how traders used the order book and the information in the order book to make their trading decisions. The combination of these factors make the nature and circumstances of the crime serious and worthy of a substantial term of imprisonment.

With regard to defendant's history and circumstances, one of the most aggravating factors here warranting a substantial sentence, your Honor, is the defendant just doesn't get it. The Court can and should consider that he has not expressed any remorse. He has not acknowledged his crime. He even continues to claim his trading strategy was legitimate.

One of the most stark moments of the trial, your Honor, was when defendant claimed he wanted to trade all of his large orders. Even though they were preprogrammed to cancel if one of them was touched, even though the large orders that he testified he wanted filled in his examples, he had tried to cancel those orders, too. The jury saw defendant's testimony for what it really was: lies. The Court should consider defendant's false testimony in imposing a sentence of imprisonment.

The defendant did not need to commit the scheme. He

was successful. He has a good family. He has a strong support network of friends and colleagues. His motivation was purely greed. He wanted to devise a way to make even more money than he was making at that time. The defendant wanted to compete with some of the largest trading firms in the world. His pre-spoofing profits, your Honor, of $150,000 a month was not enough for him. His net worth of $15 million at that time was just not enough for him.

The defendant has spent much time in his sentencing memorandum talking about what a good man he is, and he has the letters in support. And while the Court should consider these characteristics of defendant, they are not determinative nor are they conclusive as to the sentence that is appropriate. They are but one factor among many under Section 3553(a) that a court can consider.

In the same manner, the Court should consider how defendant has viewed this prosecution, his testimony at trial, his lack of remorse, his failure to acknowledge doing anything wrong, quite frankly, including the fact that he claims he wanted the large orders at all times.

There are two other issues the defendant has raised in mitigation. One is the need to care for his mother, and the other are some medical conditions identified in the PSR. And while these situations are regrettable, none of them are substantially mitigating. Defendant has a huge family network

of family and friends who can care for his mother combined with the means and the wealth to help take care of his mother for the period of time that he's incarcerated.

His medical condition which primarily consists of back issues can be treated by the BOP. Frankly, there are much more serious medical conditions being treated right now by the BOP on other defendants.

At the end of the day, these situations are not substantially mitigating for this defendant who comes to this court in a much better position than most other defendants who are here without the support of family and without the wealth to take care of their loved ones.

A valid consideration here, your Honor, is the need for general deterrence. A sentence of imprisonment will have an impact on other traders in Chicago and nationwide. The view that high-speed trading crimes are too complicated, too murky, too difficult to prosecute, and result in minimal sanctions, that view can be firmly quashed here.

If there is a sentence of imprisonment here, traders at hedge funds and proprietary trading firms will sit up, and they will take notice. There is nothing that these individuals fear more than a deprivation of their liberty, being away from their friends and from their family, locked up in a prison cell. And if the trading community knows that this fear is a potential reality, they will carefully

scrutinize their trading strategies for compliance with the law, and they will seek legal advice, and they will curtail trading algorithms that seek to manipulate or disrupt our markets.

The amount of deterrence that can be gained from a sentence of imprisonment here far exceeds that of any exchange or regulatory action this defendant has received in the past. The deterrence that comes with the deprivation of liberty far exceeds that of the jury verdict alone.

In contrast, what defendant is asking for, a sentence of probation, sends the exact opposite message. Defendant will walk out of this courtroom and continue to deny guilt while enjoying his personal freedom and his vast wealth. He will claim victory, and the trading community will see that, and they will also take notice.

A sentence here, your Honor, is also important to promote respect for the law. A sentence of imprisonment would do that for this defendant who continues to believe his trading strategy was legitimate and that it was simply good trading on his part. A sentence of imprisonment will promote the respect for our nation's commodity laws, will promote respect for fairness in the markets, and it will be just punishment for the crime.

Your Honor, the guideline range is significant, but it is significant because of defendant's own actions. The

amount of money he made, the use of sophisticated means and special skills, the fact that he did not plead guilty or acknowledge his guilt, and the fact that he provided false testimony at trial is a product of his own doing.

And more importantly, what the defendant is asking for, a 100 percent departure from the guideline range in a case that went to trial, where defendant testified falsely, where there's no acknowledgement of guilt or remorse, it would be highly inappropriate. It would be contrary to the state of the law that the guidelines are worthy of serious consideration by courts.

For these reasons, we submit that a sentence within the guideline range is appropriate, not greater than necessary, and warranted for defendant, Michael Coscia. Thank you.

THE COURT: Thank you.

Counsel?

MR. SENDEROWITZ: Thank you, your Honor. Too loud?

Your Honor, when Mr. Coscia created the trading algorithm that's at issue in this case, it was within weeks of the anti-spoofing law going into effect and two years before any initial interpretive guidance about what that law meant was issued by the CFTC.

He used the algorithm for ten weeks, from August 8th to October 18th. He immediately stopped using it when

exchange officials raised concerns. He thereafter cooperated with exchange and regulatory officials. He settled all their charges. He disgorged gains of 1.4 million. He paid over $3 million in fines in 2013, and he served a one-year trading suspension which ended in July 2014. Both of the exchanges involved here, the CME and ICE Europe, allowed Mr. Coscia, after his trading suspension ended, to resume trading, yet three months later, the U.S. Attorney indicted him for the same conduct for which he's already been punished by the exchanges and regulators.

Even after his indictment, both ICE Europe and the CME continued to allow Mr. Coscia to trade which he did without any incident whatsoever. Since his conviction, ICE Europe has suspended his trading privileges, but the CME continues to allow him to trade there.

The government contends that Mr. Coscia should be decide probation or even a lenient sentence under the guidelines because he failed to accept responsibility for his actions, yet in making this argument, the government is essentially arguing that Mr. Coscia should be denied leniency in this case because he exercised his due process rights to trial and appeal.

Further, well before he was indicted and tried, he accepted responsibility by settling with the exchanges and the regulators and satisfying severe penalties imposed upon him.

That he is now challenging the legitimacy of a new criminal law that has been first applied to him is the exact right that the Constitution is designed to protect and not to punish.

The government also opposes probation or a lenient sentence under the guidelines, departure from the guidelines because it believes only a prison sentence would deter others from spoofing. Now, your Honor, deterrence can be accomplished without incarceration. There's not an epidemic of criminal spoofing cases. In the five years since Dodd-Frank was passed, I think there's one or two besides this one. Indeed, disruptive market practice cases are typically handled as this case originally was at the exchange and regulatory level with fines and suspensions and historically, it's been very effective in creating deterrence.

