

Securities Regulation Daily Wrap Up, TOP STORY—N.D. Ill.: Judge wary CFTC may be subjecting software developer to discovery-related fishing expedition, (Sept. 11, 2019)

Securities Regulation Daily Wrap Up

<http://resource.stg.cch.com/resource/scion/document/default/sld019aeb23e67d65100087d600505688693902?cfu=Legal&cpid=WKUS-Legal-Cheetah&uAppCtx=cheetah>

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

In a CFTC enforcement action being pursued after an unsuccessful criminal prosecution, the court put the defendants' motion for summary judgment on hold but pared down the eight-month discovery period.

Judge Andrea Wood denied a motion for summary judgment, without prejudice, brought by defendants, Jitesh Thakkar and his company, Edge Financial Technologies, as being premature. At the same time, the judge indicated it was hard to see why the CFTC needed until the end of May to complete its discovery. She shortened the cutoff date to February 28, 2019 ([Commodity Futures Trading Commission v. Thakkar](#), September 28, 2019, Wood, A.).

A software developer's long strange legal trip. Jitesh Thakkar's legal odyssey began when he entered into a consulting arrangement with trader, Navinder Sarao, to develop some trading software. That engagement yielded Mr. Thakkar and his company \$24,200.

Unfortunately for Thakkar, Sarao subsequently gained notoriety for perpetrating the "flash crash" in 2010 in the E-mini S&P futures contracts traded on the CME. In November 2016, Sarao pleaded guilty to criminal charges for engaging in market manipulation and spoofing-type activity. As part of his plea agreement, Sarao paid \$38.6 million in criminal and civil monetary penalties. Additionally, he agreed to cooperate and testify for the government in its case against Thakkar.

Ultimately, the DOJ was [unsuccessful in its criminal prosecution](#) against Thakkar and dismissed charges after a mistrial was declared in April 2019. Notwithstanding the DOJ's failure, the CFTC has determined [to move forward](#) with its civil enforcement against the defendants.

A fishing expedition in progress? At the hearing's onset, Judge Wood asked CFTC attorney Margaret Aisenbrey what discovery the agency needed to respond to the defendants' motion for summary judgment. In response, she indicated the agency would require Thakkar's live testimony, his trading records, and would need to take testimony from members of the CFTC's Technology Advisory Committee (TAC) with whom Mr. Thakkar served in 2012. Aisenbrey asserted this discovery was needed to show that defendant understood what he was involved with when he did work for Sarao.

Renato Mariotti, the defendants' attorney, noted that the CFTC was trying to make the argument that Mr. Thakkar was "smart enough to figure it out" when it came to Sarao's spoofing related activities. "That's simply not the legal standard," Mariotti stated in response. Rather, under its aiding and abetting charges, the CFTC must demonstrate that Thakkar knew of Sarao's spoofing activity and intended to act in its furtherance.

Judge Wood noted that she saw the defendant's motion for summary judgment as saying the record had been fully developed as a result of the criminal investigation and proceeding, and that no evidence of bad intent had been demonstrated. At the same, she acknowledged that the criminal proceeding did not carry dispositive weight due to burden of proof differences between civil and criminal matters. Nonetheless, she noted that it seemed like most of the evidence is already available to the CFTC, and the discovery it claims it needs "sounds like a fishing expedition".

A matter of fairness and a revised discovery schedule. In shortening the close of discovery from May 29, 2019 to February 28, 2019, the judge stated she was accelerating the schedule in the interest of fairness. She also noted the defendant had lived through this matter for a long time and had gone through a lot.

At the same time, Judge Wood acknowledged that problems could arise with some of the materials that the CFTC has been provided from the criminal investigation and proceeding. For instance, the FBI form 302 used by its agents to summarize interviews are a form of hearsay evidence, and sometimes are not accurate. Moreover, she noted the possibility that some of the forms in this matter may be clipped or otherwise incomplete. The judge urged the parties to cooperate and reach accord with regard to the CFTC obtaining materials for which it does not already have access. Once that is completed the judge indicated she will ask the CFTC to specify the particular discovery it requires. She also stated that she would be amenable to entertaining the defendants' summary judgment motion at some later juncture. The following revised discovery schedule includes:

- Expert depositions shall be completed by May 20, 2020;
- The parties shall exchange any rebuttal report by June 15, 2020;
- The parties may supplement their mandatory initial discovery responses by May 29, 2020; and,
- Fact discovery will be closed by February 28, 2020.

The date for the next status hearing in this matter is set for December 11, 2019 to address any disagreements or unresolved matters.

The case is [No. 1:18-cv-00619](#).

Attorneys: Charles Marvine, Thomas L. Simek, and Margaret P. Aisenbrey for the Commodity Futures Trading Commission Renato Mariotti and Holly Campbell (Thompson and Coburn LLP) for Jitesh Thakkar and Edge Financial Technologies, Inc.

Companies: Edge Financial Technologies, Inc.

MainStory: TopStory CFTCNews CommodityFutures Enforcement FraudManipulation IllinoisNews