**APPENDIX TO THE**
**PETITION FOR A WRIT OF CERTIORARI**

**APPENDIX A**

**In the**
**United States Court of Appeals**
**For the Seventh Circuit**

Nos. 23-1528 & 23-1530

UNITED STATES OF AMERICA,

*Plaintiff-Appellee*,

*v.*

JOHN PACILIO and EDWARD BASES,

*Defendants-Appellants*.

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Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:18-cr-00048 — John Z. Lee, *Judge*.

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ARGUED SEPTEMBER 7, 2023 — DECIDED OCTOBER 23, 2023

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Before BRENNAN, ST. EVE, and JACKSON-AKIWUMI, Circuit *Judges*.

BRENNAN, *Circuit Judge*. John Pacilio and Edward Bases appeal their convictions for fraud through the manipulation of the precious metals market by "spoofing"—placing a deceptive order with no intent to trade to push the market in a certain direction. Defendants challenge their convictions on due process grounds, and they dispute several evidentiary rulings at trial. For the reasons set forth below, we affirm the district court's judgments.

## I. Factual Background and Procedural History

Pacilio and Bases were senior traders on the precious metals trading desk at Bank of America Merrill Lynch ("Bank of America"), in New York. They conducted their trading on two commodities exchanges, COMEX and NYMEX, operated by the Chicago Mercantile Exchange (CME). While working together at Bank of America from 2010 until 2011, and at times separately before and after that period, they engaged in a fraudulent scheme, known as spoofing, to manipulate the prices of precious metals.

The mechanics of commodities futures trading make spoofing possible. A commodities futures contract is a standardized agreement between a buyer and a seller to buy and sell a set amount of a specific commodity, at a set price, on a set, future date. Historically, the trading of commodities futures through the CME occurred in person on the CME trading floor. Since 2007, most CME trading takes place on the CME's electronic trading platform, Globex, which allows traders to place buy or sell orders on certain numbers of futures contracts at a set price. Traders place these orders manually or through programmed algorithms.

Commodity prices are determined by supply and demand. Orders placed in the CME order book communicate buying and selling interest, affecting the market price for futures contracts. The larger the order, the larger the effect on the commodity's market price. Because larger orders can significantly impact the market, Globex permits traders to place "iceberg" orders, showing only a partial amount of the full order. Traders on the COMEX and NYMEX exchanges may cancel an order before it is executed. But, it is assumed that every order placed is bona fide and placed with "intent to transact." Spoofing schemes take advantage of this assumption by manipulating the market through the placement of large orders that are unintended to be executed. Spoofing consists of (1) placing an order, typically a large iceberg order, on one side of the market that is intended to be traded, and (2) placing a spoof order, fully visible but not intended to be traded, on the other side of the market. The spoof order pushes the market price to benefit the iceberg order, allowing the trader to execute the iceberg order at a desired price. The spoof order is then cancelled before it can be filled.

On several occasions, each defendant placed an iceberg order to sell commodities contracts above the prevailing market price while simultaneously submitting visible spoof orders pushing the market price higher. Once the market price reached the level of the intended sale offer, the entire iceberg sell order was executed, and all the visible spoof orders were cancelled. Defendants also engaged in coordinated episodes, where one would place an iceberg buy order and the other would flood the market with spoof sell orders. The market price would plummet and enable filling the iceberg order at the desired price.

Pacilio and Bases do not contest these facts. Rather, they challenge the constitutionality of their convictions, dispute the sufficiency of the evidence, and criticize the district court's evidentiary rulings.

A federal grand jury indicted Pacilio on one count of conspiracy to commit wire fraud affecting a financial institution; seven counts of wire fraud affecting a financial institution; one count of commodities fraud; and one count of violating the anti-spoofing provision of the Dodd-Frank Act. The grand jury similarly indicted Bases on one count of conspiracy to commit wire fraud affecting a financial institution; nine counts of wire fraud affecting a financial institution; and one count of commodities fraud.

Before trial, the government disclosed its plans to call CME representatives to testify that CME Rule 432 has always prohibited spoofing. Rule 432, in place since 1989, prohibits traders from attempting to engage or engaging in "the manipulation of prices of exchange futures or options contracts;" "any manipulative device, scheme, or artifice to defraud;" or offering to purchase or sell "exchange futures or options contracts, or any underlying commodities or securities, for the purpose of upsetting the equilibrium of the market or creating a condition in which prices do not or will not reflect fair market values." This testimony, the government asserted, would support their implied misrepresentation theory.

The defendants moved to preclude this testimony as irrelevant and improper, arguing that CME representatives' subjective interpretations of Rule 432, never disclosed to market participants, could neither form the foundation of an implied misrepresentation nor support a finding of intent to defraud. The district court denied the motion, concluding that Rule 432 was ambiguous as a matter of law as to whether it prohibited spoofing. Therefore, the government could offer extrinsic evidence from CME representatives interpreting the rule.

At trial, the parties presented substantial evidence. Pursuant to the district court's pre-trial ruling, the government called as witnesses two CME representatives, John Scheerer and Robert Sniegowski. Scheerer, a CME Senior Director, testified that each order placed on the CME exchanges was expected to be a "bona fide order … placed with intent to transact." Sniegowski, the longtime director of the CME's Rules and Regulatory Outreach group, similarly testified the CME requires orders "be placed with the intent to buy" and sell—and Rule 432 prohibits spoofing. Sniegowski also outlined the mechanics of spoofing and explained that a spoof order is a deceptive order placed with "no intent to trade" to "push the market in a particular direction."

The government also called an employee who worked with Pacilio and Bases, Harnaik Lakhan, as a cooperating witness. Lakhan testified he engaged in spoofing and knew at the time it was "wrong." He described how he, Pacilio, and Bases carried out the spoofing scheme by placing orders they intended to cancel for the sole purpose of "manipulat[ing] the price to the level you wanted it." He admitted spoofing placed "false information" into the market both "as to demand, supply," and "intent" to trade, and stated defendants placed spoof orders "frequently" in the precious metals futures markets. When cross-examined, Lakhan did not recall a CME rule prohibiting spoofing, was not familiar with Rule 432, and did not remember any pre-Dodd-Frank compliance training mentioning spoofing. Additionally, the government presented testimony from bank officials concerning bank policies at the time of Pacilio's and Bases's conduct. These witnesses, John Juul and Ed McLaren, compliance officials with Deutsche Bank and Bank of America respectively, testified spoofing was always prohibited at their banks.

The jury found Pacilio guilty of conspiracy to commit wire fraud affecting a financial institution, wire fraud affecting a financial institution, and commodities fraud, but not guilty of spoofing in violation of Dodd-Frank. The jury found Bases guilty of conspiracy to commit wire fraud affecting a financial institution and wire fraud affecting a financial institution, but not guilty of commodities fraud. The district court sentenced each defendant to 12 months and one day in prison.

## II. Discussion

Defendants raise three challenges to their convictions. They assert the commodities and wire fraud statutes are unconstitutionally vague as applied to them in violation of the Fifth Amendment's due process guarantee. They also challenge the sufficiency of the evidence supporting their convictions for conspiracy to commit wire fraud and Pacilio's conviction for commodities fraud. Finally, they argue the district court abused its discretion in admitting the testimony of the CME representatives and bank officials and excluding certain evidence of Bases's good faith.

### A. Due Process Challenge

We review de novo both constitutional challenges to a conviction and vagueness challenges. *United States v. Coscia*, 866 F.3d 782, 791 (7th Cir. 2017); *United States v. Sandidge*, 863 F.3d 755, 758 (7th Cir. 2017). The Fifth Amendment guarantees "[n]o person shall … be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This guarantee forbids vague criminal laws. *Johnson v. United States*, 576 U.S. 591, 595 (2015). To satisfy this guarantee, a criminal statute must "define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

"The void-for-vagueness doctrine prohibits the government from imposing sanctions under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes." *Welch v. Unit-*

*ed States*, 578 U.S. 120, 124 (2016) (internal quotation marks omitted). "A vagueness challenge not premised on the First Amendment is evaluated as-applied, rather than facially." *United States v. Calimlim*, 538 F.3d 706, 710 (7th Cir. 2008). The "touchstone" of constitutional fair notice "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). "[A] scienter requirement in a statute alleviates vagueness concerns." *McFadden v. United States*, 576 U.S. 186, 197 (2015) (internal marks omitted). Two statutory prohibitions are relevant. Title 18 U.S. Code § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice … .

The commodities fraud statute states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery …; or (2) to ob-

> tain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery … .

18 U.S.C. § 1348.

We have held twice—in *Coscia* and in *United States v. Chanu*, 40 F.4th 528 (7th Cir. 2022)—that spoofing violates the wire fraud and commodities fraud statutes. In *Coscia*, we considered "whether spoofing amounts to a 'scheme to defraud'" within the meaning of the commodities fraud statute. *Chanu*, 40 F.4th at 540 (citing *Coscia*, 866 F.3d 782). Coscia placed large spoof orders opposite small orders on CME exchanges in 2011 and used a preprogrammed algorithm to quickly cancel the spoof orders before they were filled. *Coscia*, 866 F.3d at 788-90. The government alleged Coscia placed the spoof orders "to create illusory supply and demand and, consequently, to induce artificial market movement." *Id*. at 785. Coscia was convicted of commodities fraud in violation of 18 U.S.C. § 1348(1), and spoofing, in violation of 7 U.S.C. § 6c(a)(5)(C). *Id*. Our court affirmed. *Id*. As to his commodities fraud conviction, Coscia argued "because 'his orders were fully executable and subject to legitimate market risk,' they were not, as a matter of law, fraudulent." *Id*. at 797. This court rejected that argument. *Id*.

In *Chanu*, we again affirmed that spoofing was fraud, this time in a situation very similar to and involving the same scheme as the one Pacilio and Bases employed. Cedric Chanu and James Vorley were precious metals traders at Deutsche Bank who traded futures contracts on the COMEX exchange using CME's Globex platform. *Chanu*, 40 F.4th at 532. They "placed orders for precious metals futures contracts on one side of the market that, at the time the orders were placed, they intended to cancel prior to execution"—though unlike Coscia, Chanu and Vorley placed their trades manually. *Id.* at 533, 540. Chanu and Vorley were convicted on several counts of wire fraud. *Id.* at 538. On appeal we addressed whether the manual spoofing conduct violated the wire fraud statute and held it was determined by two questions: "Was there a scheme to defraud by means of false representations or omissions, and were such false representations or omissions material?" *Id.* at 539. "*Coscia* establishes that placing orders on opposite sides of the commodities market with the intent to cancel amounts to a 'deceitful' scheme, aiming to 'manipulate the market for [the trader's] own financial gain." *Chanu*, 40 F. 4th at 540 (quoting *Coscia*, 866 F.3d at 797).

The *Chanu* defendants attempted to distinguish *Coscia*, arguing "[b]ecause they were engaged in manual trading, … their trades—unlike Coscia's—were actually tradeable due to the length of time they remained active prior to cancellation." *Id.* That reasoning was unpersuasive, and we affirmed the convictions in *Chanu*. In *Coscia*, we had "rejected Coscia's defense that he 'placed real orders that were exactly that, orders that were tradeable'—the same defense Chanu and Vorley now employ." *Id.* (quoting *Coscia*, 866 F.3d at 790, 797 (citations omitted)). Importantly, we noted "order placement signals a trader's intent to buy or sell." *Id* at 541. Thus, "[b]y obscuring their intent to cancel, through an orchestrated approach, Chanu and Vorley advanced a quintessential 'half-truth' or implied misrepresentation—the public perception of an intent to trade and a private intent to cancel in the hopes of financial gain." *Id.* Moreover, we emphasized so long as the trading conduct "is deceitful and aligns with the plain meaning of 'scheme to defraud,'" it can be criminalized under the commodities fraud or wire fraud statute. *Id.*

The defendants had fair notice that their conduct was prohibited by the wire and commodities fraud statutes. The fraud statutes have long been held to encompass "implied representation[s]" and "misleading omission[s]." *Chanu*, 40 F.4th at 541. In particular, "[a] half-truth, or what is usually the same thing as a misleading omission, is actionable as fraud … if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled." *Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995). And, as we held in *Chanu*, the defendants' spoofing conduct "advanced a quintessential 'half-truth' or implied misrepresentation" prohibited by the fraud statutes—namely the public perception of the intent to trade and the private intent to cancel. 40 F.4th at 541.

Pacilio and Bases advance several arguments that the statutes are vague, but none are persuasive. First, defendants submit it was not until "Coscia was indicted in October 2014, that the government first claimed that spoofing could be fraudulent." Though "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope," courts may apply a statute to novel conduct so long as the plain text permits. *Lanier*, 520 U.S. at 266.

Years before *Coscia*, this court held that placing orders in the commodities market in a way that gives a "misleading signal" can be an "active misrepresentation." *United States v. Dial*, 757 F.2d 163, 169 (7th Cir. 1985). The *Dial* defendants were found guilty of mail and wire fraud—in violation of 18 U.S.C. §§ 1341 and 1343—stemming from the trading of silver futures on the Chicago Board of Trade. *Id*. at 164. They had "defrauded the people from whom they bought silver futures contracts … by trading, without margin," that is without cash backing, their clients' accounts. *Id*. at 169. This court ultimately decided that though defendants "owed" no duty to disclose their unmargined trading "to people on the other side of their silver futures transactions, their trading an unmargined account was an active misrepresentation," as trading without margin indicates the trades are backed by cash when they are not, imbuing the trader with "powerful influence on futures prices." *Id*.

Pacilio's and Bases's conduct is indistinguishable from that deemed illegal in other cases. By placing spoof orders they intended to cancel before execution, they sent misleading signals to the market that the demand for a given commodity was much higher, effecting an increase in the market price. Through this active misrepresentation of demand, defendants' iceberg orders would accrue significant profits when executed. Any novelty in this prosecution is based on the particulars of defendants' spoofing scheme, not any originality in construing the relevant fraud statutes. As we explained in *Coscia*, spoofing is a relatively new phenomenon aided by the development of high frequency programmed trading. 866 F.3d at 786-87. And as we have held before in *Coscia* and *Chanu*, spoofing is synonymous with other behavior actionable as fraud.

Second, defendants assert the passage of the Dodd-Frank Act's spoofing provisions signals that spoofing was not previously considered fraud. Dodd-Frank included an amendment to "prohibited transactions" under the Commodity Exchange Act, 7 U.S.C. § 6c(a)(5)(C), recognizing spoofing as unlawful. But Congress did not create the concept of spoofing. As the Exchange Act notes, the term spoofing was "commonly known to the trade." 7 U.S.C. § 6c(a)(5)(C). Moreover, "[t]he Federal Criminal Code is replete with provisions that criminalize overlapping conduct." *Pasquantino v. United States*, 544 U.S. 349, 359 n.4 (2005). As we have just noted, the wire and commodities fraud statutes criminalized defendants' conduct before the passage of Dodd-Frank.

Third, Pacilio and Bases contend the government's description of the spoofing scheme is impermissibly broad to capture their conduct. Yet in *Coscia*, we characterized a similar scheme—although it used an algorithm rather than manual trades—as market manipulation akin to "pump and dump" schemes that the government prosecutes under the mail and wire fraud statutes. 866 F.3d at 797. The government's description is therefore consonant with this court's precedent.