Your Honor, many years ago before I started to defend commodity cases and security cases, I was a Chicago Assistant U.S. Attorney, and I was deputy chief of the special prosecutions division. And I was head of what was then the equivalent of the commodities and securities task force. And in 1980, I tried the first major criminal jury trial under the Commodity Exchange Act. My trial partner was a young Assistant U.S. Attorney named Scott Lassar who later became U.S. Attorney, and my judge was a judge that we all know and respect, James Moran. That case was USA versus Siegel and Winograd cited in my submission. It was a complicated

commodities tax fraud case of first impression. It involved two veteran traders who effectuated an offshore tax fraud scheme through Swiss franc and Mexican peso wash trades at the CME. The course of conduct involved in the Siegel case lasted longer, involved more people, was far more sophisticated than the conduct in this case. And unlike this case, the Siegel case created identifiable and significant monetary loss.

Judge Moran, while noting the significance of the case, nonetheless -- just like the AUSA has noted the significance of this case today, nonetheless sentenced both defendants to probation, trading suspensions, and fines. He believed, Judge Moran believed, that the defendant's lost reputation, the trading and monetary sanctions, the felony probation he imposed represented a significant and sufficient punishment and, along with the notoriety and publicity surrounding the case, provided sufficient deterrence to others.

I respectfully suggest that Judge Moran's wisdom prevails to this day and that the Court should consider a sentence departure from the guidelines suggested by the prosecutor.

Your Honor, we cite other commodity cases where similar probationary or short prison terms were imposed. The cases cited by the government are inapposite. Indeed, in the one Seventh Circuit commodities case cited by the government,

the Catalfo case which I'm somewhat familiar with since I am -- was involved in the administrative part of that case, the one commodity case they cite, the defendant wiped out a net capital of his broker dealer of $8.5 million. The figures in this case, even if you take the formula that they suggest, is far from that, and the premeditation that existed in that case did not exist here.

The Third Circuit Georgiou case involved a four-year international stock manipulation conspiracy also cited by the government as a comparative case. It involved four separate schemes that generated $55 million in victim losses. And lastly, the First Circuit case, Jordan case, involved a multi-defendant FBI penny stock manipulation and kickback sting case against fraudulent stock promoters. None of those cases are, I would respectfully suggest, close to the facts we have in this case, whereas in the Siegel/Winograd case which Judge Moran ruled on, it's very similar to this case.

Your Honor, as you know, we obtained additional evidence after trial, after my firm got involved in the case and my co-counsel Kobre & Kim got involved. We were not trial counsel. That's clearly of record. But we obtained additional evidence afterwards and -- from the exchanges. And our expert, Alex Rinaudo, analyzed that evidence. And he's in court today in case you or the prosecutor has any questions. And he submitted a detailed report to the Court which I'm sure

you reviewed.

THE COURT: I did.

MR. SENDEROWITZ: And it's not my purpose to in any way relitigate the case or go over that report in any great detail. There's -- in my closing remarks before Mr. Anthony Coscia gets up and speaks and then Michael speaks, I just wanted to point to a few points in that report.

We did not, as the government suggests, your Honor, submit Mr. Rinaudo's exhaustive analysis, as I said, in an attempt to relitigate the case. We note his findings because the government sought to characterize Mr. Coscia as something more than a regular trader who made a mistake or involved -- was involved in a singular criminal offense but, rather, they characterize him as an outlier whose everyday trading was a huge disparity from everyone else.

I quickly note the following points drawn from the many points in the expert's submission. Number one: At trial the government represented that the defendant was the number one trader in large orders placed in 11 of the 17 CME markets that were traded. Our expert discovered that, in fact, Mr. Coscia's firm was not number one by number of the large orders placed in any of the CME markets on which he was trading.

Second point: At the trial, the government incorrectly contended that Mr. Coscia had an unusually high

cancellation rate compared to other traders. In fact, Mr. Rinaudo's analysis reveals that Mr. Coscia's cancellation rate on large orders was actually low compared to the other traders who used large orders.

Number three: At the trial, the government alleged that traders would avoid trading with Mr. Coscia's large orders. However, Mr. Rinaudo's analysis indicates that 195 of the 200 firms both manual and algorithmic who traded the most contracts with Mr. Coscia traded with both his large and small orders including all 18 of the counterparties to Mr. Coscia's small orders in the indictment including Alexander Gerko who testified at the trial that his algorithms would not trade against such large orders.

Four: During closing arguments, the government left the impression that the resting time similar to the duration of Mr. Coscia's large orders, 100 to 300 milliseconds, are atypical. They are not. During the ten-week period at issue, the expert found that 504 million orders were placed on the CME. They were open for less than one-half of one second.

And finally, your Honor, again, I want to emphasize, we are not re-litigating the case. We're just trying to put in perspective the arguments that they made where they're trying to personally suggest something about Mr. Coscia that I believe is not accurate.

Number five: There's nothing uniquely sophisticated

about using algorithms in trading commodities. Over 92 percent of the orders placed on CME are placed by algorithms. It's not usual, as the government contended at trial, that Mr. Coscia included a cancellation logic in his algorithm trading program as explained by the government's own witnesses at trial and confirmed by the expert's analysis. Programming cancellation protocols are necessary to address market risks and are typical behavior for an algorithm trader, and virtually all algo trading programs include preprogram cancellation protocols.

Lastly, the prosecutor mentioned that Mr. Coscia gained 1.4 million in 11 weeks whereas his average before was $150,000 a month. In fact, as the expert noted, in the week before the algo at issue was used, Mr. Coscia made $800,000 in one week. So the gain that was portrayed as being outsized based upon his other trading activity, that portrayal was also not completely accurate.

In a marketplace where it is common knowledge that 90 percent of all orders are routinely canceled before execution on any given day, any trader active in the marketplace knows that the lifetime of any given snapshot of the order book is in microseconds and that a large portion of the order book is, by definition, illusory.

Your Honor received nearly 80 letters from Mr. Coscia's business colleagues, family, and friends which in

some attest to the fact that he's -- in summary, attest to the fact that he's a devoted family man and an ethical businessman. These letters made clear that as a trader, he developed a reputation as, quote, diligent, who distinguished himself from others in his genuine desire to see his colleagues and competitors achieve success alongside. And I'm quoting from the submissions. His colleagues recall that he was one of the few people who was willing to offer advice and support to newer traders to foster their careers.

Further, his computer programmer whose testimony I'm sure you recall, Jeremiah Park, stated in his submission to the Court for sentencing, quote: "I felt like he always tried to do what was right in the business world. I would never have knowingly worked for someone who I felt was dishonest or even questionable. I never got the sense that he," Mr. Coscia, "tried to do anything in the gray area in business."

Your Honor, Michael Coscia is not a dangerous outlier. He's not an ogre. He's an amazing family man and, except for this incident, an outstanding businessman who at most made a serious mistake through which long before he was tried, he accepted responsibility and paid a substantial price.

