UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Case No. 1:18-cr-00035
	)	
JAMES VORLEY and CEDRIC CHANU,	)	Honorable John J. Tharp, Jr.
	)	
Defendants.	)	

BRIEF OF *AMICUS CURIAE*, FUTURES INDUSTRY ASSOCIATION

I. THE INTEREST OF THE FIA

Amicus Curiae, Futures Industry Association ("FIA") is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's members provide clearing and execution services for the participants in the futures markets, provide the majority of funds that support clearinghouses, and commit a substantial amount of their own capital to safeguard customer transactions. The FIA and its members rely on the proper administration of the futures markets because, among other reasons, many of them provide the clearing and execution services for the participants in these markets. As such, they play a critical role in the managing of systemic risk in the global financial markets.

In this case, the FIA is concerned that the application of the wire fraud statute to open orders in the futures markets may adversely affect the proper and efficient functioning of those markets. All of the counts of the indictment are founded on allegations that the defendants entered orders in the COMEX futures market that were in the nature of "spoofing"—*i.e.*, orders

that the defendants, at the time they entered them, allegedly intended to cancel before they were executed. *See* Indictment ("Ind."), *United States v. Vorley*, No. 18-cr-435 (N.D. Ill. July 24, 2018), Dkt. No. 12 (charging that such futures orders constituted conspiracy to commit and the commission of wire fraud in violation of 18 U.S.C. §§ 1343 and 1349). Those charges are founded on the legal contention that the open, executable futures orders entered by the defendants satisfy the required element of a "misrepresentation" for a wire fraud violation. That novel construction of "misrepresentation" is not supported by the law, is not needed to protect the futures markets, and risks real harm to the proper functioning and efficiency of futures markets.

II. SUMMARY OF ARGUMENT

Congress in the CEA has carefully crafted a comprehensive statutory scheme for futures trading that, as especially relevant here, balances the needs to (1) prohibit futures market participants from engaging in "spoofing," (2) protect the confidentiality of market participants' proprietary trading information, and (3) maintain the critical legal standard that futures market participants have no duty to disclose trading intentions when entering orders. Expanding the wire fraud statute to create an overlay to the CEA in the context of this case is unnecessary to protect futures market participants and contrary to both the CEA's design and purpose and the vitality of futures markets.

Creating novel, protean standards for "implied misrepresentations" and disclosure of trading intentions conflicts with foundational elements of futures trading that the CEA was intended to protect. The CEA and implementing regulations of the Commodity Futures Trading Commission ("CFTC"), the federal agency that oversees and regulates U.S. futures markets, place the highest value on protecting the confidentiality of proprietary information and trading

intentions of futures market participants. The careful balance struck by the statute and regulations properly permits market participants to disguise or conceal strategies from other participants and to do so in a way calculated to protect the integrity of the futures markets. Introducing new and unnecessary standards of "implied misrepresentations" that criminalize, or call into question, a market participant's failure to disclose trading intentions opens the door for arbitrary prosecutions and vexatious private claims. Losing traders could contend that another market participant violated the law by failing to make adequate disclosure—or "misrepresenting"—its intentions merely by entering an executable order. The government's approach will create undeterminable legal risk that will chill legitimate, *non-fraudulent* trading that does not violate any of the prohibitions charged in this case or in the CEA or CFTC regulations generally—trading that is essential for vibrant, liquid markets. For these reasons the wire fraud charges in the indictment should be dismissed.

III. BACKGROUND

A. The Comprehensive Federal Regulatory Scheme for Futures Markets

Congress and the CFTC have established a special and comprehensive statutory and regulatory scheme to govern the complex and fast-paced futures markets. As the Supreme Court has explained, the CEA "has been aptly characterized as 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 355–56 (1982) (quoting H.R.Rep. No. 93–975, 1 (1974)). Recognizing "the potential hazards as well as the benefits of futures trading," Congress began regulating commodity futures exchanges in 1921, when it enacted the Future Trading Act. *Id.* at 360-61. The statute's name and scope changed on more than one occasion, eventually becoming the CEA in 1936. *Id.* In 1974, Congress broadened the CEA's coverage to include non-agricultural commodities and created the CFTC "to assume the powers previously exercised by

the Secretary of Agriculture, as well as certain additional powers," *id*. at 366, including "broad powers to administer and enforce the CEA," *Am. Agric. Movement, Inc. v. Bd. of Trade of City of Chicago*, 977 F.2d 1147, 1155 (7th Cir. 1992).