Fourth, defendants urge the court to rely on the Fifth Circuit's en banc decision in *United States v. Radley*, 632 F.3d 177 (5th Cir. 2011), to hold that it is not fraud to place trades without the intent to enter into a transaction if the trades are at risk of being executed. The *Radley* defendants were charged with a conspiracy to manipulate the price of propane "by placing multiple bids … in order to trick other market participants into believing that demand for the commodity was strong and came from more than one source" and "placed bids at prices higher than other bidders had posted, allegedly perpetrating their deception by enticing other market participants to transact at higher prices." *Id.* at 180. The district court had previously ruled that "even if [the bids] were higher than any others, [they] were actually bids, and when they were accepted, defendants actually went through with the transactions." *United States v. Radley*, 659 F. Supp. 2d 803, 815 (S.D. Tex. Sep. 17, 2009). "Since defendants were willing and able to follow through on all of the bids, they were not misleading." *Id.* The Fifth Circuit affirmed the district court's dismissal of the indictment's price manipulation, cornering, and wire fraud counts. 632 F.3d at 179.

This court previously addressed *Radley* in *Coscia*. 866 F.3d at 797 n.64. We ruled that *Radley* was not analogous because that case did not involve an attempt "to create the illusion of artificial market movement that included the use of large orders to inflate the price while also taking steps to avoid transactions in the large orders." *Id*. That is the conduct (which Pacilio and Bases do not dispute) that occurred here, though through manual trades rather than a programmed algorithm. In *Coscia* and *Chanu*, this court specifically rejected this defense. *Chanu*, 40 F.4th at 540; *Coscia*, 866 F.3d at 790, 797. The defendants had sufficient notice that their spoofing scheme was prohibited by law.

**B. Sufficiency of the Evidence**

The defendants also challenge whether the evidence at trial supported their convictions. Because they moved for a judgment of acquittal, we review the sufficiency of the evidence in support of the conviction de novo. *United States v. Durham*, 766 F.3d 672, 678 (7th Cir. 2014). This court "construe[s] the evidence in the light most favorable to the government, asking whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *United States v. Weimert*, 819 F.3d 351, 354 (7th Cir. 2016). A conviction will be overturned "only if, after reviewing the record in this light, we determine that no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *United States v. Fitzpatrick*, 32 F.4th 644, 649 (7th Cir. 2022) (internal quotation marks omitted). The burden to overturn a conviction on sufficiency of the evidence "is a high one," one this court has "described as 'nearly insurmountable.'" *Id.* (quoting *United States v. Anderson*, 988 F.3d 420, 424 (7th Cir. 2021)).

The government establishes a conspiracy by proving that "(1) two or more people agreed to commit an unlawful act, and (2) the defendant on trial knowingly and intentionally joined in the agreement." *See United States v. Griffin*, 76 F.4th 724, 742 (7th Cir. 2023) (holding that sufficient evidence supported two defendants' convictions under 18 U.S.C. § 1349) (citation omitted).[1] Title 18 U.S.C. § 1343 criminalizes the use of wire, radio, or television communications to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses … . To convict a defendant of wire fraud, the government must prove three elements: (1) the defendant participated in a scheme to defraud; (2) the defendant intended to defraud; and (3) a use of an interstate wire in furtherance of the fraudulent scheme." *United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009). The stat-

[1] Though the fraud scheme in this case concerned commodities trading—whereas the fraud in *Griffin* involved a scheme to fraudulently obtain Small Business Administration loans, 76 F.4th at 733–34—both cases dealt with allegations of wire fraud and conspiracy to commit such under 18 U.S.C. §§1343 and 1349.

ute reaches "not only false statements of fact but also misleading half-truths and knowingly false promises." *Weimert*, 819 F.3d at 355. Actionable misstatements can also "include the omission or concealment of material information, even absent an affirmative duty to disclose, if the omission was intended to induce a false belief and action to the advantage of the schemer and the disadvantage of the victim." *Id.* Clarifying the statutory term "scheme or artifice to defraud," the Supreme Court has held that materiality of falsehood is an element of the federal wire fraud statute. *Neder v. United States*, 527 U.S. 1, 25 (1999).

*1. Sufficient evidence supports the defendants' convictions for conspiracy to commit wire fraud.*

Lakhan testified how he, Pacilio, and Bases carried out the spoofing scheme by placing orders they intended to cancel for the sole purpose of "manipulat[ing] the price to the level you wanted it," admitted that spoofing placed "false information" into the market "as to demand, supply," and "intent" to trade, and stated defendants both placed spoof orders "frequently" in the precious metals futures market. The government also submitted evidence of numerous trades where defendants placed an iceberg order followed by a visible spoof order which was cancelled immediately after executing the iceberg order. The evidence further included contemporaneous chat messages between the defendants, Lakhan, and others discussing their actions in placing "spoof" orders "not intended to be executed" in order to "push," "move," and "goose … up" the market price of commodities.

The defendants do not contest any of this evidence. Rather, they argue their wire fraud convictions should be reversed because CME orders do not implicitly represent that a trader wants to trade. This argument is predicated on language in the operative third superseding indictment. That states the fraudulent orders placed by defendants were "material misrepresentations that falsely and fraudulently represented to market participants that [defendants] and others actually *wanted* to trade the Fraudulent Orders when, in fact, they did not *want* to do so." To the defendants, because CME orders only impliedly represent that traders are willing to trade—not that they actually want to trade—the government did not prove the fraudulent misrepresentation in the indictment necessary for a wire fraud conviction.

The terms "intend," "intending," and "intent" are used throughout the indictment, including in the crucial paragraph setting forth the elements for conspiracy to commit wire fraud. But in one instance in paragraph 12, the term "want" is used in the "Manner and Means" section of the conspiracy. The other sixteen paragraphs of that section do not use "want."

The jury was instructed that convictions for wire fraud required that the defendants intended to not trade the spoof orders. In the instructions "scheme to defraud" meant "a scheme that is *intended* to deceive or cheat another and to obtain money or property or to cause the potential loss of money or property of another by means of materially false or fraudulent pretenses, representation, or promises." (emphasis supplied) "[I]ntent to defraud" was defined as acting "knowingly with the intent to deceive or cheat in order to cause a gain of money or property to the defendant or another or the potential loss of money or property to another." The question for the jury was whether the defendants had fraudulent intent. The evidence was sufficient for a rational jury to find that intent beyond a reasonable doubt.

Whether the trade orders showed a willingness or desire to trade does not matter. In *Chanu*, we held that placing an order on the CME represented an intent to buy and sell. 40 F.4th at 540-42. In addition, the ubiquitous use of "intent" language throughout the indictment and the jury instructions cured any error created by the word "want" in one paragraph. One word in one paragraph of the 16-page indictment does not warrant reversal.

*2. Sufficient evidence supports Pacilio's conviction for commodities fraud.*

Pacilio also contends the government presented no evidence of his fraudulent intent in 2014 to substantiate his conviction for commodities fraud. This challenge fares no better. Title 18 U.S.C. § 1348(1) criminalizes conduct "to defraud any person in connection with a commodity for future delivery." To convict a defendant on commodities fraud, the government must prove (1) fraudulent intent, (2) a scheme or artifice to defraud, and (3) a nexus with a security. *Coscia*, 866 F.3d at 796 (citation omitted). "False representations or material omissions are not required" for a conviction under this statute. *Id*. "Because [Pacilio] focuses on intent, this makes [the court's] job relatively easy." *United States v. Johnson*, 874 F.3d 990, 1000 (7th Cir. 2017) (internal quotation marks omitted). "[O]nce a jury has weighed the evidence and has found guilt beyond a reasonable doubt," a challenge to the sufficiency of the evidence proving intent "is exceedingly difficult to win." *United States v. Dingle*, 862 F.3d 607, 614 (7th Cir. 2017).

The jury could find Pacilio intended to defraud based on the government's data evidence depicting the spoofing scheme, Lakhan's testimony, and prior evidence of Pacilio's intent to commit wire fraud. Lakhan testified he witnessed Pacilio make the exact same types of spoofing trades at Morgan Stanley that he made at Bank of America during the time frame covered by the wired fraud convictions, where chats and emails provided clear evidence of Pacilio's intent. Pacilio notes, and we agree, that Lakhan did not testify to Pacilio's intent in the later time frame covering the commodities fraud. But direct evidence of intent is often unattainable, and "specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself which demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Pust*, 798 F.3d 597, 600-01 (7th Cir. 2015) (internal quotation marks omitted).

Pacilio argues "[a] jury may not infer that because a defendant committed an illegal act once, he must have also committed another alleged similar act." For this he relies on *United States v. Manganellis*, 864 F.2d 528, 531 (7th Cir. 1988)). But unlike the prior intent evidence here, *Manganellis* concerned the admission of prior bad acts, *id.*, so it is inapplicable. The government's prior intent evidence is not prior bad acts evidence. It is circumstantial evidence the jury could have relied upon to find that Pacilio maintained his fraudulent intent when continuing to trade in the exact same way at a later time period.

We afford the district court great deference on this type of challenge. A reasonable jury could find beyond a reasonable doubt, based on all the prior evidence of Pacilio's intent, coupled with the government's data and Lakhan's testimony, that Pacilio continued to trade at Morgan Stanley with the same fraudulent intent he possessed at Bank of America. Sufficient evidence supported Pacilio's conviction for commodities fraud.

### C. The District Court's Evidentiary Rulings

Bases asks for a new trial, arguing the district court erred in (1) admitting testimony from CME representatives and bank officials, and (2) excluding evidence of his good faith.

We review evidentiary rulings for an abuse of discretion. *United States v. Pulliam*, 973 F.3d 775, 782 (7th Cir. 2020). "Reversal is warranted only where the reviewing court is left with the definite and firm conviction that a mistake has been committed." *United States v. Daniel*, 749 F.3d 608, 613 (7th Cir. 2014) (internal quotation marks omitted). An evidentiary error requires reversal if the error was not "harmless." *United States v. Chaparro*, 956 F.3d 462, 481-82 (7th Cir. 2020). "The general test for harmless error at trial is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 482 (quoting *United States v. Bonin*, 932 F.3d 523, 538 (7th Cir. 2019)).

### *1. The district court properly admitted testimony of CME representatives and bank officials.*

Bases asserts the district court abused its discretion by admitting testimony from CME representatives and bank officials because their testimony was irrelevant and more prejudicial than probative.

This testimony was relevant. The district court admitted the testimony of CME representatives Robert Sniegowski and John Scheerer, who testified as lay persons to their understanding of CME Rule 432 and its prohibition of defendants' conduct. Sniegowski testified that Rule 432's prohibition of "manipulation of prices," "bad faith," and "conduct … inconsistent with just and equitable principles of trade" prohibited entering an order that the trader intends to cancel, i.e., spoofing. He also testified the CME requires traders to place only those orders that they "desire to actually buy or sell" and expects market participants to know the rules to ensure market integrity. Scheerer likewise testified CME rules prohibited traders from "placing orders with the intent to cancel before execution."

This testimony was relevant because defendants knew of the CME rules. Several commodities futures traders testified that they were on notice of and understood CME rules requiring that orders be bona fide and prohibiting the placement of orders with the intent to cancel them. The testimony was also relevant to demonstrate the defendants' intent to manipulate the market by placing orders with the intent to cancel, contrary to the expectation of market participants.

The district court also admitted the testimony of John Juul and Ed McLaren, compliance officers at Deutsche Bank and Bank of America, respectively. They testified their financial institutions prohibit the placing of orders with intent to cancel. The defendants contend this testimony is irrelevant because "there was no evidence that anyone at the banks ever shared with [the defendants] that general prohibitions against 'manipulation' were interpreted or understood to encompass spoofing." Both testified, though they worked in separate departments from defendants, that they functioned together as "one compliance department" and that traders at their banks were expected to understand and follow bank policies. Those included policies prohibiting market manipulation, such as spoofing. Further, the evidence showed that defendants knew of, and received training on, the banks' compliance policies, much like they knew of and received training on the CME Rules.

The defendants submit this testimony's probative value was outweighed by the danger of unfair prejudice, *see* FED. R. EVID. 403, because the testimony discussed market "manipulation," which is a distinct offense not charged. "The balancing of probative value and prejudice is a highly discretionary assessment, and [the court] accord[s] the district court's decision great deference, only disturbing it if no reasonable person could agree with the ruling." *United States v. Thomas*, 321 F.3d 627, 630 (7th Cir. 2003). The defendants provide no rationale to reverse the district court's decision. The government expressly defined for the jury what it meant by "manipulate."

> Ladies and gentlemen, good morning. You have before you two bankers. These two bankers manipulated the market prices of gold and silver. They pushed those prices up and they pushed those prices down with orders to buy and sell, orders that they knew sent fake signals to the market about supply and demand.

The jury would not have confused "manipulate" with "market manipulation" because the terms are distinct. "Manipulate" is a generally understood term distinct from a statutory term like "market manipulation." The defendants were not convicted for manipulation, but for fraud. *See United States v. Bloom*, 846 F.3d 243, 252 (7th Cir. 2017) (holding sufficient evidence existed of defendants manipulating investment portfolio yield rates to support convictions for wire and investment adviser fraud). And, as discussed previously, the district court sufficiently instructed the jury on the meaning of "scheme to defraud."

Bases relies heavily on *United States v. Farinella*, 558 F.3d 695 (7th Cir. 2009), in support of his claim of error in admitting this testimony. That case concerned whether sufficient evidence supported Farinella's conviction for misbranding food with intent to defraud or mislead in violation of 21 U.S.C. §§ 331, 333. *Id.* at 697. The government presented the testimony of an FDA employee. *Id.* at 699. He testified he searched through an FDA database detailing inquiries regarding the labeling of food products and found no record of inquiry from Farinella requesting a change to the "best when purchased by" date on their product. *Id.* "The implication was that changing the 'best when purchased by' date on a label requires the FDA's permission, and he added that the FDA requires supporting data before approving a request to change the date." *Id.*

This court ruled the district court should not have admitted that testimony. *Id.* at 699-700. Most salient was the fact that, if such a requirement could predicate a criminal conviction, the requirement should be included "in some written interpretive guideline or opinion, and not just in the oral testimony of an agency employee." *Id.* at 699. The court noted, "[i]t is a denial of due process of law to convict a person of a crime because he violated some bureaucrat's secret understanding of the law." *Id*. That testimony discarded, the evidence was insufficient to support Farinella's conviction. *Id*. at 700.

Here, Bases asserts that, like in *Farinella*, the testimony from CME representatives and bank officials constitutes "some bureaucrat's secret understanding of the law" and should have been prohibited. *Id*. at 699. But *Farinella* is easily distinguishable. There, to prove misbranding and fraud, the government needed to establish that FDA approval was required before changing a label. In contrast, Rule 432 was not a predicate for criminal liability here. Indeed, the district court instructed the jury, "[e]vidence that a defendant … violated an exchange rule or any bank policy is not sufficient, in and of itself, to find a defendant guilty of conspiracy to commit wire fraud, wire fraud, or commodities fraud." The instruction made clear the CME rule could not be the basis of criminal liability and cured any potential confusion by the jury.

Even if the testimony from the CME representatives and bank officials was erroneously admitted, such an error was harmless. This testimony went to the defendants' state of mind: they intended to manipulate the market by placing spoof orders with the intent to cancel that traders would perceive as bona fide. Abundant evidence at trial supported a finding of fraudulent intent, including: defendants' chat messages; the testimony of Lakhan and others that CME rules prohibit traders from placing orders with the intent to cancel; and other witnesses' testimony that spoof orders sent misleading signals to the market, irrespective of Rule 432 or bank policies. Admitting the testimony of the CME representatives and bank officials was not an abuse of discretion.