I urge the Court, therefore, to consider departing from the guidelines the prosecutor has suggested and issue a

lenient sentence, whether it's probation or a short prison term, consistent with the wisdom that Judge Moran and the discretion that Judge Moran exercised in the Siegel case.

Your Honor, at this point in time, Mr. Anthony Coscia, who is Mr. Michael Coscia's uncle, would like to give a statement concerning his qualities, and then Michael Coscia will give a short statement.

THE COURT: Fine. Thank you. He may come up here.

MR. A. COSCIA: Good morning, your Honor.

THE COURT: Good morning.

MR. A. COSCIA: I am Anthony Coscia, Michael's uncle. Today is a bittersweet day for our family because we know my nephew's future is at stake, and sweetness is in the hope that Michael will be relieved of the pressure of living in a state of uncertainty.

For over half a century, I've been involved in education in the same Catholic boys high school in Brooklyn, New York. I have taught different subjects, but most of my teaching career has been spent in school counseling. During this period, my duties primarily concentrated on counseling, supporting, educating, and help directing more young men than I could imagine.

My former and present students, I believe, have taught me more than probably could ever they realized. One major thing that comes to mind is being human can bring

happiness and sometimes painful consequences as well. They have shown to me that when they have strayed from the right path, if given another opportunity, they often are able to redirect their lives and, by doing so, have the potential to become productive citizens.

It is with this in mind that I respectfully ask your Honor that when you consider all the factors in my nephew's case that your judgment affects not only Michael, his wife, his son, my older brother, his father, and his gravely ill mother. His absence will cause a tremendous hardship on all those who presently rely upon him.

In Shakespeare's play "Hamlet," Polonius says to his son Laertes, "To thy own self be true." Over the years, I have benefited from my nephew's love and kindness. I have witnessed his giving nature, strong bonds towards his family and others and a depth of character. To me, Michael seems to mirror the advice Polonius gave to his son because my nephew has been a strong family man who gives without measuring and can be generous to a fault. Permit me to share a few occasions that reflect Michael's generous spirit and concerns not only for me but for others as well.

Several years ago while anxiously awaiting surgery, I was advised that because of then blood shortages in the hospital, I needed to have on hand blood from two sources. Having difficulty finding just one, I called Michael and

without hesitation, he immediately came to New York to donate his blood.

Sometime ago, his kindness to others was evident when our Staten Island parish's free nurse program ran into financial difficulty. Michael and his wife, Robin, offered their financial support and helped save the program for the shut-ins and the elderly of our parish.

When Michael's son Jon Michael was ten, he often returned from school suffering headaches and eye irritation. Concerned about this, Michael contacted his son's classmates' parents and learned that their children were exhibiting these same symptoms. Troubled by this, he managed to obtain and send a sample of a piece of his daughter's school rug to an agency to analyze it. The agency confirmed that there was mold and asbestos in the classroom. Through both his efforts, financial and social concern, the problem, even though pressured by the school for him to drop the issue, was resolved to the benefit of all.

Being a son and a person that he is, Michael singularly shoulders the responsibility of his parents's medical needs and moral support. His father's lung cancer and his mother's fourth stage of ovarian cancer and the treatments necessary are toll taking. In addition, his wife, Robin, suffers her own health issues which recently resulted in open heart surgery.

All these things place, I'm sure you can understand it, an understandable emotional burden on him. My wife and my presence today is to give our unwavering support and love to our nephew and his family because if these roles were reversed, he would do the exact same thing for me and my wife because this is the mark of a man who knows the importance of the love of family and who is true to himself.

In Michael and in my faith, there is a year called the year of mercy. Therefore, I would like to refer to the Bible to support Michael and why I am here today. In Chapter 8 of John's gospel, he writes:

> "When Christ was teaching in the temple, the scribes and Pharisees brought in a woman caught in the act of adultery. They said to him, 'Teacher, this woman was caught in the act of committing adultery. Now the law according to Moses commands this woman to be stoned to death. So what do you say?'
>
> "And Jesus bent down and began to write on the ground with his finger. But when they consigned to ask him again, he stood up and said, 'Let the one among you who is without sin be the first to throw a stone at her.' Again, he bent down and wrote on the ground.
>
> "When the crowd heard this, they left one by one. Turning to the woman, Jesus asked her, 'Woman, where are they? Has no one condemned you?' She answered, 'No one,

sir.' And Jesus then said, 'Neither do I condemn you. Go. From now on, do not sin anymore.'"

Your Honor, I thank you for this opportunity to speak in my nephew Michael's behalf.

THE COURT: Thank you.

Mr. Coscia?

MR. SENDEROWITZ: Your Honor, I just wanted to state for the record because the defendant is speaking and he has the right to speak that I advised him that he was not required to make a statement, and I instructed him that if he did because this matter will be under appeal that he should not comment on the evidence or the law, so he's following my instruction in that regard.

And since you won't hear anything about the evidence or the law, I just wanted you to know, that was the result of my instruction. He wanted, however, to address the Court, and here he is.

THE DEFENDANT: Good morning, your Honor.

THE COURT: Good morning.

THE DEFENDANT: I have always tried to do the proper thing. When the Exchange came to me and questioned my use of a new algorithm, I stopped immediately. I cooperated, and I agreed to sanctions.

The government says I am not remorseful. This is not true. Simply because I will appeal the application of the

spoofing law to me does not mean I am not conscience-stricken and regretful of what has happened.

The government says I do not take responsibility for my actions. This is also not true. Because I claim that I am innocent of a criminal offense does not mean I do not accept responsibility for my actions. Indeed, I stand here convicted and shamed because of my actions, and I accepted responsibility for them a long time ago when I settled the exchange matters.

This criminal proceeding has consumed my life. It has affected my health detrimentally. Every aspect of my life, my emotions, my interactions with my family and friends, and my work have all been impacted. But for the love for and of my family and their continued support has carried me forward, and I am grateful, most grateful to them.

I want to thank the Court for its consideration of my case and the courtesies the Court and its staff extended to my counsel and my family throughout this proceedings. I would also like to thank the Court for allowing me to be at my son's graduation. It was one of the proudest days of my life. I want to thank those that have come here today, my friends and family from all over the country, business associates, former employees from 20 years ago. Thank you. Thank you all.

I respectfully ask the Court, give me a sentence that takes into account the good things I try to do for my family

and in my community and allow me to be the caretaker for my mom and other family members. Thank you very much, your Honor.

THE COURT: Thank you.

Anything further?

MR. HARJANI: No, your Honor.

MR. SENDEROWITZ: Nothing, your Honor. Thank you very much.

THE COURT: Anything further?

