APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 21-2242, 21-2251, 21-2666

[Filed: July 6, 2022]

UNITED STATES OF AMERICA,	)
Plaintiff Appellee,	)
	)
v.	)
	)
CEDRIC CHANU AND JAMES VORLEY,	)
Defendants Appellants.	)
	)

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 18-cr-00035 — **John J. Tharp**, **Jr**., *Judge*.

ARGUED MARCH 29, 2022 — DECIDED JULY 6, 2022

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

FLAUM, *Circuit Judge*. This appeal presents several questions, including whether placing manual "spoofing" orders—here, precious metals orders that two traders, defendants-appellants James Vorley and Cedric Chanu, intended to withdraw before being filled—can amount to wire fraud. We address this question, as well as three issues stemming from the trial.

For the following reasons, we affirm the district court's judgment.

I. Background

A. Factual Background

Deutsche Bank—a global banking and financial services company—employed Chanu and Vorley as precious metals traders. Vorley traded precious metals futures contracts from May 2007 through March 2015 while based in London. Chanu was similarly a precious metals futures contract trader from March 2008 through May 2011 in London and from May 2011 through December 2013 in Singapore.

A futures contract is a legally binding agreement to buy or sell a particular product or financial instrument at an agreed-upon price on an agreed-upon date in the future. Futures contracts are traded on markets designated and regulated by the United States Commodity Futures Trading Commission ("CFTC"). One such commodities marketplace, the CME Group, Inc., consists of four exchanges—including the New York Mercantile Exchange, where palladium futures contracts trade, and the Commodity Exchange, Inc. ("COMEX"), where gold and silver futures contracts trade. CME Group exchanges use an electronic trading platform known as Globex to trade futures contracts from anywhere in the globe. During the time relevant to this appeal, the CME Group operated Globex using trading engines in Illinois.

Traders using Globex place "bids" to buy or "offers" to sell futures contracts at a specified price or level. Between 2008 and 2013, the Globex system permitted traders to obscure certain information about their trades. Instead of displaying *all* orders resting on Globex, as the system does now, the "order book" at this time displayed only a subset of bids and offers—the "best ten bids and best ten price levels up and down." Given this presentation, not all trade details were readily discernable from Globex; a trader could, for example, obscure the full size of his or her intended trade order by placing an "iceberg" order—which shows only a preset fraction of the total intended trade order—to mitigate market movement and detrimental price impacts. Illustrating this concept, if a trader intends to buy a thousand contracts, he or she may elect to show only one hundred at a time; once the first hundred contracts are filled, the next one hundred contracts become visible to other traders, until the full order quantity is filled.

Visible orders impact the market by conveying investors' "intent to participate" in the market at a particular price; these orders also "communicat[e] something about the liquidity in the market." Iceberg orders were a permissible way of minimizing market movement in light of the fact that larger buy orders correlated to larger price responses in the financial market.[1] In the words of the government's expert, "if a

[1] The mitigating impact of "iceberg" orders was discussed at trial. For example, a trader explained that

> If [a trader is] selling 100 lots or 100 contracts of gold, [the trader] would place an iceberg of one. So in the market …

buy order arrives, typically the price of the commodity will move higher. And the larger the buy order that is made visible to market participants, the larger … the price response typically [will be] in the financial market."

COMEX traders could also cancel an order, or the unfilled portion of an order, at any time before it was filled. But, generally speaking, the CME rules do not permit deception; consequently, traders are prohibited from placing orders that they *intend* to cancel before execution. Furthermore, traders at Deutsche Bank, including Chanu and Vorley, received training from Deutsche Bank's compliance department in 2009 explaining that "market manipulation" was prohibited.[2] Deutsche Bank took the position that "[t]rading should never be designed to give a false or misleading impression as to the supply or demand" and "[t]rades should never be executed at abnormal or artificial levels."

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other participants will only see one lot rather than the full hundred-lot size. And the purpose of that was because if [the trader] showed the full 100, the market would be able to see that there's a fairly big sell order, and [the trader] might not get as good a price when … trying to sell it.

[2] The Deutsche Bank training materials noted that "[t]he definition of market manipulation varies from jurisdiction to jurisdiction, but for our purposes, it is any transaction or order to trade which gives or is likely to give a false or misleading impression as to the supply, demand for, or price of one or more investments. Dissemination of information by any means which gives or is likely to give a false or misleading impression."

Turning to the conduct underpinning this criminal case, Chanu and Vorley 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. The government alleged that Chanu and Vorley placed such orders with the intent "to create and communicate false and misleading information regarding supply or demand (*i.e.*, orders they did not intend to execute) in order to deceive other traders" and entice them to react to the false and misleading increase in supply or demand. As noted above, at all times relevant to this case, CME rules prohibited such conduct.

Specifically at issue was Chanu and Vorley's manual "spoofing" conduct, which involved placing "fake bids and offers" to "trick other market participants." Chanu and Vorley's trading colleague, David Liew, who testified against them at trial pursuant to a plea agreement, explained how manual spoofing worked: In an effort to buy something at the lowest possible price, that trader may use spoofing. Spoofing entails "plac[ing] orders opposite of [the] buy order … [with the] intent to have those offers deceive other market participants into thinking that there was more selling than there actually was and so hoping to get a better price on [the] original order." In Liew's words, a spoofing trader tries "to signal that [certain] trades would go through, but [the trader's] intent is actually to cancel them shortly after." Liew testified that, if successful, employing this illusion "would help Deutsche Bank" while "hurt[ing] any other market participants."

Of note, there are times when a trader may "cancel an order for totally legitimate reasons." A client may change their wishes or breaking news may "cause[] [the trader] to think differently about whether a buy or sell was a good idea." Although, as Liew explained, Deutsche Bank had a rule "where there should be only one person active in the market," and that person would be referred to as the "book runner," there were times when Chanu and Vorley placed opposite orders (for example, a sell order placed to facilitate a buy order, and vice versa) in violation of this rule. The rule was intended to avoid "different people placing orders that might confuse each other." If, however, a trader is "the book runner and [the trader's] colleagues are aware that [they are] selling something, and if [the trader] see[s] them buying … and especially if they don't talk to [the trader] about a trade and they're just placing orders very quickly and cancelling, [the trader] has very good reason to believe that those orders placed by them were to assist [the book running trader] buying or selling rather than genuine intent."

The government also presented evidence of Chanu and Vorley's trading patterns and resultant "fill ratios" in an attempt to align their record with the description of spoofing. A "[f]ill ratio is the ratio of the quantity that is filled divided by the quantity that is submitted." Looking to Chanu and Vorley's relative fill ratios, "the fill ratio for the iceberg orders tend[ed] to be high, close to 90 percent, whereas the fill ratios of the visible orders tend[ed] to be quite lower, .2 percent."

The traders communicated amongst themselves via electronic chat. These included Vorley saying "UBS and this spo[o]fing is annoying me … it[']s illegal for a start" and Chanu applauding another trader for tricking the algorithm.

Overall, although the trading mechanics are quite complex, the defendants' actual actions are not in dispute. The focus here is on the interaction between the defendants' actions and the conduct prohibited by relevant criminal statutes.

B. Statutory Background

Defendants were charged with conspiracy to commit wire fraud affecting a financial institution under 18 U.S.C. § 1343; on appeal, however, they argue any trading conduct akin to "manual spoofing" was not criminal prior to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Although the outcome of this appeal turns solely on the wire fraud statute, a brief overview of both statutes helps situate the parties' arguments.

First, and of primary relevance, the federal wire fraud statute was enacted back in 1952. 18 U.S.C. § 1343. Applicable to fraud by wire, radio, or television, the statute states:

> 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 … affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years or both.

Id. Wire fraud affecting a financial institution has a 10-year statute of limitations. 18 U.S.C. § 3293(2) ("No person shall be prosecuted … for a violation of … [§] 1343, if the offense affects a financial institution … unless the indictment is returned or the information is filed within 10 years after the commission of the offense."); 18 U.S.C. § 20 (defining financial institution). The wire fraud statute is expansive and is examined in detail below.

Second, and relevant only for context, the Dodd-Frank Act was enacted in 2010 to reform many facets of our financial regulatory system. Dodd-Frank included an amendment to "prohibited transactions" under the Commodities Exchange Act, 7 U.S.C. § 6c(a)(5)(C), by defining spoofing and explicitly recognizing spoofing as a disruptive practice. The Dodd-Frank Act did not go into effect until 2011, Pub. L. No. 111-203, § 754, 124 Stat. 1376, 1754 (2010), and prosecution for prohibited conduct is time-barred after five years, 18 U.S.C. § 3282.

We turn now to the procedural history that sets the stage for the legal issues raised on appeal.

C. Procedural Background

In an indictment filed on July 24, 2018, the government charged Chanu and Vorley with conspiracy to commit wire fraud affecting a financial institution between 2009 and 2011 in violation of 18 U.S.C. § 1343.

The Speedy Trial Act applies to this prosecution. The Act's protections are triggered when an indictment is filed or the defendant is arraigned, whichever occurs later. 18 U.S.C. § 3161(c)(1). Because the defendants raise a Speedy Trial Act challenge on appeal, we pay close attention to the timeline of proceedings below.

Vorley was arraigned on August 14, 2018; Chanu was arraigned on September 25, 2018. The government and defendants' counsel agreed to defer the next status hearing until November 15, 2018. The district court noted that Speedy Trial Act time was excluded through November 15, 2018, to give counsel the opportunity to obtain and review discovery materials from the government and to consider what pretrial motions may be appropriate. The district court also entered a specific finding that "the ends of justice served by taking this action outweigh the best interest of the public and the defendants in a speedy trial."

On November 15, 2018, Chanu and Vorley filed their motion to dismiss the indictment in full, contending that the indictment failed to state an offense pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). That same day, the district court entered an order stating that "[t]ime will be excluded through briefing and ruling on the defendants['] motion to dismiss pursuant to 18 U.S.C. § 3161(h)(1)(D)."[3]

As relevant to this appeal, Chanu and Vorley's motion to dismiss argued that the indictment failed to sufficiently allege wire fraud because it did not identify a "false statement." They argued that the allegedly fraudulent orders (1) were not "false and misleading representations of supply and demand," (2) that Chanu and Vorley did not, simply by placing an order, implicitly represent to the market that they intended for the order to be filled, and (3) that the government was improperly attempting to prosecute as wire fraud a non-fiduciary's "failure to disclose." Multiple amici, including the Bank Policy Institute, the U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association, and the Futures Industry Association, filed briefs raising concerns that the government's "sweeping" application of the wire fraud statute risks implicating "legitimate, non-fraudulent commercial conduct."

In an extensive, 37-page order issued on October 21, 2019, (about six months after briefing was completed)

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[3] 18 U.S.C. § 3161(h)(1)(D) provides:

> The following periods of delay shall be excluded … in computing the time within which the trial of any such offense must commence: … Any period of delay resulting from other proceedings concerning the defendant, including but not limited to … delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

the district court denied Chanu and Vorley's motion to dismiss. The district court reasoned:

> [D]efendants' arguments come up short in two respects, one legal and one factual. As a question of law, the defendants' argument that a wire fraud conviction requires proof of a false statement is inconsistent with both the history of the wire fraud statute and Circuit precedent. That the indictment alleges no affirmative misrepresentations by the defendants does not mean that the defendants could not have engaged in a scheme to defraud by means of implied misrepresentations. And whether the defendants' Spoofing Orders carried with them any implied misrepresentations is the central fact question presented by the indictment.

As the district court summarized, "[i]n short: Wire fraud does not require proof of affirmative misstatements; implied misrepresentations will also suffice."

Ten days later, on October 31, 2019, the district court held a status hearing where it explained "it would have been great if [the court] could have resolved it [the motion to dismiss] more quickly than [the court] did, but it was a substantial motion, and [the court] could understand the defendants not wanting to invest a ton of resources and money into something while a—I'm trying not to cast aspersions on others, but, you know, this was no ordinary boilerplate motion to dismiss." The district court further noted it would "continue to exclude time in view of the complexity of the case, the need to provide additional discovery and to ensure that the defendants have an adequate opportunity to prepare a defense." The district court found that "the ends of justice in excluding time through [the next status hearing on] November 26 outweigh the public and the defendants' interest in a speedy trial."

The government filed a superseding indictment on November 26, 2019, which expanded the period of the charged conspiracy to 2008–2013. The government described two goals for this superseding indictment: first, to extend the alleged conspiracy period in response to comments made in defendants' motion to dismiss, and second, to add substantive wire fraud counts to focus on specific trading sequences. Count 1 charged Vorley and Chanu with conspiracy to commit wire fraud affecting a financial institution. The remaining sixteen counts encompassed specific alleged incidents of wire fraud.

On January 16, 2020, the defense preserved its objection to the superseding indictment, but did not file another motion to dismiss. The district court confirmed on the record that it would deny a second motion to dismiss the superseding indictment for the reasons explained in its denial of the first motion to dismiss.

On May 20, 2020, Chanu and Vorley filed a motion to dismiss the superseding indictment with prejudice based on an alleged violation of the Speedy Trial Act stemming from "189 days of non-excludable time that elapsed while the defendants' motion to dismiss was pending." This motion argued that no more than 30 days had been automatically excluded after the court took the motion under advisement, per 18 U.S.C.

§ 3161(h)(1)(H).[4] The 189-day period is calculated by defendants from April 25 (thirty days after briefing concluded) to October 31, 2019 (the status hearing when the district court next excluded time under the Speedy Trial Act).

On July 21, 2020, the district court denied defendants' motion to dismiss based on the Speedy Trial Act. The district court noted that "[w]hile courts must make ends-of-justice findings to exclude time under § 3161(h)(7),[5] those findings do not have to be

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[4] 18 U.S.C. § 3161(h)(1)(H) provides:

> The following periods of delay shall be excluded … in computing the time within which the trial of any such offense must commence: … Any period of delay resulting from other proceedings concerning the defendant, including but not limited to … delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

[5] 18 U.S.C. § 3161(h)(7) excludes from time computation

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection *unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of*

entered on the record at the time the continuance is granted." The district court went on to explain in more detail:

> Unfortunately, I did not articulate the ends-of-justice provision as the basis for excluding time going forward from November 15. Instead, I relied on the automatic exclusions of time for the briefing and consideration of pretrial motions. As a matter of administrative efficiency, where an automatic exclusion of time applies, I generally rely on that provision to exclude time rather than making an additional ends-of-justice finding that also provides a basis for excluding time. Eschewing redundancy paid no dividend here, however; a full articulation of my reasoning would have obviated this motion. I compounded the problem, moreover, by erroneously construing the automatic exclusions applicable to the briefing and consideration of motions to extend to the disposition of the motion, whereas § 3161(h)(1)(H) limits the automatic exclusion for consideration of a pretrial motion to 30 days (that is why I cited only § 3161(h)(1)(D) as the basis for exclusion and omitted reference to § 3161(h)(1)(H)). Having misconstrued the duration of the exclusion, I believed the automatic exclusion provided a sufficient basis to exclude time

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> *such continuance outweigh the best interests of the public and the defendant in a speedy trial.*

18 U.S.C. § 3161(h)(7) (emphasis added) (formerly § 3161(h)(8)).

> through the ruling on the motion to dismiss and that there was therefore no need to exclude time pursuant to § 3161(h)(7). That was a mistake, obviously, but not one that prejudiced the defendants. Had I not made that mistake (or had any party noted the Court's error), I unquestionably would have remedied the error by including my determination that the defendants' request to defer other pretrial motions warranted an ends-of-justice exclusion under § 3161(h)(7).

Even though the district court did not make an ends-of-justice finding on the record on November 15, 2018, the district court specifically did so on July 21, 2020. The district court also emphasized that a substantial period of delay had been "unavoidable" due to the restrictions on the court operations necessitated by the COVID-19 pandemic.

Chanu and Vorley's trial was held in September 2020. Relevant to this appeal, the district court overruled the defendants' objection to the admission of Vorley's "spo[o]fing is … illegal" chat. Although the defendants contended that the chat referred to a different kind of spoofing than the spoofing that formed the basis of the criminal indictment, the judge held that the meaning of the chat was a question of fact for the jury.

