UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	:	
v.	:	Hon. John J. Tharp, Jr.
JAMES VORLEY and CEDRIC CHANU,	:	No. 18 Cr 35 (JJT)
Defendants.	:	

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO THE *AMICUS* BRIEFS FILED IN SUPPORT OF THE DEFENDANTS

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PRELIMINARY STATEMENT

The submissions filed by the *amici* in support of the Defendants provide no basis to dismiss the Indictment. The briefs ignore relevant Seventh Circuit law, misstate controlling law, mischaracterize readily available facts, and assert factual propositions as self-evident even though contrary to the allegations in the Indictment. The *amici* also present themselves as the standard bearers for a statutory scheme that two of them have previously characterized as ill-conceived, unnecessary, and unconstitutional—as part of what is now a nearly decade-long lobbying effort.

First, the *amici*'s submissions are replete with factual contentions that are contrary to the allegations in the Indictment, irrelevant, and unsupported. These include assertions about fraudulent intent and materiality, notwithstanding the Seventh Circuit's holding in *United States v. Coscia*, 866 F.3d 782, 798–800 (7th Cir. 2017), that spoofing can satisfy both of those elements.

Second, the *amici* contend that the Government has not pled that the spoof orders alleged in the Indictment (the "Fraudulent Orders") constitute false or fraudulent "representations," but the arguments rely on a series of inaccurate claims. To start, the argument ignores the well-established principle that fraudulent misrepresentations can take the form of "false statements of fact, misleading half-truths, deceptive omissions, and false promises of future action." *United States v. Weimert*, 819 F.3d 351, 357 (7th Cir. 2016). The Defendants' implied misrepresentation of supply and demand through their placement of the Fraudulent Orders accords with that standard, and the concept of an implied misrepresentation has been endorsed by the Seventh Circuit and at least seven other circuit courts of appeals.

In addition, this prosecution is not "novel," as the *amici* claim—defendants have been convicted of conspiracy to commit wire fraud based on similar conduct in three different judicial circuits, (i) including two defendants in this District and (ii) including conduct that pre-dated passage of the anti-spoofing provision. Similarly baseless are the *amici*'s suggestions that

executable orders are immune from criminal scrutiny (a claim foreclosed, again, by *Coscia*); that the prosecution in *Coscia* "disclaimed" the possibility of wire fraud; and that the alleged misrepresentations do not pertain to an "essential element" of any transactions—a claim that is at odds with the basic axiom that supply and demand affect the prices of commodities.

Third, there is no support for the claim that spoofing cannot constitute fraud if the additional elements of a fraud charge are present. The claim that the anti-spoofing provision impliedly repealed the wire fraud statute ignores the Seventh Circuit's statement on the issue, the holdings of other courts, and the controlling legal principle that implied repeal is strongly disfavored. The related claim that the use of the wire fraud statute here would be at odds with the priorities of Congress, the CFTC, or the CME is belied by their words and actions.

Finally, the *amici* raise a variety of purported policy concerns that are unsupported, premised on mistaken factual claims, and/or irrelevant. To start, the FIA's purported concern with the effect on the functioning of the futures markets is dubious given the absence of any adverse effects following the multiple wire fraud convictions to date based on conduct involving spoofing. The other *amici* purport to raise concerns about implications in other commercial settings, but they identify just one example of another "commercial setting" that would be implicated (a "stalking horse" bidder in a bankruptcy auction) and fail to substantiate their argument as to even that example. The *amici*'s other concerns—about potential civil RICO liability and the impact of applying the ten-year statute of limitations for wire fraud that "affects" financial institutions (*see* 18 U.S.C. § 3293(2))—are tantamount to requests for the Court to disregard the law.

RELEVANT BACKGROUND

I. The Relevant Statutes

The Wire Fraud Statute. The wire fraud statute (18 U.S.C. § 1343) was passed in 1952 and was modeled on the mail fraud statute (18 U.S.C. § 1341), which dates to the late 19th century.

See Congressional Research Service, "Mail and Wire Fraud: A Brief Overview of Federal Criminal Law," at 1–2 (last updated Feb. 11, 2019). The wire fraud statute "is an expansive tool" but there remain "limits" to its reach. *Weimert*, 819 F.3d at 354, 369.

The Anti-Spoofing Provision. The anti-spoofing provision—passed in 2010 as part of the Dodd-Frank Act—prohibits "bidding or offering with the intent to cancel the bid or offer before execution," 7 U.S.C. § 6c(a)(5). It "has almost no legislative history." *Coscia*, 866 F.3d at 787 n.7.