Okay. One of the -- probably the most difficult act for a judge is to impose sentence because often people are -- who commit crimes have good things about them, and it becomes very difficult to separate what's good from what was bad in trying to impose a fair, just resolution to the case.

Getting back to what the charge in this case was, is spoofing, which is also a form of commodity fraud. And I might add that in the indictment, there were six counts both of spoofing and six counts of commodity fraud. There has been an objection to the newness of the statute and the failure of the regulatory agencies to issue rulings as to how it was to be interpreted, but spoofing has been around for a long time. And I would read from one of the -- and by the way, I read all 79 of the letters.

One of the letters, No. 46, I'll just read from them:

"I am not justifying spoofing as the law now

addresses but merely pointing out that the practice in years past was tolerated and do not believe the pain and punishment Michael has already suffered would serve any good for Michael to be further punished with any type of prison time. Michael's case has served up a wake-up call to all traders to refrain from spoofing, and that in itself is a win/win situation for the government."

The point of the matter is that spoofing has been around for a long time, and the government -- because of the fact that it's been around that our legislature and the president through its signature adopted a statute specifically describing spoofing, defining spoofing and making it illegal, but it is a form of commodity fraud. And I might point out that Mr. Coscia was convicted of both spoofing and commodity fraud.

It's been passed. It's the law. It's the way that has been used over and over again, I guess, by people to make money through the inadvertence of other people who don't know what they were doing, but I want to make a special emphasis that this is an intent crime. The intent was incumbent upon the government to prove beyond a reasonable doubt.

Now, Mr. Coscia testified in his own defense, and he testified as to his lack of intent. Mr. Coscia also called an expert witness who testified. Both were subject to cross-examination. Some of the facts that were relied upon in

the CME, only less than 1 in 1,000 large orders were filled and a similar ratio in ICE. Mr. Jeremiah Park, who did write a letter which I did read and -- but did testify at the trial, and he testified that the purpose of the large orders was to pump the market and to move the market, very strong evidence as to intent. This was stated to Mr. Coscia by Mr. Park in an email without apparent response.

That makes this very little difference, but everybody agrees that "pump and dump" is a violation of the law, also, because here we have very little difference between it, pumping and then -- of a particular market in order to make results.

Now, one other letter that was written by one of Mr. Coscia's, I believe, colleagues quotes at length from Mark Cuban who we probably know as the owner of the Dallas Mavericks. And he said this about algorithms:

> "If you create winning algorithms that can anticipate, predict what will happen in the next millisecond in the market's equities, you will make millions of dollars a year. Note: Not all algorithms are bad. Algorithms are just functions. What matters is what their intent is and how they are used."

And getting back here, everybody uses apparently algorithms in the market now as opposed to the old system where you would actually stand up in the pit and trade. So

it's the intent that algorithms are fine, but if you use the algorithms wrongly, then you have committed a crime.

Now, I might add that after a week and a half of trial and the evidence which was brought out during the trial, it took the jury less than one hour to bring back a conviction on all 12 counts, six counts of spoofing and six counts of commodities fraud.

So now we get to the 3553 factors and the nature and circumstances. I think it was very well put by the prosecutor, well-functioning markets depend on accurate information, and that's the information concerning supply and demand. Inaccurate information skews the market. Now currently the traders not only use algorithms but they have direct lines to the market so that there's really nothing in between the trader and the market itself. That's a very serious crime and has serious consequences.

Now we get to the history and circumstances of the defendant. I said I read the 79 letters, the personal family, from people he's worked with, the people who have traded with him, and they indicate a very excellent life. He has helped a lot of people over the years, not only his family and friends but fellow traders, but he also engaged in spoofing, and what -- so that is certainly -- his good life is certainly mitigating, but he engaged in spoofing. And he had no financial need to do so. He was making, he has $15 million in

assets. He was making around 150,000 per month prior to spoofing. And it went up to -- well, if it was an average of 1 million, 4, in 11 weeks, it's probably somewhere around 450, $500 a month, three times more than what he was making before. And it's hard to see any reason for doing that other than greed. He wanted more money. So that is certainly an aggravating factor.

Specific and general deterrence, again, today Mr. Coscia has stated that he did wrongdoing, and he states that because he cooperated with the CTFC in their investigation that that's an acknowledgement of his wrongdoing.

General deterrence, we hope other traders seeing the result will be induced not to spoof. Just punishment and respect for the law, we get a lot of fraud cases of different varieties, a whole slew of them. And many people go to jail because of fraud and a lot of people on a much lower scale. We had a whole large group of mortgage fraud cases which involved relatively minor amounts of money, and these people tend to go to jail, so we have to consider the sentencing disparities, which is the other one.

The guidelines were intended to be uniform. I personally am not a great fan of the guidelines. I think that they tend to be excessive and particularly in cases which do not involve any way, shape, or form any kind of danger to

anybody else.

So in trying to figure out what a fair and reasonable sentence would be in this case, again, it's very difficult. I do agree with the prosecution that the case does warrant prison time. I do not believe that it warrants anywhere near the sentence that the guidelines would prescribe.

There's a couple of reasons why I am certainly going to depart downwards from the guidelines. One is, I think Mr. Coscia's age and his health condition warrant some consideration. He's not a young person. He's not an overly healthy person. And I think that he deserves some consideration for that.

The amount of the loss, again, it's difficult to determine. Again, it's kind of hard to see that if a person actually makes money on a trade that he could have made more if he hadn't been induced to purchase at a lower -- or higher -- at a higher price or sell at a lower rate, that it's not a form of loss but again, I will take the fact that it's difficult to determine. I think that the amount of loss is difficult to compute and equate into the 1 million, 4, might be a little too -- a little bit higher than need be.

Also, I -- it always irks me a little bit that we are -- in effect, punish people for exercising their right to trial by not giving them acceptance of responsibility. Again, I think the acceptance, if there is any here, was relatively

weak but nevertheless, it just -- I do not think anybody should, in effect, be punished by exercising the right to go to trial. I am a -- been a trial judge for a long time. I was a trial lawyer prior to that. I have a great belief in the jury system.

So for all of those factors, I'm going to impose a sentence below the guidelines. And what that sentence should be, it seems to me a fair sentence under all the facts and circumstances including the aggravation and the mitigation, the need for deterrence, and the age, health, the questionable amount of the loss, the fact that Mr. Coscia exercised his right for trial, it seems to me a sentence of 36 months' custody to be followed by two years supervised release is a fair and just sentence for under the facts and circumstances of the case.

The terms of supervised release, counsel, have you reviewed those?

MR. SENDEROWITZ: Your Honor, you mean the conditions that were set forth in the probation officer's --

THE COURT: Yes.