2. *The district court correctly excluded evidence of Bases's good faith.*

A key question at trial was whether Bases knew his conduct was prohibited. He argues the exclusion of certain evidence of his good faith was an abuse of discretion. Specifically, he faults the exclusion of certain chat messages between him and Bank of America colleague Simon Butler. Because the sequence of these messages is important to our analysis, a history of their exchange is below.

Bases and his colleagues received an email from their Bank of America supervisor, Rupen Tanna, on July 22, 2013, informing them that the British regulatory authorities had fined Coscia and noting that his behavior is "deemed unacceptable." The *following* day, Bases and Butler engaged in the following exchange:

> [Bases]: **Did u read that thing that Rupen sent out?**
>
> …
>
> [Bases]: Everyone has done it
>
> …
>
> [Bases]: **Offered it or bid it to do the opposite**

[Bases]: The problem is

[Bases]: Both orders were good

[Butler]: it is however t[he] same as any algo based strategy

[Bases]: U could have traded either side

[Bases]: **And that's illegal?**

…

[Bases]: They were real orders

The government sought to exclude the evidence as hearsay that fell outside the scope of the state-of-mind exception under Federal Rule of Evidence 803(3). The district court agreed and excluded all the messages except for those bolded above.

Exempt from the prohibition of hearsay are "statement[s] of the declarant's then-existing state of mind … or emotional, sensory, or physical condition …, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." FED. R. EVID. 803(3). Statements are admissible under the state-of-mind exception only when the following three requirements are met: "(1) the statement[s] must be contemporaneous with the mental state sought to be proven; (2) it must be shown that declarant had no time to reflect, that is, no time to fabricate or misrepresent his thoughts; and (3) the declarant's state of mind must be relevant to an issue in the case." *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1992).

The district court properly excluded Bases's statements. None of these messages were made contemporaneously with the execution of the orders they reference. Rather, Bases sent these messages to Butler the day after receiving the Rupen Tanna email, showing that Bases had ample time to reflect on the email and misrepresent his thoughts to Butler.

Bases argues these statements were contemporaneous to his learning of the event to which he was reacting, namely the enforcement action against Coscia, and not prior trades. Even assuming the messages were not made in reference to prior trades, Bases still has a contemporaneity problem. He was not reaching out to Butler as the Tanna email came through. Certainly, some of the statements are contemporaneous reactions to Butler's questions. But other statements are likely thoughts Bases formulated following the arrival of the Tanna email the previous day. As such, Bases's messages were properly excluded as hearsay, and the district court did not abuse its discretion.

Even if the messages were improperly excluded, any error was harmless. The district court permitted Bases to introduce ample evidence addressing whether he had knowledge that his conduct was prohibited. This evidence included: Tanna's email about Coscia; Bases's reference to that email in the chat messages the next day; Bases's contextual statement, “offered it or bid it to do the opposite;” and Bases’s questions, “And that’s illegal?” During closing argument, Bases’s counsel relied on this admitted evidence to argue Bases’s belief “that his trading was lawful.” As the government points out, Bases was able to introduce evidence on the very question he claims he was precluded from addressing. Therefore, the exclusion of other statements relevant to Bases’s good faith did not show beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. The district court acted within its discretion.

## III. Conclusion

For these reasons, we AFFIRM the judgments of the district court.

## APPENDIX B

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

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | **18 CR 48-1, 2** |
| | ) | |
| **v.** | ) | **Judge John** |
| | ) | **Z. Lee** |
| **EDWARD BASES and** | ) | |
| **JOHN PACILIO,** | ) | |
| | ) | |
| **Defendants.** | ) | |

## MEMORANDUM OPINION AND ORDER

Defendants Edward Bases and John Pacilio were tried and found guilty by a jury on charges of wire fraud and conspiracy to commit wire fraud. Pacilio also was found guilty of commodities fraud.[1] Defendants have moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 or, in the alternative, for a new trial under Rule 33. For the reasons provided below, their motions are denied.

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[1] The jury acquitted Pacilio of violating 7 U.S.C. §§ 6c(a)(5)(C), 13(a)(2), and Bases of violating commodities fraud under 18 U.S.C. § 1348.

## I. Factual and Procedural Background

Bases and Pacilio were traders in various commodity futures markets for at least fourteen years. During that time, Bases traded precious metals futures while employed at Deutsche Bank and then Bank of America Merrill Lynch; Pacilio traded precious metals futures at Deutsche Bank, Bank of America Merrill Lynch, and then Morgan Stanley.

According to the third superseding indictment, when Defendants worked together at Bank of America Merrill Lynch, they conspired to engage in a fraudulent scheme to artificially move the prices in certain commodity futures markets on the Chicago Mercantile Exchange ("CME") in order to facilitate the execution of certain transactions that they wanted to fulfill. Defendants then conspired to continue this scheme once they went their separate ways.

More specifically, the government asserts, Defendants placed large orders in various commodity futures markets with the intent not to execute them, which induced other market participants to buy or sell futures contracts at prices that they otherwise would not have, in a way that benefited Defendants financially. This scheme comprised of several steps. *See generally* Tr. at 221:13-227:9, ECF No. 635; Tr. 652:15-665:1, ECF 636.

First, Defendants placed orders (in the form of bids or offers) that they actually wanted to trade (I will refer to these as the "Intended Orders").[2] Usually, these took the form of "iceberg" orders.[3]

Second, Defendants placed orders on the opposite side of the market as the Intended Orders with the intent to cancel the orders prior to execution. These orders (which I will call the "Subject Orders") were typically large visible orders, and Defendants placed them for the sole purpose of driving the market price toward the price of the Intended Orders. The Subject Orders gave the illusion that the demand or supply in the particular market was greater than it actually was.

Third, this illusion of market activity prompted other traders to react, causing the market price to move toward Defendants' Intended Orders. This price movement eventually led traders to execute the Intended Orders at the prices Defendants wanted.

Fourth, Defendants then cancelled the Subject Orders before they were filled, just as they had planned.

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[2] An order to buy on the CME is a "bid," and an order to sell is an "offer." Tr. at 74:6-12, ECF No. 634.

[3] An iceberg order is a large order that is split up into a series of smaller orders in order to "obscure the true extent of supply or demand" for a particular position. *United States v. Coscia*, 866 F.3d 782, 800 (7th Cir. 2017) (citation omitted), *cert. denied sub nom. Coscia v. United States*, 138 S. Ct. 1989 (2018).

In addition to the conspiracy charge, the superseding indictment also accused Bases and Pacilio individually of engaging in wire fraud affecting a financial institution from around 2008 to at least 2014. Additionally, the indictment charged Defendants with engaging in commodities fraud from at least May 20, 2009, through at least January 2014. Lastly, the indictment charged Pacilio with violating the anti-spoofing statute, 7 U.S.C. §§ 6c(a)(5)(C), 13(a)(2), on April 17, 2014.

The government's case-in-chief spanned eight days. Altogether, the government presented evidence of approximately seventy trading episodes involving at least one of the Defendants, twenty-two of which were accompanied by recorded, contemporaneous online chats. The jury also heard testimony from two CME directors familiar with the CME's trading practices and rules; an econometrician who summarized Defendants' trading episode data; a cooperating witness who recounted, among other things, that Bases and Pacilio had taught him about the scheme and how to execute it; compliance officers from Deutsche Bank and Bank of America Merrill Lynch; two victims of the scheme; and an FBI agent who specializes in investigating security and commodities fraud.

After the government rested its case, Defendants moved for a judgment of acquittal as a matter of law under Rule 29. The Court took the motions under advisement.

Pacilio then presented one witness, Daniel Fischel, a professor emeritus of University of Chicago Law School and president of Compass Lexecon, an economic consulting firm. Dr. Fischel testified that there is nothing wrong with placing a large visible order into the market opposite an iceberg order and that a person placing a large visible order has no idea how other traders will react. He also analyzed Pacilio's trading episodes and opined that the government's analysis inaccurately portrayed Pacilio's trading behavior, because it focused only those episodes where he cancelled large visible orders that were opposite iceberg orders.

After deliberations, the jury found Bases guilty as to Count 1 (conspiracy) and Counts 2 through 10 (wire fraud), but it found him not guilty on Count 18 (commodities fraud). As to Pacilio, the jury found him guilty as to Count 1 (conspiracy), Counts 11 through 17 (wire fraud), and 19 (commodities fraud), and not guilty on Count 20 (spoofing).

Each Defendant has filed a renewed motion for acquittal under Rule 29 or, in the alternative, for a new trial under Rule 33. Inasmuch as each motion raises different issues, each Defendant has adopted the arguments of the other.

## II. Statutory Background

Bases and Pacilio were charged with and convicted of conspiracy to commit wire fraud affecting a financial institution under 18 U.S.C. § 1343. Additionally, Pacilio was charged with and convicted of commodities fraud under 18 U.S.C. § 1348.

The wire fraud statute, § 1343, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire … in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation … affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years or both.

The commodities fraud statute, § 1348(2), states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice … to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery … shall be fined under this title, or imprisoned not more than 25 years, or both.

## III. <u>Analysis</u>

### A. Rule 29 Motions for a Judgment of Acquittal

Under Rule 29, a court may, after a jury has returned a guilty verdict, set aside the verdict and "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a), (c)(2). Challenging the sufficiency of the evidence in such instances is a "heavy, indeed, nearly insurmountable burden." *United States v. Warren*, 593 F.3d 540, 546 (7th Cir. 2010). Bases and Pacilio each must convince this Court "that even after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found him guilty beyond a reasonable doubt." *Id*. (internal quotation marks omitted). In other words, the record must be devoid of any evidence from which a reasonable jury could have found him guilty. *Id*. "[W]e do not reweigh evidence or reassess the credibility of witnesses; these are jury determinations to which we defer." *United States v. Griffin*, 194 F.3d 808, 816 (7th Cir. 1999).

Defendants argue there was insufficient evidence for a rational jury to find that they had engaged in or had conspired to engage in a scheme to defraud in violation of the wire fraud statute. Additionally, Defendants argue that the wire fraud statute is unconstitutionally vague as applied to their conduct.

**1. Whether There Was Sufficient Evidence of Wire Fraud**

Bases and Pacilio challenge the sufficiency of the trial evidence to support wire fraud in three ways. First, they argue that the government failed to prove that the Subject Orders were fake or fraudulent. Second, they assert that, even if the government had proven the foregoing, it still failed to establish that any pretense, representation, or promise the Subject Orders conveyed was material. Third, Defendants contend that the government failed to prove that, by placing an order on the CME, a trader implicitly conveys an intent to trade on that order or that either Defendant had intended to defraud anyone.

**a. False Pretenses, Representations, or Promises**

Defendants first argue that the government failed to present any evidence that their Subject Orders were in any way fake or fraudulent. They are mistaken. To the contrary, the government presented numerous witnesses and documents demonstrating that, at the time that Bases and Pacilio had placed the Subject Orders, CME rules required that any order placed on the exchange represented a genuine, bona fide intent to trade at the specified quantity and price.

By way of example, Harnaik Lakhan, a trader who worked under Defendants at Bank of America Merrill Lynch, explained in detail how Bases and Pacilio carried out the trading scheme, by placing orders they intended to cancel for the sole purpose of moving the market price towards the orders that they actually wanted to fill. Tr. at 601:22-604:4. Lakhan admitted that, with Defendants' guidance, he too placed orders with the intent to cancel them and that each time he did so, he was "providing the market incorrect information as to demand, supply, also my intent." *Id.* at 598:7-12. "[W]hen we place a spoof order," Lakhan testified, "you put in large quantity on one side. So if you want to buy—if your intent is to buy, you place a large sell order, so that's—that's false supply in that instance." *Id.* at 598:15-18.

Lakhan also noted that, in some instances, instead of one large spoof order, Bases placed multiple smaller spoof orders. *Id.* at 661:2-662:19. This had the advantage of minimizing suspicion and limiting the financial risk in the event that any of them were filled. *Id.*; *see also id.* at 661:15-662:1 ("You don't want people to know it's a spoof order. You want them to react to it."). Under either approach, Lakhan confessed, the sole intent behind a spoof order was to push the market price toward the intended order on the other side of the market that they wanted to fill. *Id.* at 599:2-20. According to him, Defendants carried out this scheme in the platinum, palladium, gold, and silver futures contract markets. *Id.* at 602:11-23.

The jury also heard from Robert Sniegowski, the Executive Director of CME's Rules and Regulatory Group. He testified that "the purpose of the market is to have integrity and … [to have] the bids and the offers represent people's desire to actually buy or sell at that price." Tr. at 220:7-9, ECF No. 635. For that reason, he emphasized that the CME always has required orders to be placed with an actual intent to buy and sell. *Id*. at 219:15-21. Sniegowski also stated that, since he joined the CME in 1989, the exchange has prohibited orders intended solely to create an artificial movement in price. *Id*. at 238:1-24; *see Id*. at 229:1-2, 229:11-22, 231:13-19, 232:16-11, 233:3-18, 236:4-13; *see* GX220, CME Rule 432. According to Sniegowski, such orders mislead other market participants and disrupt the integrity of the market. Tr. at 231:5-12, 235:4-236:8, 247:7-9.

The government also presented John Scheerer, the Senior Director of the CME's Global Command Center. Scheerer testified that, based on his twelve years of experience at the CME and his decade of trading futures beforehand, he understood that each order placed on the CME was required to be a bona fide order placed with the intent to transact on that order. Tr. at 73:18-74:2, 91:13-19, 93:21-24, 94:4-19, 96:14-16, 97:2-6, 98:17-99:23, 181:22-24, 187:23-188:1. He explained that, while Defendants' executable orders were in the market, they were fake because "if your intent was to cancel it before you even put it in, then … [it is] not a real order." Tr. at 185:9–23.[4]

[4] Pacilio points to Scheerer's testimony regarding so-called "fill-and-kill" orders for the proposition that traders are allowed to place an order with intent to cancel as long as it is paired with an order that the trader intends to execute. This is incorrect. A "fill-and-kill" order demands immediate execution or cancellation. Scheerer noted that, sometimes, when a trader

In addition, the jury heard from compliance officers from two of Defendants' former employers. John Juul worked in Deutsche Bank's compliance department. He described the bank's commodities trading policies and how the bank communicated the policies to its traders. Juul testified that, while Bases was employed by Deutsche Bank from 2008 to 2010, its policies prohibited commodity traders from placing orders without an intent to execute them and from deceiving other market participants. *Id.* at 1097:1-1099:3, 1101:24-1106:3, ECF No. 639. Juul stated that Deutsche Bank adopted these policies to protect market participants and the market itself from harm. *Id.* at 1096:3-6.

Ed McLaren was Bank of America's chief compliance officer. He testified that the bank's employment agreements put Defendants on notice that the bank prohibited them from engaging in fraud, which subjected a trader to disciplinary action, termination, and financial penalties. *Id.* at 1238:20-1241:9, 1242:12-1243:1.

Lastly, the jury heard from numerous traders, who were injured by Defendants' fraudulent scheme.

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places such an order, the entire order will be filled immediately if the quantity is available at the set price, and killed immediately if unavailable. Tr. at 160:1-20. At other times, the trader is willing to take whatever quantity is available at that price, but if a portion of the order is unavailable, then that portion is cancelled. *Id.* at 161:11-162:7. Under either scenario, the cancellation of the order depends on market conditions that are beyond the control of the individual trader placing the order.