Congress' intention that the regulation of futures trading be focused in one regulatory scheme is expressed in the CEA's reposing "exclusive jurisdiction" in the CFTC to regulate futures trading, thereby barring other federal agencies and the states from imposing regulatory requirements or enforcing their statutes with respect to futures trading. 7 U.S.C. § 2(a)(1); *see, e.g.*, *Hunter v. FERC*, 711 F.3d 155, 157 (D.C. Cir. 2013) ("Congress crafted CEA section 2(a)(1)(A) to give the CFTC exclusive jurisdiction over transactions conducted on futures markets").

As relevant here, the CEA contains both *general* prohibitions of fraud and manipulation and *specific* prohibitions of particular trading practices that do not require proof of fraud or manipulation. The general anti-fraud and anti-manipulation prohibitions include CEA sections 4b, 6(c)(1) and (3), and 9(a)(2). 7 U.S.C. §§ 6b, 9(1), (9)(3), and 13(a)(2). Specific trading prohibitions include, among others, exceeding speculative position limits, wash sales, accommodation trades, violating bids or offers, intentional or reckless disorderly trading in market closing periods, and, the type of activity alleged here, bidding or offering with the intent to cancel the bid or offer before execution (*i.e.*, "spoofing"). 7 U.S.C. §§ 6a(b), 6c(a)(2), and 6c(a)(5)(A-C). The specific prohibitions serve two related interests: they prevent and deter undesirable market conduct without requiring proof of the more exacting elements of fraud and manipulation; and they eliminate a need to try to proscribe that conduct by other means that would indiscriminately water down or expand the definitions of fraud and manipulation. In

contrast, the government's approach could unfold in ways that could be antagonistic to competitive, liquid markets and their price discovery and hedging functions.

To the extent that the government seeks to address spoofing in particular, Congress prohibited spoofing in CEA section 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), in July 2010 as part of the amendments to the CEA in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). The prohibition became effective on July 16, 2011. Prior to that legislation such futures trading had never been charged as a violation of the anti-fraud or anti-manipulation prohibitions of the CEA, the wire fraud statute, or any other statute. Considering spoofing to be wire fraud after the 2010 amendment could confuse the way that such market conduct will be treated, unsettling the markets in ways that run counter to the balance currently in place.

B. Trading Through COMEX's Electronic Trading Platform Globex

The indictment charges conduct allegedly occurring on the COMEX, a CFTC-registered futures exchange. COMEX is one of the exchanges operated by the CME Group Inc. It uses an electronic trading platform known as the Globex system. Trading on Globex is anonymous—the market participants associated with any bid or offer on the system are unknown to the rest of the market participants. Orders to purchase or sell COMEX–listed futures communicate only the futures contract offered to be traded, the price, whether the order is to buy (a "bid") or sell (an "offer"), and the quantity of futures contracts to be bought or sold.

The Globex system permits traders to apply certain "order qualifiers" to orders, which are embedded conditions that can limit the execution of an order, the amount of the order displayed to the market, or, if certain condition occur, automatically cancel an order. Those qualifiers are

not displayed to the market when an order is entered or resting in the market.[1] The market is protected in these instances by execution: the Globex system automatically matches publicly displayed best bids and offers at the same price in the same product, resulting in a binding trade. When an order has been accepted by the exchange system and matched with another order, the trade is final; it cannot be cancelled.