MR. SENDEROWITZ: I did look at them. I have not looked at them today, your Honor.

THE COURT: I'd like to go over them with you. Most of them I don't think are necessary, so if you would get the list of them.

MR. SENDEROWITZ: Just give me one moment, your Honor.

THE COURT: All right.

MR. SENDEROWITZ: Thank you, your Honor.

THE COURT: The first one suggested is No. 4, seek lawful employment. I don't think that's necessary. Mr. Coscia, I think, has the ability to seek work without having to justify to the -- or not work as the case may be because he is an older person, so I will not impose the first suggestion.

The next one, engage in specific occupations, I think since he's regulated heavily by the -- I forget the initials, CTFC -- is it CFTC?

MR. SENDEROWITZ: CFTC, your Honor.

THE COURT: I don't think that it's necessary to keep him from working, so 5 would be out. 6 is not suggested. 7, there's no indication at all that he has any alcohol or drug problems. I don't think that's necessary.

8, he has -- I don't know if there's an objection to 8, whether he has a weapon. There's no indication in his background that he has any tendency towards harming anything, so I don't think that's necessary, so I won't impose that.

No. 12, community service, I don't think that's necessary.

14, remain in the jurisdiction where he's being

supervised, that -- is there any objection to that one?

MR. SENDEROWITZ: Well, your Honor, it depends how the jurisdiction is set up. If he's supervised in New Jersey but needs to go to New York for business, it may have to --

THE COURT: Normally, all he has to do is notify, and we don't tend to keep him in New Jersey for the two years, but it seems to me that they ought to keep tags on him.

Report to -- 15 is okay unless there's objection: You should report to the probation office as directed by the court or probation officer.

I don't think -- 16, any reasonable time to visit, I think at home but not at work or school or community service location.

MR. HARJANI: That's fine, your Honor. And I gather that is for the probation officer to be able to keep track of the defendant and his whereabouts.

THE COURT: Yes. I don't know about permitting confiscation, I suppose if contraband observed, I don't think that's necessary.

Any change in residence should notify, I will impose that. And if he's arrested, then he should notify the probation office within a period of time.

And let's see. The special condition, unemployed, I don't think we need that one, No. 3.

MR. SENDEROWITZ: It's on Page 22, your Honor.

THE COURT: On Page 23, No. 6, this is a special condition, financial information. I don't think that's necessary because -- by the way, am I correct, the government is not urging a fine?

MR. HARJANI: That's correct. We are not seeking a fine of restitution in this case.

THE COURT: All right. So I will not impose a fine. I don't think that No. 6 is necessary then.

Notify of change in economic circumstances, I suppose if he lost all his money, he should notify the probation office, so that would be all right.

And he should obviously pay his taxes as required. 10, you shall pay any financial penalty, I'm not imposing one, so that's out.

And not be an informer, I guess?

MR. HARJANI: It's not necessary in this case, your Honor.

THE COURT: Pardon?

MR. HARJANI: It's not necessary in this case.

THE COURT: Okay. We'll take that out, 11 out.

13, risk to another person, I don't see that either, so 13 will be out.

So the only ones left, which I think are correct, is No. 14, 15, portions of 16, 17, and 18, and 22, and 7 and 8 and 22. I think that's -- that's it.

THE PROBATION OFFICER: Your Honor, if I could clarify for the record, I guess, for No. 16, did you then wish to check "permit confiscation of contraband" or not check that?

THE COURT: I don't think that's necessary. I don't expect him to --

THE PROBATION OFFICER: And then also you didn't address the mandatory conditions which I think we had marked 1, 2, 5, and 6.

THE COURT: Which ones?

THE PROBATION OFFICER: It's the first one, Page 19 of the PSR.

THE COURT: Wait a minute. I didn't bring that. I don't know if I have that with me. Do you -- hold on. Maybe I've got it.

THE PROBATION OFFICER: We're using the recommendation, your Honor, at the top of Page 3.

THE COURT: Okay. Mandatory, not commit another federal, state crime; unlawful to possess a controlled substance; cooperation in the DNA; and refrain from unlawful use of controlled substances. Those are the mandatory, correct?

THE PROBATION OFFICER: Yes, correct.

THE COURT: Okay. Well, I guess if they're mandatory, then they're mandatory, so they'll be imposed.

THE PROBATION OFFICER: And then also for the sentence, I just wanted to make sure you wanted all Counts 1 through 12 to be concurrent.

THE COURT: Yes, to be concurrent.

THE PROBATION OFFICER: Thank you.

THE COURT: And the two years supervised release concurrent to -- also, and no fine. And then I guess there's $1400 special assessment.

MR. HARJANI: 1200, your Honor. It's 100 per count.

THE COURT: 1200. Isn't that what I said?

MR. HARJANI: I think you said 14, but it's 1200.

THE COURT: 1200, which is due and owing.

Now, would you have your client step forward? I want to advise him of his appeal rights.

Mr. Coscia, you have a right to appeal the sentence and conviction and all matters related leading up to this point. Do you understand that, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: In order to do so, you must file or have filed on your behalf a written notice of appeal within 14 days. Do you understand that, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: I will ask your counsel to discuss with you whether you wish to appeal and, based on his comments, I'm sure you do wish to appeal, that he will file a notice of

appeal on your behalf.

Will you do that, counsel?

MR. SENDEROWITZ: Yes, your Honor.

THE COURT: Okay. So if you cannot afford an attorney on appeal, you have the right to have counsel appointed for you. Do you understand that you have that right, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: Anything further?

MR. HARJANI: I think report date, your Honor.

THE COURT: Report date.

THE CLERK: August 30th.

MR. SENDEROWITZ: Your Honor, I have one -- when you're done, I have one --

THE COURT: Yes.

MR. SENDEROWITZ: -- issue to raise.

THE COURT: Yes.

MR. SENDEROWITZ: My co-counsel, Kobre & Kim, would like to file a motion for bond pending appeal and would like a briefing schedule for that motion if it's okay with the Court.

THE COURT: All right.

MR. SENDEROWITZ: They would suggest --

THE COURT: When would they file it?

MR. SENDEROWITZ: I'm sorry, your Honor?

THE COURT: When, how soon do they -- will they file

it?

MR. SENDEROWITZ: They would like 21 days to file it.

THE COURT: 21 days to file and then the government response.

THE CLERK: August 3.

MR. HARJANI: Your Honor, if I may, I'm happy to deter to the Court, the only issue is if you do 21 days to file it and then there's a response and reply, we're getting right up to the report date. So I'm happy to defer to your Honor, but a shorter schedule on a straightforward motion might be more appropriate.

THE COURT: Let's see. What date did I give for the --

THE CLERK: Reporting, August 30th.

MR. SENDEROWITZ: Perhaps we could extend that a few weeks.