The traders explained that they understood orders on the CME to represent genuine intents to trade. David Pettey has worked at Susquehanna International Group since 2002. According to Pettey, he understood that, when trading on the CME, each "order[] represent[ed] bona fide interest in buying and selling" and that he "expected that people intended to actually trade at that price at that time." *Id*. at 1420:3-7, 1479:24-1482:24, ECF No. 640. Similarly, Anand Twells, a trader at Citadel Securities from 2006 to 2021, said that he understood that everybody "play[ed] by the rules of the exchange and plac[ed] orders with the intent to trade." *Id*. at 1577:9-25.

In sum, the government presented numerous competent witnesses who testified that they understood that placing orders on the CME with the intent to cancel them was prohibited conduct. Based on this testimony, a rational jury could conclude that the government had proven beyond a reasonable doubt that Defendants' Subject Orders constituted false pretenses, representations, or promises within the meaning of the wire fraud statute.

Defendants disagree and note that some of the orders in question in fact were executed. They are correct that a small percentage of the orders were filled. However, the trial evidence is sufficient for a reasonable jury to conclude that Bases and Pacilio had placed the Subject Orders with the intent to cancel them, even if they were not 100% successful in doing so.

Defendants also lean on *United States v. Connolly*, 24 F.4th 821 (2d Cir. 2022). There, the defendants—two Deutsche Bank derivatives traders—were convicted under the wire fraud statute for causing co-workers to submit false information to the British Bankers' Association ("BBA") in order to manipulate the London Interbank Offered Rate ("LIBOR").[5] *Id.* at 842-43. This allowed the traders to profit on contracts that were dependent on changes in interest rates. *Id.* at 824.

In reversing their convictions, the Second Circuit noted that the BBA merely directed the banks to submit "the rate at which it *could* borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size." *Id.* at 835. The court observed that the government had failed to present any evidence that Deutsche Bank could not borrow at the rates that had been submitted to the BBA. *Id.* at 841. Furthermore, the court held that the BBA did not prohibit Deutsche Bank from considering the impact of its rate submissions on the profitability of its traders. *Id.*

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[5] LIBOR is a benchmark interest rate calculated from estimates submitted by the leading banks in London to the BBA. *Id.* at 824. To calculate the LIBOR for each loan duration (ranging from overnight to a year), the BBA receives rate submissions from sixteen panel banks, including Deutsche Bank. *Id.* at 825. The BBA eliminates the four highest and the four lowest rates and averages the middle eight rates to arrive at the LIBOR. *Id.* The LIBOR is then published globally each day. *Id.*

By contrast, as discussed above, there is substantial evidence here from which a reasonable jury could find that Defendants' practice of placing orders on the CME with the intent to cancel them once their orders on the opposite side of the market were filled was fraudulent and deceptive. Accordingly, the Court denies their motions for a judgment of acquittal on this basis.[6]

### b. Materiality

Next, Defendants contend that, even if the Subject Orders were fraudulent, the government failed to prove that the orders were false in a material way.

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[6] The Court previously rejected Defendants' argument that an open-market, tradeable order entered with the intent to cancel cannot be fraudulent as a matter of law. *See United States v. Bases*, No. 18-cr-48, 2020 WL 2557342, at *4-9 (N.D. Ill. May 20, 2020). Indeed, in light of the testimony and evidence at trial, a rational factfinder could conclude that Defendants, by repeatedly using large or multiple smaller visible orders to affect prices while taking steps to avoid transactions in those orders, deceptively created the illusion of market movement. *See Coscia*, 866 F.3d at 797 (holding that a defendant's identical argument with regard to the commodities fraud statute "ignores the substantial evidence suggesting that he never intended to fill his large orders and thus sought to manipulate the market for his own financial gain" (cleaned up)); *see also United States v. Chanu*, 40 F.4th 528, 541 (7th Cir. 2022) ("Given the common ground between these two statutes, it is enough that *Coscia* establishes that this pattern of trading conduct is deceitful and aligns with the plain meaning of "scheme to defraud."). The holdings in *Coscia* and *Chanu* are binding on the Court, and Defendants' reliance upon extra-circuit authority is misplaced.

In support, Defendants point to Twells's and Pettey's testimony. Both used computer algorithms to trade futures contracts and acknowledged that their algorithms were not designed to determine the subjective intent behind an order placed on the CME. As such, Defendants argue, Twells's and Pettey's trading activity could not have been influenced by Defendant's subjective intent. *Id.* at 1467:7-9, 1504:24-1505:1. But this misunderstands their testimony.

In fact, Twells testified that Citadel's algorithm assumed that other traders were "playing by the rules of the exchange and placing orders with the intent to trade." *Id.* at 1577:9-25. He also believed that Bases's placement of three visible ten-lot offers on April 27, 2011, did influence Citadel's decision to trade with his iceberg bids. *Id.* at 1497:13-1500:18. Similarly, Pettey testified that Pacilio's placement of a visible 200-lot offer on September 22, 2010, "absolutely" was capable of influencing Susquehanna's trading algorithm to fill Bases's iceberg bid. *Id.* at 1428:17. Pettey further testified that Susquehanna's algorithm was affected by the various examples of Defendants' coordinated deceptive trading activity. *Id.* at 1435:24-1436:1. And both Twells and Pettey emphasized that, if traders were allowed to place orders with the intend to cancel them, such a practice would have a "bad" or "detrimental" effect on algorithmic trading platforms. *Id.* at 1426:3-6, 1488:24-25. A reasonable jury could find from such testimony that Defendants' fraudulent orders were material to the trading decisions made by other market participants.

In the same vein, Lakhan observed that the trading scheme influenced the trading decisions of others. "So, if I, for example," Lakhan stated, "place a spoof sell order, I'm pushing prices down, it's going to encourage somebody else to sell at a lower price than they otherwise would have done. Or even—it might even encourage them to come in when they're not going to trade otherwise." Tr. at 599:23-600:8. Bases himself concurred. *See* Gov't's Trial Ex. 47 (stating "that does show u how easy it is to manipulate it soemtimes [sic]" and stating "correct" and "I know how to 'game' this stuff" when responding to a fellow trader's text message, "basically you tricked alkll [sic] the algorhthm [sic]"); Gov't's Trial Ex. 64 (stating "I had to bid the systems to lose it."); Tr. at 778, ECF No. 637 (Lakhan's explaining that, under Bases's trading pattern scheme, "bid it to lose it" meant placing a spoof buy order in order to sell).

In light of this and similar evidence, Defendants have failed to establish that no rational factfinder could find that their Subject Orders were false to a material degree. *See*, *e.g.*, *Chanu*, 40 F.4th at 542 (holding that, because "traders employing manual spoofing do so with the aim (and effect) of influencing other actors in the trading space … there is no question the traders' implied misrepresentations were material"); *Coscia*, 866 F.3d at 800 (stating that materiality was established where defendant's large orders tricked trading algorithms by creating the illusion of an oversaturated market).

**c. Intent**

Defendants also contend that the government presented insufficient evidence that, by placing an order, a trader implicitly conveys the intent to trade. They also argue that no reasonable jury could find from the trial evidence that Bases and Pacilio knew that their Subject Orders were unlawful or that they acted with the intent to defraud. But as discussed, the jury heard from numerous witnesses that traders on the CME were prohibited from placing orders with the intent to cancel them and that other traders reacted to orders based on the assumption that they were bona fide.

What is more, the jury also heard and saw evidence that Defendants themselves understood that their scheme was fraudulent. For instance, Bases admitted in chat messages after spoofing episodes that he "f…k[s] the mkt around a lot," that the market is "easy … to manipulate," that he "tricked" the algorithms, and that "we fkd a lot of people there." *See* GX 42, GX 56. A rational jury could conclude from Bases's own words that he possessed fraudulent intent when executing his scheme.

Additionally, Lakhan testified that, based on his understanding of futures trading, he knew that the scheme he learned from Bases and Pacilio was wrong because the fraudulent orders inserted false information into the market to the detriment of other traders. Tr. at 598:7-12, 599:23-600:8. Furthermore, the financial institutions that employed Defendants informed them that conduct that created a misleading impression as to supply, demand, or price was prohibited. *See* GX 200, at DOJ-001369544; GX 203; GX 213; *see also* Tr. at 1109:6-15, 1109:23-1114:22, 1279:20-23, 1286:15-1287:1, 1288:10-1289:17, 1291:4-1292:24, 1293:3-1295:25, ECF Nos. 639, 640.

For their part, Defendants attempt to poke holes in the evidence in various ways. For instance, they highlight that, at times, they placed spoof orders at the top of the book where the risk of execution was highest. However, as Lakhan testified, the top of the book was "the best place to have maximum impact" when trying to move the price with spoofs. *See* Tr. at 1041:19. A reasonable jury certainly could have credited this testimony.

Defendants also point to Professor Fischel's testimony that placing visible orders on the opposite side of the market of iceberg orders was commonplace and not indicative of fraud. This testimony, however, focused solely on Pacilio's placement of iceberg orders opposite large visible orders. It ignored Pacilio's pattern of placing large visible orders and cancelling them as soon as his iceberg orders on the opposite side of the market were filled. Given this, a rational jury certainly could have discounted the value of Fischel's testimony.

Defendants also argue that, because they were manual traders who could not compete against the speed of algorithmic traders, the alleged scheme was nonsensical. And it is true that Defendants were not always successful in cancelling spoof orders quickly enough to avoid filling them. But, a reasonable jury could find, based upon Defendants' repeated execution of the scheme along with the other trial evidence discussed above, that they acted "with the specific intent to deceive or cheat … for the purpose of getting financial gain for one's self." *See United States v. Faruki*, 803 F.3d 847, 853 (7th Cir. 2015); *cf. Connolly*, 24 F.4th at 839 ("[A] scheme need not succeed in order to violate § 1343"); *United States v. Aslan*, 644 F.3d 526, 545 (7th Cir. 2011) ("The wire fraud statute punishes the scheme, not its success.").[7]

Along similar lines, Defendants contend that there was insufficient evidence from which a rational jury could find that they possessed the requisite fraudulent intent with regard to the particular orders listed in Counts Four, Seven, Eight, Ten, and Nineteen. To the contrary, the government introduced evidence in the form of charts and underlying trading data to illustrate how the Subject Orders in these Counts adhered to Defendants' scheme of placing false orders to illegally manipulate market

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[7] In all of the ways discussed, the weight of the government's evidence established that, during the trading episodes at issue, Defendants intended to cancel their visible orders that they placed on the opposite side of their iceberg orders. This is so, regardless of whether Defendants faced the risk that the scheme might not work. *See Aslan*, 644 F.3d at 545. Accordingly, Defendants' argument that the government's use of the terms "wanting," "willing," and "intending" interchangeably during closing argument risked jury confusion or was unfairly prejudicial is unpersuasive.

prices. *See* GX1.[8] To explain the scheme, the government relied on Sniegowski and Lakhan. Tr. at 221:13-227:9, 652:15-665:1; *see also* Tr. at 601:22-602:25, 664:19-665:1, 815:8-817:17 (observing first hand Defendants' fraudulent scheme). Even Pacilio recognized that another trader's use of the same manipulative scheme in 2013 and 2014, constituted "systematically spoofing the futures to buy or sell his 20 lots." *See* GX 130, Email From J. Pacilio to A. Sandhu (Apr. 30, 2015). A rational jury could easily have put two-and-two together by applying the scheme's pattern to the trading episodes depicted in the charts and data. Accordingly, Defendants' motions for an acquittal as to Counts Four, Seven, Eight, Ten, and Nineteen also are denied.

Lastly, Defendants contend that the government presented no evidence of motive. But this too is incorrect. As Lakhan testified, spoofing helps a trader place a client's orders quickly and at a favorable

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[8] The charts and data included the orders identified in Count Four (Bases's 50 sell contracts in gold futures on September 24, 2010, at 8:13 a.m.), Count Seven (Bases's 50 sell contracts in gold futures on April 27, 2011, at 8:52 a.m.), Count Eight (Bases's 90 buy contracts in gold futures on August 17, 2011, at 2:28 p.m.), Count Ten (Bases's 50 buy contracts in gold futures on March 25, 2012 at 6:21 p.m.), and Count Nineteen (*e.g.*, Pacilio's 50 buy contracts in gold futures on January 24, 2014, at 9:44 a.m.; 100 buy contracts in gold futures on February 18, 2014, at 3:20 p.m.; 200 buy contracts in platinum futures on February 28, 2014, at 10:31 a.m.; 100 sell contracts for silver futures on September 15, 2014, at 1:15 p.m.; and 100 buy contracts for platinum futures on October 6, 2014, at 10:26 a.m.).

price. "If you can execute—if you can trade the client at the price they want, then—and also quickly, it—you get more business from the client and information from the client by doing so." Tr. at 642:1-9. Indeed, according to Lakhan, Bases stressed that "you have to do anything you can to help keep clients, customers happy." *Id*. at 642:25-643:20. This is sufficient evidence from which a rational jury could find motive.

For these reasons, to the extent that Defendants' motions for a judgment of acquittal are premised on the insufficiency of the trial evidence, the motions are denied.

**2. Whether Wire Fraud Statute Is Unconstitutionally Vague**

Defendants also reprise their argument that the wire fraud statute is unconstitutionally vague as applied to their conduct. In Defendants' view, the trial confirmed that Section 1343's prohibition against "any scheme or artifice to defraud" or "false or fraudulent pretenses, representations, or promises" failed to provide sufficient notice to the public that placing orders in the market with an intent to cancel was illegal. The Court already rejected this argument, *see United States v. Bases*, No. 18 CR 48, 2020 WL 2557342, at *11-13 (N.D. Ill. May 20, 2020), and nothing at trial changes this view.

The Seventh Circuit's recent decision in *United States v. Chanu* is instructive. There, the defendants were convicted under the wire fraud statute for engaging in conduct substantially identical to that at issue here. They too argued that the wire fraud statute did not prohibit them from placing orders in the futures market with the intent to cancel, because the orders were executable. The Seventh Circuit was unpersuaded. *Citing Neder v. United States*, 527 U.S. 1, 23-25 (1999), and *Emery v. American General Finance*, 71 F.3d 1343, 1348 (7th Cir. 1995), for the well-established proposition that the federal wire fraud statute outlaws fraudulent omissions and half-truths, as well as misrepresentations, the court held that the defendants, "[b]y obscuring their intent to cancel, through an orchestrated approach, … had advanced a quintessential 'half-truth' or implied misrepresentation—the public perception of an intent to trade and a private intent to cancel in the hopes of financial gain." *Id.* Such conduct, the Seventh Circuit concluded, fell squarely within the prohibitions expressed in § 1343.

The court in *Chanu* had little trouble determining that placing orders in the futures market with a coincident intent to cancel them was outlawed by the federal wire fraud statute. And, given the rule espoused in *Neder* and *Emery*, this comes as no surprise. The language of § 1343 provides more than sufficient notice that Defendants' conduct was illegal. Thus, Defendants' motions for a judgment of acquittal based on the theory of unconstitutional vagueness is denied.

For all of the reasons discussed, Defendants' Rule 29 motions for a judgment of acquittal are denied.

### B. Rule 33 Motions for a New Trial

In the alternative, Defendants request a new trial under Rule 33. That rule allows a court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. While Rule 33 does not define "the interest of justice," "courts have interpreted the rule to require a new trial … in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial." *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989). "A defendant is entitled to a new trial if there is a reasonable possibility that a trial error had a prejudicial effect upon the jury's verdict." *United States v. Van Eyl*, 468 F.3d 428, 436 (7th Cir. 2006).