II. Prior Prosecutions of Wire Fraud Based on Conduct Involving Spoofing

Since 2016, the Government has convicted defendants in three different federal judicial circuits of conspiracy to commit wire fraud based on underlying conduct that included spoofing. Three of those defendants (two in this Court) admitted guilt in connection with conduct predating the enactment of the anti-spoofing provision.[1]

Another case that includes a charge of conspiracy to commit wire fraud is pending before Judge Lee. *See United States v. Bases*, 18-cr-48 (N.D. Ill.).

III. The Wire Fraud Charges in this Action

The Defendants are charged together with one count of conspiracy to commit wire fraud affecting a financial institution (in violation of 18 U.S.C. § 1349) and individually with one count each of wire fraud affecting a financial institution (in violation of 18 U.S.C. § 1343).

A fuller summary of the Indictment is set forth in the Government's opposition to the Defendants' motion (*see* Dkt. No. 83 at 2–5), but, in short, the Indictment alleges that, while working at Deutsche Bank, the Defendants and co-conspirator David Liew conspired to commit

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[1] *See United States v. Gandhi*, 18-cr-609 (S.D. Tex.), Dkt. Nos. 19–20; *United States v. Mohan*, 18-cr-610 (S.D. Tex.), Dkt. Nos. 22–23; *United States v. Edmonds*, 18-cr-293 (D. Conn.), Dkt. Nos. 6–7 (conduct dating to 2009); *United States v. Liew*, 17-cr-1 (N.D. Ill.), Dkt. Nos. 20–21 (conduct dating to 2009); *United States v. Sarao*, 15-cr-75 (N.D. Ill.), Dkt Nos. 58, 62 (conduct dating to 2009).

wire fraud and engaged in wire fraud by placing visible orders to buy or to sell precious metals futures contracts on one side of the market that they intended to cancel before execution—the "Fraudulent Orders"—in order to facilitate the execution of their "Primary Orders." (Indictment ¶¶ 3–19.)

Standing alone, the first half of this scheme—placing orders with the intent to cancel—would constitute spoofing; the second half of the scheme—using those orders to facilitate the execution of other orders by deceiving others in the market—is what makes it fraud. In particular, the purpose of placing the Fraudulent Orders was to inject false and misleading information into the market to create a false impression of increased supply or demand and, in turn, to cause other market participants to buy or sell futures contracts at quantities, prices, and times that they otherwise would not have. (*Id.* at ¶¶ 4–8.) At or around the same time, the Defendants and Liew would place their "Primary Orders" on the opposite side of the market from their Fraudulent Orders in order to profit from their fraudulent scheme. (*Id.* at ¶ 9.)

The Defendants and Liew intended to artificially move the prevailing price in a manner that would increase the likelihood that one or more of their Primary Orders would be filled. (*Id.* at ¶ 10.) The Fraudulent Orders "were material misrepresentations that falsely and fraudulently represented to traders" that the Defendants and Liew "were intending to trade the Fraudulent Orders when, in fact, they were not because . . . [they] intended to cancel them." (*Id.* at ¶ 11.)

IV. The *Amici*

A. Prior Efforts by the *Amici* to Prevent Any Prohibition on Spoofing

After Dodd-Frank was passed, the CFTC solicited comments on the interpretation and enforcement of the anti-spoofing provision. *See* 75 Fed. Reg. 67,301 (Nov. 2, 2010); 76 Fed. Reg. 14,943 (Mar. 18, 2011). The FIA claimed that the provision was "impermissibly vague and unenforceable" and "urge[d] the CFTC to seek repeal" of it. Letter from the FIA to the CFTC

dated Dec. 23, 2010, at 2, 3, 7.[2] SIFMA later joined the FIA in asking the CFTC to "urge Congress to repeal the new authority." Letter from the FIA and SIFMA to the CFTC dated May 17, 2011, at 3.[3] They also insisted that the anti-spoofing provision be interpreted to "require manipulative intent to avoid encompassing legitimate conduct." *Id.* at 6.

B. The Interests of the *Amici*'s Members in this Proceeding

In the *Bases* case, the Government has noted that some of the *amici*'s members have "undisclosed legal, monetary, and reputational interests" in these proceedings. (18-cr-48, Dkt. No. 166 at 1.) To the extent the Court is interested in further details on the issue—also applicable in this case—the Government respectfully refers the Court to the Government's brief in response to the *amici* in that proceeding. (*See* 18-cr-48, Dkt. No. 178 at 3, 6–7, 25.)

ARGUMENT

I. The *Amici*'s Arguments Are Based on Factual Contentions that Are Beyond the Scope of the Court's Review of the Indictment

At this stage, the Court reviews an indictment on its face—accepting all of its allegations as true (*see* Dkt. No. 83 at 6)—yet the *amici*'s submissions are replete with factual contentions.