Furthermore, the district court rejected several of defendants' requested modifications to the jury instructions focused on explaining the term "scheme to defraud" in the wire fraud statute. The district court also declined to give the defendants' proposed "good faith" jury instruction, reasoning that the intent required to prove wire fraud was incompatible with good faith.

The jury deliberated for four days and returned several deadlock notes before acquitting Chanu and Vorley on the conspiracy count. Vorley was convicted of three counts of wire fraud (Counts 2, 8, 10), and Chanu was found guilty of seven counts of wire fraud (Counts 3, 9, 11, 12, 14, 15, and 16). The district court denied defendants' motion for a judgment of acquittal and motion for a new trial, raising many of the same issues now before us on appeal. The district court sentenced Vorley and Chanu to one year and one day of imprisonment.

Chanu and Vorley now appeal.

II. Discussion

On appeal, Chanu and Vorley raise four issues: (1) whether "spoofing" of readily tradeable, at-risk orders that a trader is willing to honor if executed violates the wire fraud statute; (2) whether the district court correctly instructed the jury; (3) whether the district court abused its discretion in admitting Vorley's chat message stating that a competitor bank's "spo[o]fing is … illegal"; and (4) whether this case should be dismissed under the Speedy Trial Act. We address each question in turn.

A. Manual Spoofing and the Wire Fraud Statute

The first issue on appeal is whether Chanu and Vorley's manual spoofing conduct violated the wire fraud statute. The defendants frame the "threshold legal issue" as whether spoofing was "already a crime under the general wire fraud statute"—a statute that significantly pre-dated the relevant provision in Dodd-Frank prohibiting spoofing. *See* Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010); 7 U.S.C. § 6c(a)(5)(C). Chanu and Vorley are challenging the district court's denial of their motion to dismiss the indictment for failure to state a claim as well as the legal sufficiency of the evidence to prove wire fraud.

We "review questions of law in a district court's ruling on a motion to dismiss an indictment de novo." *United States v. White*, 610 F.3d 956, 958 (7th Cir. 2010) (per curiam). An indictment must "(1) state[] the elements of the offense charged; (2) fairly inform[] the defendant of the nature of the charge so that he may prepare a defense; and (3) enable[] him to plead an acquittal or conviction as a bar against future prosecutions for the same offense." *United States v. Miller*, 883 F.3d 998, 1002 (7th Cir. 2018). We also "review de novo the denial of a defendant's motion for acquittal." *United States v. Hernandez*, 952 F.3d 856, 859 (7th Cir. 2020). We will "uphold the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Coscia*, 866 F.3d 782, 795 (7th Cir. 2017). "Given our deference to jury determinations on evidentiary matters, we rarely reverse a conviction for mail or wire fraud due to insufficient evidence." *United States v. Weimert*, 819 F.3d 351, 354 (7th Cir. 2016).

The wire fraud statute, 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 on 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). In 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. *See Neder v. United States*, 527 U.S. 1, 25 (1999).

Defendants contest the applicability of the wire fraud statute in this case, claiming that the government charged them with wire fraud "in order to retroactively criminalize manual spoofing that pre-dated the July 16, 2011 effective date of Dodd-Frank using the 10-year statute of limitations for wire fraud that affects a financial institution." By Chanu and Vorley's formulation, acceptance of the government's theory "would transform the federal wire fraud statute into an all-purpose law for criminalizing violations of exchange rules—or any trading tactics the government deems to be dishonest—because such violations or tactics could always be characterized as implied misrepresentations of good faith." To avoid this outcome, Chanu and Vorley raise two primary arguments. First, they contend that the wire fraud statute requires proof of an affirmative (rather than implied) misrepresentation. And second, even if an implied misrepresentation is enough, the defendants insist that *their* implied misrepresentations—*i.e.*, the implied misrepresentation that Chanu and Vorley wanted to fill, not cancel, their spoofing orders—could not be material.

To answer whether this manual spoofing conduct violated the wire fraud statute, we ask two questions: Was there a scheme to defraud by means of false representations or omissions, and were such false representations or omissions material? Answering both questions in the affirmative, we conclude Chanu and Vorley's conduct was within the reach of the wire fraud statute.

1. Scheme to Defraud by Means of False Representation or Omission

In determining the scope of wire fraud, we begin with the statutory formulation of our first prong of inquiry: "scheme or artifice to defraud … by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. In *United States v. Coscia*, 866 F.3d 782, we previously considered whether spoofing amounts to a "scheme to defraud," although under a similar, but not identical, statute—the commodities fraud statute. Acknowledging the statutory differences at play, we separately analyze "scheme to defraud" and "by means of false representation."

Beginning with "scheme to defraud," the plain meaning of "scheme" is "[a] systemic plan; a connected or orderly arrangement, esp[ecially] of related concepts" and "[a]n artful plot or plan, usu[ally] to deceive others." *Scheme*, Black's Law Dictionary (11th ed. 2019). The plain meaning of "defraud" is "[t]o cause injury or loss to (a person or organization) by deceit; to trick (a person or organization) in order to get money." *Defraud*, Black's Law Dictionary (11th ed. 2019).

Turning to the specifics of the trading conduct in this case, our decision in *Coscia*, 866 F.3d 782, is on point. In *Coscia*, the government alleged that the defendant "commissioned and utilized a computer program designed to place small and large orders simultaneously on opposite sides of the commodities market in order to create illusory supply and demand and, consequently, to induce artificial market movement." 866 F.3d at 785. Noting that the defendant, Michael Coscia, "engaged in ten weeks of trading during which he placed orders with the clear intent to cancel those orders prior to execution," this Court concluded that the defendant intended to inflate and deflate the price of certain commodities and, thus, his conduct amounted to commodities fraud. *Id.* at 803.

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." *Id.* at 797. Nonetheless, Chanu and Vorley attempt to distinguish *Coscia*. On its facts, they note Coscia used a computer algorithm to engage in high-frequency trading, *id.* at 786 ("a mechanism for making large volumes of trades in securities and commodities based on trading decisions effected in fractions of a second"), rather than the manual trades now before us. Because they were engaged in manual trading, Chanu and Vorley argue that their trades—unlike Coscia's—were actually tradable due to the length of time they remained active prior to cancellation. Speed at which the spoofing occurred aside, however, we still rejected Coscia's defense that he "placed real orders that were exactly that, orders that were tradeable," *id.* at 790, 797—the same defense Chanu and Vorley now employ.

Chanu and Vorley also attempt to distinguish *Coscia* on statutory grounds. As noted, Coscia was not charged under the wire fraud statute now before us; instead, he was convicted of commodities fraud under 18 U.S.C. § 1348(1).[6] Under the wire fraud statue, "[a] scheme to defraud requires the making of a false statement or material misrepresentation, or the concealment of [a] material fact." *Powell*, 576 F.3d at 490 (alteration in original) (citation and internal quotation marks omitted). Under the commodities fraud statute, by contrast, "[f]alse representations or material omissions are not required." *Coscia*, 866 F.3d at 796. Defendants push for a clear distinction on those underlying statutory grounds. We note, however, that the commodities fraud statute, 18 U.S.C. § 1348, was modeled on the mail and wire fraud statutes—as evidenced by its text and legislative history. *Id.* at 799 & n.71 ("Several courts have recognized that because the text and legislative history of 18 U.S.C. § 1348 clearly establish that it was modeled on the mail and wire fraud statutes, an analysis of Section 1348 should be guided by the caselaw construing those statutes." (citation and internal quotation marks omitted)); *see*

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[6] Coscia was also convicted of violating the anti-spoofing provisions of the Commodity Exchange Act, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2). That conviction is not relevant for purposes of our analysis.

also United States v. Doherty, 969 F.2d 425, 429 (7th Cir. 1992) (holding that "scheme to defraud" has a consistent meaning between 18 U.S.C. §§ 1341 [mail fraud], 1343 [wire fraud], and 1344 [bank fraud]). And the jury instructions we approved in *Coscia* were adapted from our pattern jury instructions for mail, wire, and carrier fraud. 866 F.3d at 799.

Today, we need not decide whether the phrase "scheme to defraud" bears a wholly identical meaning in both the commodities fraud and the wire fraud statutes. 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." Thus, the fact that Coscia was convicted of commodities fraud, and Chanu and Vorley were convicted of wire fraud, is a distinction without a meaningful difference, at least in this case.

Turning to the remaining statutory language, we analyze whether real, at-risk orders placed with the intent to cancel amount to "means of false or fraudulent pretenses, representations, or promises" as stated in 18 U.S.C. § 1343. At the outset, we note that "false representation" encompasses a range of conduct. Beyond affirmative misrepresentations a defendant knows to be false, the Supreme Court has explicitly held that a material *omission* can amount to wire fraud. *See Neder*, 527 U.S. at 24–25. Failure to give the whole story may also be fraud, especially when a defendant actively conceals information. *Powell*, 576 F.3d at 491. Finally, "[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 misleading and the disadvantage of the misled." *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005) (some alterations in original) (quoting *Emery v. Am. Gen. Fin.*, 71 F.3d 1343, 1346 (7th Cir. 1995)). An implied misrepresentation is simply an omission by another name.

Defendants argue that their readily tradeable bids and offers are not rendered "false" by their subjective intent to cancel. We agree that by simply placing an order, a trader is not certifying it will never be cancelled. Instead, the order placement signals a trader's intent to buy or sell. By 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. We remain unconvinced by defendants' arguments to the contrary.

Thus, we find Chanu and Vorley's actions amounted to a scheme to defraud by means of false representations or omissions.

2. Materiality

We turn finally to the question of materiality. Defendants argue that even if their actions amounted to a misrepresentation or omission, those actions cannot be deemed material for the purposes of the wire fraud statute. Wire fraud "requires a *material* misrepresentation or omission." *Neder*, 527 U.S. at 22. In general, "a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 16.

The record clearly establishes that traders employing manual spoofing do so with the aim (and effect) of influencing other actors in the trading space. Defendants' former colleague Liew testified that the spoofing illusion "would help Deutsche Bank" while "hurt[ing] other market participants." Such action is neither customary nor relatively harmless. *See Weimert*, 819 F.3d at 357 (outlining the bounds of criminalizing deceptive misstatements or omissions about a buyer or seller's negotiating position). Thus, there is no question the traders' implied misrepresentations were material.

* * *

In summary, we conclude that the district court correctly denied defendants' motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v) because manual spoofing of this kind falls under the wire fraud prohibition, and we further reject the defendants' contention that the evidence was legally insufficient to prove wire fraud. We are not categorically "unsympathetic to the … commentary regarding the 'expansive glosses' on the mail and wire fraud statutes that have led to their liberal use by federal prosecutors," *Weimert*, 819 F.3d at 371–72 (Flaum, J., dissenting), but the inquiry into the reach of the wire fraud statute remains fact-specific. Here, the facts indicate defendants' conduct falls within the ambit of the wire fraud statute.

B. Jury Instructions Regarding Intent to Deceive and Good Faith

The second issue on appeal stems from the district court's order denying the defendants' request to modify its jury instructions explaining the term "scheme to defraud" and to issue a good-faith instruction.

"We review challenges to jury instructions de novo." *Coscia*, 866 F.3d at 799. "Nevertheless, '[t]he district court is afforded substantial discretion with respect to the precise wording of instructions so long as the final result, read as a whole, completely and correctly states the law.'" *Id.* (quoting *United States v. Marr*, 760 F.3d 733, 743 (7th Cir. 2014)).

The district court instructed the jury that a "scheme to defraud" is "a scheme that is intended to deceive or cheat another and to obtain money or property of another by means of materially false or fraudulent pretenses, representations, or promises." William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, 541 (2020 ed.). Chanu and Vorley sought three changes to the jury instructions: (1) the deletion of the word "deceive" from the instruction recounted above; (2) an additional instruction to the jury that "misrepresentations amounting only to a deceit do not meet a definition of a scheme to defraud"; and (3) an additional "good faith" pattern instruction. We address each requested change in turn.

Little time needs to be spent discussing the first two issues relating to "deception." Defendants argue that a "mere scheme to 'deceive' or 'trick' cannot support a wire fraud conviction without some accompanying intent to harm the victim of the scheme." But, the jury instruction incorporates that logic: You need deception, and you need an intent to cause loss of money or property, *i.e.*, intent to harm. The provided instruction clearly delineates between "deceptive conduct that is fraudulent" and "deceptive conduct that is not fraudulent." The defendants' argument that the repeated use of "the disjunctive 'deceive or cheat' … convey[ed] to the jury that a scheme to 'deceive' was itself sufficient to convict" is cherry-picking the center of the instruction. But we will "reverse only if the instructions *as a whole* do not correctly inform the jury of the applicable law and the jury is misled," *Marr*, 760 F.3d at 743 (emphasis added), so defendants' argument is unconvincing.

Next, the district court decided to exclude the good faith instruction. The court below felt the "proposed good faith instruction was unnecessary and would potentially confuse the jury because what can be argued as good faith can also be argued as the absence of evidence of intent to defraud—a point the Seventh Circuit has made in several cases affirming the denial of a good faith instruction in fraud cases." The district court explained that to warrant a good faith instruction, a trader "would have to believe that it was permissible for them to devise a scheme intended to obtain money or property from another by use of materially false or misleading information" and expressed skepticism that this could be done in good faith. At trial, defense counsel responded that "[e]ven if it's not logically possible, the jury is going to be talking about this in the jury room."

The district court's conclusion was based on our decisions in *United States v. Johnson*, 874 F.3d 990, 1002 (7th Cir. 2017) and *United States v. Lunn*, 860 F.3d 574, 579–80 (7th Cir. 2017). *Johnson* held specifically that "[a] good faith instruction is not required where lack of good faith is part of the charge." 874 F.3d at 1002. The *Johnson* defendants were convicted of crimes, including wire fraud, that required the jury to find bad faith; they therefore were not entitled to an additional good faith instruction. *Id.* Similarly, in *Lunn*, this Court held that "an action taken in good faith is on the other side of an action taken knowingly" and thus "it is impossible to intend to deceive while simultaneously acting in good faith." 860 F.3d at 580.

The defendants' attempts to factually distinguish *Johnson* and *Lunn* are unconvincing. *Lunn* involved a conviction for bank fraud, and *Johnson* involved a conviction for wire fraud; "scheme to defraud" bears the same meaning between these two statutes. *Doherty*, 969 F.2d at 429. In both cases, the requested jury instruction (good faith) was the same. Given these constants, the rule is clear, and Chanu and Vorley cannot demonstrate that "the failure to include [the good faith] instruction … den[ied] the defendant[s] a fair trial." *See United States v. Douglas*, 818 F.2d 1317, 1320–21 (7th Cir. 1987) (holding "that a defendant is entitled to an instruction on his or her theory of defense if: the defendant proposes a correct statement of the law; the defendant′s theory is supported by the evidence; the defendant′s theory of defense is not part of the charge; and the failure to include an instruction on the defendant′s theory of defense in the jury charge would deny the defendant a fair trial"). Today we address only the exclusion of a good faith instruction in the case before us. Given the substantial deference afforded to a district court in formulating the language of a jury instruction, this opinion should not be read to preclude the inclusion of such an instruction in a future case. *See United States v. Brandon*, 50 F.3d 464, 468 (7th Cir. 1995) (holding no error in giving the jury a good faith instruction for a defendant charged with four counts of wire fraud).

For these reasons, we hold there was no error in excluding the "good faith" instruction.

C. Admissibility of Electronic "Spoofing" Messages

The third issue on appeal relates to defendants' motion *in limine* asking the court to exclude certain electronic communications using the word "spoof."[7] We look to whether this evidence was improperly admitted.

"All evidentiary questions begin with [Federal Rule of Evidence] 402, which contains the general principle that '[r]elevant evidence is admissible' and '[i]rrelevant evidence is not.'" *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (en banc) (quoting Fed. R. Evid. 402). Evidence is relevant if it "is both probative

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[7] Although there are other arguably relevant chats, the sole focus of the appellants' brief is on the "spo[o]fing … is illegal" chat. Because any "[u]ndeveloped arguments are waived on appeal." *Vesey v. Envoy Air, Inc.*, 999 F.3d 456, 464 (7th Cir. 2021), we focus only on this single chat, rather than the series of chats identified by the government using search terms such as "spoof," "manipulate," and "help."