Rule 33 permits a court to "reweigh the evidence, taking into account the credibility of the witnesses." *United States v. Washington*, 184 F.3d 653, 658 (7th Cir. 1999). But "[i]n general, conflicting testimony or a question as to the credibility of a witness [is] not [a] sufficient ground[] for granting a new trial." *Kuzniar*, 881 F.2d at 470. Instead, such testimony must be "contrary to the laws of nature or otherwise incapable of belief." *Washington*, 184 F.3d at 657.

Furthermore, a court may not vacate a judgment and grant a new trial unless "the verdict is so contrary to the weight of evidence that a new trial is required in the interests of justice." *United States v. Chambers*, 642 F.3d 588, 592 (7th Cir. 2011).

Whether to vacate a judgment and grant a new trial falls within the sound discretion of the district court and should be exercised in "only the most 'extreme cases.'" *United States v. Peterson*, 823 F.3d 1113, 1122 (7th Cir. 2016) (quoting *United States v. Linwood*, 142 F.3d 418, 422 (7th Cir. 1998)).

**1. Manifest Weight of the Evidence**

Defendants first argue that the jury's verdict was so contrary to the weight of the evidence that a new trial is warranted. In their view, the government presented only minimal evidence supporting its theory that placement of an order on the CME with the intent to cancel was an implied misrepresentation prohibited by § 1343. Defendants also contend that there was little to no evidence to support a verdict beyond a reasonable doubt that they had acted with the necessary intent to defraud. These arguments are unpersuasive. Given all of the incriminating testimony and the exhibits described above, the Court concludes that the jury's verdict was supported by enough evidence so that a new trial is not warranted under Rule 33.

**2. Government's Use of the Term "Market Manipulation"**

Next, in Defendants' view, the government's use of the term "market manipulation" during the trial tainted their right to a fair trial. This is especially so, they say, because the Court denied their request for a curative instruction to ensure that the jury understood that Defendants were not being charged with market manipulation under the Commodities

Exchange Act ("CEA"), specifically 7 U.S.C. § 9 and 7 U.S.C. § 13(a)(2).

As the Court previously explained, however, there was little to no risk that the jury would have confused the government's use of the word "manipulate" in its common, everyday meaning with the term "market manipulation" as used in § 9 and § 13(a)(2). *See United States v. Coscia*, No. 14-cr-551, 2015 WL 6153602, at *3 (N.D. Ill. Oct. 19, 2015) (denying motion to exclude references to "manipulation" and stating that "[t]he term 'manipulation,' when used in the ordinary, nonlegal sense that the Government describes, is not unfairly prejudicial."). Indeed, from the outset, the government expressly defined for the jury what it meant by the term "manipulate."

> Ladies and gentlemen, good morning. You have before you two bankers. These two bankers manipulated the market prices of gold and silver. They pushed those prices up and they pushed those prices down with orders to buy and sell, orders that they knew sent fake signals to the market about supply and demand.

Tr. at 3:7-12. And Defendants have not cited a single instance in which the government, its witnesses, or exhibits referenced § 9 or § 13(a)(2) at all.

Because the jury would not have confused the government's use of the term "manipulation" with the term "market manipulation" as defined under 7 U.S.C. § 9 and 7 U.S.C. § 13(a)(2), Defendants' proposed curative instruction was unnecessary. To the contrary, mentioning those other offenses to the jury, when the government had not charged Defendants with violating them, likely would have confused the jury, rather than assisted it. Accordingly, the government's use of the phrase "market manipulation" or "manipulate" before the jury does not warrant a new trial.[9]

### 3. CME Rule 432

Defendants also argue that they were unduly prejudiced by the admission of the text of CME Rule 432, as well as the testimony of Sniegowski, Lakhan, Pettey, and Twells regarding their understanding of the rule. The government's aim in introducing this evidence was to establish that Defendants were on notice that their conduct was

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[9] Nor would a reasonable jury have been confused regarding whether evidence of manipulating or spoofing the market, in and of itself, was enough to convict either Defendant of conspiracy to commit wire fraud, wire fraud, or commodities fraud. The Court instructed the jury:

> Evidence that a defendant engaged in spoofing … is not sufficient, in and of itself, to find a defendant guilty of conspiracy to commit wire fraud, wire fraud, or commodities fraud. Rather, the government must prove all of the elements of conspiracy to commit wire fraud, wire fraud, or commodities fraud beyond a reasonable doubt in order to find a defendant guilty on each of those charges.

Final Jury Instructions at 37, ECF No. 623. Accordingly, the Court rejects Defendants' arguments otherwise.

prohibited.[10] During a final pretrial conference, Defendants argued that the rules of the CME, specifically Rule 432, were ambiguous and did not address or prohibit the conduct at issue. *See* Hr'g Tr. at 240:8-14, ECF No. 596 (July 7, 2021). The Court agreed that Rule 432 was ambiguous and allowed the parties to introduce evidence as to how participants in the commodities futures industry commonly interpreted it. *Id*. at 239:17-23.[11]

At trial, Sniegowski testified that, as CME's Executive Director of Rules and Regulatory Outreach, he was familiar with Rule 432, which existed when he joined the CME in 1989. Tr. at 216:22-25, 233:15-18. He opined that, based on his experience, Rule 432's prohibition against "engag[ing], or attempt[ing] to engage, in fraud or bad faith" and "conduct or proceedings inconsistent with just and

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[10] To avoid any jury confusion, the Court instructed the jury that "[e]vidence that a defendant … violated an exchange rule or any bank policy is not sufficient, in and of itself, to find a defendant guilty of conspiracy to commit wire fraud, wire fraud, or commodities fraud." Final Jury Instructions at 37.

[11] Defendants argue that, in general, parol evidence should have been excluded precisely because the Court held Rule 432 was ambiguous. Defendants do not explain why. Nor do they cite any case law to support this proposition. Thus, the argument is deemed waived. *See United States v. Davis*, 29 F.4th 380, 385 n.2 (7th Cir. 2022) ("Perfunctory and undeveloped arguments are waived, as are arguments unsupported by legal authority." (cleaned up)). But even if it weren't, to the extent that Bases and Pacilio were aware of the rule and understood its meaning, such facts would be relevant to their intent.

equitable principles of trade" encompassed the practice of placing orders with the intent to cancel them. *Id*. at 235:14-236:22. Sniegowski also stated that the CME expects its market participants to know the rules to ensure market integrity. *Id*. at 233:3-9.

In addition, Lakhan, Pettey, and Twells testified that, during the relevant period, they as commodities futures traders understood that placing an order on the CME with the intent to cancel was against the rules. Tr. at 855:12-15 (Lakhan), 1424:5-17 (Pettey), 1577:9-25 (Twells). According to Lakhan, he knew that doing so was wrong because it inserted false information into the market and harmed other traders. Tr. at 598:7-12, 599:23-600:8, 601:22-604:4. Although Lakhan, Pettey, or Twells did not specifically cite Rule 432 as the source of their understanding, their unequivocal testimonies that they knew spoofing was forbidden on the CME were probative of whether Bases and Pacilio also were aware of the prohibition.

The cases Defendants cite provide them no aid. Defendants first rely on *United States v. Chandler*, 388 F.3d 796, 802 (11th Cir. 2004). There, the defendants were charged with mail fraud for fraudulently representing to McDonald's Corporation that they were legitimate winners of certain promotional games, when, in reality, they had received the playing stamps from someone who had stolen them. The Eleventh Circuit held that, because the game rules did not explicitly prohibit receiving game stamps from someone else (indeed, a McDonald's representative testified that game players could transfer stamps to anyone), and there was no evidence that the defendants knew their stamps had been stolen, the government had failed to prove that the defendants had made any intentional misrepresentations to the company. *Id*. at 804-05.

Defendants also cite *United States v. Finnerty*, 533 F.3d 143 (2d Cir. 2008). In that case involving securities fraud, the Second Circuit affirmed the district court's grant of a motion for acquittal on the grounds that an implied representation arising from exchange rules was insufficient, in and of itself, to establish fraud where the government failed to present evidence of a "material misrepresentation," "omission," or "creation of a false appearance of fact" "by any means." *Id*. at 151.

Both *Chandler* and *Finnerty* are readily distinguishable. In those cases, the government presumed that a violation of a rule alone was sufficient to establish intent. By contrast, here, the government presented witnesses and documents indicating that Bases and Pacilio knew that the Subject Orders were prohibited and conveyed false information to the market. All of this evidence was highly probative of their criminal intent and substantially outweighed any prejudice to Defendants. Accordingly, Defendants' motion for a new trial on this ground is denied.

### 4. Lay Opinions Regarding Bank Policies

In a similar vein, Defendants object to the testimony from bank representatives that their respective financial institutions forbade placing orders with the intent to cancel, claiming that this information was never conveyed to them. But the bank officials testified that the traders at their respective banks were expected to understand and adhere to bank policies. Tr. at 1108:14-25 (Bases at Deutsche Bank), 1239:14-1240:25 (Bases at Bank of America), 1242:12-1243:1 (Pacilio at Bank of America); 1277:23-1279:11 (same), 1287:2-7 (same). Moreover, the officers pointed to exhibits demonstrating that the banks had notified each Defendant of these policies in emails and during training programs. *See*, *e.g.*, Tr. at 1109:6-15 (Bases at Deutsche Bank), 1109:23-1114:22 (same), 1293:3-1295:25 (Bases at Bank of America), 1279:20-23 (Pacilio at Bank of America), 1286:15-1287:1 (same), 1288:10-1289:17 (same), 1291:4-1292:24 (same).

Given this, the testimony from the bank officers that their respective banks prohibited the conduct at issue and that the banks had informed Defendants of these policies also was probative of Defendants' knowledge and intent and substantially outweighed any undue prejudice to Defendants.

**5. Lakhan's Testimony Regarding Three Trades**

Next, Defendants contend that Lakhan's testimony about three specific trading episodes on August 20, 2009, November 20, 2009, and November 16, 2010, as well as the contemporaneous online chat messages that accompanied them, exceeded the bounds of his personal knowledge and, therefore, was unfairly prejudicial. This argument is contrary to the record.

The evidence demonstrates that Lakhan was involved in the three chats in question. As to the online chat between Nick Green and Pacilio on August 20, 2009, Lakhan provided documentation that he himself was logged into the chat. Tr. at 743:24-747:23; *see* GX 54. Likewise, Lakhan discussed a chat between Amrik Sandhu and Pacilio on November 20, 2009, and noted that he participated in that chat session as well. Tr. at 693:6-695:1; *see* GX 57. Finally, Lakhan talked about a chat between Amrik Sandhu and Bases on November 16, 2010, during which time he too was logged into the chat. *See* Tr. at 742:22-743:6; *see* GX 78. Lakhan was an online participant in each of these chats and, thus, was competent to describe his understanding as to the contents of the chats. Moreover, his observations were probative of Defendants' intent and their probative value outweighed any undue prejudice to Defendants. Accordingly, this argument too fails.

**6. Exclusion of Evidence as to Bases's Good Faith**

Defendants also assert that they were unjustly prejudiced when the Court precluded the introduction of certain evidence relevant to Bases's purported state of mind. Specifically, Defendants point to excluded portions of DX 76—an online chat on July 23, 2013, between Bases and another trader in which Bases states, "Both orders were good," "Both sides were tradeable," "It's not like they were false orders," and "They were real orders." Defendants also highlight excluded statements in DX 103 and DX 131—an audio recording and transcript of a March 13, 2015, conversation between Bases and a former customer in which Bases stated "four or five years ago … if I had an offer, I would show a bid, and I'm happy to trade on either side. … both orders are good."' *Id*. The problem with these statements is that they are hearsay. And Defendants were offering them to prove the truth of the matters asserted therein, *i.e.*, that the orders at issue of "were good," "were tradeable," were not "false orders," and "were real orders."

What is more, these statements failed to meet the state-of-mind exception under Federal Rule of Evidence 803(3). In order to qualify, "the statement must be contemporaneous with the mental state sought to be proven"; "it must be shown that declarant had no time to reflect, that is, no time to fabricate or misrepresent his thoughts"; and "the declarant's state of mind must be relevant to an issue in the case." *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1992).

None of Bases's statements were made contemporaneously with the placement or execution of the orders referenced in them. Nor did Defendants show that Bases lacked the opportunity to reflect on those orders or to fabricate or misrepresent his thoughts about them. In fact, Bases made some of the statements an entire day after he had received an email from a colleague informing him of the civil enforcement actions brought against Michael Coscia for the same conduct. *Compare* DX 110, *with* DX 76; *see United States v. Carter*, 910 F.2d 1524, 1530-31 (7th Cir. 1990) (finding Rule 803(3)'s contemporaneousness requirement unsatisfied where the statement at issue was made "at least an hour after [the defendant] had confessed" because "[s]uch a time period provided defendant with ample opportunity to reflect upon his situation"). The other conversation between Bases and a former customer occurred on March 13, 2015, over a year after Bases had ceased his trading scheme. *Compare* GX1, at #43b, *with* DX 103. Because the contested statements in DX 76, DX 103, and DX 131 fail to satisfy the requirements of the state-of-mind exception to the hearsay rule, their exclusion does not provide a basis for a new trial.

### 7. *Weimert* instruction

As a final point, Defendants argue the Court's rejection of their proposed jury instruction, which was based on *United States v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016), deprived them of a fair trial. The proposed instruction provides:

> Deception about negotiating positions is not material for purposes of the federal fraud statutes. Where a buyer is not misled as to the nature of the asset it was buying or the consideration received, there is no fraud. Deception about a party's negotiating position is deception about that party's preferences and values, and therefore cannot be material.

Proposed Jury Instructions at 23, ECF No. 489-1.

In *Weimert*, a cash-strapped bank that needed to sell the bank's share in a real estate development tasked its vice president to negotiate the sale. 819 F.3d at 353. In a series of negotiations over the course of several months, the vice president misled the bank and the buyers into believing that the deal would not close unless he was given a minority interest in the real estate development. *Id.* The government charged the vice president with wire fraud, and a jury found him guilty. *Id.*

The defendant filed a motion for acquittal, and the district court denied it. The Seventh Circuit reversed, holding that the defendant's deceptive statements about the contracting parties' negotiating positions were customary and harmless and, therefore, did not amount to a scheme to defraud under the wire fraud statute. *Id.* at 357-58. In arriving at this conclusion, the court noted that there was "no evidence that Weimert misled anyone about any material facts." *Id.* at 354. At the same time, the court emphasized that "[s]ome deceptions in commercial negotiations certainly can support … wire fraud prosecution. A party may not misrepresent material facts about an asset during a negotiation." *Id.* at 356.

By contrast, the evidence at trial showed that Defendants' placement of orders on the exchange with the intent to cancel them conveyed false information that was material to the other market participants. Nor were such orders customary in the industry or harmless. In fact, the trial evidence demonstrated that the opposite was true. *See*, *e.g.*, *Chanu*, 40 F.4th at 542. As such, the instruction Defendants proposed was unnecessary and unsuited to the evidence in this case. If anything, it likely would have confused the jury rather than assisting it.

In sum, the verdict in this case is not contrary to the manifest weight of the trial evidence. Nor is there a reasonable possibility that a legal error committed during the trial had a prejudicial effect on the verdict. Accordingly, Defendants' Rule 33 motions for a new trial are denied.

## IV. Conclusion

For the above reasons, Defendants' motions for a judgment of acquittal or, in the alternative, for a new trial are denied.