These contentions include claims about the relevance of "advances in electronic trading technology and algorithmic trading programs," (Dkt. No. 107 at 6), "[m]ost trading in [the] markets," and "any other type of contract in commerce" that can be withdrawn before acceptance (Dkt. No. 96 at 5–6). The submissions also contain claims about fraudulent intent and materiality, even though the *amici* do not dispute that these elements are adequately pled. (*See, e.g.*, Dkt. No. 107 at 13 ("an open, executable order does not represent any facts regarding trading intentions"); Dkt. No. 96 at 11 ("any deception about a trader's intent cannot be material for purposes of wire

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[2] *See* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26795&SearchText=.

[3] *See* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42697&SearchText=.

fraud”).)

The Government’s evidence at trial will include the testimony of a co-conspirator of the Defendants who will corroborate other evidence on these elements and probative communications including those excerpted in the Indictment. These are matters to be resolved through evidence—not on the basis of written submissions.

II. The Indictment Properly Alleges False or Fraudulent “Representations” and/or “Pretenses” that Satisfy the Wire Fraud Statute

The *amici*’s submissions add nothing to the legal analyses already presented to the Court by the parties. The wire fraud charges are valid on one or both of two grounds: (1) the Fraudulent Orders were false or fraudulent “representations” because the Defendants and Liew misrepresented both their intent to trade and the existence of genuine supply or demand in the marketplace; and (2) the Fraudulent Orders constituted false or fraudulent “pretenses.” (*See* Dkt. No. 83 at 8–22.) The *amici*’s arguments to the contrary are meritless.

A. The Fraudulent Orders Constituted Implied Misrepresentations

In *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1995 (2016), the Supreme Court held that liability under the False Claims Act “can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant’s noncompliance with a [material] statutory, regulatory, or contractual requirement” such that “the omission renders those representations misleading.”

The Court’s decision relied on well-established principles of common law fraud that are similarly applicable here. In particular, the Court held that “[b]ecause common-law fraud has long encompassed certain misrepresentations by omission, ‘false or fraudulent claims’ include more than just claims containing express falsehoods” and that the claims at issue fell “squarely within

the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." *Id.* at 1999–2000.

Here, the Defendants and Liew failed to represent to other traders in the market that they never wanted their Fraudulent Orders to be executed. The Government expects that Liew will testify to this fact. The Defendants acknowledge that in placing the Fraudulent Orders, the Defendants represented to the market that they were "ready, willing, and able" to trade. *See* Jan. 1, 2019 Hrg. Tr. at 40 ¶¶ 17–20. What the Defendants failed to represent—*i.e.*, that they did not *want* their Fraudulent Orders to be executed, and that they planned to cancel the Fraudulent Orders at the time they were placed in order to avoid their execution—is what renders their "ready, willing, and able" representation a fraudulent half-truth and/or deceptive omission.

The efforts by the Chamber, SIFMA, and BPI to distinguish *Escobar* are meritless. The *amici* start with the (self-evident) observation that the case was decided "under a different statute and a different regulatory regime" (Dkt. No. 96 at 12)—a fact that the Court itself noted at oral argument on the Defendants' motion to dismiss—but the decision draws on principles of common law fraud equally applicable here, not on specialized requirements under the FCA.

Equally specious is the *amici*'s claim that the application of the principles of fraud described by the Supreme Court would be tantamount to "creat[ing] new law . . . outside the FCA context" (Dkt. No. 96 at 12). The decision is based on a "classic example" of fraud described in a nearly-century-old Supreme Court case and a rule that "recurs throughout the common law," including in "tort law" and "securities law." *Escobar*, 136 S. Ct. at 2000 & n.3.

Relatedly, as the Government has previously noted, in at least two instances, the Seventh Circuit has affirmed fraud convictions in cases involving communicative conduct that carries an implicitly misleading representation. (*See* Dkt. No. 83 at 10–11.) The Defendants sought to

distinguish these cases on the purported basis that they involved a defendant's breach of duty to an employer (Dkt. No. 85 at 9–10)—a distinction that finds no support in the cases[4]—but they are consistent with the Supreme Court's description of longstanding principles of common law fraud.

The appeals courts in at least seven other circuits have also recognized the concept of "implied misrepresentations" in a variety of contexts involving fraud, including wire fraud. *See Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004) (mail fraud); *United States v. Yeaman*, 194 F.3d 442, 455 (3d Cir. 1999) (securities fraud) (quoting *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943)); *United States v. Bean*, 85 F.3d 629, 1996 WL 224077, at *1 (Table) (6th Cir. 1996) (wire fraud); *United States v. Hall*, 996 F.2d 284, 286–87 (11th Cir. 1993) (wire fraud); *United States v. Young*, 952 F.2d 1252, 1255–57 (10th Cir. 1991) (bank fraud); *Huff v. United States*, 301 F.2d 760, 765 (5th Cir. 1962) (wire fraud).