THE COURT: Why don't we push that off 30 days. I don't think --

THE CLERK: 30 days more.

THE COURT: And then -- so 21 days. How much time do you need to respond?

MR. HARJANI: 14 is fine.

THE COURT: 14 days, and seven days to reply.

MR. SENDEROWITZ: That's fine, your Honor.

THE COURT: And the Court will rule certainly prior

to the report date.

MR. HARJANI: Thank you for everything, your Honor.

MR. SENDEROWITZ: Thank you very much, your Honor.

THE COURT: All right. We'll stand in recess.

(Proceedings adjourned at 11:10 a.m.)

* * * * * * *

C E R T I F I C A T E

I, Judith A. Walsh, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable HARRY D. LEINENWEBER, one of the judges of said Court, at Chicago, Illinois, on July 13, 2016.

/s/ *Judith A. Walsh, CSR, RDR, CRC, F/CRR* July 15, 2016
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **MICHAEL COSCIA,** **Defendant.**	**Case No. 14 CR 551** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Michael Coscia's ("Coscia") Motion for Judgment of Acquittal and for a New Trial [ECF No. 96]. For the reasons stated here, the Court denies the Motion.

I. BACKGROUND

The Court described the material facts of this case in its prior opinion denying Coscia's Motion to Dismiss the Government's indictment. *See, United States v. Coscia,* 100 F.Supp.3d 653, 655 (N.D. Ill. 2015). The following is a brief review. Coscia was the principal of a futures trading firm. In August 2011, he implemented a high-frequency trading program that essentially enabled him to manipulate the commodities markets. The computer program would place large orders that were programmed to cancel before execution, with the purpose of moving the market in a particular direction such that Coscia could reap benefits through small orders placed on the other side.

After discovering the scheme, the Government charged Coscia with six counts of "spoofing" under 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2), and six counts of commodities fraud under 18 U.S.C. § 1348. The case went to trial. A jury found Coscia guilty on all counts. He now challenges the sufficiency of the evidence for the verdict and claims the Court made numerous errors that gravely undermined the integrity of the trial. Accordingly, he renews his Motion for Judgment of Acquittal under Federal Rule of Criminal Procedure 29(c) and requests a new trial pursuant to Rule 33(a).

II. LEGAL STANDARD

The Court grants a motion for judgment of acquittal when the evidence is insufficient to sustain a conviction. FED. R. CRIM. P. 29(a). The Court views the evidence in the light most favorable to the Government and "will overturn [the] guilty verdict only if the record contains no evidence, regardless of how it is weighed, from which the jury could have concluded beyond a reasonable doubt that [the defendant] is guilty." *United States v. Moses,* 513 F.3d 727, 733 (7th Cir. 2008) (internal quotations and citations omitted).

The Court may grant a motion for a new trial if the interest of justice so requires. FED. R. CRIM. P. 32(a). In considering the motion, the focus is on "whether the verdict is against the manifest weight of the evidence, taking into account the credibility of the witnesses." *United States v. Washington,* 184 F.3d 653, 657 (7th Cir. 1999). Still, the Court should grant such motions "only [in] the

most extreme cases." *United States v. Linwood,* 142 F.3d 418, 422 (7th Cir. 1998) (internal quotations and citations omitted).

III. ANALYSIS

A. Commodities Fraud

Coscia first challenges the jury's verdict that he committed commodities fraud. The relevant statute makes it a crime to "defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered [under certain provisions of the Exchange Act]." 18 U.S.C. § 1348. According to Coscia, the Government needed to show that his actual orders were false or deceptive, but instead the Government sought to prove that he committed fraud merely by inducing other market participants to trade with him. This "pure inducement" theory, says Coscia, ducked the statutory requirements for fraud.

Coscia mischaracterizes the Government's theory of the case; this Court has addressed the issue once already. *See, Coscia,* 100 F.Supp.3d at 660-61. As the Court noted then, the Second Circuit has held that "false representations or material omissions are not required for a conviction under § 1348(1)" as long as there is fraudulent intent, a scheme or artifice to defraud, and a nexus with a security. *United States v. Mahaffy,* 693 F.3d 113, 125 (2d Cir. 2012) (citing *United States v. Motz,* 652 F.Supp.2d 284, 294 (E.D.N.Y. 2009)). In the indictment (*see,* Indictment ¶¶ 3, 8, 11) and

throughout the trial, the Government alleged that Coscia engaged in a scheme to defraud by intentionally misleading market participants about price and volume information in the commodities markets through sham quote orders. That theory fits the requirements of the statute.

Whether the proof was sufficient is another matter, and Coscia contends the Government offered no evidence of any actual deception. Coscia's primary argument in this regard is that the orders he placed were not fraudulent, but rather real orders that stayed on the market for 100 to 450 milliseconds (a long time, he claims, by high-frequency trading standards). Some of the large orders, he points out, actually traded. This argument ignores the substantial evidence suggesting that Coscia never intended to fill large orders and thus sought to manipulate the market for his own financial gain.

At trial, Coscia's computer programmer testified that his trading program placed large "quote orders" designed to "stimulate the market," and the program attempted to cancel the large orders as soon as they started to fill. (Trial Tr. 463-65.) In addition, a timer was set on the quote orders, and the programmer testified that the orders' short duration on the market was intended to reduce the risk that they would be filled. (Trial Tr. 469.) The Government also contrasted Coscia's trading activity with that of other high frequency traders. It introduced evidence, for example, suggesting that Coscia placed many more large quote orders than other traders, and then cancelled them at an unusually high rate (on one exchange at

a rate of 99%). (Trial Tr. 299-300; Govt. Exs. ICE Summ. Charts 2-3.) The fact that some of his large orders were partially filled may have been a result of an imperfect program, as the Government points out – at least, the jury was entitled to believe so.

In short, the Government introduced ample evidence from which a reasonable jury could find intent to deceive. But even then, Coscia argues, the Government offered no proof that the deception related to a material matter. That's hard to understand, based on the nature of the deception. Drumming up interest on one side of the commodities market through the placement of large (though illusory) quote orders seems obviously material to other market participants' investment decisions. "Wash trades" are an analogous practice that the Securities Exchange Act explicitly forbids. *See,* 15 U.S.C. § 78i(a)(1). This practice entails deceptively trading the same shares back and forth in an effort to create an artificially high price for the stock. The Seventh Circuit has mentioned wash trading as an example of genuine market manipulation. *See, Sullivan & Long, Inc. v. Scattered Corp.,* 47 F.3d 857, 864 (7th Cir. 1995) (contrasting the legitimate market practice of short selling with wash trading); *but see, Stoller v. CFTC,* 834 F.2d 262, 265-67 (2d Cir. 1987) (reversing CFTC enforcement action under a different statute where CFTC guidance on wash trades was overbroad and shifting). The statutory prohibition against wash trading is silent on materiality, and that is no surprise: the relevant deception in a

wash trade necessarily conveys information about demand and price, which are quintessentially material to investors. The same was true of Coscia's deception.