(having 'any tendency to make a fact more or less probable than it would be without the evidence') and material (the fact must be 'of consequence in determining the action')." *Id.* (quoting Fed. R. Evid. 401). Even if evidence is admissible, however, it "may be excluded under Rule 403," which "gives the district court discretion to exclude relevant evidence if its probative value is "substantially outweighed by a danger of ... unfair prejudice." *Id.* at 856–57 (quoting Fed. R. Evid. 403). As a rule, "[w]e give special deference to a district court's evidentiary rulings, and we reverse these rulings only if no reasonable person could take the judge's view of the matter." *United States v. Pulliam*, 973 F.3d 775, 782 (7th Cir. 2020) (citations and internal quotation marks omitted).

Prior to the start of trial, the government indicated it intended to offer electronic chat messages between precious metals traders. Chanu and Vorley moved *in limine* to preclude the admission of chat evidence under Federal Rules of Evidence 401 and 403. On appeal, they challenge only the admission of one chat, dated October 2, 2007. In it, Vorley wrote: "UBS and this spofing [*sic*] is annoying me … its [*sic*] illegal for a start."

Defendants contend this chat does not relate to the same variety of spoofing at issue in this case, but instead refers to an agreement that the major banks had with each other where one bank could call another bank and ask for a two-way price to either buy or sell precious metals in preset amounts. Although this was a "gentlemen's agreement," banks would sometimes use the calls "to make [a trader] think that they were a buyer when they were really a seller[.]" This risked leaving the other banks feeling "duped" into giving a "bad" price.

The district court concluded that the meaning of the chat was an issue of fact for the jury. The district court stated:

> If it's as clear as you say that this refers to another practice, then, No. 1, the jury should have no trouble understanding that point; and, No. 2, I think it[] … may backfire on the government if it's that clear. But we're having a trial right now about whether the defendants engaged in illegal conduct, part of which there is some evidence is referred to as spoofing. It is a fact question as to whether that occurred or not, and a defendant using the term in a discussion about illegal conduct I think is a sufficient predicate to put the question before the jury.

Defendants characterize the chats as "irrelevant and prejudicial." By their formulation, had these electronic chats been excluded, they "would likely have been acquitted across the board." The government, by contrast, argues that even if the chats in question referred to a different variety of spoofing, the chats (1) showed Vorley knew a different variety of spoofing (over-the-counter market) was illegal, (2) showed Vorley's consciousness of guilt, and (3) cast doubt on Vorley's past statement to compliance officers (specifically the explanation that his use of "spoof" mainly referred to a game the traders played to decide who would get breakfast or coffee).

The district court correctly determined that the information in question was relevant for the reasons articulated by the government. *See* Fed. R. Evid. 401; *Gomez*, 763 F.3d at 853. Moreover, under the applicable deferential review standard, a reasonable person could agree that the chat passed muster under Rule 403, as well. Evidence will only be excluded under Rule 403 if its probative value "is substantially outweighed by the risk of unfair prejudice." *Gomez*, 763 F.3d at 860. "Recognizing that 'most relevant evidence is, by its very nature, prejudicial, we have emphasized that evidence must be unfairly prejudicial to require exclusion.'" *United States v. Boros*, 668 F.3d 901, 909 (7th Cir. 2012) (some internal quotation marks omitted) (quoting *United States v. Hanna*, 630 F.3d 505, 511 (7th Cir. 2010)). "Evidence poses a danger of 'unfair prejudice' if it has 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *United States v. Rogers*, 587 F.3d 816, 822 (7th Cir. 2009) (quoting Fed. R. Evid. 403 advisory committee's note on proposed rules). Because the defendants had ample opportunity to present evidence and argue to the jury that their interpretation of the chat was the correct one, the district court did not err when it held that the chat was not *unfairly* prejudicial.

D. Speedy Trial Act Challenge

The final issue on appeal is defendants' challenge to the district court's order denying defendants' motion to dismiss based on an alleged violation of the Speedy Trial Act. "We review the district court's legal interpretations of the [Speedy Trial] Act de novo, and its decisions to exclude time for an abuse of discretion." *United States v. Parker*, 716 F.3d 999, 1005 (7th Cir. 2013) (alteration in original) (quoting *United States v. Wasson*, 679 F.3d 938, 943 (7th Cir. 2012)). "Absent legal error, we will reverse the district court's decision to exclude time only where the defendant can show both an abuse of discretion and actual prejudice." *United States v. Ramirez*, 788 F.3d 732, 735 (7th Cir. 2015).

The Speedy Trial Act of 1974 governs the timely commencement of a federal criminal trial after a defendant is charged or makes an initial appearance. The Act provides that

> the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1). Recognizing, however, "that criminal cases vary widely and that there are valid reasons for greater delay in particular cases[,] .... the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." *Zedner v. United States*, 547 U.S. 489, 497 (2006). As relevant here, § 3161(h)(1)–(6) provides for certain automatic exclusions. *See Parker*, 716 F.3d at 1006 ("[P]eriods of delay excludable under § 3161(h)(1)–(6) may be *automatically* excluded if the specified conditions are present" (alteration in original)

(citation omitted)). *But see Bloate v. United States*, 559 U.S. 196, 213–14 (2010) (holding that time granted to prepare pretrial motions in a criminal case is not automatically excludable for purposes of the Speedy Trial Act but instead requires case-specific, ends-of-justice findings). But, "[m]uch of the Act's flexibility is furnished by [§ 3161(h)(7)], which governs ends-of-justice continuances …." *Zedner*, 547 U.S. at 498. An exclusion under § 3161(h)(7) is not automatic but instead "requires specific findings." *See Bloate*, 559 U.S. at 213. Section § 3161(h)(7) provides, in relevant part:

> (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> (B) The factors, among others, which a judge shall consider in determining whether to grant

a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

....

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

In summary, "[t]his provision permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial." *Zedner*, 547 U.S. at 498–99. In practice, "[t]his provision gives the district court discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs." *Id.* at 499.

The parties take opposing positions on the question of whether § 3161(h)(7) requires an ends-of-justice finding on the record at the time of granting the continuance or whether a post-hoc explanation satisfies the on-the-record finding requirement. Supreme Court and Seventh Circuit precedent provide a clear answer to this question.

In *Zedner*, the Supreme Court stated that "[a]lthough the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance (the continuance can only be 'granted … on the basis of [the court's] findings'), the Act is ambiguous on precisely when those findings must be 'se[t] forth, in the record of the case.'" 547 U.S. at 506–07 (some alterations in original). "However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2)." *Id.* at 507. "The best practice, of course, is for a district court to put its findings on the record at or near the time when it grants the continuance." *Id.* at 507 n.7; *see also United States v. Adams*, 625 F.3d 371, 380 (7th Cir. 2010) (noting that the "prudent course" for ends-of-justice findings is for the district court to "put its rationale on the record well before [the defendant] s[eeks] dismissal of the indictment on speedy trial grounds"). Our decision in *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008), reaffirmed that "the district court is not required to make the ends of justice findings contemporaneously with its continuance order." *Id.* at 830; *see also Adams*, 625 F.3d at 380 ("The fact that in one instance the court made that [ends of justice] finding (and stated the reasons for it) in retrospect rather than contemporaneously with its order granting the continuance is immaterial; the Supreme Court has indicated that this is permissible ....").[8]

[8] Defendants rely on *United States v. Janik*, 723 F.2d 537 (7th Cir. 1983) for the proposition that "retroactive continuances" are improper, as the "continuance itself must be granted *before* the period sought to be excluded begins to run." *Id.* at 545. Not only does this case significantly pre-date the Supreme Court's decision in *Zedner*, but the highlighted language also addresses a case where the district judge entered no continuance at all, an issue not present in defendants' case. We agree that "[a] district judge cannot wipe out violations of the Speedy Trial Act after they have occurred by making the findings that would have justified granting an excludable-delay continuance before the delay occurred," *Janik*, 723 F.2d at 545, but in this case, the district court had granted a continuance on November 15, 2018, before the period to be excluded began to run. As the government points out, "although [the district court] cited the wrong basis for the continuance, the court unquestionably 'granted' the continuance before the excluded period."

To briefly summarize the timeline of the relevant proceedings in the alleged delay period, the defendants' filing of their motion to dismiss automatically tolled the speedy trial clock as of November 15, 2018, until there had been a hearing and all necessary submissions were before the court plus thirty days. *See* 18 U.S.C. § 3161(h)(1)(D); *United States v. Piasecki*, 969 F.2d 494, 500 (7th Cir. 1992) ("Once there has been a hearing and/or all necessary submissions are before the court so that the court has been deemed to have taken the matter under advisement, unless such a period is unreasonable, the court generally has up to thirty additional days of excludable delay to decide the motion"). In this case, briefing was concluded on March 26, 2019. The 30-day excluded period ran through April 25, 2019. Defendants count April 25, 2019, through the next status hearing on October 31, 2019 (where ends of justice findings were clearly made), as 189 days of non-excludable delay.

Although articulating the ends-of-justice finding and entering the continuance at the same time is "undoubtedly the 'best practice,' it is not the *only* permissible practice." *Wasson*, 679 F.3d at 946. "*Zedner* and its progeny support our interpretation that a court's ends-of-justice findings need not be articulated contemporaneously on the record." *Id.*; *see United States v. Hills*, 618 F.3d 619, 628 (7th Cir. 2010) ("As mentioned, § 3161(h)(7)(A) requires a court excluding time on ends-of-justice grounds to articulate its findings on the record. A court need not do so contemporaneously with the exclusion, but it must do so by the time it rules on a defendant's motion to dismiss." (citation omitted)).

The district court does not appear to have followed the "best practice" or the "prudent course" in relying on the wrong exclusionary hook on November 15, 2018; however, the court ultimately made on-the-record ends-of-justice findings by the time it ruled on the defendants' motion to dismiss on July 21, 2020. There is no indication that the court was continuing the case on account of a "crowded calendar, a factor wholly impermissible for consideration in support of an ends of justice continuance," *Ramirez*, 788 F.3d at 735; *see* 18 U.S.C. § 3161(h)(7)(C), and there is no indication that this was an unreasonable continuance given the litigants' requests and the complexity of the case, *see, e.g.*, *United States v. Lattany*, 982 F.2d 866, 881 (3d Cir. 1992) ("We think [open-ended] continuances can be reconciled with the Speedy Trial Act provided they are not permitted to continue for an unreasonably long period of time."). Instead, the district court stated that, had the underlying error been brought to its attention, it "unquestionably" would have given "a full articulation of [its] reasoning," including that the defendants' request to defer other pretrial motions warranted a § 3161(h)(7), ends-of-justice exclusion.

Finding no legal error in the district court setting forth, on the record, an ends-of-justice rationale for excluding time, we hold the district court did not abuse its discretion by excluding the time needed to resolve defendants' Rule 12(b)(3)(B)(v) motion in a written opinion.

III. Conclusion

For the reasons explained above, we AFFIRM the judgment of the district court.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 21-2242, 21-2251, 21-2666

[Filed: August 4, 2022]

Before

JOEL M. FLAUM, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
CEDRIC CHANU and JAMES VORLEY,)
Defendants-Appellants.)
)

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:18-cr-00035

John J. Tharp, Jr.
Judge.

O R D E R

On consideration of the petition for rehearing en banc filed by the defendants-appellants in the above cases on July 20, 2022, no judge in active service has requested a vote thereon. The petition is therefore **DENIED**.

APPENDIX C

UNITED STATES DISTRICT COURT
Northern District of Illinois

Case Number: 1:18-CR-00035(1)

USM Number: 52195-424

[Filed: June 30, 2021]

UNITED STATES OF AMERICA	)
v.	)
	)
JAMES VORLEY	)
	)

JUDGMENT IN A CRIMINAL CASE

Roger Anson Burlingame
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☒ was found guilty on count(s) Two Eight and Ten of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:1343.F Fraud By Wire, Radio, Or Television and 2	05/05/2011	2s
18:1343.F Fraud By Wire, Radio, Or Television and 2	05/05/2011	8s
18:1343.F Fraud By Wire, Radio, Or Television and 2	05/05/2011	10s

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☒ **All remaining Counts** ☒ are dismissed on the motion of the United States

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

June 21, 2021
Date of Imposition of Judgment

/s/ John J. Tharp, Jr.
Signature of Judge

John J. Tharp, Jr., United States District Judge
Name and Title of Judge

6/30/21
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **1 year and a day as to as to Counts Two, Eight and Ten of the superseding Indictment; each Count to run concurrently**.

☒ The court makes the following recommendations to the Bureau of Prisons: The Court recommends to the Bureau of Prisons that

Mr. Vorley be designated to FCI Allenwood-Low, in Allenwood, Pennsylvania, for Institutional Hearing Program (IHP) purposes.

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

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

☐ at on

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2:00 pm on 9/20/21

- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:
____
____
____

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

____
UNITED STATES MARSHAL

By ____________________________________
DEPUTY UNITED STATES MARSHALS

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$300.00	$.00	$.00	$.00	$.00

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

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

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

☐ Restitution amount ordered pursuant to plea agreement $

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

6 may be subject to penalties for delinquency and default, pursuant to **18 U.S.C. § 3612(g).**

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

☐ the interest requirement is waived for the

☐ the interest requirement for the is modified as follows:

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $300 due immediately.

☐ balance due not later than , or

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

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

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

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

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

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

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

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

☐ Joint and Several

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

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX D

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

No. 18 CR 00035

[Filed: March 18, 2021]

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JAMES VORLEY and CEDRIC CHANU,)
)
Defendants.)
)

Judge John J. Tharp, Jr.

MEMORANDUM OPINION AND ORDER

James Vorley and Cedric Chanu were charged in a superseding indictment with conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349, and, collectively, sixteen substantive counts of wire fraud affecting a financial institution, in violation of 18 U.S.C. §§ 1343 and 2. *See* Superseding Indictment, ECF No. 127. Following a two-week jury trial, each defendant was found guilty on several substantive wire fraud counts—Vorley on three, and

Chanu on seven—but acquitted as to the conspiracy and remaining wire fraud charges. Both defendants have moved for a judgment of acquittal or, in the alternative, a new trial. Their challenges range from insufficiency of the evidence, to the wire fraud statute's unconstitutionality as-applied in this case, to various errors in the jury instructions and evidentiary objections, to juror coercion during deliberations owing to the COVID-19 pandemic. The evidence was sufficient to support the jury's verdicts, however, and none of the defendants' arguments for a new trial are meritorious, so their Rule 29 and Rule 33 motions [350], [355], [354], and [361] are denied.

BACKGROUND

Defendants James Vorley and Cedric Chanu are former Deutsche Bank precious metals traders. Vorley worked in the Bank's London offices between May 2007 and March 2015; Chanu worked in both London (March 2008 to May 2011) and Singapore (May 2011 to December 2013). The superseding indictment[1] charged that from March 2008 through approximately June 2013, Vorley and Chanu knowingly and intentionally devised a scheme to defraud other precious metals futures traders on the Chicago Mercantile Exchange ("CME")'s Commodity Exchange, Inc. ("COMEX"). Superseding Indictment ¶ 1. Their alleged scheme involved placing so-called "Fraudulent Orders" or "spoof" orders in the COMEX order book via the electronic trading system "Globex"—these orders were

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[1] All references to the indictment are to the superseding indictment.

wire communications for the purpose of the statute. *Id.* These orders were fraudulent, the government alleged, because the entry of an order on the exchange carries with it an implicit representation that the party placing the order intended for the order to be executed. The prosecution's theory was that Vorley and Chanu instead intended to cancel the trades before they were executed and, in doing so, aimed to create a false impression of supply and demand in the market and induce other traders to execute on the defendants' opposite-side "Primary Orders" at "prices, quantities, or times that they otherwise would not have." *Id.* ¶¶ 4-5, 21.