Even if *Escobar* were inapplicable (and it is not), the Fraudulent Orders here could also be described as misleading "half-truths" and/or deceptive "omissions" because the Defendants represented supply and demand in the markets without disclosing to the parties executing against their Primary Orders that this activity would disappear after those transactions were completed.

Finally, the two FCA cases cited by the *amici* in their discussion of *Escobar* provide no reason to disregard the Supreme Court's description of the law of fraud. Both of them were rulings on summary judgment in which the courts concluded that the plaintiffs had not presented sufficient evidence to proceed to trial on the basis that any claims for payment at issue were false. *See United States ex rel. Lisitza v. Par Pharm. Co.*, 276 F. Supp. 3d 779, 801 (N.D. Ill. 2017); *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016) (cited in Dkt. No. 96 at 12–13).

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[4] In *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005), for example, the court explained that its decision was not based on a "mere failure to disclose"—an observation that would have been unnecessary if the decision had been premised on a fiduciary obligation.

A motion to dismiss an indictment is not subject to the standard of review that applies to a motion for summary judgment, in which the party opposing summary judgment is required to demonstrate a "genuine dispute" of "material fact" based on record evidence, typically following the close of discovery. *See* Fed. R. Civ. P. 56(a). The Indictment here alleges the nature of the Defendants' conspiracy and scheme to defraud at length, but it is not an exposition of the Government's trial evidence, and particularly in light of *Escobar* and the other decisions cited above, the Defendants' motion to dismiss should be denied.

B. The Contention that this Prosecution Is "Novel" Is Incorrect

The *amici* claim that application of the wire fraud statute here would be "novel" (Dkt. No. 107 at 2; Dkt. No. 96 at 2), but that is just as incorrect as the Defendants' claim that prior pleas to wire fraud charges based on spoofing deserve no weight (*see* Dkt. No. 76 at 4 n.4). The judges who accepted those pleas—including Judge Kendall and Judge St. Eve—were bound by Fed. R. Crim. P. 11(f), which required them to ascertain "whether the [defendants'] admissions [were] factually sufficient to constitute the alleged crime." *United States v. Fountain*, 777 F.2d 351, 355 (7th Cir. 1985). There is no reason to doubt that those judges properly discharged that duty.

In any event, the novelty of a prosecution is irrelevant. The wire fraud statute has "often been used to plug loopholes in statutes prohibiting specific frauds" prior to the enactment of targeted prohibitions. *United States v. Dial*, 757 F.2d 163, 169 (7th Cir. 1985). The statute is not limitless—it does not "cover all behavior which strays from the ideal," *Weimert*, 819 F.3d at 357—but "[s]tatutory prohibitions against schemes to defraud are often worded broadly because Congress cannot anticipate each and every new context in which they might be carried out." *United States v. Coscia*, 100 F. Supp. 3d 653, 660 (N.D. Ill. 2015) (discussing commodities fraud statute). Although the anti-spoofing provision is now effective, there is no material difference between a wire fraud charge that could have been brought prior to passage of the anti-spoofing

provision and—as in this case—a charge based on conduct that predates passage of the provision.

The relevant question now is whether the Indictment properly alleges the elements of the offenses. The *amici* do not dispute—much less call into question—this dispositive fact.

C. The *Amici*'s Claim that Orders Placed on an Open Market Are Immune from Criminal Scrutiny Is Incorrect

The *amici* contend that orders placed on an open market "cannot constitute false statements" (Dkt. No. 96 at 8), but their conclusory assertions add nothing to the meritless arguments already advanced by the Defendants.

As the Government has noted: (1) whether the Fraudulent Orders were materially false or fraudulent "representations" is a question properly reserved for resolution by a jury after the presentation of evidence; (2) the claim that the Fraudulent Orders cannot be misrepresentations as a matter of law is contrary to the allegations in the Indictment and cannot be reconciled with the Seventh Circuit's rejection of the defendant's claim in *Coscia* that "because his orders were fully executable and subject to legitimate market risk, they were not, as a matter of law, fraudulent," 866 F.3d at 797; (3) the claim relies on a mischaracterization of the alleged fraud, which was not directed solely at market participants who might execute against the Fraudulent Orders but, rather, market participants who might execute against the Defendants' *Primary* Orders based on a distorted perception of supply and demand; (4) none of the cases cited by the Defendants (and the *amici* cite none that were not already addressed) hold that an order in a market is immune from criminal scrutiny where, as here, that order is alleged to have been placed to deceive and distort the market; and (5) the charges are independently viable on the basis that the Fraudulent Orders were false or fraudulent "pretenses"—an issue that the *amici* ignore. (*See* Dkt. No. 83 at 6–22.)