**IT IS SO ORDERED.** **ENTERED: 8/22/22**

*/s/ John Z. Lee*
**JOHN Z. LEE**
**United States District Judge**

## APPENDIX C

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

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | **18 CR 48** |
| | ) | |
| **v.** | ) | **Judge John** |
| | ) | **Z. Lee** |
| **EDWARD BASES and JOHN** | ) | |
| **PACILIO**, | ) | |
| | ) | |
| **Defendants.** | ) | |

## MEMORANDUM OPINION AND ORDER

Defendants Edward Bases and John Pacilio have been indicted on charges arising from trading practices in the commodity futures markets that the government contends amounted to "spoofing"—that is, placing bids or offers with the intent not to execute them. They did so, the indictment alleges, in order to artificially inflate or deflate market prices and obtain more favorable market positions for their intended transactions. The indictment charges Bases and Pacilio with committing wire fraud affecting a financial institution under 18 U.S.C. § 1343, commodities fraud under 18 U.S.C. § 1348, as well as conspiracy to commit commodities fraud under 18 U.S.C. § 1349. In addition, the indictment charges Pacilio separately with violating the anti-spoofing provision of the Commodity Exchange Act, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

Bases and Pacilio have moved to dismiss the indictment on various grounds. Their principal argument is that bids and offers placed in an open market cannot constitute, as a matter of law, grounds for a charge of wire fraud or commodities fraud. This is so, they contend, because the bids and offers accurately state their terms and can be accepted (and enforced) by anyone in the market that wishes to fill them. But this theory ignores the indictment's allegations (which must be taken as true at this stage) that Defendants never intended to fill the bids and orders in question and placed them solely for the purpose of creating a misleading picture of market conditions that they used to their benefit. For the reasons more fully explained below, Defendants' motions are denied.

## I. Factual Background[1]

Bases and Pacilio have been employed as precious metals futures traders since 2008 and 2007, respectively. Indictment, Count 1 ¶¶ 1(a)-(b), ECF No. 67. They worked at the same bank from June 2010 to June 2011, although they are alleged to have engaged in unlawful conduct before, during,

[1] The following allegations are taken from the indictment and must be accepted as true in evaluating Defendants' motions to dismiss. *See United States v. Clark*, 728 F.3d 622, 623 (7th Cir. 2013).

and after that period. *Id.* ¶¶ 1(a)-(b), 2. According to the indictment, between at least June 2009 through October 2014, Defendants engaged in a fraudulent scheme to artificially move the prices in various precious metals futures markets in a way that facilitated the execution of certain transactions that they wanted to execute. *Id.* ¶¶ 3-18, 24.

To accomplish this, Defendants placed large orders on one side of a market with the coinciding intent to cancel them prior to their execution for the purpose of driving the price of the commodity futures contracts up or down. (Although the indictment refers to these large orders as "Fraudulent Orders," we will refer to them as the "Subject Orders.") *Id.* ¶¶ 3-8. At the same time, Bases and Pacilio placed smaller orders that they actually wanted to execute on the other side of the market. (The Court will refer to these smaller orders as the "Purposive Orders.") *Id.* ¶¶ 9-12.

For example, as described in the indictment, by placing numerous Subject Orders to purchase certain futures contracts (orders to purchase future contracts are called "bids"), Defendants led market participants to believe that there was a greater demand for the contracts than actually was the case; this practice drove the market price of the contracts up. At the same time that they submitted the Subject Orders, Defendants placed Purposive Orders to sell the same futures contracts (orders to sell future contracts are called "offers") at a price just above the then-prevailing market price. By artificially causing the market price to go up using this practice, Defendants increased the likelihood that their Purposive Orders would be filled at a higher price than they would have been able to obtain otherwise. *Id.* ¶ 10.

The method also worked in the other direction. Defendants placed Subject Orders to sell certain futures contracts (thereby creating an impression of increased supply in the contracts), while simultaneously placing Purposive Orders to buy the same contracts at a price lower than the then-prevailing market price. As other market participants reacted to the Subject Orders, the price of the contracts went down, and Defendants were able to fill their Purposive Orders at the lower price.

In short, the indictment alleges, Defendants' scheme of placing the Subject Orders with the intent not to execute them induced other market participants to buy or sell precious metals futures contracts at times, prices, and quantities that they otherwise would not have but for Defendants' actions, in a way that benefited Defendants financially. *Id.* ¶¶ 3, 6, 12. The indictment also claims that, in February 2011, Pacilio engaged in electronic communications with various traders, including Bases and another co-conspirator, acknowledging his efforts to "push" the market by using this trading strategy. *Id.* ¶¶ 17, 24.

## II. Legal Standard

Under Federal Rule of Criminal Procedure 7(c)(1), "[t]he indictment or information must be a plain, concise, and definite statement of the essential facts constituting the offense charged." Fed.

R. Crim. P. 7(c)(1). "For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." *Id*. An indictment satisfies Rule 7(c)(1) if it "(1) states all the elements of the crime charged; (2) adequately informs the defendant of the nature of the charges so that he may prepare a defense; and (3) allows the defendant to plead the judgment as a bar to any future prosecutions." *United States v. White*, 610 F.3d 956, 958 (7th Cir. 2010).

If an indictment "tracks the words of a statute to state the elements of the crime," it generally suffices, and "while there must be enough factual particulars so the defendant is aware of the specific conduct at issue, the presence or absence of any particular fact is not dispositive." *Id.* (internal quotation marks omitted). In this way, the pleading requirements in criminal cases are less stringent than those in civil cases. *See United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013) (declining to apply *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to criminal cases).

That said, just as in the civil context, for the purpose of a motion to dismiss, the allegations in the indictment are accepted as true and viewed in the light most favorable to the government. *Clark*, 728 F.3d at 623; *United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 1999). And "indictments are reviewed on a practical basis and in their entirety, rather than in a hypertechnical manner." *United States v. Smith*, 230 F.3d 300, 305 (7th Cir. 2000) (internal quotation marks omitted).

## III. Analysis

Bases and Pacilio seek to dismiss the counts in the indictment on numerous grounds. They attack the sufficiency of the indictment, seek dismissal of a portion of the commodities fraud charges based upon the statute of limitations, and raise constitutional challenges to the fraud and spoofing counts.

### A. Sufficiency of the Indictment

Defendants first attack the sufficiency of the indictment with regard to the wire and commodities fraud counts. Each count is addressed in turn.

#### 1. Wire Fraud

The federal wire fraud statute proscribes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" via the use of wire, radio, or television communication. 18 U.S.C. § 1343. To convict a person under this section, the government must prove that the defendant: "(1) was involved in a scheme to defraud; (2) had an intent to defraud; and (3) used the wires in furtherance of that scheme." *United States v. Faruki*, 803 F.3d 847, 852 (7th Cir. 2015) (citing *United States v. Durham*, 766 F.3d 672, 678 (7th Cir. 2014)). Establishing a scheme to defraud "requires the making of a false statement or material misrepresentation, or the concealment of [a] material fact." *Id.* (citing *United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009)).

As an initial matter, Defendants contend that the indictment fails to adequately plead wire fraud because the government has failed to allege an affirmative misrepresentation of any kind. In Defendants' view, open-market orders, such as the Subject Orders, convey no information other than the price and quantity specified in the orders themselves. And, because the orders accurately depict the terms upon which they can be accepted by counterparties in the market, Defendants assert, such open-market orders cannot form the basis of a misrepresentation claim. Indeed, Defendants add, once a counterparty accepts a bid or offer placed on the electronic exchange (which in this instance was COMEX), the originating party has no choice but to honor the acceptance in accordance with COMEX rules.

As a corollary, Defendants posit that, at best, the indictment's allegations amount only to a fraud by omission—that is, a failure by Defendants to disclose their intent to cancel the Subject Orders at the time that they were placed. However, Defendants note, because they had no legal duty to disclose this information to others in the market, the omission cannot constitute wire fraud as a matter of law.

For the first proposition, Defendants rely upon *Sullivan & Long, Inc. v. Scattered Corp.*, 47 F.3d 857 (7th Cir. 1995); *United States v. Radley*, 649 F. Supp. 2d 803 (S.D. Tex. 2009), *aff'd*, 632 F.3d 177 (5th Cir.

2011); *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007); *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189 (3d Cir. 2001), and *CP Stone Fort Holdings, LLC*, No. 16-C-4991, 2016 WL 5934096 (N.D. Ill. Oct. 11, 2016). But the problem with this argument is that it misapprehends the contours of the alleged fraudulent scheme, beginning with its intended targets.

Defendants' theory focuses exclusively on the potential counterparties to the Subject Orders. As far as those counterparties are concerned, to the extent that they accepted the Subject Orders (if anyone did), the bids and offers did state accurately the price and quantity at which the orders were to be filled. But, in the fraudulent scheme described in the indictment, the primary victims of the fraudulent scheme were not the counterparties to Defendants' Subject Orders, but the counterparties to the *Purposive Orders*, who—along with the rest of market—reasonably believed that the large Subject Orders were posted to the exchange either (1) with the intent to fill them or (2) with the intent to fill them, except when certain conditions are triggered between the time the orders are placed and they are executed (the latter scenario will be discussed more below).

Before addressing the cases cited by Defendants, we must first discuss *United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017). There, Coscia, a commodities futures trader, used a computer program to place simultaneously large orders (which he had no intention of executing) and small orders (which he hoped to fill) on opposite sides of certain commodity futures markets. The large orders artificially distorted market prices, enabling him to fill his small orders and carry out his plan to buy low and sell high. 866 F.3d at 787-88. A jury found him guilty of committing commodities fraud, 18 U.S.C. § 1348(1), and violating the anti-spoofing statute, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

Appealing his conviction, Coscia argued, among other things, that his actions could not be deemed fraudulent as a matter of law, because the large orders were fully executable on the market and subject to legitimate market risk. *Id.* at 797. The Seventh Circuit disagreed stating, "We cannot accept this argument. At bottom, Mr. Coscia confuses *illusory* orders with an *illusion* of market movement." *Id.* (internal quotations omitted; emphasis in original). "Mr. Coscia designed a scheme to pump and deflate the market through the placement of large orders," the court continued. "His scheme was deceitful because, at the time he placed the large orders, he intended to cancel the orders." *Id.*

*Coscia* appears to squarely dispose of Defendants' argument. It is true that *Coscia* involved commodities fraud, 18 U.S.C. § 1348(1), and not wire fraud, 18 U.S.C. § 1343, but the Seventh Circuit in *Coscia* recognized that the phrase "scheme to defraud" had the same meaning under both statutes. *See United States v. Vorley*, 420 F. Supp. 3d 784, 794–95 (N.D. Ill. 2019) (observing that the *Coscia* court borrowed the definition of a 'scheme to defraud' from the mail and wire fraud model jury instructions). As such, "[i]f spoofing can be a scheme to defraud under 1348(1)—and it can, the Seventh Circuit has held—it can be a scheme to defraud under the wire fraud statute as well." *Id.*[2]

Defendants, however, attempt to distinguish *Coscia* in two ways. First, Defendants argue that *Coscia* is inapposite, because it addressed a conviction under § 1348(1), and not § 1348(2).[3] Presumably, Defendants mean to argue that, had the conviction in *Coscia* been under § 1348(2), the Seventh Circuit would have reached a different result. *See* Def. Pacilio's Mem. at 6 n.6, ECF No. 118 (arguing that *Coscia* "does not change the long-standing requirement that, for a conviction to stand under the wire fraud statute, a scheme requires the making of a false statement of material representation, or the concealment of a material fact"). This argument appears to be based upon De-

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[2] The same definition of the phrase "scheme to defraud" has been commonly applied across various federal fraud statutes. *See*, *e.g.*, *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992) (holding that "'scheme to defraud' means the same thing under 18 U.S.C. §§ 1341, 1343, and 1344"); *United States v. Bertram*, 900 F.3d 743, 748-49 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 852 (2019) (holding that "scheme to defraud" in 18 U.S.C. § 1347 means the same as the phrase under the wire fraud statute).

[3] Section 1348(1) prohibits a "scheme or artifice … to defraud any person in connection with any commodity for future delivery," while § 1348(2) proscribes a "scheme … to obtain [money or property] by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1348(1), (2).

fendants' belief that a violation of § 1343 (wire fraud)—like § 1383(2), and unlike § 1383(1)—requires the use of "false or fraudulent pretenses, representations, or promises," and (at least in Defendants' eyes) none are alleged here. But this proposition is untenable for several reasons.

First, Defendants' argument assumes that § 1343 contains two independent subparts—one that proscribes "any scheme or artifice to defraud," and another that prohibits "any scheme or artifice … for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C § 1343;[4] *see* Def. Pacilio's Mem. at 6 (noting that § 1343 prohibits "a scheme or artifice (a) to defraud or (b) to obtain money or property by means of false or fraudulent pretenses, representations, or promises"). But this is not the case.

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[4] Section 1343 states, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

As the district court laid out in *Vorley*, the phrase "or for obtaining money or property by means of false of fraudulent pretenses, representations, or promises" was added to the mail fraud statute (upon which the wire fraud statute is based) in 1909. 420 F. Supp. 3d at 794.[5] But even after its addition, the Supreme Court understood the mail fraud statute to define a single offense: engaging in a scheme to defraud by using the mails. *Loughrin v. United States*, 573 U.S. 351, 359 (2014). And such a scheme did not require the making of a false statement. *Vorley*, 420 F. Supp. 3d at 795.

In fact, rather than limiting the reach of the mail fraud statute, the 1909 addition merely "clarified" that the pre-existing "scheme to defraud" language "*included* certain conduct, rather than doing independent work." *Id.* (emphasis added). Therefore, Defendants' parsing of § 1343 is incorrect, and the Seventh Circuit's discussion in *Coscia* construing the phrase "scheme to defraud" as it appears in § 1383(1) is equally applicable to § 1343 and consistent with the way it has interpreted that language in other contexts. *See Powell*, 576 F.3d at 491 (finding that, even though a transaction on its face contained no misrepresentations and both parties received what they bargained for, the failure to disclose "the whole

[5] The mail fraud statute begins with language identical to that used in the wire fraud statute: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises …." 18 U.S.C. § 1341.

story" regarding defendants' plan to profit from that transaction at the other party's expense constituted concealment sufficient to establish mail fraud); *United States v. Sloan*, 492 F.3d 884, 890 (7th Cir. 2007) (explaining that a scheme to defraud exists when a defendant "demonstrated a departure from the fundamental honesty, moral uprightness and candid dealings in the general life of the community"); *United States v. Richman*, 944 F.2d 323, 332 n.10 (7th Cir. 1991) (rejecting notion that mail fraud requires the making of a false statement as "an obvious misstatement of the law" "because the mail fraud statute proscribes fraudulent schemes rather than specific misrepresentations to the party to be defrauded").

What is more, even under Defendants' construction, a scheme to defraud can be established not only by false representations, but also through "false or fraudulent pretenses." 18 U.S.C. § 1343. Thus, even if Defendants were correct that the Subject Orders did not constitute actionable misrepresentations, the indictment sufficiently pleads that Defendants induced market participants into transactions that they otherwise would not have executed, under the false pretense that supply and demand were at a certain level when, in fact, they were not. Indictment, Count I ¶ 3; *see United States v. Leahy*, 464 F.3d 773, 789 (7th Cir. 2006) (finding a false pretense sufficient to plead wire fraud when defendant was awarded contracts based on a pretense involving falsely-awarded certifications).