The government alleges the scheme worked as follows: if Vorley or Chanu wanted to *buy* gold futures at a price lower than the prevailing market price, he would place large spoof orders to *sell* gold futures at above-market prices; as other market participants reacted to the arrival of large sell orders, the prevailing price of the contract at issue would fall and the defendant's primary buy orders would be filled at an artificially low price. If Vorley or Chanu wanted to sell gold futures at a price above the market, on the other hand, he would place large, visible spoof orders on the buy side; the market would climb toward his primary sell order and that order would be filled at an artificially high price. In either scenario, the defendant would cancel the large spoof orders if his primary order was executed on or if the market got too close that he risked "getting given"—having an unwanted fill of the visible buy or sell order.[2] The defendants' primary orders generally were "iceberg" orders[3] that revealed only a portion of the defendants' full trading interest to the market, while the "spoof" orders took the form of either a single, large visible order, often for one hundred contracts or more, or groups of visible ten-lot orders, layered at slightly different price points.

The government alleged that the defendants variously executed this scheme individually, together, and, at times, in coordination with other Deutsche Bank precious metals traders, including David Liew, who worked for the bank in Singapore from December 2009 until February 2012, pled guilty to participating in the scheme, and testified at trial. At the center of the prosecution's presentation at trial were sixty-one trading episodes—each of which, it alleged, involved at least one of the defendants placing "spoofing" orders on the opposite side of the market of a smaller "iceberg" order, on their own or in coordination with another Deutsche Bank trader, in order to fill the iceberg orders at a better price than the price at which the market had previously been trading.

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[2] *See, e.g.*, Tr. 717:12-718:1 (David Liew explaining that when he warned Chanu not to "get given," he was "warn[ing] him that his bids were fairly close to the market and some of that might get executed" which Liew knew Chanu did not want to happen).

[3] The evidence established that "iceberg" orders are orders in which only a portion of the bid or offer (the tip of the iceberg) is visible to other traders, with the balance (like the submerged mass of an iceberg) hidden from view. The evidence established that iceberg orders were permitted by the CME's rules. Tr. 376:8-377:2.

Over the course of six days of evidence presentation, the jury heard from a variety of witnesses during the government's case: John Scheerer, a senior director in CME Group's Global Command Center; David Liew, the defendants' former Deutsche Bank colleague and alleged coconspirator in the charged conduct; Professor Kumar Venkataraman, a professor of finance at Southern Methodist University and an expert on financial markets; Anand Twells, of Citadel Securities; Travis Varner, of Quantlab Financial; Michael Koplowitz, a Deutsche Bank compliance officer; Special Agent Jonathan Luca, the FBI case agent who led the FBI's investigation in this case and who is himself a former futures trader; Maria Garibotti, a consultant with Analysis Group, the group that designed the government's charts and performed the underlying analysis of the defendants' trading data; and Charles Graf, a graphics design professional who created one of the government's demonstrative exhibits. The defendants called no witnesses.

The trial took place in a courtroom modified to permit the observance of strict COVID-19 protocols. However, on the morning of September 22, the last day of evidence presentation, a juror was hospitalized with symptoms consistent with COVID-19.[4] He was excused from jury service, and, with the agreement of the parties, the Court anonymously polled the remaining jurors to determine whether they would like an opportunity to consult that day with a medical professional about potential COVID-19 exposure. Two

[4] As it turned out, the juror had not contracted COVID-19, but was suffering from a collapsed lung.

jurors indicated that they would like the opportunity to do so, while the remaining eleven responded that they did not need to consult with a medical professional and would like to proceed with the trial. Tr. 1997:23-1998:3; Tr. 2001:15-2002:1. The parties then stipulated to proceed with an eleven-member jury, and the two jurors who wanted to see a medical professional were excused. At the end of the government's case later that day, both defendants moved for a Rule 29 judgment of acquittal; those motions were taken under advisement. The case went to the jury in the late afternoon on September 22. After three days of deliberations, the jury returned their verdicts on September 25. Mr. Vorley was found guilty of Counts 2, 8, and 10, and Mr. Chanu was found guilty of Counts 3, 9, 11, 12, 14, 15, and 16. The defendants were found not guilty of the remaining charges, including the conspiracy charged in Count 1.

The defendants have now briefed Rule 29 and Rule 33 motions for judgments of acquittal or, alternatively, a new trial. *See* Defs.' Joint Rule 29 Mot., ECF No. 355; Chanu Suppl. Memo., ECF No. 356; Vorley Suppl. Memo., ECF No. 357; Defs.' Joint Rule 33 Mot., ECF No. 354; Defs.' Suppl. Rule 33 Mot., ECF No. 361. They argue that the evidence was insufficient as to each element of the substantive wire fraud offense for a rational jury to conclude, beyond a reasonable doubt, that the defendants were guilty of the charged conduct; that the defendants did not participate in a "scheme to defraud" as a matter of law; and that the wire fraud statute is unconstitutionally vague as applied to the defendants' conduct. They also allege various errors throughout the trial that, they argue, warrant a new trial, should the Court consider the government's evidence sufficient under the Rule 29 standard.

DISCUSSION

I. Rule 29 Motion for a Judgment of Acquittal

In considering a Rule 29 motion, this Court views the evidence in the light most favorable to the government, and the verdict will be overturned only if no rational trier of fact could have found beyond a reasonable doubt that the defendants committed the essential elements of the crime. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Genova,* 333 F.3d 750, 757 (7th Cir. 2003) ("Rule 29(c) does not authorize the judge to play thirteenth juror."). After a jury's guilty verdict, a criminal defendant seeking a judgment of acquittal under Rule 29 faces a hurdle that the Seventh Circuit has deemed "nearly insurmountable." *See United States v. Jones*, 713 F.3d 336, 339 (7th Cir. 2013); *see also United States v. Garcia*, 919 F.3d 489, 497-98 (7th Cir. 2019) (observing that successful Rule 29 motions are "relatively rare" in modern federal practice); *United States v. Weimert*, 819 F.3d 351, 354 (7th Cir. 2016) ("Given our deference to jury determinations on evidentiary matters, we rarely reverse a conviction for mail or wire fraud due to insufficient evidence."). Nevertheless, because the government bears the burden of proof, the Rule 29 standard is not wholly insurmountable, and "the height of the hurdle depends directly on the strength of the government's evidence." *Jones*, 713 F.3d at 339. If the evidence is insufficient to sustain the conviction, this Court must grant a motion for judgment of acquittal. *See id*. at 339-40.

A. The Government Presented Sufficient Evidence for a Reasonable Jury to Convict Each Defendant of Wire Fraud Affecting a Financial Institution.

In challenging their convictions on the substantive wire fraud counts, the defendants maintain that the prosecution failed to present sufficient evidence to prove any of the elements of wire fraud as to any of the counts of conviction. They contend that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that Vorley and Chanu knowingly misrepresented their intent to trade, that their intent was material to other market participants, or that the defendants had the specific intent to defraud; that, as a matter of law, the evidence did not establish a "scheme to defraud" within the meaning of the wire fraud statute; and that the implied misrepresentation theory underpinning the prosecution renders the wire fraud statute unconstitutional as applied to the defendants. *See* Defs.' Joint Rule 29 Mot. at 1-4. Each of these arguments fails when the evidence adduced at trial is viewed in the light most favorable to the prosecution.

1. There Was Sufficient Evidence for a Jury to Conclude that the Defendants' "Spoof" Orders Implicitly Misrepresented their Intent to Trade to Other Exchange Participants.

The defendants first attack the sufficiency of the evidence establishing that they made misrepresentations to other COMEX precious metals futures traders. The indictment contended that the defendants' spoof orders were "material misrepresentations" that "falsely and fraudulently" represented to the other traders in the marketplace that the defendants were "intending to trade the Fraudulent orders when, in fact, they were not" because, at the time they were placed, the defendants intended to cancel those orders before they were executed. Superseding Indictment ¶ 11. As this Court observed in its order on the defendants' motion to dismiss the indictment, whether their spoof orders implicitly misrepresented to other market participants the defendants' intention to trade is "the central fact question in this case." Order at 28, ECF No. 119. Vorley and Chanu argue that the evidence failed to establish that their bids and offers made any representations to other traders other than the basic terms on which those orders could be executed—price, quantity, and type of metal. Defs.' Joint Rule 29 Mot. at 9. Moreover, the defendants contend that certain features of the COMEX exchange, including traders' ability to make bids and offers anonymously, to place orders on both sides of the market simultaneously, to leave orders on the market for any period of time they deemed fit, and to place orders that obscure the traders' full trading interest (such as "immediate or cancel" and iceberg orders, or orders pre-set to cancel after a certain amount of time elapsed), taken together, preclude the conclusion that "a trader impliedly was representing to the market the full extent of his buying or selling interest in a particular commodity." Defs.' Joint Mot. at 10-11. But the jury heard testimony from several witnesses—specifically, John Scheerer, David Liew, Dr. Venkataraman, Anand Twells, and Travis

Varner—from which they could have rationally concluded that orders on the COMEX do, in fact, implicitly represent to other market participants a genuine intent to trade according to the express terms of the order, "and, thus, orders placed by the defendants *without* that intent constituted an implied misrepresentation." Gov't Resp. Opp'n 7, ECF No. 363 (emphasis in original).

First, John Scheerer, a senior director in CME Group's Global Command Center, told the jury that throughout his time in the Global Command Center (dating back to 2009), the CME's rules have required that all traders' orders be entered for the purpose of executing a bona fide transaction, *i.e.*, an order that the trader is not just willing to trade if hit, but an order that the trader "actually intend[s] and want[s] to" trade on. Tr. 387:7-19. Scheerer testified unequivocally: "It has always been against the CME rules to place an order with the intent not to trade it." Tr. 406:14-16. This testimony, even standing alone, would be sufficient to support a jury's conclusion that orders therefore carried an implied representation that the order reflected a bona fide interest in executing the trade on the stated terms; it would not be irrational for a jury to conclude that traders expected that their counterparties placed and executed orders in compliance with the rules of the exchange on which they were trading.

In any event, Mr. Scheerer's testimony did not stand alone. David Liew, who pled guilty to conspiracy to commit wire fraud and spoofing based on the same type of trading at issue here, testified that spoof orders conveyed false information about his and the defendants' intention to trade. Tr. 577:23-579:19 (Q: As part of the scheme you described, did you transmit false information? A: Yes. Q: What false information did you transmit? A: I gave false signals that I wanted to execute the orders that I sent to the exchange, but in reality I had the intention to cancel them. . . . Q: Do you see anybody in the courtroom today who participated in the trading that you've described? A: Yes. [identifying Chanu and Vorley]). And though he acknowledged that the spoof orders were "real" in the sense that other market participants could execute against them, Liew explained that the orders were simultaneously "fake in the sense of the intention" behind them, and that his goal was for the orders to "give the appearance that they would be things that [he] would like to get executed." Tr. 637:11-638:10; Tr. 639:1-5 ("[T]he intention of the sell orders is to show the market – or, rather, deceive the market into thinking that there's more supply in this case."). *See Weimert*, 819 F.3d at 355 (noting that the concept of a misrepresentation under the wire fraud statute is broad, "reaching not only false statements of fact but also misleading half-truths" and also omissions or concealment of material information "if the omission was intended to induce a false belief and action" to the schemer's advantage); *see also United States v. Allen*, 160 F. Supp. 3d 698, 701-02 (S.D.N.Y. 2016) (in a wire fraud prosecution, the "relevant issue was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which those submissions were made" because the prosecution's theory of misrepresentation was that "each LIBOR submission made the implicit statement that the number was calculated according to the [BBA] definition" when, in reality, the defendants' LIBOR submissions were calculated to make money at the expense of their counterparties) (citations omitted).

Moreover, Liew identified certain characteristics of the spoof orders that were designed to disguise the fact that the orders had been entered without a genuine intent to trade. For example, he told the jury that using a layering technique, where groups of spoof orders are stacked at slightly different price levels, made the spoof orders look "more real" and "more genuine" than one large one-hundred or two-hundred lot order. Tr. 687:5-16. He explained that from other market participants' point of view, watching smaller groups of ten to fifty buy orders "slowly being added to the market" looks "more natural" and like the trader placing those orders "actually want[s] to trade." Tr. 687:16-24. Liew also testified that the price levels spoof orders were placed at reinforced the implicit representation that they were genuine orders. Tr. 657:8-658:1 (explaining that if spoof orders were set too far from the market mid-price level, "people would not believe [his spoof orders] to be genuine").

The defendants, to be sure, vigorously challenged Liew's credibility, but it was of course for the jury to weigh Liew's testimony. It was not irrational for the jury to credit it, particularly when, on this point (and others) his testimony was corroborated. Liew's testimony about his spoofing trades, for example, was buttressed by Professor Venkataraman's analysis, which established that the defendants' trading patterns closely resembled Liew's. Tr. 1480:24-1481:2. Professor

Venkataraman, the government's principal expert witness, told the jury that orders to buy and sell implicitly convey a trader's "interest in participating in the market" under the terms and conditions of the order. Tr. 1402:3-14 (noting that this information about "interest in participating" is sent in addition to and apart from explicit information about whether the offeror wants to buy or sell, which metal, what the price is, how many contracts, etc.). Venkataraman testified that each order also "communicate[s] something about the liquidity in the market" to other traders; because orders implicitly carry a representation that the trader is "available to support the market at the price that it stated in their order, under the conditions of the order," Venkataraman explained, "the arrival of an order implicitly conveys the arrival of an interested buyer in the market." Tr. 1402:10-1403:12; *compare United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985) (observing that the defendants "confused the market by signaling the presence of big buyers who had not in fact put up any money"). He opined that the implicit information conveyed by orders on the exchange is "well recognized by market participants" and that the "well-established set of results" observed in financial markets following an influx of buying or selling interest is "related to some of the implicit information that is conveyed in an order." Tr. 1402:19-20; Tr. 1403:13-16; *see also* Tr. 656:1-11 (Liew corroborated Professor Venkataraman's opinion, noting that spoof orders create a false impression of buying or selling interest in the market, and traders anticipate that prices will react accordingly).

Professor Venkataraman's opinion that futures orders carry with them an implied representation that the order was placed with an intent to execute it was also consistent with the testimony of counterparties who were trading in the same market. The government presented the testimony of two such counterparties—traders from two hedge funds, Citadel and Quantlab Financial—from which the jury could infer that the defendants' counterparties in the market understood COMEX orders as implicitly signaling the offeror's genuine intent to trade. Anand Twells told the jury that Citadel's trading strategies "take bids and offers in the order book as orders that are intended to trade," and that live orders are "indications of supply and demand" that inform market participants' fair market value determinations for futures contracts—an approach to valuation that is only reasonable if the orders are bona fide and thereby signal an actual shift in the buying or selling interest in the market. Tr. 1619:5-19. Travis Varner of Quantlab similarly testified that bids and offers in the top five levels are important factors in the firm's trading strategy's fair market value calculation. Tr. 1673:19-25; Tr. 1728:21-24.

So, the defendants' contention that the government presented "*no evidence* of any industry standard, consensus, or literature supporting its novel theory that an order implicitly communicates an 'intent to trade,'" *id.* at 9 (emphasis in original), is simply wrong. Market participants, including Liew, who traded for Deutsche Bank, and counterparties who traded with the defendants, a financial markets expert, and a representative from the exchange itself all testified to the same effect: markets, in general, work the way they do because orders implicitly convey a trader's genuine interest in participating in the market; bids and offers on COMEX, specifically, were required to represent a bona fide intent to trade by the CME's rules; Liew and the defendants, from whom Liew learned to spoof, took steps to foster the impression that their spoof orders were bona fide; and because of those implicit representations, the defendants' counterparties took orders in the visible order book as indications of legitimate changes in supply and demand and reacted accordingly.

The defendants insist that all of this evidence should be disregarded because the CME's rules allowed traders to cancel orders at any time for any reason and to engage in other deceptive conduct. That means, they contend, that no trader could rationally understand an order to carry with it an implicit statement about the trader's desire to execute that trade. But in addition to glossing over contrary evidence presented at trial, *see, e.g.*, Tr. 418:3-5 (Q: Can a trader enter an order to try to manipulate or deceive? A (Scheerer): No.), this argument depends on drawing inferences in the defendants' favor, rather than the government's, and the jury was free to recognize—and reject—the false equivalencies on which the defendants' argument is based. In arguing that "fill or kill" orders and iceberg orders allow traders to deceive other market participants, the defendants ignore the "fundamental distinction" the Seventh Circuit drew in *Coscia* between those permitted practices and spoofing: those types of "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." 866 F.3d at 795; *see also id.* at 800 (fill or kill orders and iceberg orders are different than spoofing orders "because they are designed to be executed under certain conditions, whereas Mr. Coscia's large orders were designed to *evade* execution") (emphasis in original). The life span of a fill or kill order may be measured in milliseconds, but however ephemeral, the intent to execute the trade at the stated price distinguishes it from a spoofing order that is never intended to be executed at all but was placed as part of a scheme to manipulate the market. Similarly, an iceberg order allows a trader to understate the depth of their buying or selling interest, but not to advertise such interest where none exists.