The *amici*, like the Defendants, treat their claims about what information is conveyed to the market when an order is placed as self-evident, but the Indictment alleges that the Fraudulent

Orders were placed to distort supply or demand and, in turn, to cause other market participants to buy or sell at quantities, prices, and times that they otherwise would not have. Like the Defendants, the *amici* effectively concede that an order constitutes communicative conduct, but whether the allegations in the Indictment about the full content and impact of that communication are correct depends on context-specific evidence—not generic claims about how "markets" work.[5]

D. The *Amici*'s Claim that the Government Has "Disclaimed" the Availability of the Wire Fraud Statute Is Incorrect

The claim that the prosecution "in *Coscia* expressly disclaimed that spoofing involves the making of a misrepresentation" (Dkt. No. 96 at 9) is false. The *amici* cite no support for it, and it is contrary to the multiple prosecutions that have resulted in convictions for conspiracy to commit wire fraud based on conduct involving spoofing. For their part, all that the Defendants have cited are statements by the prosecutors in that case explaining that they did not need to prove a misrepresentation because they were proceeding under the scheme provision of the commodities fraud statute (*see* Dkt. No. 76 at 3–4), but describing the elements of one claim is not "disclaim[ing]" the availability of another claim in another proceeding.

As the Government previously noted, any suggestion that open-market activity cannot be prosecuted as fraud is unsupported by the law. (*See* Dkt. No. 83 at 10–20.) Indeed, courts have repeatedly rejected the contention that live, open-market activity cannot be fraudulent or manipulative. In one such case from last year—involving civil claims brought by the SEC based in part on alleged spoofing—the court observed that "[t]o the extent that [the defendants] argue that the entry of an order in the open market may never constitute manipulative conduct, they are wrong." *SEC v. Lek Secs. Corp.*, 276 F. Supp. 3d 49 (S.D.N.Y. 2017). Cases involving open-

[5] *See, e.g.*, *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) (noting that "successful communication depends on meanings shared by interpretive communities").

market orders that have been brought under anti-manipulation statutes have also acknowledged that this misconduct can be accomplished through "misrepresentations" comprised of market activity. *See, e.g.*, *In re London Silver Fixing, Ltd.*, 213 F. Supp. 3d 530, 565 (S.D.N.Y. 2016) (stating that claims under CEA anti-manipulation provision alleging "false and misleading" bids in silver futures auctions for purpose of affecting benchmark rate "sound in fraud"); *In re Crude Oil Commodity Litig.*, No. 06-cv-6677, 2007 WL 1946553, at *5 (S.D.N.Y. June 28, 2007) (applying Fed. R. Civ. P. 9(b) where "the crux of plaintiffs' allegations is that defendants misled the market with regard to supply and demand . . . resulting in artificial prices").

E. The Claim that the Government Has Conflated the Misrepresentation and Intent Elements of Wire Fraud Is Incorrect

The contention that the Government has "conflate[d]" the misstatement and intent elements of wire fraud is specious (Dkt. No. 96 at 10). The Indictment alleges that the Fraudulent Orders were false or fraudulent "representations" and/or "pretenses" that were made with fraudulent intent (*i.e.*, the intent to defraud).

The falsity of the representations or pretenses relies on the allegation that the Fraudulent Orders were placed with the "inten[t] to cancel before execution." (Indictment ¶ 4.) In fraud cases, ascertaining whether a representation is false may rely on the speaker's intent, but that is not "conflating" the representation's falsity with the separate requirement that the speaker have had the intent to defraud. For example, as the *Weimert* court recognized, "actionable deception" can include "false promises of future action," 819 F.3d at 357, but the reason a promise is "false" is because the speaker—like the Ponzi schemer who tells his new victims he will invest their money when he intends to pay back his old victims—does not intend to follow through on it.

F. The *Amici*'s Claim that the Alleged Misrepresentations Do Not Pertain to an "Essential Element" of Relevant Transactions Is Incorrect

The claim that the Defendants' intent to cancel the Fraudulent Orders does not "relate to

an essential element of the transactions" (Dkt. No. 96 at 10–11) is specious. To start, this is just another way of stating that the alleged misrepresentations were not material (a question of fact), and it cannot be squared with the *Coscia* court's conclusion that spoofing may be materially misleading, *see* 866 F.3d at 798–800. The argument fails for two additional reasons.