Next, Defendants attempt to distinguish *Coscia* by pointing out that the present indictment does not accuse them of employing a computer program like that used by Coscia. This is important, Defendants posit, because Coscia's computer algorithm eliminated the risk that his large orders would be filled, whereas Defendants' manual trading practices did not.

But the Seventh Circuit in *Coscia* did not require the use of a computer algorithm for a conviction under the commodities fraud statute. Rather, in *Coscia*, the government pointed to the computer program and the fact that it was designed to minimize the execution of the large orders to prove that Coscia had intended to cancel the large orders *when he first placed them—i.e.*, as proof of Coscia's intent to mislead other participants in the market in order to increase the probability of filling his small orders.[6]

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[6] Coscia's computer program was designed to cancel the large orders under three conditions: (1) after a certain amount of time (usually milliseconds after the orders were placed), (2) when a portion of a large order was filled, or (3) when all of Coscia's small orders were filled. *Coscia*, 866 F.3d at 789. As a result, for example, only 0.08% of his large orders on the Chicago Mercantile Exchange were filled, while 35.61% of his small orders were filled. *Id.* at 796. And, on the International Exchange, only 0.5% of Coscia's large orders were filled. *Id.* The government also offered testimony that Coscia's order-to-fill ratio (that is, the average size of the order he posted divided by the average size of the orders filled) was approximately 1,600%, while the ratio for other traders was typically between 91% and 264%. *Id.* at 789.

As for Defendants' contention that, because they traded manually, there was a risk that their Subject Orders would be filled, while Coscia bore no such risk, this is not entirely true. In fact, a portion (albeit small) of Coscia's large orders were filled by other market participants. Certainly, Defendants may be correct that the probability of filling their Subject Orders was greater than the probability of filling Coscia's orders. But exactly what that probability was and whether Defendants were aware of it (and what actions they took in response) are all relevant factors in determining whether Defendants possessed an intent to defraud other market participants when the Subject Orders were placed. At this stage, however, the allegations in the indictment must be taken as true, and it will be up to the jury to decide whether the government has proven beyond a reasonable doubt that Defendants acted with the requisite intent to defraud when posting their orders. *Morissette v. United States*, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.")

The cases cited by Defendants do not dictate a different result. In *Sullivan & Long*, the Seventh Circuit held that the defendant, who had sold short more shares of a company than were outstanding, was not liable for securities fraud because "the plaintiffs could not count on the volume of short sales being capped at the total number of shares outstanding." 47 F.3d at 863. "They were on notice that the sort of thing that did happen might happen … they were not deceived." *Id.* By contrast, here, the indictment alleges that, by submitting large orders that they intended not to fill, Bases and Pacilio artificially moved the market in a way that deceived other market participants. *See Coscia*, 866 F.3d at 800 (distinguishing *Sullivan & Long*).

In *ATSI Communications*, the plaintiff relied upon a pattern of short-selling with accompanying drops in stock price to allege that defendants had fraudulently manipulated the market. 493 F.3d at 96-97. The Second Circuit disagreed. Starting with the unremarkable premise that "short selling—even in high volumes—is not, by itself, manipulation," the court recognized that market deception arises from the fact that investors are misled to believe "that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators." *Id.* at 100 (internal quotations and citation omitted). This is precisely what the government alleges here—that Bases and Pacilio upset the "natural interplay of supply and demand" by using the Subject Orders to inject false supply and demand information into the market. *See id.*

Similarly, in *GFL Advantage Fund, Ltd. v. Colkitt*, the Third Circuit held that a claim of securities market manipulation requires plaintiff "to establish that the alleged manipulator injected inaccurate information into the market or created a false impression of market activity." 272 F.3d 189, 205 (3d

Cir. 2001) (internal quotations and citation omitted). Again, that is what the indictment charges here.[7]

Lastly, the Court finds compelling the *Coscia* court's discussion of *Radley*, 632 F.3d 177, and *CP Stone*, 2016 WL 5934096. *See* 866 F.3d at 797 n.64. There, the Seventh Circuit aptly observed that, in neither case, did the government allege that the defendants had created "the illusion of artificial market movement that included the use of large orders to inflate the price while also taking steps to avoid transactions in the large orders." *Id*. That is precisely the crux of the government's case here.

Before moving on, it is necessary to address Defendants' argument that the Subject Orders could not have deceived other market participants as a matter of law, because the participants would have been aware of the possibility that the Subject Orders had been placed without any intent to fill them. In support, Defendants point to other trading devices—such as "iceberg orders" and "partial-fill orders—that are common trading practices in the commodity futures markets.

[7] *United States v. Finnerty* also is distinguishable, because the government in that case had presented at trial no "proof of manipulation or a false statement, breach of duty to disclose, or deceptive communicative conduct," 533 F.3d 143, 150 (2d Cir. 2008); *see Coscia*, 866 F.3d at 800 (distinguishing *Finnerty*). Here, this is the core of the government's allegations, and whether it can prove it will be left to trial.

In brief, "iceberg orders" apportion large orders into smaller orders, *Coscia*, 866 F.3d at 800 n.80; while "partial-fill orders" are programmed to cancel the balance of an order once a predetermined portion is filled, Def. Pacilio's Mem. at 12. In both cases, the orders are "designed to be executed under certain circumstances." *Coscia*, 866 F.3d at 800. Put another way, the party submitting these types of orders intends to fill the order up until a certain condition is met (if the condition is triggered at all). Defendants hope to analogize their conduct to such orders, noting "the government does not explain why a trader cannot place an order with *both* the intent to cancel in the future *and* a willingness to trade in the meantime." Defs.' Joint Reply at 4, ECF No. 144 (emphasis in original). But that is not the conduct the government challenges here. Rather, what the government claims is that Bases and Pacilio submitted the Subject Orders with the intent to *not* fill them—that is, with no "willingness to trade [them] in the meantime." *See Coscia*, 866 F.3d at 795 ("The fundamental difference is that legal trades are cancelled only following a condition subsequent to placing the order, whereas orders placed in a spoofing scheme are never intended to be filled at all.").

Defendants' second argument flows from the first. They contend that, because the government's case is premised not on affirmative misrepresentations, but material omissions (that is, Defendants' failure to inform the marketplace that they had no intention of filling the Subject Orders when they placed them), the wire fraud counts must be dismissed, because a fraud charge cannot be based upon an omission absent a duty to disclose. But Defendants' crabbed view of the wire fraud statute is incorrect.

Like other circuits, the Seventh Circuit has construed the wire fraud statute broadly. *See United States v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016) ("[T]he wire fraud statute has been interpreted to reach a broad range of activity."); *see also United States v. Greenberg*, 835 F.3d 295, 306 (2d Cir. 2016) (statutory language in wire fraud statute is "broad enough to include a wide variety of deceptions intended to deprive another of money or property") (internal quotations and citation omitted). And, so construed, the statute prohibits "not only false statements of fact but also misleading half-truths and knowingly false promises" and "can also include the omission or concealment of material information, *even absent an affirmative duty to disclose*, if the omission was intended to induce a false belief and action to the advantage of the schemer." *Weimert*, 819 F.3d at 355 (emphasis added). And so, "actionable deception can include false statements of fact, misleading half-truths, deception omissions, and false promises of future action." *Id.* at 357[8]; *see also*

[8] In *Weimert*, the Seventh Circuit recognized the broad reach of the wire fraud statute, but noted that the statute is not without its limits, holding that the statute does not criminalize a person's "lack of candor about the negotiating positions of parties to a business deal" where the parties' negotiating positions were not "likely to affect the decisions of a party on the other side of the deal." 819 F.3d 351, 356-57 (7th Cir. 2016). By contrast, here, Bases's and Pacilio's actions are alleged to have induced other market participants to buy or sell precious met-

*Faruki*, 803 F.3d at 852 (wire fraud requires "the making of a false statement or material misrepresentation, *or* the concealment of a material fact" (citing *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005)) (emphasis added); *United States v. Morris*, 80 F.3d 1151, 1160-61 (7th Cir. 1996)) (mail and wire fraud statutes "apply not only to false or fraudulent representations, but also to the omission or concealment of material information, even where no statute or regulation imposes a duty of disclosure") (internal citations omitted); *United States v. Dial*, 757 F.2d 163, 169 (7th Cir. 1985) (upholding conviction of commodities future brokers for wire fraud because "their trading an unmargined account was an active misrepresentation and hence actionable even without a breach of fiduciary duty"); *United States v. Hollnagel*, 955 F. Supp. 2d 830, 843 (N.D. Ill. 2013) (rejecting an argument that an omission cannot constitute wire fraud in the absence of a duty because "no such absolute requirement exists").[9]

als futures contracts at times, prices, and quantities that they otherwise would not have. Indictment, Count 1 ¶¶ 9-12.

[9] *Reynold v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989), and *United States v. Dick*, 744 F.2d 546, 550 (7th Cir. 1984), do not help Defendants. In *Reynolds*, the Seventh Circuit found "no active or elaborate steps to conceal" or a "failure to disclose part of a larger pattern of lies or half-truths." 882 F.2d at 1253. In *Dick*, the Seventh Circuit affirmed the defendants' convictions of mail fraud, holding, *inter alia*, that even "[r]eckless disregard for truth or falsity is sufficient to sustain a conviction for mail fraud." 744 F.2d at 551.

The indictment at issue claims that Bases and Pacilio engaged in an effort to "deceive other market participants by injecting materially false and misleading information into the … market that indicated increased supply or demand in order to induce market participants to buy or sell … contracts at prices, quantities, and times that they would not have otherwise." Indictment, Count I ¶ 3. They did so, the government says, by submitting large orders even when they intended never to fill them in order to artificially move the market price. These allegations are sufficient to withstand a challenge at the pleading stage, and Defendants' motion to dismiss the wire fraud charge as insufficiently pleaded is denied.

**2. Commodities Fraud**

Next, Defendants argue that the indictment fails to adequately plead commodities fraud. The statute criminalizes executing, or attempting to execute, a "scheme or artifice" (1) "to defraud any person in connection with any commodity for future delivery," 18 U.S.C. § 1348(1), or (2) "to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery," 18 U.S.C. § 1348(2). The indictment charges Defendants with violating both provisions.

As before, Bases and Pacilio argue that their orders presented genuine market risk and would have been executed if accepted and, therefore, cannot constitute fraud as a matter of law. But this is just the same argument presented above, and it fails for the same reasons.

Next, Defendants contend that, in order to plead commodities fraud, there must be an allegation of market manipulation, and open-market orders subject to market risk cannot be manipulative. Def. Bases's Mem. at 9, ECF No. 117; Def. Pacilio's Mem. at 12-13. Defendants, however, fail to cite any support for the notion that 18 U.S.C. § 1348 requires market manipulation. Rather, their argument rests on civil cases interpreting 17 C.F.R. § 240.10b, SEC Rule 10b-5, or 15 U.S.C. § 78i, which explicitly require manipulation. *See*, *e.g.*, *Sante Fe Indus. v. Green*, 430 U.S. 462, 476-77 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 185 (1976); *ATSI Communications*, 493 F.3d at 101; *GFL Advantage Fund*, 272 F.3d at 199; *Sullivan & Long*, 47 F.3d at 864-65; *CP Stone*, 2016 WL 5934096, at *1.

On the other hand, 18 U.S.C. § 1348 by its terms does not. *Compare Coscia*, 866 F.3d at 796-97 (explaining that § 1348 requires fraudulent intent, a scheme or artifice to defraud, and a nexus to a security without requiring manipulation or deception), *with Santa Fe Indus.*, 430 U.S. at 473-74 (explaining that a cause of action under § 10b and Rule 10b-5 succeeds "only if the conduct alleged can be fairly viewed as manipulative or deceptive within the meaning of the statute") (internal quotations and citation omitted), *and ATSI Communications*, 493 F.3d at 101 (explaining that market manipulation under § 240.10b-5 requires six elements, including "manipulative acts").

Finally, Pacilio argues that spoofing cannot constitute grounds for fraud because Congress deliberately chose to create a separate anti-spoofing statute, namely 7 U.S.C. § 6c(a)(5)(C) ("It shall be unlawful for any person to engage in conduct … commonly known to the trade as … "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution.)". He posits that, if Congress had intended spoofing to equate to fraud, "there would be no reason to create an entirely new category of conduct and place it in a section … separate and apart from" the fraud statutes. Def. Pacilio's Mem. at 10.

But this argument rests on the false premise that the indictment equates spoofing to fraud. It does not. Rather, the indictment alleges conduct sufficient to give rise to spoofing *and* fraud. Spoofing is a prosecutable offense under 7 U.S.C. § 6c(a)(5)(C) when someone engages in "bidding or offering with the intent to cancel the bid or offer before execution," but such conduct may also be implicated in a larger scheme where, as here, spoofing was allegedly used in a "scheme to defraud" to obtain money or property by means of "false or fraudulent pretenses, representations, or promises," 18 U.S.C. § 1348. And the notion that the same conduct may be chargeable as multiple different crimes is nothing new. *See*, *e.g.*, *Sloan*, 492 F.3d at 884 (affirming conviction of both mail and wire fraud). What is more, *Coscia* scotches the argument by upholding a conviction of both spoofing and commodities fraud. 866 F.3d at 661. Accordingly, this basis for dismissal also is denied.

### B. Statute-of-Limitations Challenge

Commodities fraud has a statute of limitations of six years. 18 U.S.C. § 3301. Because the indictment was returned on July 17, 2018, the limitations period extends back to July 17, 2012. Here, the indictment alleges that Bases and Pacilio each committed commodities fraud from "June 2009 and continuing through at least in or around January 2014." Indictment Count 2 ¶ 20; *id.* Count 3 ¶ 22. And so, Defendants assert that at least a portion of the commodities fraud counts (presumably, the portion that allegedly took place before July 17, 2012) must be dismissed.

In support, Bases and Pacilio rely on *United States v. Yashar*, 166 F.3d at 875. In that case, the defendant had received wages for ostensibly serving as a City of Chicago committee member from June 1, 1989, until September 1, 1992, when in fact he had performed little to no work during this time. This "ghost payroller" was charged with one count of violating 18 U.S.C. § 666 for misappropriating government property valued at more than $5,000 during a one-year period in which the City of Chicago received more than $10,000 in federal benefits. *Id.* The time period encompassed by the charge was between September 1, 1991, and September 1, 1992, and the operative return date of the indictment was August 13, 1997. Because § 666 has a five-year limitations period, Yashar moved to dismiss the portion of the charge that was based upon conduct prior to August 13, 1992. The district court agreed.

On appeal, both sides acknowledged that the "continuing offense" doctrine enunciated by the Supreme Court in *Toussie v. United States*, 397 U.S. 112, 115 (1970), did not apply.[10] Nonetheless, the government argued that an indictment should be deemed timely so long as a single act within the continuing course of conduct occurred after the limitations cut-off date, even if that act did not satisfy all the elements, or any element in its entirety, of the charged offense within the limitations period. *Id.* at 876. For his part, Yashar asserted that the government must establish that all elements of the crime occurred within the limitations period. *Id.*

The Seventh Circuit rejected both arguments, holding "that for offenses that are not continuing offenses under *Toussie*, the offense is committed and the limitations period begins to run once all elements of the offense are established, regardless of whether the defendant continues to engage in criminal conduct." *Id.* at 879-80. Because it was unclear from the indictment whether the government was alleging that at least $5,000 was taken by Yashar and $10,000 in benefits received by the City before the limitations period had expired, the *Yashar* court

[10] The Supreme Court in *Toussie* held that an extension of the limitations period under the continuing offense doctrine should not be permitted "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing [offense]." 397 U.S. at 115 (internal quotations and citations omitted).

vacated the district court's denial of the motion to dismiss and remanded for further proceedings. *Id*. at 880.