Moreover, even if one accepts the defendants' characterizations of these permitted practices as deceptive, that the CME allows some forms of deception does not compel the conclusion that it allows all forms—particularly where, as here, the conduct at issue is not only deceptive but manipulative. The evidence at trial permitted the reasonable inference that the CME drew the line at deception about an offeror's intent to trade when an order is placed, so as to distinguish between deceptive practices that allow a trader to "trade quietly"[5] to minimize market reaction to a change in supply or demand and deceptive

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[5] *See* Tr. 1870:5-10 (Agent Luca testified that "trading quietly" might involve "using icebergs or a lot of small orders to not tip off the market to your actual trading position so that you don't have an instance where the market moves away and you have potential slippage or a worse price on average for your fill").

practices, like spoofing, designed to manipulate market prices. *See* Tr. 1413:23-1414:7 (Q: Would you agree that the purpose of an iceberg is *not* to move prices? A (Venkataraman): Yes. The purpose of the iceberg order is to limit the price impact . . . to move the prices as less as possible, that's correct. Q: And in that sense, would you agree that it is not manipulative? A: That's correct.) (emphasis added). The permissibility of iceberg orders or fill or kill orders, which facilitate trades at the offerors' chosen price level for those orders, does not suggest that traders believed they had license to place spoof orders, which they had had no intent to execute and which artificially inflated or deflated prices for opposite-side orders, nor does it otherwise undermine the affirmative evidence that traders understood orders to carry an implicit representation of an intent to trade at the stated terms. So, although there is no minimum amount of time that an order is required to stay on the market, nor a requirement that traders tell the market how long an order will be held open, nor a penalty for cancelling an order because a trader has "change[d] their minds," "because they wanted to get a sandwich," or "because they needed a bathroom break," Tr. 393:13-394:22, the jury was entitled to credit Scheerer's testimony that the CME's rules do not permit traders to cancel an order if their purpose for doing so is to manipulate or deceive other traders in the marketplace, Tr. 417:22-418:5, and the testimony of the other witnesses discussed above who explained that market participants understand orders in the exchange to reflect a bona fide intent to trade, even when orders did not convey the totality of an offeror's trading interest. Viewed in the light most favorable to the prosecution, the evidence was sufficient to support a finding by the jury that the defendants' orders implicitly and falsely represented that they intended to execute the "spoofing" orders placed as part of the alleged scheme to defraud.

2. There Was Sufficient Evidence for a Jury to Conclude that the Defendants' Misrepresentation of Their Intent to Trade Was Material.

Next, the defendants challenge the evidence regarding the materiality of their misrepresentations. A false statement is material if it has a "natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999) (citation omitted); *see also Weimert*, 819 F.3d at 357 (noting that the federal mail and wire fraud statutes reach misrepresentations "that are likely to affect the decisions of a party on the other side of the deal"). The "decisionmaking bodies" at issue here were the defendants' counterparties in the market, and as in *Coscia*, "[t]he evidence at trial showed that [Vorley and Chanu's] course of action was not only reasonably calculated to deceive but also that actual investors *did* find [their] actions important in making a decision." 866 F.3d at 800 (emphasis in original) (internal quotations omitted).[6]

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[6] The defendants argue that *Coscia* is irrelevant because it was not a wire fraud case. Defs.' Reply at 8 n.3, ECF No. 365. In so arguing, they continue to deny (as they did in their motion to dismiss) *Coscia*'s substantial overlap with this case. That *Coscia* involved a violation of the commodities fraud statute, § 1348(1),

First, the jury could infer materiality directly from the trading data presented. In the charts depicting the government's sixty-one selected trading episodes, a clear pattern emerged: after placing large, visible orders on the opposite side of the market, the mid-market price moved, and the defendants very quickly filled their primary iceberg orders. Count Two, for example, targets a trading episode by Vorley on February 12, 2010. Unable to complete an iceberg purchase of fifteen gold contracts when the market price exceeded his bid on the last four remaining contracts, Vorley placed eleven 10-lot visible orders, comprising 58.8% of the visible order book, to sell gold contracts at above market prices; as soon as Vorley began layering these sell orders, the market mid-price dropped from roughly $1,088.45 to $1,088.30 and the rest of Vorley's iceberg buy orders were almost immediately filled at the lower price. GX 1. A similar pattern jumps out from the chart depicting Chanu's trading on April 20, 2011, which is the basis for Count Nine; after Chanu layered sixteen 10-lot buy side orders at below market prices, the mid-market price climbed from approximately $1,501.75 to approximately $1,501.85 for a period of seconds, just long enough for Chanu to fill the final nineteen contracts in the iceberg sell order he had placed before

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which does not require a misrepresentation, does not change the fact that a "scheme to defraud" under § 1348(1) is subject to the same materiality requirement as a scheme to defraud under the wire fraud statute—which is why the Seventh Circuit expressly approved in *Coscia* the district court's use of the materiality instruction included in the Circuit's pattern instruction for mail and wire fraud. 866 F.3d at 799.

entering the buy orders. GX 1. While Chanu's spoof orders were active, they constituted 62.7% of the visible order book. *Id.* That other COMEX traders repeatedly filled the defendants' iceberg orders shortly after a sudden influx of seemingly genuine buying or selling interest supports an inference that the defendants' spoof orders were material.

Professor Venkataraman's overarching analysis of the defendants' trading established that these episodes were not anomalistic; economic theory would expect the defendants' large orders to move the market for the defendants' benefit. Professor Venkataraman explained that, in general, market participants respond "to information that is made available to the market" and that "when [a] visible order is submitted, the market can see the size of the order and . . . the perception of the demand and supply of the commodity changes in the eyes of the market participants," given counterparties' belief that the orders are bona fide. Tr. 1412:6-14. The defendants' trading was no exception. Professor Venkataraman explained that, across the sixty-one trial episodes, the market was generally balanced between visible-side and iceberg-side orders in the moments before Vorley and Chanu began spoofing. Tr. 1467:11-13 (there were, on average, forty-five visible-side contracts and forty-two iceberg-side contracts); GX 74. By the time the defendants had placed their single, large visible order, or finished layering groups of 10-lot visible orders, however, the visible depth in the order book on the side of the defendants' spoof orders had changed considerably—by 132 contracts, according to Professor Venkataraman's analysis. Tr. 1466:8-24 (creating an imbalance between

168 visible-side contracts, on average, and 41 iceberg-side orders). A change of that magnitude is certainly "consistent with the visible orders moving market prices," Tr. 1466:19-22, and is the type of "significant imbalance" between the buy and sell sides and "shock that the market experiences which results in other participants reacting to the arrival of this large buyer or seller, and, therefore, moving the price." Tr. 1467:18-21; Tr. 1482:3-21 (from April 2008 to July 2013, there were, on average, 43 visible contracts in the top five levels of the book in the market; in the same time period, when Vorley placed 10-lot groups opposite iceberg orders, the average volume increased to 91 visible contracts, and when Chanu traded in the same manner, the average visible volume was 163 contracts);.

And the evidence showed that the impact of the defendants' spoofing orders was not just theoretically expected, but actually observed: the scheme worked. Across the government's sixty-one episodes presented at trial, the defendants' primary iceberg orders were active for a total of three hours and thirty minutes; roughly one-third of the total value of those iceberg orders was filled in just the ten minutes that the spoof orders were active opposite the iceberg orders. Tr. 1469:6-25. Professor Venkataraman explained that the defendants' iceberg orders were filled about ten times faster when the defendants had visible orders opposite them than when the iceberg orders were in the market alone. Tr. 1470:13-16. He confirmed that this data is "consistent with the visible orders actually helping to fill the iceberg orders." Tr. 1470:17-19.

The defendants argue, however, that the prosecution's theory of materiality was "entirely dependent on a sleight of hand"—the evidence at trial may have "fool[ed] the jury" into believing that if an order in the visible order book was capable of influencing other traders' decisions then materiality was established, they object, but it "is not the order but the alleged *misrepresentation* that must be material." Defs.' Joint Mot. at 13 (emphasis in original). But this argument ignores the evidence from which the jury could reasonably conclude that, had the defendants' orders accurately represented that they did not actually intend to execute the order—thereby permitting counterparties to conclude that the purpose of the orders was to manipulate the market rather than to address a bona fide commercial purpose to execute the contracts at issue—the orders would not have been filled. It was not irrational for the jury to conclude that knowledge that the defendants' orders were placed as part of a scheme to manipulate the price of gold futures was capable of influencing the actions taken (or not taken) by potential counterparties when those orders were placed.

Indeed, the jury heard testimony that the large, visible spoof orders were effective only because the defendants' counterparties believed that the orders were placed with a genuine intent to trade. David Liew explained to the jury that, when he spoofed, he would "choose price levels close to where [his] genuine order is being [placed] at" to maximize the impact the spoof orders had on other market participants' trading decisions. Tr. 657:8-23. And Liew reinforced the notion that the express terms of the order itself and the perceived intent behind the order are inextricable, noting that if he had chosen price levels further away from mid-market, "people would not believe [his spoof orders] to be genuine" and those orders would therefore be ineffective. *Id.*; Tr. 658:11-14 (observing that "there's a fine line between being close enough to have some kind of impact" and "lowering the risk that those [spoof] orders would be executed on"). He told the jury that if other traders in the market knew that his orders were placed with the intent to cancel them, they would not react to the change in buying or selling interest in the visible order book. Tr. 656:20-657:1.

Other COMEX market participants confirmed that they found the defendants' intent material. Anand Twells testified that Citadel's trading strategies treat bids and offers in the order book as bona fide, which Twells understood as "order[s] with the intent to trade" Tr. 1619:1-9. He explained that the trading strategies use live bids and offers as "indications of supply and demand," which the algorithms rely on to "make a determination of fair market value." Tr. 1619:15-19. Travis Varner similarly testified that orders in the first few levels of the order book were capable of influencing Quantlab's trading decisions and that larger orders would have been more capable of influencing those decisions than smaller ones. Tr. 1760:17-24. Moreover, the defendants' contention that "[t]here was no evidence" that Citadel or Quantlab would have traded differently had they known that the defendants did not intend to trade their visible orders, Defs.' Joint Rule 29 Mot. at 14, is simply wrong. Varner testified that Quantlab's trading models "depend[] on the data from the exchange" and so, if the data was "not real"—defined by him as not reflecting "true supply and demand"—it would be difficult for the firm's algorithms to trade successfully. Tr. 1760:17-1761:12; Tr. 1762:22-25. *See also United States v. Reliant Energy Servs., Inc.*, 420 F. Supp. 2d 1043, 1058 (N.D. Cal. 2006) ("Fraud and deceit are not legitimate market forces. Fundamentally, markets are information processing systems. The market price is only as 'real' as the data that inform the process of price discovery. By the same token, the market price is 'artificial' when the market is misinformed."). In fact, Varner indicated that Quantlab would not want to trade on the CME at all if orders in the exchange routinely misrepresented an offeror's genuine interest in executing or trading. Tr. 1763:1-4; *see also Coscia*, 866 F.3d at 800 (finding sufficient evidence of materiality, in part, because certain traders testified that the defendant's trading induced them to leave the market altogether).[7] In short, the implicit representation that the defendants' orders reflected a genuine intent to trade was material—that is, capable of influencing trading decisions.

This evidence also answers the defendants' argument that the trading algorithms used by Citadel and Quantlab did not account for the trader's intent to

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[7] In arguing that there was no evidence that anyone complained about the defendants' trading, much less left the market because of it, the defendants turn the test of materiality inside out; the test is whether knowledge of the misrepresentation was capable of influencing the victim's decisionmaking if known, not whether the victim discovered the fraud and therefore altered its conduct. Were that the test of materiality, no successful scheme to defraud would ever be actionable.

execute a trade but instead made their trades solely on the basis of the objective factors discernible from the order: commodity, quantity, price, and type of transaction (buy or sell). Because the algorithms did not take intent to trade into account, the defendants maintain, that intent could not have been material. But the argument ignores the evidence establishing that, in seeing trades as just "orders in the book," Tr. 1791:18-20, Citadel and Quantlab understood that all "orders in the book" carried with them an implicit representation that they had been placed with an intent to execute them on the stated terms. And, as noted above, that representation was "capable of influencing"—that is, material to—at least some traders' participation in the market.

The defendants contend this evidence is insufficient for two additional reasons:[8] first, because neither Varner nor Twells "testified that they were even trading" during some of the trading episodes at issue, Chanu Suppl. Memo. at 6-7 (neither testified that their fund was trading on six of the seven days corresponding to Chanu's counts of conviction), Vorley

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[8] The defendants also argue that the prosecution used "intent to trade" as a proxy for the length of time that an order was likely to remain on the market before the trader cancelled it and go on to argue that neither Vorley nor Chanu made any implicit representation about how long they intended to leave any of their visible orders out on the market. Defs.' Joint Rule 29 Mot. at 14-15. This is a straw man that mischaracterizes the government's argument. The government's theory is that the spoofing scheme was fraudulent because the defendants never intended to execute the spoofing orders, not because they did not intend to trade them for a sufficient duration.

Suppl. Memo. at 13 (same, for two out of three counts); and second, that the traders' testimony failed to establish that the defendants' visible orders "had any material effect on Citadel's and Quantlab's algorithms' trading." Chanu Suppl. Memo. at 6-7 (arguing that, as to Count Three, the firms "were trading in the same way regardless of whether Mr. Chanu had open visible orders on the market"); Vorley Suppl. Memo. at 13, 15 (alleging a lack of evidence "that [Quantlab or Citadel's] trading decisions could have been affected" by Vorley's spoof orders). Neither objection is persuasive.

First, Twells' and Varner's testimony was sufficient for the jury to infer that the defendants' misrepresentations about their intent to trade were material to the defendants' counterparties in the market generally. Nothing about their testimony that order book pressure (meaning "the number of people who want to buy and sell") was important to their algorithms' fair market value calculations and trading decisions, *see* Tr. 1752:5-21; Tr. 1673:19-25, suggested that this was unique to Quantlab and Citadel. To the contrary—Twells explained that "the best price at which buyers are willing to pay and the cheapest price which sellers are willing to sell," *i.e.*, the top five levels in the order book, is "just basic information for determining fair market value by most professional traders." Tr. 1728:16-1729:6.

That observation was corroborated by Professor Venkataraman and David Liew, each of whom testified that this approach to valuation was common across market participants. *See, e.g.*, Tr. 1403:4-16 (Professor

Venkatraman stated that it is a "well-established set of results" that the arrival of an order moves the price on average due, in part, to the implicit information conveyed in an order); Tr. 640:16-641:7 (Liew explained that, as a trader, when he sees a change in the volume of interest on one side of the market, he is inclined to think that the market is going to move because he believes those are "real" orders). In each charged episode, traders executed against the primary iceberg orders after defendants' large, visible spoof orders flooded the market; even if those counterparties were not Quantlab or Citadel, the evidence was such that a rational jury could infer that the defendants' misrepresentation of their intent to trade their spoof orders was at least capable of influencing those traders' decisions to execute against the defendants' primary orders.

The defendants' second objection conflates materiality and reliance—because a false statement is material so long as the falsehood "has a natural tendency to influence or [is] capable of influencing" the victim, "[a] scheme to defraud can exist even when . . . *no one* relied on any misrepresentation." *United States v. Corrigan*, 912 F.3d 422, 430 (7th Cir. 2019) (emphasis in original) (internal quotations and citation omitted); Tr. 2202:22-25 (jury was instructed that it is "not necessary" that the misrepresentation "actually have that influence or be relied on by the alleged victim as long as it is capable of doing so"); *see also Neder*, 527 U.S. at 25 (citing favorably a case that held, under the analogous mail fraud statute, "the government does not have to prove actual reliance upon the defendant's misrepresentations"). Twells' and Varner's testimony about the materiality of the defendants' implicit representation that their trading was bona fide easily suffices to support the jury's finding that the misrepresentation of their intent to trade was "capable of influencing" the trading decisions of counterparties in the market when the orders were placed. No more was required.