First, it relies on a misreading of the Indictment. The *amici* assume that the only potential victims of the alleged scheme are counterparties to the *Fraudulent* Orders and that they get "exactly what [they] bargained for" (Dkt. No. 96 at 11). But as the Indictment alleges, the Defendants and Liew placed the Fraudulent Orders in order to artificially move the prevailing price and distort perceptions of supply and demand in the market in a manner that would mislead potential counterparties to the Defendants' *Primary* Orders.

Second, the argument is at odds with an axiom of modern economics for nearly 250 years—namely, that the value of a commodity is influenced by supply and demand. *See* Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book One, Ch. VII ("Of the Natural and Market Price of Commodities") (1776). A misrepresentation about supply and demand is a misrepresentation about the value of a commodity, and someone who is temporarily and artificially increasing supply and demand (here, through the placement of the Fraudulent Orders) is misrepresenting the value of a commodity (here, the commodities underlying the Primary Orders).

For these reasons, the Seventh Circuit's decision in *Weimert* supports the wire fraud charges here. This is not a case about "negotiating positions," contrary to the claims of the *amici* and Defendants; it is about misleading market participants about the value of the commodities they are acquiring in order to improperly influence the price they are willing to take (if selling against a Primary Order) or pay (if buying against a Primary Order). As the Seventh Circuit explained by way of analogy, "a seller or his agent may not falsely tell potential buyers or investors that a piece

of property has no history of environmental problems if soil and groundwater contamination on the property was discovered the year before," because "[t]he buyer would be led to purchase a property worth far less than she was led to believe"—and such "misrepresentations materially alter one party's understanding of the subject of the deal." 819 F.3d at 356.

III. The Alleged Spoofing Also Constitutes Fraud

There is no merit to the contention that conduct that would support a spoofing conviction cannot constitute wire fraud if the additional elements of fraud are established. That position is unsupported by any legislative history or *Coscia*, which affirmed spoofing and (commodities) fraud convictions for the same underlying conduct.

The claim by *amici* that the anti-spoofing provision impliedly repealed the wire fraud statute is devoid of any support. Courts have repeatedly rejected this argument based on controlling legal principles, and the Seventh Circuit has indicated that it shares that view.

A. The Anti-Spoofing Provision Did Not Impliedly Repeal the Wire Fraud Statute

A statute has not been repealed by implication "unless [Congress's] intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam). This requires either a showing that "the later act covers the whole subject of the earlier one and is clearly intended as a substitute," *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936), or that an "irreconcilable conflict" exists between the two statutes, *Rodriguez*, 480 U.S. at 524. If a course of conduct violates two statutes with different elements, the government may prosecute under each of them. *See Blockburger v. United States*, 284 U.S. 299 (1932).

The Seventh Circuit indicated over 30 years ago that the CEA did not impliedly repeal the wire fraud statute. In *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985) (Posner, J.), the court affirmed mail and wire fraud convictions of two brokers for "trading ahead" of their clients.

Shortly before their scheme was complete, Congress had added penalties to the CEA for such conduct, but the court observed that "[t]he defendants do not argue that the [CEA] supersedes the federal mail or wire fraud statutes, and are wise not to make the argument." *Id.* at 167.

The court relied on a decision from the First Circuit that had rejected the argument. *See United States v. Brien*, 617 F.2d 299, 309–11 (1st Cir. 1980). As the FIA does here, the *Brien* defendants relied "primarily on the exclusive jurisdiction provisions" of the CEA, but although the CEA "occup[ies] the entire field of commodities futures regulation," the mail and wire fraud statutes remain applicable. *Id.* at 310. The court explained that (i) the statutes are "general antifraud statutes" that are not premised on "the sale of commodity options"; (ii) there is a "strong judicial policy disfavoring the implied repeal of statutes"—contrary to the FIA's claim that "[a]ny doubt [about implied repeal] should be resolved in favor of preclusion" (Dkt. No. 107 at 9); and (iii) "[a]lthough the statutes prohibit similar conduct, they operate independently and harmoniously." 617 F.2d at 310.

The Second Circuit reached a similar conclusion, using comparable reasoning, when it rejected the argument that the CEA "implicitly repealed" the mail fraud statute. *United States v. Shareef*, 634 F.2d 679, 680–81 (2d Cir. 1980); *see also United States v. Faulhaber*, 929 F.2d 16, 19 (1st Cir. 1991) (indictment charging mail and securities fraud was not multiplicitous).