C. The Freedom To Modify and Cancel Orders

COMEX's rules—like the rules of all other CFTC-registered futures exchanges—generally permit, with very limited exceptions, every market participant the right to cancel any order at any time prior to being matched. The right and ability to alter or cancel orders is essential to allow market participants to manage their risks. It is common for many market participants to cancel and modify resting executable orders throughout a trading day, acting frequently and rapidly in response to the various factors affecting commodity market prices. With the advances in electronic trading technology and algorithmic trading programs, it is common for orders to be entered, cancelled, and modified within milliseconds or microseconds.[2]

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[1] One example of an order qualifier is an "iceberg" or "hidden quantity" order. It permits only a portion of a participant's full order to be displayed to the rest of the market at a time; if the displayed quantity is fully filled, another pre-set portion of the order automatically will be displayed to the market. CME Group, *CME Globex Reference Guide* at 24, available at https://www.cmegroup.com/globex/files/GlobexRefGd.pdf. An iceberg order legitimately allows a participant to hide the full volume of its order from the market. Another example is a "fill-or-kill" order, which requires that the order must be filled immediately for the specified minimum quantity at the specified price or better or the entire order is immediately canceled. *Id.* at 12. Fill-or-kill orders protect traders from receiving poor pricing in fast-moving markets.

[2] The CME Group's electronic "wash blocker" functionality and its order entry audit rules reflect this. The CME's wash blocker software can prevent a market participant's order from being matched against a new or resting opposite order of the same participant submitted within the same millisecond or one millisecond of each other. *See U.S. Commodity Futures Trading Comm'n v. Oystacher*, No. 15-cv-9196, 2016 WL 3693429, *39 (N.D. Ill. July 12, 2016). The CME requires that entities certified to perform order routing must establish an electronic audit trail that contains all order receipt, order entry, order modification, and response receipt times to

D. The Indictment

The indictment charges that from in or around 2007 through at least 2013 defendants committed multiple different types of criminal violations based on the same alleged spoofing activity. Ind. Count One charges conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. Count Two charges defendant Vorley with wire fraud affecting a financial institution in violation of 18 U.S.C. § 1343. Count Three charges defendant Chanu with wire fraud affecting a financial institution in violation of 18 U.S.C. § 1343. The indictment further alleges that the alleged unlawful orders exposed the defendants' employer and others to "new and increased risks of loss" in the form, among others, of monetary "losses associated with the financial risk" that the orders would be executed. *Id.* at ¶14.

IV. ARGUMENT

A. The Wire Fraud Count Should be Dismissed for Failure To Plead a Misrepresentation

The briefs of the defendants in support of their motion to dismiss and the brief of the *Amici Curiae* Bank Policy Institute, the Chamber of Commerce of the United States of America, and Securities Industry and Financial Markets Association explain why, as a matter of law, open executable futures market orders are not misrepresentations within the meaning of the wire fraud statute. *See* Memorandum in Support of Defendants' Motion to Dismiss the Indictment, *United States v. Vorley*, No. 18-cr-35 (N.D. Ill. Nov. 15, 2018), Dkt. No. 76 at 11-20; Reply in Support of Defendants' Motion to Dismiss the Indictment, *United States v. Vorley*, No. 18-cr-35 (N.D. Ill. Jan. 18, 2019), Dkt. No. 85 at 4-13; Brief of *Amici Curiae*, Bank Policy Institute et al., *United States v. Vorley*, No. 18-cr-35 (N.D. Ill. Feb. 6, 2019), Dkt. No. 96 at 7-13.

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the highest level of precision achievable by the operating system, but at least to the millisecond. CME Rule 536.B.2. COMEX has an identical Rule 536.B.2.