The defendants' argument that, because Quantlab and Citadel traded contracts at the same price or better at other times on the days in question, a jury could not find that the defendants' spoof orders were material to the algorithms during a particular trading episode itself, is a complete non-sequitur. As the defendants repeatedly noted while cross-examining the government's witnesses, the futures markets move quickly and react to a steady stream of information external to the order book—a good price at one moment may be a terrible deal just minutes later. As a result, in the fast-paced environment the defendants described, it is hardly irrational, in measuring the impact of a spoof order, to compare a counterparty's trading decisions in the minutes, seconds, or even milliseconds on either side of a trade. *See* Tr. 1693:11-24 (Q (Katz): And the algorithm calculates that fair market value on a constant basis, millisecond by millisecond, correct? A (Twells): I don't know if the time frame of milliseconds is accurate, but it does I would say constantly calculate it, yes.). The defendants had ample opportunity to, and did, challenge the government's focus as too narrow and argue that it had "cherry picked" the trading sequences it presented, but the jury could reasonably infer from the trading data that the defendants' seemingly bona fide, large, visible orders influenced their counterparties' assessment of the fair market value of gold or silver futures contracts during the moments those orders were active, and could reasonably disregard as irrelevant trading decisions minutes or hours before or after the trades at issue.

In sum, the jury heard evidence that 1) the defendants' scheme would theoretically be expected to influence other market participants' trading decisions; 2) the defendants' iceberg orders were filled about ten times faster when defendants placed large, visible orders on the opposite side of the market; 3) spoof orders are effective only if other traders believe them to be genuine, and Liew and the defendants priced them accordingly; and 4) the defendants' counterparties made price determinations based on the belief that the defendants' orders, and all orders in the exchange, were bona fide. Taken together with examination of the trading data itself, a rational jury could conclude, beyond a reasonable doubt, that the defendants' misrepresentations were material to their counterparties in the market.

3. There Was Sufficient Evidence for a Jury to Conclude that the Defendants Acted Knowingly and with the Specific Intent to Defraud.

To convict the defendants on the wire fraud charges, the jury had to conclude that Vorley and Chanu acted both knowingly, meaning the defendant "realize[d] what he [was] doing and [was] aware of the nature of his conduct and [did] not act through ignorance, mistake or accident," Tr. 2200:9-13, and with the intent to defraud, *i.e.*, "with the intent to deceive or cheat [their COMEX counterparties] in order to cause a gain of money or property to the defendant or another." Tr. 2203:1-4; *see, e.g.*, *United States v. Faruki*, 803 F.3d 847, 853 (7th Cir. 2015). The jury heard some evidence to suggest that the defendants' trading, on some occasions, could have been accidental, and Vorley and Chanu vigorously dispute the sufficiency of the evidence establishing that they had the intent to defraud other COMEX participants. When the evidence is viewed in the light most favorable to the prosecution, however, neither of these challenges prevails.

a. A Rational Juror Could Conclude the Defendants Acted Knowingly.

The evidence adduced at trial was more than sufficient for the jury to conclude that the defendants acted knowingly. Both the defendants' trading data, itself, and Professor Venkataraman's analyses of that data established that the defendants repeatedly and successfully traded according to the same pattern—a primary iceberg on one side of the market, and a group of large, visible orders on the opposite side that were quickly cancelled once the iceberg was filled—throughout the charged period. From August 2009 through July 2013, Vorley placed 1,616 groups of ten-lot orders opposite iceberg orders, and Chanu placed 1,191 groups of ten-lot order opposite icebergs. GX 75; Tr. 1475:14-25 (Vorley, nearly 14,103 10-lot orders total); Tr. 1478:25-1480:3 (Chanu, nearly 19,000 10-lot orders total). The differences in median duration and fill ratio between the defendants' iceberg and opposite-side visible orders were stark: Vorley's icebergs had a

60% fill ratio and median duration of 51.78 seconds, versus a 1.8% fill ratio and median duration of 1.29 seconds for the groups of 10-lot visible orders; Chanu's icebergs had a 57.9% fill ratio and median duration of 74.68 seconds, versus a 0.4% fill ratio and median duration of 2.99 seconds for his groups of 10-lot orders. GX 75.

The strength of the observable trading patterns and overarching statistical evidence was not undermined by the limited evidence suggesting Vorley may have accidentally placed and cancelled orders on one or more occasions. The jury heard audio clips from Vorley's Deutsche Bank disciplinary interview regarding his trading on March 16, 2011. During those clips, Vorley avers that he was confused; that his reference to spoofing was a lighthearted attempt to deflect criticism, after Adam Farthing pinged Vorley to alert him he had "made an error"; that Vorley "clearly . . . didn't know" that he was supposed to be selling during the episode at issue and had "clearly messed up"; and that his repeated placement and subsequent cancellation of large chunks of orders "could've been a fat finger itself." Tr. 1906:12-1907:7; GX 143, 144, 145. But the jury was not required to credit Vorley's explanation for his trades that day; nor were jurors required to extrapolate from Vorley's shaky justification for one uncharged trading episode that every time Vorley appeared to be spoofing, he was, in actuality, placing and cancelling orders because he misunderstood directions from his supervisors or was otherwise mis-entering his intended orders.

b. A Rational Juror Could Conclude that the Defendants Had the Specific Intent to Defraud.

But proving that the defendants' conduct was purposeful is not enough. Wire fraud is a specific intent crime; to establish the defendants' guilt, the government also had to produce evidence that Vorley and Chanu specifically intended to defraud others—that is, to deceive or cheat others to obtain money or property. Moreover, in the context of this case, the government had to prove that the defendants' deception and cheating involved a knowing misrepresentation—in essence, a lie. The defendants argue that the government did not prove intent to defraud because a rational jury could not have concluded from the government's evidence that "either Mr. Vorley or Mr. Chanu had the intent to cheat or harm their counterparties" when they placed visible orders opposite their primary iceberg orders. Defs.' Joint Rule 29 Mot. at 17. That is because, they say, their trading took place "openly, in the presence of supervisors and compliance officers, for five years"; because "[e]ach element of the alleged scheme—iceberg orders, opposite side visible orders, and cancellations—was permitted on the COMEX exchange"; and because "no one from the bank or from the CME ever told [the defendants] they were doing anything improper." *Id.* Moreover, because Deutsche Bank did not train its traders on Dodd-Frank's anti-spoofing provision until September 28, 2012, the defendants contend that it would be impossible for a juror to rationally conclude that "placing and cancelling visible orders opposite iceberg orders was improper, much less that they intended to defraud their counterparties, before that date." *Id.* at 17-18.

Not so. Though "[d]irect evidence of an intent to defraud is rare," a defendant's specific intent to defraud may be shown "by circumstantial evidence and inferences drawn from the scheme itself." *United States v. Sloan*, 492 F.3d 884, 891 (7th Cir. 2007). As already discussed, the evidence presented at trial is sufficient to prove that a COMEX order carries with it an implicit representation that the offeror has a genuine intent to trade. It is therefore perfectly reasonable for jury to conclude that Vorley and Chanu knew they were making a misrepresentation—*i.e.*, lying—about their intent to trade when they repeatedly placed orders they intended to cancel after those orders had served their price-distorting purpose and before other traders could execute against them, and, therefore, that they had the specific intent to defraud. *See, e.g.*, *United States v. Yoon*, 128 F.3d 515, 524 (7th Cir. 1997) ("[T]he execution of the scheme, in itself, may be relevant to establishing the defendant's specific intent to defraud.")

But the jury did not have to rely on that evidence alone. David Liew offered direct and circumstantial evidence that Vorley and Chanu acted with the intent to deceive their counterparties for their own, and Deutsche Bank's, financial gain. For example, Liew explained that, when he spoofed, the "intention of this act was to trick other market participants"—in placing visible orders opposite his iceberg orders, Liew's "intent was to have those offers deceive other market participants into thinking that there was more selling [or buying] than there actually was" in the hopes that he would "get a better price on [his] original order." Tr. 633:12-23; Tr. 656:12-19 (explaining that he intended for the spoof orders to communicate the false intent that he wanted to execute those orders and believed he was successful in communicating that intent on at least some occasions); *compare Coscia*, 866 F.3d at 797 (citing as evidence supporting the jury's finding of fraudulent intent that Coscia's trading "was intended to create the *illusion* of market movement" through a "system that used large orders to inflate or deflate prices") (emphasis in original). Liew confirmed that, if successful, the scheme would "help Deutsche Bank, and it hurts other market participants" including "other banks, hedge funds, [and] retail customers." Tr. 634:1-6.

And Liew, the jury could reasonably conclude, did not devise this technique on his own—he testified that he learned how to spoof from Vorley and Chanu, Tr. 641:8-16, and he told the jury that he contemporaneously watched the defendants spoof in the market with this same intent. Tr. 641:17-643:3; Tr. 646:12-25 (explaining that he observed Chanu and Vorley "place buy orders as [he's] working [his] sell order" and that he "kn[e]w that the intention of those buy orders are to, again, try to trick the market to holding the price a bit higher and to assist me to clear my selling"); Tr. 693:15-702:13 (Count Eight, trading opposite Vorley and Chanu); Tr. 714:4-715:6 (Count Twelve, trading opposite Chanu). Liew also reviewed a number of the defendants' solo trading episodes for the jury, and confirmed that, even in episodes where he was not involved in the trading, Vorley or Chanu used the same techniques Liew used when he spoofed. *See, e.g.*, Tr. 686:13-689:17 (reviewing Vorley's trading on February 9, 2010, and concluding that the episode displayed techniques that Liew himself used when he was spoofing); Tr. 703:23-704:15 (reviewing Chanu's April 20, 2011, trading episode that was the predicate for Count Nine).

Finally, Liew explained that the practice on the precious metals desk was to designate "one person at any one time to be the active trader in the market," so as to prevent confusion and minimize the risk of Deutsche Bank traders undermining their colleagues' trading activity. Tr. 648:21-649:5. In light of this standard practice, the jury could have inferred, as Liew himself did, that when Vorley or Chanu were trading opposite Liew or each other—as they were in Counts Eight, Twelve, and Fourteen—that "if those were genuine orders, they would have communicated it" to each other to "square off" positions, "rather than to go direct to the market."[9] Tr. 650:2-651:5. Because they did not, it was relatively straightforward for Liew, and the jury, to "infer that those . . . orders were to assist [Liew] in trying to clear [his] primary order" at a better price than the market would otherwise support. Tr. 651:6-8; Tr. 654:11-23.

The jurors could also infer intent to defraud from the defendants' reliance on an otherwise economically unsound trading strategy for roughly five years across

[9] To "square off" positions means to net the bank's orders before going to the market for the balance of the contracts needed. Tr. 649-650.

thousands of trades. Professor Venkataraman opined that a "persistent strategy of sending in an order and cancelling it immediately upon submission is just not economically rational" or "consistent with the strategy where the trader is trying to get the orders filled." Tr. 1406:14-17; *see also* Tr. 1478:9-17 (a strategy of quickly cancelling visible orders is "associated with outcomes that are really not good because the fill ratios tend to be so small"). Yet that was exactly how the defendants traded. GX 74; Tr. 1464:11-1465:11 (across the government's sixty-one episodes, the defendants' primary iceberg orders had a fill ratio of nearly 90 percent, while the fill ratio of their visible orders was roughly .2 percent—less than 50 contracts were executed of nearly 21,000 visible orders placed); GX 75; Tr. 1477:14-1478:2 (over tens of thousands of Vorley's trades between August 2009 and July 2013, same imbalance in fill ratio between ten-lot group visible orders opposite iceberg orders and iceberg orders); Tr. 1479:17-1480:3 (similar analysis for Chanu). *Compare Coscia*, 866 F.3d at 797 (fact that Coscia's trading program "facilitated the consummation of small orders and actively avoided the completion of large orders," even if not totally successful, was evidence of fraudulent intent).

So, the jury could reasonably infer that the defendants' large spoof orders were being placed for some purpose other than to be filled. And that their "economically irrational" trading was not a one-off, but a trusted strategy that the defendants turned to over and over again lends itself, instead, to two inferences supporting intent to defraud: first, that the defendants kept spoofing because it benefitted them financially to do so, despite the low fill ratios on their large, visible orders; and second, that the defendants either knew from the outset, or came to understand, that spoofing worked, even given the sophistication of their COMEX counterparties, and even in a fast-moving, information-rich environment, because it involved deception above and beyond what other traders expected to encounter in this competitive marketplace.

Both inferences are supported by evidence in the record. Though he agreed that it was facially economically irrational,[10] Liew testified that, on the sell side, he "would spoof in order to move prices higher so that [he] could sell at a better price"; as a result "spoofing helped either to increase [his] profits or to decrease [his] losses, and either way, that helps to build [his] PnL."[11] Tr. 763:4-8; Tr. 723:18-21 (Liew describing spoofing as a tool that he and the defendants "employed to help get a better price, and with a better price, we get better profits"). Where a defendant benefits financially from his actions in this way, and the benefit is contemporaneous with the defendant's

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[10] *See, e.g.*, Tr. 723:13-16 (Liew explaining that spoofing might mean risking $50,000 to try to make $5,000).

[11] "PnL" refers to a trader's net total profit and loss. Tr. 747:4-13. The jury heard testimony that Deutsche Bank traders' performance bonuses were tied to their individual PnLs in a given calendar year. Tr. 747:22-748:3. Moreover, an individual trader's PnL was "capable of influencing the bonuses of other traders on the desk"; Liew testified that each trader's PnL would roll up to the trading desk's collective PnL, the "pie" to be divided among the group. Tr. 748:4-13. As a result, each trader's individual performance determined, to some extent, other traders' bonuses as well.

misdeeds or misrepresentations, the evidence establishes the intent to defraud. *See United States v. Britton*, 289 F.3d 976, 982 (7th Cir. 2002); *United States v. Paneras*, 222 F.3d 406, 410 (7th Cir. 2000) (describing evidence that the defendant "benefitted financially . . . and that these benefits were contemporaneous with his misrepresentations" as "more than adequate to establish the defendant's intent to defraud beyond a reasonable doubt"); *see also United States v. Meyer*, 359 F.2d 837, 839-40 (7th Cir. 1966) ("The success of a scheme to defraud is not an element of the crime, although it may reflect the defendant's fraudulent intent.").

And the defendants' own chats establish that they knew that their trading strategy involved tricking, "triggering," or otherwise manipulating their COMEX counterparties, especially the high-speed algorithmic traders. In one chat, for example, Chanu exclaimed to Edward Bases that Bases had "tricked a[ll] the algorithm[s]" and asked Bases to "teatch [sic] [him] that pls," after Bases spoofed to move the market to Chanu's target price for a trade. GX 85; Tr. 1860:25-1862:7 (Bases also explained to Chanu that the episode "show[s] you how easy it is to manipulate [the market] sometimes," that he "f..k[s] the mkt around a lot" and that he "know[s] how to 'game' this stuff"). The very next day, Deutsche Bank trader Teng Kong Ong asked Chanu whether Chanu was "flashing bids to help [him] get done"; in other words, whether Chanu was very quickly placing and cancelling bids opposite Ong's sell order to help Ong get a good deal. GX 183; Tr. 1865-1867. Chanu confirmed that he was—"just to trigger [the] algorithm." Tr. 1865:17. In another chat, from

August 2012—over a year after Dodd-Frank became effective, though shortly before Deutsche Bank circulated the training presentation featured at trial—Chanu writes that he had "skewed the quote to the left" and gotten "[p]eople scared," and that he would "spoof it." GX 189; Tr. 1872:12-25 (Agent Luca explained that to "skew the quote to the left," Chanu was "heavy on orders to the bid side of the market" to "influence the quote").