That the deception was material is not only intuitive, it was supported by evidence at trial. Several witnesses testified that Coscia's large quote orders influenced their trading activity or had the potential to do so, based on the parameters of their own trading algorithms. (Trial Tr. 637, 644, 656, 696-698, 742, and 765.) In short, Coscia cannot claim fairly that the Government failed to prove the materiality of his deception. Because the Government offered sufficient proof of deception and materiality, the jury's guilty verdict on commodities fraud stands.

B. Spoofing

The next challenge concerns the verdict against Coscia for "spoofing." The relevant statute prohibits "any trading, practice, or conduct [that] . . . is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. § 6c(a)(5)(C). Coscia resurrects the argument, already rejected by this Court, that the statute is void for vagueness. *See, Coscia,* 100 F.Supp.3d at 656-59. The Court adopts the reasoning from its prior opinion on this topic and repeats only a few key points here. The question is whether the statute is unconstitutional as applied to Coscia's conduct, not as applied to the hypothetical conduct of other

commodities traders. *See, United States v. Mazurie,* 419 U.S. 544, 550 (1975). The Court is also mindful that it must interpret a statute in such a way to avoid declaring it unconstitutional, if reasonably possible. *See, Rust v. Sullivan,* 500 U.S. 173, 190-91 (1991) (citations omitted).

Coscia's primary argument for the statute's vagueness is that it encompasses much routine, innocuous conduct by commodities traders. The Court already rejected this notion as applied to Coscia, *see, Coscia,* 100 F.Supp.3d at 658-59, because his intent to cancel the orders before he executed them differentiated his conduct from other, legitimate practices such as fill-or-kill and partial-fill orders. Coscia now further argues that there is nothing "in the statutory text that would have provided [him] notice of [the] intent-to-immediately-cancel standard." (Def.'s Br. at 15.) Without fair notice that his conduct was criminal, his guilty verdict cannot stand. In inquiring about notice, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier,* 520 U.S. 259, 267 (1997).

Coscia had fair notice. It would be unreasonable to believe that Congress had intended to criminalize all orders that are eventually cancelled at any point, for any reason, under 7 U.S.C. § 6c(a)(5)(C). The definition of spoofing must be read in conjunction with the companion statutory provision that actually

criminalizes the conduct: 13 U.S.C. § 13(a)(2) prohibits the manipulation or attempted manipulation of commodity prices generally, and prohibits knowing violation of the anti-spoofing rule. The purpose is clear: to prevent abusive trading practices that artificially distort the market. That, in turn, only occurs when there is intent to defraud by placing illusory offers (or put another way, by placing offers with the intent to cancel them before execution). Moreover, as the Court indicated in its previous discussion of wash trading, statutory prohibitions against specific forms of market manipulation are nothing new. *See, generally,* 15 U.S.C. § 78i.

Coscia also attacks the sufficiency of the evidence supporting the verdict for spoofing, arguing the Government failed to establish that he intended to cancel the orders in their entirety at the time he placed them with an intent to manipulate the market. But the Court has already described some of the relevant evidence that suggested intent to cancel under the commodities fraud count. For example, Coscia's computer program was designed to place large orders that would cancel automatically before being filled, for the purpose of manipulating the market, according to his programmer. Such evidence supports the guilty verdict on all counts.

C. Challenge to Jury Instructions

Coscia challenges the jury instructions on two separate bases. "Jury instructions are sufficient if, taken together, they convey the

issues fairly and accurately." *United States v. Johnson,* 584 F.3d 731, 739 (7th Cir. 2009) (internal quotations and citations omitted). First, Coscia contends that the Court erred in refusing to adopt his proposed instruction on materiality for the commodities fraud charge. His proposed instruction reads:

> It is not sufficient for the Government to prove that Mr. Coscia intended that his large-volume orders would induce others to react to allegedly deceptive market information and enter into futures transactions with him. The Government must also prove that Mr. Coscia's allegedly deceptive market information was intended to mislead others as to the quality or price of the futures transactions at issue, or otherwise to the nature of the bargain at issue. Stated differently, to prove that Mr. Coscia engaged in a scheme to defraud, he must have acted with intent to deprive others with whom he traded of the benefit of the bargain they struck.

(Suppl. to Prop. Jury Instr., ECF No. 74.)

This was an excessively wordy, potentially confusing formulation of what the Government had to prove.

To review, on the commodities fraud charge, the Government had to establish Coscia's fraudulent intent, a scheme or artifice to defraud, and a nexus with a security. *See, Mahaffy,* 693 F.3d at 125. The Court adopted a much more concise instruction than Coscia's proposal. (Jury Instr. No. 19.) The Court's instruction required the jury to find separately that there was a scheme to defraud and that Coscia acted with the intent to defraud; the instructions subsequently indicated that the scheme must be material, "which means it is capable of influencing the decision of the person to whom it is

addressed." *Id*. This definition was borrowed directly from the Seventh Circuit's pattern instructions. *See, Pattern Criminal Jury Instructions of the Seventh Circuit* 399 (2012). The Court's instruction fairly and accurately captured all of the required elements of commodities fraud, and Coscia was not prejudiced by the exclusion of his proposed instruction.

The next challenge is to the instruction on the spoofing charge. Coscia argues that the Court should have adopted his proposed instruction regarding "conditional intent." According to him, the jury was not adequately apprised that if he intended to cancel orders only under some conditions, he was not guilty of spoofing. The instruction Coscia requested reads:

> It is not sufficient for the Government to prove . . . that [Coscia] intended to cancel the bid or offer under some, but not all, conditions. Put another way, if you find that Mr. Coscia intended to execute his bid or offer under some, but not all circumstances, then the Government has failed to prove that he had an intent to cancel the bid or offer before execution, and this element has not been satisfied.

(Prop. Jury Instr., ECF No. 59.)

The instruction the Court ultimately adopted reads, in relevant part:

> "Spoofing" is defined as bidding or offering with the intent to cancel the bid or offer before execution. To find this element satisfied, you must find that the government has proven beyond a reasonable doubt that, at the time Mr. Coscia entered the bid or offer specified in the Count that you are considering, he intended to cancel the entire bid or offer before it was executed, and that he did not place the bid or offer as part of a legitimate, good-faith attempt to execute at least part of that bid or offer.

(Jury Instr. 24.)