*Yashar* is similar to this case in one respect. The parties here agree that the commodities fraud is not a continuing offense under *Toussie*. But, this is where the similarity ends. Unlike the ghost payrolling crime charged in *Yashar*, the crime of commodities fraud is a scheme offense, and this distinction is fatal to Defendants' position. *Compare* 18 U.S.C. § 1348, *with* 18 U.S.C. § 666. The Court finds *United States v. Longfellow*, 43 F.3d 318 (7th Cir. 1994), instructive.

In *Longfellow*, the government charged the defendant with bank fraud under 18 U.S.C. § 1344, alleging that he had engaged in a scheme to defraud a credit union (where he was the President and Chief Operative Officer) by approving loans to facilitate the sale of properties that he himself owned; failing to properly record the sales; keeping the deeds in his own name, rather than transferring them to the credit union or the purchaser; and concealing his interests from other credit union directors. *Id*. at 319. The indictment listed six separate loans that were closed between April 1982 and February 1984 and alleged a separate refinancing of one of the loans in April 1985 as the "execution" of the scheme. *Id*. at 322.

The indictment was issued in November 1992, and, due to a statutory amendment, could only encompass acts that occurred after August 1984. *Id*. As such, the defendant moved to dismiss the charge, arguing that each of the six loans at issue were outside the limitations period. *Id.* He also argued that the April 1985 refinancing of a previous loan was merely a continuation of a 1983 loan, which was barred, and thus could not extend the limitations period. *Id.* at 324-25. The district court disagreed, and the Seventh Circuit affirmed. *Id.* at 326.

Noting that the bank fraud statute "punishes each execution of a fraudulent scheme rather than each act in furtherance of such a scheme," *id.* at 323 (internal quotations and citations omitted), the Seventh Circuit held that the 1985 refinancing constituted a separate "execution" of the charged bank fraud, because it created a new, independent risk for the credit union. *Id.* at 324-25. And, because the 1985 refinancing was within the limitations period, "[t]he fact that only one or two executions fell within the Statute of Limitations does not detract from the entire pattern of loans' being a scheme, and renders Longfellow no less culpable for the entire scheme." *Id.* at 325.

Here, the government alleges that Bases engaged in a scheme to commit commodities fraud with executions occurring from June 2009 through at least January 2014, and that Pacilio engaged in a scheme with executions occurring from August 2009 through at least October 2014. Indictment Count 2 ¶ 20; *id.* Count 3 ¶ 22. Furthermore, according to the indictment, each execution of the scheme—a number of which occurred after July 17, 2012—created new and different risks for other market participants, and each execution was chronologically and substantively independent with its own function and purpose. *See* Indictment Count 1 ¶ 3; *id.* Count 2 ¶ 19-29; *id.* Count 3 ¶¶ 21-22. Accordingly, if the allegations are proven true, Defendants would be liable for the entire scheme, even if some of the conduct at issue occurred prior to July 2012. *See*, *e.g.*, *Longfellow*, 43 F.3d at 322-25; *United States v. O'Brien*, No. 17 CR 239, 2018 WL 4205472, at *15 (N.D. Ill. Sept. 4, 2018) (finding that at least one execution of a mail and bank fraud scheme falling within the limitations period "brings the entire scheme within the statute of limitations"). Thus, Defendants' motion based upon the statute of limitations is denied.

### C. Defendants' Constitutional Arguments

Defendants next argue that the commodities and wire fraud statutes are unconstitutionally vague as applied to them in violation of the Fifth Amendment's guarantee of fair notice. Pacilio also contends that the anti-spoofing statute, 7 U.S.C. § 6c(a)(5)(C), is an unconstitutional restriction on commercial speech and ensnares truthful speech in a way that is disproportionate to the government's interest in preventing spoofing.

#### 1. Fair Notice Challenge

To satisfy due process, a criminal statute must "'define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Furthermore, a vagueness challenge "not premised on the First Amendment is evaluated as-applied, rather than facially." *United States v. Calimlim*, 538 F.3d 706, 710-11 (7th Cir. 2008) (citing *Chapman v. United States*, 500 U.S. 453, 467 (1991)). And, in conducting this analysis, courts must consider "the statute, either standing alone or as construed" to see if it was "reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997). Moreover, it is important to note that "a scienter requirement in a statute alleviate[s] vagueness concerns." *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (internal quotations and citation omitted).

Defendants contend that applying the commodities and wire fraud statutes to their conduct is void for vagueness, because the statutes had never been applied to spoofing prior to Coscia's indictment in 2014. According to Defendants, to the extent that their alleged spoofing activities predated *Coscia*, they could not have known that this conduct constituted a crime. Defendants also argue that the statutes themselves fail to give notice that spoofing might count as fraud, especially given that Congress categorized spoofing as a "disruptive practice" in 7 U.S.C. § 6c(a)(5)(C), rather than fraud.

The same challenge to the commodities fraud statute was rejected by the district court in *Coscia*, 100 F. Supp. 3d 653 (N.D. Ill. 2015), *aff'd*, 866 F.3d

782 (7th Cir. 2017). Like Defendants here, Coscia claimed an absence of authority "that could have provided reasonable notice that [his] trading activity might be considered a form of fraud at the time of that activity." *Id.* at 661. But the district court "declin[ed] to conclude, based solely on the scarcity of cases interpreting [the commodities fraud statute] that the statute fails to provide a person of ordinary intelligence fair notice of the conduct that it prohibits," finding that the indictment, which alleged false impressions, fraudulent inducement, and tricking others, was "consistent with [a] scheme to defraud …." *Id.*

Similarly, the present indictment alleges that Defendants presented false and misleading information to market participants, inducing them to execute transactions that inured to Defendants' financial benefit. Indictment, Count 1 ¶¶ 2(b)-11. That the fraud also constitutes spoofing is of little moment because the alleged conduct describes a scheme to defraud as defined by the commodities fraud statute and construed by ample case law at the time the conduct took place. Pacilio concedes as much in his brief. Def. Pacilio's Mem. at 14 ("The commodities fraud and wire fraud statutes were actively enforced long before the passage of Dodd-Frank."). Thus, the Court concludes that the statute is sufficiently definite to give an ordinary person notice that such conduct could be charged as commodities fraud. *See Coscia*, 100 F. Supp. 3d. at 661.

Defendants' contention that the wire fraud statute does not provide fair notice falters for the same reason. In pertinent part, the wire fraud statute requirements mirror those of the commodities fraud statute. Both the commodities fraud and wire fraud statutes require a scheme or artifice to defraud. 18 U.S.C. §§ 1343, 1348. In addition, the definition of a scheme to defraud is the same under both statutes. *Compare* Jury Instructions, *United States v. Coscia*, 14 CR 551, ECF No. 85 (defining a scheme to defraud to establish commodities fraud as "a plan or course of action intended to deceive or cheat another"), *with* 7th Cir. Pattern Fed. Jury Instr., Crim. (2012 ed.) for 18 U.S.C. §§ 1341 and 1343 (defining a scheme to defraud to establish wire fraud as "a scheme that is intended to deceive or cheat another"). Accordingly, there is no reason to believe that *Coscia*'s holding as to the commodities fraud statute also would not apply to the wire fraud statute.

It is true, as Pacilio points out, that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope," *see Lanier*, 520 U.S. at 266. But the wire fraud statute makes criminal "a scheme or artifice to defraud … by means of false or fraudulent pretenses, representations, or promises" for the purpose of "obtaining money or property" using electronic communications. 18 U.S.C. § 1343. Regardless of the novelty of the conduct, so long as it falls within the statute's plain language, as is the case here, there is fair notice. *See United States v. Walters*, 711 F. Supp. 1435, 1438 (N.D. Ill. 1989) (rejecting due process challenge where alleged fraud scheme to obtain college scholarships by mailing falsified eligibility information presented a case of first impression). Furthermore, because the statute is not ambiguous as applied to Defendants' conduct, the rule of lenity does not apply. *Lanier*, 520 U.S. at 266 (explaining that the rule of lenity requires *ambiguity* in a criminal statute to be resolved in favor of lenity).

Defendants also cite to *Skilling v. United States*, 561 U.S. at 402-03, and *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012). Both are unavailing. In *Skilling*, the Supreme Court determined, as a matter of first impression, what types of schemes qualified as honest-services fraud. *Skilling*, 561 U.S. at 408-09. In *Fox*, the Supreme Court considered an "abrupt change" in an agency's previous interpretation of a regulation. Here, however, the term "scheme or artifice to defraud" as it appears in federal fraud statutes has been interpreted broadly and consistently over the years. *See*, *e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 377 (2005) (interpreting "scheme or artifice to defraud" expansively to prohibit foreign tax law fraud); *Durland v. United States*, 161 U.S. 306, 313 (1896) (extending wire fraud to "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future").

For these reasons, Defendants' motions to dismiss the indictment on vagueness grounds is denied.

### 2. Commercial Speech Challenge

Next, Pacilio argues that the anti-spoofing statute is an unconstitutional restriction on commercial speech. Commercial speech is "speech that proposes a commercial transaction" and is protected by the First Amendment, albeit to a lesser degree than noncommercial speech. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515-16 (7th Cir. 2014); *see also Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989) ("[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.") (internal quotation marks omitted).

That said, false and misleading commercial speech is not entitled to any First Amendment protection. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980). For this reason, the government "may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity." *Id.* at 563-64 (citations omitted). Only if the speech is "neither misleading nor related to unlawful activity" is the government's regulation power limited. *Id.* at 564.

To guide the lower courts, the Supreme Court in *Central Hudson* developed the following test. First, the court must ask whether the commercial speech in question is lawful and not misleading and whether the asserted government interest in regulating the speech is substantial. *Id.* at 566. If the answer to both of these questions is yes, the court must determine whether the regulation "directly advances" the government's asserted interest and whether it is "not more extensive than necessary to serve that interest." *Id.*

Pacilio argues that the anti-spoofing statute's ban on "bidding or offering with the intent to cancel the bid or offer before execution," 7 U.S.C. § 6c(a)(5)(C), ensnares truthful commercial speech in a way that fails the *Central Hudson* test. But this argument fails for a number of reasons.

As a preliminary matter, Pacilio misapprehends the conduct that the statute prohibits. As the government notes, the anti-spoofing provision prohibits traders from placing orders that "are never intended to be filled at all." *Coscia*, 866 F.3d at 795. This distinguishes such orders from other lawful orders, such as "fill-or-kill" and "stop-loss" orders, that "are designed to be executed upon the arrival of *certain subsequent events*." 866 F.3d at 795 (emphasis in original).[11]

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[11] Pacilio also refers to "hedge," "ping," and "price discovery" orders and contends that they are subject to the anti-spoofing provision because a trader places them with the intent to cancel them before execution. Def. Pacilio's Mem. at 21; Def. Pacilio's Reply Mem. 8–9, ECF No. 145. But he does not elucidate whether such orders "are never intended to be filled at all." Def. Pacilio's Mem. at 21; Def. Pacilio's Reply Mem. 8-9. In fact, from his own description of these orders, the opposite appears to be true. When discussing hedge orders, Pacilio explains that they are placed "for risk management purposes" but are cancelled when the market "move[s] in a favorable direction." Def. Pacilio's Mem. at 21. He explains that ping orders are placed to explore market depth, suggesting that they are

Operating under this faulty understanding, Pacilio next contends that the anti-spoofing statute regulates truthful speech, because all open-market orders accurately reflect to market participants the terms on which they can be filled. But this is the same argument he has made before, just under a different guise. In the scheme described in the indictment, the Subject Orders do not constitute truthful speech, but fraudulent speech. This is so because (it is alleged) Defendants intended not to fill them *at the time that the orders were placed*. Again, this is precisely the type of speech and conduct that the Seventh Circuit considered fraudulent in *Coscia*, 866 F.3d at 787, and fraudulent commercial speech is not entitled to First Amendment protection. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012) ("[F]raudulent speech generally falls outside the protections of the First Amendment[.]).[12]

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cancelled if there was insufficient depth. *Id*. And he states that price discovery orders are placed for the purpose of exploring market liquidity, and, therefore, would presumably only be cancelled if there was insufficient market liquidity. *Id*.

[12] For this reason, Pacilio's reliance upon *Edenfield v. Fane*, 507 U.S. 761 (1994), is misplaced. Def. Pacilio's Mem. at 22; Def. Pacilio's Reply at 7-8, ECF No. 145. In *Edenfield*, the Supreme Court struck down a regulation banning all personal solicitation of customers by accountants, including truthful and nonmisleading communications. *Id*. at 777. The *Edenfield* court, however, distinguished blanket bans from bans of fraudulent or deceptive commercial expression, stating that the government "may ban commercial expression that is fraudulent or deceptive without further justification." *Id*. at 768-69.

Furthermore, Pacilio's argument presumes that the anti-spoofing statute targets speech—that is, the terms of the offer or bid when it is posted. This too is incorrect. The statute is directed not at speech, but at the *conduct* of the trader using the speech, namely, the placing bids or orders in the commodities market with the intent to not fill them at all. Indeed, "it has never been deemed an abridgement of freedom of speech … to make a *course of conduct* illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) (emphasis added). Put another way, the government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.*

Examples of such statutory limitations on speech (or, more accurately, the use of speech) abound. Take, for example, governmental restrictions placed upon "the exchange of information about securities," "corporate proxy statements," or "the exchange of price and production information among competitors." *Id.* (citations omitted).[13] Similarly, here, the

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[13] Just to expand on the last example, when competitors exchange communications regarding the prices that they will charge for competing products, the information is truthful (it must be for the price-fixing conspiracy to succeed), but the act of exchanging such information is prohibited by antitrust laws. *See, e.g., Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 392, 412 (1921) (finding that an industry plan to disclose

anti-spoofing statute does not regulate speech *per se*—*i.e.*, the terms that a trader must use when placing bids or offers—instead, it prohibits the fraudulent conduct of using the instrumentality of speech to create an illusion that supply and demand are at certain levels, when they are not.

For these reasons, Defendants have failed to establish that the anti-spoofing provision is unconstitutional under the *Central Hudson* test.

## IV. Conclusion

For the foregoing reasons, Defendants Bases's and Pacilio's Motions to Dismiss the Indictment are denied.

**IT IS SO ORDERED.** **ENTERED 5/20/20**

*/s/ John Z. Lee*
**John Z. Lee**
**United States District Judge**

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price and quantity information amongst industry members for the alleged purpose of gaining accurate knowledge of market conditions was subject to regulation to avoid using that information to artificially raise prices).

# APPENDIX D

United States Code
Title 7. Agriculture.

7 U.S.C. § 6c(a)(5)

## § 6c Prohibited transactions

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(5) Disruptive practices

It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—

(A) violates bids or offers;

(B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

(C) 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).

## APPENDIX E

United States Code
Title 18. Crimes and Criminal Procedure.

18 U.S.C. § 1343

### § 1343 Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

## APPENDIX F

United States Code
Title 18. Crimes and Criminal Procedure

18 U.S.C. § 1348

### § 1348. Securities and commodities fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

**(1)** 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 section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)); or

**(2)** to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of 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 section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d));

shall be fined under this title, or imprisoned not more than 25 years, or both.