Further undermining the FIA's argument is the absence of any relevant legislative history. Indeed, the FIA now attempts to place the anti-spoofing provision into what it calls "a special and comprehensive statutory and regulatory scheme" (Dkt. No. 107 at 3) even though the FIA repeatedly claimed that it was ill-conceived, unnecessary, and unconstitutional. The FIA (and SIFMA) also urged the CFTC to interpret the provision to require manipulative intent, even though they now take issue with wire fraud charges that (i) require proving fraudulent intent and (ii) are

based on an intent to affect commodity prices.

If the FIA's argument were correct (and it is not), it would mean—among other things—that *Coscia* was wrongly decided (because the anti-spoofing provision would also have impliedly repealed the earlier commodities fraud statute); that the commodities fraud statute impliedly repealed the mail and wire fraud statutes; and perhaps that every other specialized federal fraud statute—including statutes directed at bank fraud (18 U.S.C. § 1344), health care fraud (18 U.S.C. § 1347), and securities fraud (18 U.S.C. § 1348)—impliedly repealed the wire fraud statute. This cannot be squared with the cases that have affirmed the role of the wire and mail fraud statutes in the face of challenges based on implied repeal following the passage of narrower statutes to address specific areas of legislative concern. *See, e.g.*, *Edwards v. United States*, 312 U.S. 473, 483–84 (1941) (Securities Act of 1933); *United States v. Arif*, 897 F.3d 1, 6 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 832 (Mem) (2019) (Federal Trade Commission Act); *United States v. Young*, 955 F.2d 99, 109 (1st Cir. 1992) (Breyer, C.J.) (embezzlement statute).

B. The FIA's Characterization of the Regulatory Priorities of Congress, the CFTC, and the CME Is Incorrect

There is also no merit to the FIA's claims that the application of the wire fraud statute to the conduct alleged in the Indictment is inconsistent with the intent behind the CEA, the CFTC or CME's supposed interest in "plac[ing] the highest value on protecting the confidentiality of proprietary information and trading intentions," or the absence of any "duty to disclose anything to the market" (Dkt. No. 107 at 2–3, 10–12 & n.3). To start, the FIA's position cannot be squared with Congress's passage of the anti-spoofing provision—much less the application of the commodities fraud statute to spoofing conduct, as affirmed by the Seventh Circuit in *Coscia*.

In addition, neither the CFTC nor the CME has ever taken the position attributed to it by the FIA. To the contrary, the CFTC—which has explained that "[s]poofing is a particularly

pernicious example of bad actors seeking to manipulate the market"[6]—routinely files and settles enforcement actions based on spoofing, including in this Court.[7] Likewise, the CME has for years disciplined members for spoofing.[8]

C. The *Coscia* Decision Supports the Government's Position

The *amici* also contend that the Seventh Circuit's decision in *Coscia* is irrelevant, but the core premise of the *amici*'s briefs—that the anti-spoofing provision should be the exclusive criminal enforcement mechanism to address spoofing—is refuted by *Coscia*'s affirmance of a parallel commodities fraud charge. Moreover, the FIA claims that Coscia's orders "had no chance to be executed" (Dkt. No. 107 at 13), but Coscia himself argued on appeal that his "large orders were universally subject to market risk," 2016 WL 4729788 (C.A.7), at *50, and the *Coscia* court recognized this defense, without rejecting (or endorsing) it. 866 F.3d at 797.

Nor did the Seventh Circuit "describe[ ]" Coscia's programs as having "rendered [his large orders] unexecutable" (Dkt. No. 107 at 13). The program was designed to *automate* cancellation mechanisms like those the Government will prove occurred here *manually*—such as "the passage of time" and "the complete filling of the small orders." 866 F.3d at 789.

IV. The *Amici* Do Not Identify Any Valid Policy Concerns

A. The Purported Concerns About Market Functioning Are Baseless

The FIA purports to raise concerns about "the proper functioning and efficiency of futures markets" (Dkt. No. 107 at 2), but as noted above, this would not be the first conviction of conduct involving spoofing based on wire fraud charges. The FIA does not explain why those earlier

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[6] Release No. 7681-18, Jan. 29, 2018, https://www.cftc.gov/PressRoom/PressReleases/pr7681-18.

[7] *See, e.g.*, *CFTC v. Oystacher*, 203 F. Supp. 3d 934 (N.D. Ill. 2016).

[8] *See, e.g.*, https://www.cmegroup.com/notices/disciplinary/2018/12/cme-17-0640-bc-1-joerik-financial-pte-ltd.html#pageNumber=1; https://www.cmegroup.com/notices/disciplinary/2016/10/COMEX-13-9490-BC-1-GENEVA-TRADING-USA-LLC.html#pageNumber=1.

convictions did not adversely impact "the proper functioning and efficiency of futures markets," and it provides no explanation for why convictions in this proceeding would be any different.