B. The Wire Fraud Count Should Be Dismissed Because the Application of the Wire Fraud Statute Conflicts with the Design of the CEA and is Unnecessary for the Protection of Markets

Where Congress has enacted a special and comprehensive statutory scheme to govern a particular market and vested a single agency with broad and exclusive powers to administer the statute, the statutory scheme can implicitly preclude the application of other laws to those markets. *See, e.g., Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 271 (2007) ("*Billing*"); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). In *Billing*, the Supreme Court explained that in making such a determination the question is whether different statutes are "clearly incompatible," which can be evidenced by (1) the existence of a regulatory authority to supervise the activities in question, (2) the exercise of authority by the responsible regulator, (3) a resulting risk that the application of both statutes would produce conflicting guidance, and (4) the possible conflict affects practices the regulatory statute seeks to regulate. *Billing*, 551 U.S. at 264.

The application of the wire fraud statute here to open, executable orders is incompatible with two foundational tenets of the CEA and futures trading, and entirely unnecessary for the protection of the futures markets. It injects harmful uncertainty with respect to the protection of the confidentiality of a market participant's proprietary trading information (including its intentions with respect to open orders) and to the vitality of the established legal precept that a market participant has no duty to disclose anything to the market in connection with entering open orders to buy or sell futures contracts (including the participant's intentions with respect to its orders). The wire fraud application is not needed to protect the markets. The CEA already directly prohibits spoofing as both a civil and criminal offense. 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

In these circumstances, where importing an expansive interpretation of wire fraud that changes and erodes vital futures market norms with respect to open, executable futures orders and is unnecessary for the protection of the markets, the balance should weigh in favor of precluding its application. Any doubt should be resolved in favor of preclusion. Consistent with this, the Court of Appeals for this Circuit has declared that, at least without much clearer direction from Congress, courts must be wary of criminalizing "[d]eception and misdirection" about a party's "values, priorities, [and] preferences" in negotiation because that is common and accepted aspect of negotiating. *See United States v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016). In addition, no court has approved of using the general wire fraud statute to criminalize a negotiating party's failure to disclose its future intentions or its subjective desire to enter into the transaction.

With respect to the *Billing's* factors, the regulatory authority, the CFTC, not only is empowered to and does supervise futures market trading, it has the "exclusive jurisdiction" to do so. 7 U.S.C. § 2(a)(1); *see, e.g.*, *Hunter*, 711 F.3d at 157. It has adopted an elaborate body of regulations specifically targeted to encourage and protect sound trading practices. It also regulates the exchanges (here, the COMEX) that have their own extensive self-regulatory obligations under CEA section 5, 7 U.S.C. § 5, and Part 38 of the CFTC's regulations, 17 CFR part 38. Those provisions require registered futures exchanges to establish, maintain and enforce rules that implement 23 core principles for fair, sound, honest and financially reliable markets. The CFTC exercises its authority every day through direct regulation, surveillance, and policing of the markets by its several operating divisions, including among others, its Division of Market Oversight and Division of Enforcement, and through oversight of the exchanges' self-regulatory responsibilities.

The protection of the confidentiality of a market participant's proprietary information—including, among other things, trading intentions, strategies, positions, cash market forward contract positions, storage inventories and the like—is a paramount concern of the CEA itself. CEA section 8(a)(1), subject to certain limited exceptions, makes it a criminal offense for the CFTC to publish any "data and information that would separately disclose the business transactions or market positions of any person." 7 U.S.C. § 12(a)(1) and see 7 U.S.C. §§ 13(a)(5), 13(d) and 13(e). The Court of Appeals for the District of Columbia Circuit has explained that CEA section 8(a) is designed to protect the secrecy of traders' information:

> From the beginning of regulation of futures trading it has been undisputed that widespread publication of information as to who was holding what, would be disruptive of the smooth functioning of the commodity markets. Those markets require a substantial number of speculative transactions for growers and processors to 'hedge,' thereby protecting themselves against fluctuations in commodity prices. This speculation, at least by large traders, requires some secrecy. Furthermore, publication would reveal the actual commodity holdings of the hedgers, because these hedges reflect actual commitments. These are trade secrets, and the secrecy required is furnished by the statute.

Freeman v. Seligson, 405 F.2d 1326, 1349-50 (D.C. Cir. 1968) (*per curiam;* concurring opinion of Leventhal, C.J. and Bazelon, J.).