The same is true for Vorley, who complained about spoofing by others in chats with traders at other banks but was far more approving of the strategy in conversations with other Deutsche Bank traders. In 2007, Vorley wrote to a trader at another bank that "UBS and the spoofing is annoying [him]" because "it's illegal, for a start." GX 80; Tr. 1897:22-1898:7. In another chat, a trader asks Vorley whether he is a "seller" in the market, which Vorley denies, responding "I told you I'm offer up here." The trader later asks Vorley whether a particular Globex order is Vorley's "spoofed 200-lots bid," which Vorley strenuously denies, responding, "F-k no. I'm not an asshole." GX 81; Tr. 1899:4-19. But when talking in-house, Vorley agreed with Edward Bases that traders can "def manipulate [the market] if you are aggressive." GX 184; Tr. 1903:13-19. Vorley demonstrated what he described as a "classic" example of the technique when, referring to the price of gold futures, he crowed ("Woooooooooooo") to Liew that he had "bi[d] it up" and "jam[med] it" while helping Liew clear his position (*i.e.,* sell). GX 20; Tr. 700:8-701:7. And in his March 16, 2011, chats with Adam Farthing, which were the subject of Deutsche Bank's 2015 disciplinary investigation against him, Vorley's tone is far more tongue-in-cheek when he tells Farthing that he is "spoofing it up, ahem ahem" to explain why he is placing buy orders when Farthing gave him gold to sell. GX 94; Tr. 1905:11-22. Though the defense vociferously argued that Vorley's references to "spoofing" or "illegal" conduct are not what they appear, the jury was not obligated to accept the defense characterization of these chats.

Finally, the jury heard evidence that spoofing violated CME and Deutsche Bank rules throughout the charged time period. Michael Koplowitz, a Deutsche Bank compliance officer, testified that even before Dodd-Frank specifically criminalized "spoofing," Deutsche Bank made clear to traders that "market manipulation"—defined as "any transaction or order to trade which gives or is likely to give a false or misleading impression as the supply, demand for, or price of one or more investments," as spoofing does—was prohibited. Tr. 1190:23-1191:7; GX 176. Deutsche Bank warned traders that "[m]arket [m]anipulation is illegal," not just against bank policy, and that such conduct had the potential to lead to criminal or civil penalties. GX 176. Vorley and Chanu were both trained on that policy in 2009, Tr. 1186:24-1187:14; GX 181, 180, 176, and that same market conduct policy was cited in Deutsche Bank's letter to Vorley inviting him to a disciplinary meeting based on his alleged spoofing on March 16, 2011. GX 131 (noting, as well, that the relevant section of the 2011 market conduct policy was "the same in all material respects as Section 3.2 of the current [2014] market conduct policy," which added spoofing as an example of a prohibited trading strategy); GX 133, 134. This policy was consistent with the CME's rules, as well. Tr. 386-387 (Scheerer testimony that the CME rules do not permit deception and prohibit traders from placing orders that they intend to cancel before execution).

The defendants counter that even if Deutsche Bank's 2010 and 2011 market manipulation policies prohibited defendants' spoofing and the defendants were trained on those policies, there was no evidence that they understood their trading to violate that policy. *See* Vorley Suppl. Memo. at 6; Chanu Suppl. Memo at 9. But that's not true. All of the evidence recounted above points to the reasonable conclusion that the scheme in which the defendants engaged was a market manipulation scheme, designed and intended to move the market price so that the defendants could execute trades at more favorable prices. The jury was hardly unreasonable in concluding that, having been trained that the bank's policies prohibited market manipulation, the defendants knew that placing orders they did not intend to trade was not a permissible trading technique.[12]

Vorley's conduct during his 2015 disciplinary review is particularly noteworthy in this regard. As noted, in his 2015 disciplinary interview, Vorley did not defend himself by arguing that his trading did not violate Deutsche Bank's market manipulation policy, nor did he claim to misunderstand or be unaware of the policy; instead, he tried over and over to explain away his trading by reference to "fat fingers," misunderstandings, and general floundering. GX 141-

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[12] *See also infra* Section II.A.

46, 150-153. Of similar import is Chanu's reaction when Edward Bases told Chanu that he liked to "f**k the markets around a lot"; the jury would have been irrational only had it concluded that Chanu's response —teach me how to do it—reflected a belief that there is some distinction that permits conduct to "f**k" the market around while prohibiting market manipulation.

The defendants' focus on what Deutsche Bank traders knew about Dodd-Frank's anti-spoofing provision and when they knew it is similarly off-target. *See, e.g.*, Chanu Suppl. Memo at 8 (arguing that there is no evidence Chanu, a French citizen, was or should have been independently aware of Dodd-Frank's anti-spoofing provision); Vorley Suppl. Memo. at 7-8. Specific intent to defraud does not require knowledge that conduct is prohibited by a statute or rule; rather, it requires an intent to lie to someone in an effort to obtain their money or property. Lying to cheat others out of money is frowned upon in France, England, and Singapore too, and the jury was not irrational in concluding that the evidence proved, beyond reasonable doubt, that Vorley and Chanu did just that. It does not matter that Dodd-Frank was not effective during the period comprising the defendants' guilty counts—in fact, it would not matter if Dodd-Frank had never been enacted at all. As they repeatedly argued to the jury, Vorley and Chanu were charged with wire fraud, not violations of Dodd-Frank. If, as the jury concluded, they intentionally deceived or cheated other market participants out of money by telling material lies, then they are guilty of the charged conduct.

Moreover, the inference the defendants draw based on the claim that when, in September 2012, they were "told to stop . . . they did stop"—that until then they did not know their conduct was prohibited—is compelled by neither the evidence nor logic. *See* Vorley Suppl. Memo at 8 & n.7. As an evidentiary matter, the government presented trading data from episodes on October 4, 5, and 25, 2012, and January 28, June 2, and July 9, 2013, all of which post-date the Deutsche Bank presentation. Two of these episodes involved Vorley, and the other four involved Chanu. Only the first of these involved layering 10-lot visible orders, and the rest involve one of the defendants placing single, very large visible orders opposite the primary iceberg. *See, e.g.*, GX 1 (Vorley trading on January 28, 2013, with a visible sell order for 110 contracts opposite his iceberg order); GX 1 (Chanu trading on June 2, 2013, with a visible buy order for 100 contracts opposite his sell side iceberg). The defendants reject the notion that these episodes involve spoofing and highlight that Vorley was acquitted of the single post-training count in the indictment. Vorley Suppl. Memo at 8 n.7. That result does not, however, necessarily reflect an absence of evidence that the defendants continued spoofing after the September 2012 presentation; Professor Venkataraman's testimony was enough to permit the inference that 100-lot orders operated in much the same way as layered 10-lot orders. *See, e.g.*, Tr. 1421:17-1422:1; *see also* Tr. 680:24-681:10 (Liew testifying that he was spoofing in an episode in which he placed 100-lot buy orders to "clear some of his selling in the market"). And even if the evidence had demonstrated that the defendants' spoofing ended after they received the training presentation, it would be just as reasonable for a jury to infer that the defendants abandoned the practice because it was more likely to be discovered as it would be to infer that the training prompted an epiphany that their conduct was fraudulent.

Finally, Vorley and Chanu each argue that it would be "*irrational* to conclude that he was openly engaged in market manipulation and fraud in front of his colleagues, including supervisors and the bank's compliance officers, but simply never got caught." Vorley Suppl. Memo. at 11 (emphasis in original). In support, the defendants note that their trading took place in the open, under the supervision of managers and compliance officers; that each element of the scheme was permitted on the COMEX exchange,[13] as were other types of orders that masked the full extent of a trader's buying or selling interest; and that no one from Deutsche Bank or the CME informed either defendant that they were doing anything improper. Defs.' Joint Rule 29 Mot. at 17-18; *see also* Vorley Suppl. Memo. at 6. These arguments, too, are unpersuasive.

The so-called "deafening silence" from Deutsche Bank, the CME, and the defendants' counterparties

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[13] This contention completely ignores Scheerer's unambiguous testimony that orders placed with the intent to cancel were not permitted on the exchange, whether they took the form of icebergs, visible resting orders, or any other type of otherwise permissible order. Tr. 387:3-6 (Q: So at least since the time that you've been in the Global Command Center, was it always a violation of the rules for someone to place orders they intended to cancel? A: Yes, it's always been a rule against that.).

provides weak support, at best, for the defendants' argument that until the September 2012 Dodd-Frank training, Vorley and Chanu "simply believed that [they] were engaged in a sharp, albeit permissible, trading strategy," Chanu Suppl. Memo. at 10; Vorley Suppl. Memo. at 8. And the jury was entitled to credit contrary evidence that the silence regarding the defendants' conduct is better explained by the fact that the risk of detection was small. The jury heard David Liew's testimony, for instance, that he thought spoofing was only "okay" in the sense that he "thought [he] wouldn't get caught" because spoofing "felt commonplace" on the precious metals desk, which had an attitude that "if spoofing helps you to achieve your goal, which is to make money, you should do it." Tr. 672:21-673:1; Tr. 674:15-675:13. Both John Scheerer and Michael Koplowitz testified that spoofing was difficult to detect, even for diligent compliance professionals. Koplowitz explained that Deutsche Bank's compliance officers could not watch traders' activity in real time from their own computers, Tr. 1237:6-14, and that even though compliance officers could, in theory, stand behind traders to monitor their trades, "it's very hard to stand behind a trader and understand . . . exactly what they're doing." Tr. 1235:13-1236:10. Liew corroborated this; he testified that compliance would have trouble figuring out whether he was spoofing while casually watching his screen because to "anyone that was walking past, without much context, it would just appear that it looks like you're busy." Tr. 673:19-674:14. Scheerer similarly acknowledged that it would be possible for a trader to violate the CME rules in a manner such that the CME would be unable to detect it. Tr. 416:3-5. And, given that even full-time compliance officials had difficulty detecting spoofing, the defendants' contention that silence from their counterparties suggests the strategy was permitted is particularly weak. *See* Vorley Suppl. Memo. at 9. Other COMEX traders were in an even worse position to "say something" than the CME or Deutsche Bank itself—Twells confirmed that spoofing is "extremely difficult to catch at [the traders'] level when we don't know the counterparties' specifics." Tr. 1731:16-21.

Taken as a whole and viewed in the light most favorable to the prosecution, there is ample evidence in the record supporting the jury's conclusion that Vorley and Chanu repeatedly and purposefully engaged in a pattern of placing large, visible spoof orders opposite their primary, iceberg orders, and that their intent in doing so was to falsely signal to other market participants the arrival of a significant buying or selling interest and induce other traders to execute against their iceberg orders at more favorable prices. With the evidence in the record, the jury could reasonably disregard the defendants' alternative explanation—that the defendants merely got lucky and stumbled upon a "sharp" but innocent trading strategy that routinely paid off in the hyper-competitive environment the defendants described at trial. The evidence further supports the inference that, Dodd-Frank aside, Vorley and Chanu understood that their conduct was both intrinsically fraudulent and also violative of CME rules and Deutsche Bank's market manipulation policies. As such, the defendants' assault on the sufficiency of the evidence regarding knowledge and intent to defraud fail.

B. The Evidence Was Sufficient for a Rational Jury to Conclude that the Charged Episodes Involved Spoofing.

In their supplemental memoranda, both defendants argue that the prosecution failed to prove that the charged trading episodes were, in fact, part of a spoofing scheme. Chanu Suppl. Memo. at 2-6; Vorley Suppl. Memo. at 11-15. Both defendants cite various evidence that, in their view, contradicts or undermines the government's theory that the defendants were spoofing during the episodes corresponding to their respective counts of conviction. *See, e.g.*, Vorley Suppl. Memo. at 12-13 (rehashing perceived weaknesses in government witnesses' testimony and alternative justifications for Vorley's trading decisions on February 12, 2010, and May 5, 2011); Chanu Suppl. Memo. at 3-6 (lamenting the government's selection of "arbitrary time frames of between 15 seconds and 15 minutes" and urging that a rational jury could only have concluded that the visible orders placed during the "government-defined episode[s]" were "simply a continuation of an innocuous trading pattern").

As an initial matter, that there was potentially inconsistent testimony or hypothetically innocent explanations for a defendant's conduct does not mean the record was devoid of evidence supporting the jury's guilty verdicts. And the Rule 29 standard demands that courts "give[] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). For the reasons already discussed, there was sufficient evidence from which a rational jury could conclude, beyond a reasonable doubt, that the defendants were spoofing in the government's charged episodes; the jurors heard the defendants' present arguments through their thorough, extensive cross-examination of the government's witnesses and still exercised their role "as weigher[s] of the evidence" to conclude that the defendants were, on at least some occasions, guilty of wire fraud.[14] *Id.* The Court cannot disturb that conclusion by reweighing the evidence at this stage.

A common refrain in these arguments nevertheless bears noting. The defendants argue that "given the many possible alternative explanations for placing and cancelling the visible orders," and the fact that Vorley and Chanu "placed similar orders tens of thousands of times with no iceberg orders on the opposite side," the evidence did not support a finding beyond a reasonable doubt that they engaged in spoofing (*i.e.,* that they misrepresented their intent to trade). *See* Vorley Suppl. Memo. at 2; Chanu Suppl. Memo. at 3 (in view of cancellations when no iceberg orders were pending, "the jury had no rational way to conclude beyond a reasonable doubt that Mr. Chanu's placement and cancellation of visible orders opposite iceberg orders was 'spoofing,' as opposed to coincidental"). The premise of the argument is that the defendants "traded

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[14] Surprisingly, given their Rule 29 motion, the defendants did not address in their closing arguments the adequacy of the evidence to support a finding that any specific trading episode involved spoofing, with the exception of Count 17 on July 9, 2013, of which Mr. Vorley was acquitted.

in the exact same way" in periods outside of those episodes depicted on the government's charts, and that what the government depicted as spoofing was "simply a continuation of an innocuous trading pattern" engaged in throughout the rest of the day. Chanu Suppl. Memo. at 4; *see also*, *e.g.*, Tr. 2093-94 (counsel for Vorley) ("75 percent of the time he's trading exactly the same way, placing and quickly cancelling orders, and there's no iceberg on the other side. They just left that off the charts. They didn't want you to know that that's what he does all day long. That's what normal trading looks like.").

The comparison, however, is fallacious. It mischaracterizes the scheme by ignoring the probative import of the iceberg orders, which as alleged and argued by the government, were an integral part of the scheme. The government's theory was not that all large visible orders were fraudulent; it was that the defendants' scheme involved the placement of large visible orders on the opposite side of the market from open iceberg orders that were priced above (for offers) or below (for bids) the prevailing market price. There was ample evidence from which the jury could conclude that transactions that fit that pattern were part of a scheme to defraud rather than the product of "coincidence." That the defendants frequently placed and canceled visible orders when they did ***not*** have open iceberg orders pending on the opposite side of the market says nothing about their intent when placing and canceling such orders while trying to fill open iceberg orders at better prices than the market was offering.[15]

C. The Evidence Established a Scheme to Defraud Within the Meaning of the Wire Fraud Statute.

The defendants also contend even if Vorley and Chanu used large, visible orders to induce third parties

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[15] The jury's mixed verdicts suggest that they considered the evidence relating to each defendant and each charge separately and carefully. Chanu speculates, however, that the jury's verdicts can be explained simply by reference to whether the government's charts showed that "there was more than one visible order opposite an iceberg." Chanu Suppl. Memo. at 6. Chanu also acknowledges, however, that the "rule" he posits does not in fact explain the jury's verdict on Count Four.

There is, of course, no evidentiary support for Chanu's claim (*see* Fed. R. Evid. 606(b) and LCrR31.1) and, in any event, it is not at all clear why a conclusion that episodes in which the defendants layered multiple 10-lot orders opposite open iceberg orders involved spoofing, while those that included only a single, large visible order did not, would be irrational. Indeed, the same distinction was suggested by Vorley's counsel in his closing argument when he contrasted trades involving single 100-lot orders from those involving multiple 10-lot orders and argued that placement of a single, large visible order is an inadequate basis to infer a spoofing scheme. Tr. 2102:16-2103:4 ("What do we have here? July 9, 2013, one 100-lot red dot. There are no groups of ten-lot orders, the thing the prosecutors say were the spoofing fingerprint at this time. There's a single red dot. . . . There's no way you can know why James placed a single red dot for one second, more than seven years ago, with no information other than this chart."). Implicit in that argument is what the jury could have understood as an acknowledgement that placement of multiple layered 10-lot orders is different and more probative of participation in spoofing.

to enter into economic transactions they may have otherwise avoided, "[n]ot all deceit or deception about something that would be relevant to another party constitutes fraud." Defs.' Joint Mot. at 18. They argue that, under the Second and Eleventh Circuits' approach, the defendants' conduct falls outside the reach of the wire fraud statute because their scheme did not involve a false representation regarding the "essential elements of the bargain." *Id.*, *citing United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007), *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016). Vorley and Chanu acknowledge that the Seventh Circuit has not endorsed this approach, but assert that the Circuit's decisions in *Weimert* and *Coscia* "fully align[]" with a narrower construction of the statute's reach. *Id.* at 20.