B. The *Amici* Do Not Identify Any Other Legitimate Commercial Conduct that Would Be Criminalized by Application of the Wire Fraud Statute

The other *amici* purport to raise concerns about other "commercial settings" (Dkt. No. 96 at 2) that would be implicated, but every level of their analysis is mistaken.

To start, the *amici*'s effort to extrapolate a generally applicable principle from one criminal proceeding is mistaken and based on an inaccurate understanding of the law. In particular, they claim that applying the wire fraud statute here would result in "potential exposure for wire fraud" for someone who "[o]ffer[s] to enter into a commercial contract without disclosing one's intent or motivation for making such offer" (Dkt. No. 96 at 6; *see also id.* at 2), but the wire fraud statute requires more—an intent to mislead someone for the purpose of obtaining money or property.

The sole example the *amici* do purport to identify—a "stalking horse" bidder in a bankruptcy auction—is flawed for several reasons.

First, a stalking horse bidder is not someone whose purpose "is often to prevent lowball offers, rather than consummating a deal under the terms of the offer" (Dkt. No. 96 at 14). Rather, a "stalking horse bidder" "commits to an initial bid" with a "range of buyer protections" so that "that the trustee must either complete the sale or pay the buyer's expenses." 3 *Collier on Bankruptcy* ¶ 363.02[7]. These protections "provide the prospective buyer with some confidence that either the transaction will succeed or the buyer will be compensated for the failure." *Id.*[9]

Second, the conduct described by the *amici*—the placement of a bid on a debtor's assets in order to set an artificial price floor—may already be prohibited. The sale of a company's assets

[9] The *amici*'s apparent misunderstanding—that a "stalking horse" bid is "an early phony bid"—is common. *In re Integrated Ress.*, 147 B.R. 650, 661–62 & n.2 (S.D.N.Y. 1992) (Mukasey, J.).

in a bankruptcy auction is subject to a number of restrictions (*see* 11 U.S.C. § 363(b)–(c),(m),(n)), including that the sale "has been negotiated and proposed in good faith, that the purchaser is proceeding in good faith, and that it is an 'arms-length' transaction." *In re Wilde Horse Enters. Inc.*, 136 B.R. 830, 841–42 (Bankr. C.D. Cal. 1991).

Third, even if the conduct posited by the *amici* were not already prohibited, they do not explain why it is desirable—particularly since a bankruptcy auction is conducted by a court-appointed trustee and is often a court-supervised process, and the objective is not merely to maximize the sale price of a debtor's assets. *See* 3 *Collier on Bankruptcy* ¶¶ 363.02[1], [4].

C. The *Amici*'s Contentions About Potential Civil RICO Liability Should Have No Bearing on the Court's Ruling

The questions before the Court should be resolved by the relevant statutes, caselaw, and legal principles—not the monetary concerns of the *amici*'s members stemming from potential civil RICO liability. In any event, the *amici* fail to cite a single civil RICO claim that has been brought to date—notwithstanding the prior convictions on comparable charges—or otherwise explain why the litigation risk they posit has yet to materialize anywhere. The supposed litigation risk posited by the *amici* also ignores the constraints on any plaintiff's ability to pursue a fraud-based civil RICO claim—particularly in an anonymous market—including Rule 9(b) of the Federal Rules of Civil Procedure, as well as prohibitions on claims that would be actionable as securities fraud, on group pleading, and on extraterritorial claims.[10]

D. There Is No Reason to Disregard the Applicable Statute of Limitations

There is also no reason to ignore the law that extends the statute of limitations for wire fraud "if the offense affects a financial institution," 18 U.S.C. § 3293(2). *See generally United*

[10] *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 726, 731 (S.D.N.Y. 2013); *Gross v. Waywell*, 628 F. Supp. 2d 475, 495 (S.D.N.Y. 2009).

States v. Serpico, 320 F.3d 691, 694–95 (7th Cir. 2003). Congress enacted this limitations period "in direct response to the 1980's savings and loan crisis" to protect the public "not only [from] frauds by [corporate] insiders who were trying to harm their employers, but also"—as in this case—"frauds by [corporate] insiders seeking to benefit their employers." *United States v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438, 455–56 (S.D.N.Y. 2013).

The *amici*'s claim that "any harm the government believes spoofing causes to commodities markets can be addressed" by the anti-spoofing provision (Dkt. No. 96 at 14) is also specious. In addition to a longer limitations period, the wire fraud charges here also have higher penalties and address conduct that is more serious than merely spoofing—namely, engaging in spoofing with fraudulent intent and in order to obtain money or property from someone else.

CONCLUSION

The Court should deny the Defendants' motion to dismiss.

Dated: March 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will notify counsel for the Defendants of the filing.

By: /s/

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