The CFTC's rules also recognize and protect the confidentiality of market participants' proprietary trading information by prohibiting market intermediaries from disclosing it to others. For example, CFTC Rule 23.410(c)(1)(i) specifically declares that it "shall be unlawful for any swap dealer or major swap participant to disclose to any other person any material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant." 17 CFR 23.410(c)(1)(i). In adopting this rule, the CFTC explained that it is "aimed at improper disclosure of the counterparty's position, the transaction and the counterparty's

intentions to enter or exit the market, which may be detrimental to the interest of the counterparty." *Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties*, 77 Fed. Reg. 9734, 9754 n. 271 (Feb. 17, 2012).[3]

A companion legal tenet flows from the protection of market participants' proprietary information: a market participant has no duty to disclose anything to the market in connection with entering open orders to buy or sell futures contracts. Specifically, when entering orders, a market participant has no duty to disclose its proprietary information about, for example, its projections of futures commodity valuations, its trading objectives or strategies, or the intended purpose of its orders. The Dodd-Frank Act enacted new antifraud authority for the CFTC in new CEA section 6(c)(1). 7 U.S.C. § 9(1). Congress expressly provided in the statute that "no rule or regulation promulgated by the [CFTC] shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to another person in or in connection with the transaction not misleading in any material respect." *Id*. Consistent with this and the longstanding legal standards of the futures markets, in adopting Rule 180.1 to implement section 6(c)(1), the CFTC expressly declared that:

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[3] Similarly, exchange rules protect trader proprietary information in multiple ways. CME Rule 539.C, for example, prohibits market participants that receive pre-execution expressions of interest from another market participant from disclosing such communications to others. The rule defines "pre-execution communications" as "communications between market participants for the purpose of discerning interest in the execution of a transaction prior to the exposure of the order to the market. Any communication that involves discussion of the size, side of market or price of an order, or a potentially forthcoming order, constitutes a pre-execution communication." CME, *Market Regulation Advisory Notice on Pre-Execution Communications* (Dec. 5, 2017). CME Rule 539.C.2 expressly prohibits disclosure of pre-execution communications to others: "Parties to pre-execution communications shall not (i) disclose to a non-party the details of such communications or (ii) enter an order to take advantage of information conveyed during such communications except in accordance with this rule." *See* ICE Rule 4.02 for similar restrictions on that exchange.

> [I]t is not a violation of final [CFTC Anti-Fraud] Rule 180.1 to withhold information that a market participant lawfully possesses about market conditions. The failure to disclose such market information prior to entering into a transaction, either in an anonymous market setting or in bilateral negotiations, will not, by itself, constitute a violation of final Rule 180.1.

Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg., 41398, 41404 (July 14, 2011).

The government's expansive application of the wire fraud statue here to open, executable orders undermines both of these tenets. The government's theory necessarily reads into the regulatory scheme a new duty to disclose proprietary trading intentions where the failure to disclose those intentions might mislead another market participant as to the true intent underlying the order. Introducing any doubt about the ability of market participants to maintain the secrecy of their trading intentions, however, is incompatible with sound futures trading and the CEA's protection of that confidentiality.

Again, the balance struck by the current regulatory scheme is important. Even a lawful order in the market, standing alone, can create a misperception of a trading intention and invite misunderstandings about supply and demand. Using the government's theory, this misperception could lead to erroneous claims of fraud. As discussed above at pages 5-6 and note 1, Globex permits the use of "order qualifiers" that condition or limit the execution of orders. The qualifiers are not displayed to the market and therefore are generally not known to other traders evaluating an open, executable order. In the instance of an iceberg order, the full volume (supply or demand) of the order is hidden from the market. In the instance of a fill-or-kill order, the order will be cancelled automatically and immediately if not fully filled.