The Court's instruction emphasized that the Government had to prove Coscia entered the relevant bid or offer with the intent to cancel it entirely before it was executed. The instruction therefore did not foreclose any defense by Coscia. He remained free to argue that his trading program only cancelled orders under certain conditions. And if that were true, it would necessarily mean that he did not have a preexisting intention "to cancel the entire bid or offer before it was executed." (Jury Instr. 24.) The instruction allowed the jury to consider fully his "conditional intent" defense, and they rejected it. In short, the Court's instruction on the spoofing charge fairly and accurately captured the required elements.

D. False and Prejudicial Testimony

Coscia challenges various aspects of testimony given by the Government's witnesses, claiming the testimony undermined his right to a fair trial. He first claims that two Government witnesses – Bessembinder and Dermenchyan – inappropriately testified regarding his intent in violation of Federal Rules of Evidence 704 and 701. Rule 704(b) prohibits expert witnesses from opining on a criminal defendant's mental state that constitutes an element of the crime. FED. R. EVID. 704(b). Rule 701(a) allows non-experts to provide an opinion as long as it is rationally based on the witness's perception, helpful to understanding the evidence, and not based on scientific or technical knowledge. FED. R. EVID. 701(a).

Bessembinder served as an expert witness for the Government. Coscia claims that Bessembinder's testimony crossed the line into testimony about Coscia's mental state, but that is a stretch too far. The Government asked Bessembinder to explain Coscia's testimony regarding his trading patterns. (Trial Tr. 1389-90.) Bessembinder testified that "the only way that trading is generated in the electronic futures markets is through order submission. So if one is seeking to generate trading, seeking to generate a reaction, the only way one could do that is by inducing people to change their order submissions." (Trial Tr. 1390.) The Government then asked Bessembinder if he observed data in evidence consistent with that description. He responded:

> Well, in particular, the high fill rates on the small orders. They were not only very high relative to the fill rates on the large orders, they are actually remarkably high for fill rates for other high frequency traders, so the high fill rates on the small orders are certainly very much consistent with the idea that the reaction that was generated was to induce other traders to submit orders to trade against, interact with the small orders.

(Trial Tr. 1391.)

This testimony fell safely within Rule 704(b)'s limitations. Bessembinder opined on direct testimony from Coscia; he stated, as an expert witness, his belief that the data in evidence differentiated Coscia's trading patterns from that of other high-frequency traders. Coscia then immediately had the opportunity to cross-examine Bessembinder on this opinion. Bessembinder did not testify that

Coscia intended to deceive the market or intended to cancel orders; the testimony did not implicate intent as to any element of the crime charged.

Coscia next contends that Dermenchyan, a lay witness and a commodities trader, improperly testified to matters outside of his personal knowledge in violation of Rule 701(a). As Coscia concedes, lay witnesses may testify as to intent. *See, United States v. Locke,* 643 F.3d 235, 240 (7th Cir. 2011). Dermenchyan testified that, on a particular day, he noticed unusual trading patterns: "[A]fter noticing the behavior and doing a little more research, I was able to . . . figure out that essentially these large orders were placed with the – from my perspective and the conclusions I made at the time, with the intention of inducing other participants to trade." (Trial Tr. 652.) Dermenchyan continued to describe the patterns he observed, and stated again that the pattern "was very consistent behavior which led me to conclude at that time that those orders were placed with the intention of essentially moving the market down and then pushing the market back up." (Trial Tr. 653.)

Even if these statements related to Coscia's intent, they were within Dermenchyan's first-hand knowledge and so satisfied the requirements of Rule 701(a). Dermenchyan testified about his direct observations of the market on a particular day as a commodities trader. His testimony would have been pointless had he been barred from explaining his interpretation of the pattern. And Coscia had

the opportunity to challenge his interpretation on cross-examination. The statements did not undermine the fairness of the trial.

Coscia additionally claims that Dermenchyan and another lay witness, Redman, gave the sort of scientific or technical opinion testimony proscribed by Rule 701(c). Both witnesses testified about market patterns they observed; these observations were based on their direct experience. Coscia objects to a few relatively brief passages in which the witnesses discuss supply and demand, and use the terms "buying pressure" and "selling pressure." (Trial Tr. 276, 278-79; 654, 682).

It is true that "testimony which goes beyond the observations that a normal person could make, and is based instead on the specialized knowledge obtained through experience in the field," must comply with Rule 702 as expert testimony. *United States v. Jones,* 739 F.3d 364, 369 (7th Cir. 2014). But that was not the sort of testimony offered here. Dermenchyan's and Redman's testimony contained rudimentary statements about supply and demand, concepts that are relatively easy to grasp. As traders, the witnesses had to speak about these concepts in order to describe their own observations about market activity at specific points in time. Because the statements were based on their personal knowledge and were not offered as opinions based on their years of expertise, the statements complied with Rule 701. *See, United States v. Cheek,* 740 F.3d 440, 447-48 (7th Cir. 2014) (holding that when a law enforcement

officer testifies using technical terms but based on his personal knowledge of a relevant investigation, the officer testifies as a lay witness).

Dermenchyan and Redman also made statements that Coscia now contends were false. When a defendant demands a new trial based on alleged false testimony, the proper analysis asks whether:

> (a) the court is reasonably well satisfied that the testimony given by a material witness is false; (b) the jury might have reached a different conclusion absent the false testimony or if it had known that testimony by a material witness was false; and (c) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

United States v. Bender, 539 F.3d 449, 456 (7th Cir. 2008) (internal brackets and citations omitted).

First, Coscia objects to Redman's statement that on a particular day, Coscia sustained a loss due to execution of his large buy orders. (Trial Tr. 303-04.) The loss that day, Coscia counters, resulted from execution of his small orders rather than the large ones. Second, Coscia takes issue with Dermenchyan's statement that he witnessed a trading pattern repeat 4,000 times in one day. (Trial Tr. 651.) This is wrong, Coscia claims, because on that day he entered only 1,836 orders in total.

The two challenged statements are slight compared to the amount of other evidence the Government offered at trial on these points. The Government introduced substantial evidence about Coscia's trading

activity, including a breakdown of his large and small orders, the rate at which they were filled or cancelled, and other data. (Govt. Exs. ICE Summ. Chart 1 and Summ. Charts as to Counts.) Moreover, as the Government points out, Coscia had the opportunity to discredit any material false statements during cross-examination of Dermenchyan and Redman. These relatively minor statements, assuming they were false, do not entitle him to a new trial. The jury likely would not have reached a different verdict in the absence of the statements, and Coscia has offered no convincing argument that he was unfairly surprised by the testimony.

IV. CONCLUSION

For the reasons stated herein, Defendant's Motion for Judgment of Acquittal and a New Trial [ECF No. 96] is denied.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: April 6, 2016