The government's contention that an open, executable order is a misrepresentation is inherently confusing because an executable order is, by definition, available for acceptance and

can be taken and executed by any other market participant. Although the government argues that the application of the wire fraud statute does not create a disclosure obligation, that position is incompatible with its theory of "implied" misrepresentation. The fact that the government relies on the qualification of an "implied" misrepresentation necessarily grounds its legal theory on a notion that the fraud arises from a failure to disclose rather than from a clear and unambiguous misrepresentation. As the defendants' and the other amici's briefs make clear, the government's position can never overcome the fact that an open, executable order does not represent any facts regarding trading intentions, except to honor the order according to its terms if it is executed.

The government's heavy reliance on *U.S. v. Coscia*, 866 F.3d 782 (7th Cir. 2017), to support the wire fraud charges is misplaced. *Coscia* did not involve wire fraud charges, and the Court of Appeals made no findings that the orders involved there were misrepresentations. This is significant because, as described in the opinion, the computer programs controlling Coscia's orders rendered them unexecutable, meaning, unlike the alleged orders here, they had no chance to be executed. Yet even there the court did not find a misrepresentation.

C. The Wire Fraud Count Should Be Dismissed Because the Application of the Wire Fraud Statute Will Harm the Vitality of Futures Markets

While the government contends that its theory does not assert a duty to disclose or erode the protection of confidential proprietary information, the doubt it injects over where the legal lines will be drawn—when does the duty arise, what does it require, and what is the liability for breach—by itself is harmful to futures markets. It creates uncertain risk of legal liability. That risk will deter and chill otherwise lawful trading that is necessary to strong and liquid markets.

Traders in the futures markets do attempt to discern the trading objectives of others for their own gain or to frustrate rivals. The ongoing order flow and changes to it can unfold in milliseconds. And there are times when a market participant may disguise its trading intention

by entering orders and consummating trades that are inconsistent with its overall strategy. It is not uncommon for a trader to buy some contracts even if its overall strategy is to take a net short position. It also is common for a market participant to try to disguise its strategy by relying on multiple different brokers to execute different pieces of a large order. Trading in a way that is designed to prevent others from detecting one's trading strategy is an accepted and legitimate phenomenon of trading in the futures markets.

The government's wire fraud theory raises new issues of when it could be unlawful as a "implied misrepresentation" to enter an order to provide a false impression of a trader's true intent or evaluation of the market—is such an order a "false" representation of opinion on market pricing or a "false" indication of demand or supply? The government's theory thus opens the door for arbitrary prosecution and for vexatious private claims by losing traders claiming that another market participant failed to make adequate disclosure or "misrepresented" its intentions of the supply and demand when entering an executable order. Such claims, if allowed, would be difficult to dismiss at the pleading stage because they could be bound up with factual issues--*e.g.*, what a market participant's intentions were—to be decided by the trier-of-fact. *Compare Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 743 (1975) (standing for private claims under the federal securities law is limited to purchasers and sellers for policy reasons to prevent vexatious litigation). The government's theory also potentially could expose trading from years past to retroactive application of this new standard of wire fraud misrepresentation under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (where the mail and wire fraud statutes are commonly pled as predicate acts to support the civil RICO claim). *See* 18 U.S.C. § 1961 (both mail fraud and wire fraud fall within the definition of "racketeering activity").

In the end, trading intentions can be as varied as there are market participants and should not be burdened with uncertain legal duties and liability. Futures markets bring together many different types of commercial and financial parties that have different opinions, points of view, business needs, and financial objectives into trading anonymously with one another to hedge other transactions or to trade in futures alone. A hedge fund and an oil company can have completely different intentions even when submitting orders for the same quantity of the same commodity at the same price. The CEA has struck a balance between protection against spoofing, protection of the confidentiality of trader proprietary information, and disclosure obligations. The government's wire fraud theory of liability here threatens to upset that balance and should be rejected.

V. CONCLUSION

For all the foregoing reasons, the FIA respectfully submits that the wire fraud charges in the indictment should be dismissed.

Dated: February 21, 2019

Respectfully submitted,

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