Neither *Weimert* nor *Coscia* support the defendants' argument. The Seventh Circuit's conclusion in *Weimert* that "[d]eception about negotiating positions—about reserve prices and other terms and their relative importance—should not be considered material for purposes of mail and wire fraud statutes" did not narrow the wire fraud statute's scope so as to exclude the defendants' conduct from its reach. 819 F.3d at 358. In explaining that not all deceit is material, the court observed that, in the type of arms-length commercial negotiation at issue in that case, "parties . . . do not expect complete candor about negotiating positions" from their counterparties, and analogized deception about a party's negotiating position to "statements about a party's opinions, preferences, priorities, and bottom lines," which have generally been treated as immaterial to a transaction. *Id.* (differentiating also between representations of fact "where the maker has definite knowledge" from statements of opinion, where opinions "may be expected to differ"). But in deeming one category of misleading statements immaterial, the Seventh Circuit did not categorically exclude as material all misrepresentations that "induce a third party to enter into an economic transaction that it might otherwise have avoided." Defs.' Joint Rule 29 Mot. at 18. In fact, the court held firm that "[s]ome deceptions in commercial negotiations certainly can support a mail or wire fraud prosecution"—and gave, as paradigmatic examples, factual misrepresentations that would induce a counterparty's participation in a deal at a seemingly competitive price that is, in actuality, out of sync with the asset's actual value. *See Weimert*, 819 F.3d at 356 (giving examples of misrepresentations of material facts that would, *e.g.*, lead a buyer to "purchase a property worth far less than she was led to believe," lead an investor to "believe that he was investing in a valuable asset that was actually worthless," or obscure "information [that] would be material to the price buyers . . . are willing to pay"). The court's examples illustrate that material misrepresentations are not limited to just misstatements about price, quantity, or other basic terms of the deal—what the defendants seem to implicitly urge are the only "essential elements of the bargain." *Id.* (describing misrepresentations as to the possibility of future remediation costs of a property's environmental issues; as to the likelihood of patent protection for a company's intellectual property; or as to the magnitude of investors' expected loss, none of which misstate the price or object of a deal); *see also United States v. Binday*, 804 F.3d 558, 575-76 (2d Cir.

2015) (rejecting the defendants' argument that victim life insurance companies got "exactly what they bargained for: legally transferable contracts on the lives of individuals of a specific age and overall health," because there is no reason why a jury would be compelled to conclude those are the only "essential elements" in determining life expectancy and, in turn, the value of the insurance contract). Rather, *Weimert* reaffirmed that the wire fraud statute reaches a wide, though not exhaustive, range of "deliberate misrepresentation[s] of facts or false promises that are likely to affect the decisions of a party on the other side of the deal." 819 F.3d at 357. And as discussed above, *supra* Section I.A.2, the misrepresentation of a trade intended to manipulate the market as one entered with a bona fide intent to execute it is most assuredly one that is likely to affect the party on the other side of the deal.

Vorley and Chanu treat "negotiating position" and "intent to trade" as interchangeable but that is a false equivalency. The government's theory was not that Vorley and Chanu merely misled other market participants about their own private valuation of a given futures contract or bluffed about their willingness to trade at a certain price level; either type of deception would arguably fall within *Weimert*'s ambit. Instead, the prosecution alleged that the defendants' misrepresentations impacted other traders' valuations of the contracts at issue such that the defendants' genuine bids or offers were more economically attractive. That the misrepresentation concerned the defendants' internal intent, rather than outside information about the world, makes it no less objectively or demonstrably false. *Compare id.* at 356 (material misrepresentations might concern facts outside of a party's control, like a property's history of environmental problems or a piece of intellectual property's potential patent protection, or facts within the party's control, like a company's deliberate understatement of its own approximation of investors' expected losses). And, unlike in *Weimert*, where the negotiating parties did not expect complete candor regarding bargaining positions, the defendants and their counterparties were trading against the backdrop of the CME's rules. The exchange may not have demanded "complete candor," but, as already highlighted, it did prohibit the non-bona fide orders integral to the defendants' scheme. In sum, the evidence adduced at trial established that Vorley and Chanu's misrepresentations of their intent to trade were not just a sharp negotiating tactic, but material falsehoods likely to affect other market participants' trading decisions. Under *Weimert*, that is wire fraud.

As for *Coscia*, the defendants' attempt to argue that it supports their "benefit of the bargain" argument stretches the boundaries of credibility; their argument about the scope of a scheme to defraud simply cannot be squared with the Seventh Circuit's opinion. Coscia, like Vorley and Chanu, schemed to "pump or deflate the market through the use of large orders that were *specifically designed* to be cancelled if they ever risked actually being filled." *Coscia*, 866 F.3d at 794 (emphasis in original). And, like the defendants, Coscia urged that his large orders were not fraudulent because "they were left open in the market long enough that other traders could—and often did—trade against them, leading to thousands of completed transactions." *Id.* at 797. The Seventh Circuit was clear, however, that occasional fills notwithstanding, Coscia's trading scheme "was deceitful because, at the time he placed the large orders, he intended to cancel the orders . . . and thus sought to manipulate the market for his own financial gain." *Id.* (internal quotations omitted). That the counterparties to Coscia's small, primary orders received the agreed-on quantity of copper futures contracts at the agreed-on price was beside the point.

As a result, the defendants' efforts to distinguish their conduct from Coscia's trading are unavailing. Like Coscia's algorithmic orders, Vorley and Chanu's manual spoof orders were effectively "equivalent to truly fake, riskless orders" that had the sole purpose of creating an illusion of market movement. Defs.' Joint Rule 29 Mot. at 20. That Coscia's algorithmic programs cancelled his large visible orders in a matter of milliseconds with a fill ratio of .08%, while the defendants' visible orders had a median duration of 2.93 seconds and a fill ratio of .2%, are distinctions without a difference. *Coscia*, 866 F.3d at 797; Tr. 1463:22-1464:1 (median duration across government's sixty-one trial episodes); Tr. 1464:11-17 (fill ratio across sixty-one episodes). The fraudulent scheme was the same: "to create the illusion of artificial market movement that included the use of large orders to inflate [or deflate] the price." *Coscia*, 866 F.3d at 797 n.64. By definition, the defendants' counterparties, like Coscia's, did not get the benefit of their bargain, because the agreed-on price was an artifice of the defendants' making.

There is, in any event, substantial reason to question the defendants' contention that had the defendants been tried in the Second or Eleventh Circuit, "they clearly would be entitled to a judgment of acquittal on the indictment's wire fraud charges." Defs.' Joint Rule 29 Mot. at 19. As the Second Circuit has clarified, deceit that "deprive[s] the victim of potentially valuable economic information," such that "the deceit affected the victim's economic calculus or the benefits and burdens of the agreement," is actionable under the wire fraud statute. *Binday*, 804 F.3d at 570-71, 579 (for a finding of fraudulent intent, "it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision"); *see also United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994) (explaining, in a mail fraud prosecution, that the government could have established that information withheld was material by demonstrating that the victim "could have negotiated a better deal for itself if it had not been deceived"). So, too, the Eleventh Circuit acknowledged in *Takhalov* that "misrepresentation [that] goes to the value of the bargain" is fraud. 827 F.3d at 1313.[16]

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[16] *Takhalov* has been the subject of criticism within the Eleventh Circuit. Chief Judge William Pryor, in a concurring opinion, described the court's *Takhalov* opinion as "puzzling," with "no obvious basis in the common law of fraud," and opined that "[n]othing about the common-law test limits materiality to misrepresentations about 'the price,' 'the characteristics of the good,' or even 'the nature of the bargain itself.'" *United States v. Feldman*, 931 F.3d 1245, 1265, 1272 (11th Cir. 2019) (Pryor, J., concurring). He further warned that "depending on how our

Such is the case here. Several witnesses testified in support of the proposition that the defendants' spoofing worked because their large, visible orders implicitly misrepresented that Vorley and Chanu had a genuine intent to trade; that misrepresentation signaled a shift in supply and demand in the market which, in turn, affected other market participants' evaluation of the fair market value of futures contracts. So yes, the defendants' counterparties got what they paid for: a certain quantity of precious metals futures contracts, at a price they agreed to. But market participants were deceived by the defendants' spoof orders in a way that affected their economic calculus and assessment of the value of those contracts, as evidenced by the fact that the defendants' iceberg orders often sat unfulfilled for, in this context, relatively lengthy periods of time, until the defendants placed large spoof orders to push the mid-market price in the direction of their primary orders. In this regard, this case is a variation on the familiar trope of an auction house that employs sham bidders to drive up the price of an item up for sale. No one would maintain that the high bidder got the benefit of its bargain in that scenario, even though it was willing to pay the higher price. Because the defendants' scheme was premised on depriving their counterparties of economically valuable information—that their orders did not actually correspond to the arrival of new buyers or sellers or a shift in supply and demand for futures contracts—the defendants' conduct falls within the

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opinion is interpreted, its analysis may well be at odds with both the common law and binding precedent" and encouraged "the bench and bar" to exercise "due care" in interpreting and applying the opinion in future wire fraud prosecutions. *Id.* at 1265, 1273.

wire fraud statute's definition of a "scheme to defraud" under either approach.

D. The Prosecution's Implied Misrepresentation Theory Did Not Render the Wire Fraud Statute Unconstitutional as Applied to the Defendants.

Finally, the defendants renew their due process challenge, and argue that nothing in the wire fraud statute put them on notice that placing large, visible orders on the COMEX implied an intent to trade, such that their conduct could be prosecuted as a violation of that statute. *See* Defs.' Joint Rule 29 Mot. at 21-23. This argument was addressed and rejected in this Court's opinion on the defendants' motion to dismiss the indictment. Order at 33-37, ECF No. 119. And, as there, the defendants' underlying argument that the evidence was insufficient to prove that their orders carried implied misrepresentations "is no more persuasive when presented in the context of a vagueness challenge." *Id.* at 34. As relevant here, the wire fraud statute makes criminal schemes intended to cheat others of money by making materially false representations. The defendants' vagueness argument is simply that the statute does not make sufficiently clear that the statute covers implied, as well as express, misrepresentations. But, as the Court explained in its ruling denying the defendants' motion to dismiss, the wire fraud statute has long encompassed implied misrepresentations and its application here does not, as the defendants maintain, represent a radical expansion in the statute's reach.

Repackaged post-trial, the defendants' vagueness argument is simply that the government failed to present sufficient evidence to prove that the defendants knowingly made material misrepresentations when they placed orders on the futures markets that they did not intend to trade. Defs.' Reply, at 13-14 ("***the trial evidence*** showed that [the defendants] had no notice that placing visible orders opposite iceberg orders could be construed as giving a false impression of supply or demand based on the intent to cancel the orders") (emphasis in original). But the jury concluded that ***the trial evidence*** showed that the defendants knowingly made material misrepresentations about their intent to execute various trades in furtherance of a scheme to defraud by spoofing and it was not irrational in reaching that determination. Accordingly, the defendants' vagueness challenge fails. Again.

II. Rule 33 Motion for a New Trial

Alternatively, the defendants move under Rule 33 for a new trial. Defs.' Joint Rule 33 Mot., ECF No. 354; Defs.' Suppl. Rule 33 Mot., ECF No. 361. Under Rule 33, a court may grant the defendants a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a); *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989) ("The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court."). Courts have interpreted the Rule 33 standard "to require a new trial in a variety of situations in which trial errors or omissions have jeopardized the defendant's substantial rights." *United States v. Reed*, 986 F.2d 191, 192 (7th Cir. 1993). However, a jury verdict in a criminal case is "not to be overturned lightly." *United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994) (citation omitted). A new trial is warranted only in "rare cases in which consideration of the evidence leaves a strong doubt as to the defendant's guilt of the charged offense." *United States v. Peterson*, 823 F.3d 1113, 1122 (7th Cir. 2016) (citation omitted).

The defendants raise a number of issues that, in their view, warrant vacating the their convictions: first, that the Court erred by declining to instruct the jury on the defendants' "permissible trading strategy" defense; second, that the Court erred by declining to instruct the jury that misrepresentations do not constitute a scheme to defraud if they do not go to the "essential elements of the bargain"; third, that FBI Special Agent Johnathan Luca gave improper and prejudicial "legal opinion" testimony regarding one of Vorley's electronic chat messages; fourth, that Special Agent Luca's dual-role testimony prejudicially blurred the line between his lay and opinion testimony; fifth, that the Court's orders to the jury to continue deliberations were unduly coercive in the context of the COVID-19 pandemic; and sixth, that Professor Venkataraman's spreadsheet of 5,902 "spoofing sequences"—prepared at the government's behest for sentencing, and disclosed to the defense on November 24, 2020, two months after the trial concluded—constitutes newly discovered exculpatory evidence that likely would have led to acquittal on at least some counts. None of these alleged errors warrant setting aside the defendants' convictions and ordering a new trial.

A. The Defendants Were Not Entitled to the Proposed "Permissible Trading Strategy" Defense Jury Instruction.

The defendants contend that it was error for the Court not to instruct the jury that "if the defendant honestly believed that his trading strategy was not fraudulent—that is . . . that his trading strategy was permitted by the applicable marketplace rules and/or did not involve the use of false representations to the market regarding his intent—then he acted in good faith and without the intent to defraud." Defs.' Joint Rule 33 Mot. at 2; *see also* Defs.' Request for Good Faith Instruction, ECF No. 333. Vorley and Chanu argue that this instruction was necessary to "convey at least two of their principal theories of defense": first, that the COMEX rules permitted various trading strategies that were designed to disguise a trader's full selling or buying interest, and, as a result, the defendants in good faith believed that their trading strategies were within COMEX rules; and second, that the defendants had a good faith belief that their COMEX orders did not include any false representations. Defs.' Joint Rule 33 Mot. at 3.

"Defendants are not automatically entitled to any particular theory-of-defense jury instruction." *United States v. Cruse*, 805 F.3d 795, 814 (7th Cir. 2015) (citation omitted). Rather,

> a defendant is . . . entitled to a jury instruction that encompasses a theory of the defense if (1) the instruction represents an accurate statement of the law; (2) the instruction reflects a theory that is supported by the evidence;

> (3) the instruction reflects a theory which is not already part of the charge; and (4) the failure to include the instruction would deny the defendant a fair trial.

Id. (internal alterations omitted). Vorley and Chanu maintain that the evidence presented at trial supports their proposed instruction and that the Court's instruction regarding intent to defraud was insufficient, as "not all forms of commercial deception are *fraudulent*." Defs.' Joint Rule 33 Mot. at 4-5 (emphasis in original), *citing Weimert*, 819 F.3d at 357. Moreover, the defendants argued that the Court's instructions "erroneously conveyed to the jury that it could find the defendants guilty *regardless* of whether the defendants believed in good faith that their trading strategy, though deceptive, was permitted by the applicable marketplace rules." *Id.* at 5 (emphasis in original).

Not so. The defendants' proffered instruction was effectively already part of the charge; it was entirely redundant with the instructions that told the jury that to find the defendants guilty of wire fraud, it had to find that Vorley and Chanu acted knowingly and with the specific intent to defraud—that is, to deceive or cheat another—out of money or property by means of a materially false representation. This instruction, which tracks the Seventh Circuit pattern instructions for wire fraud,[17] made clear that to convict the

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[17] See SEVENTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, 18 U.S.C. §§ 1341 & 1343 Mail/Wire/Carrier Fraud—Elements, p.

defendants of wire fraud, the jury was required to find that they had acted in bad faith. As the Court observed at trial, the defendants' proposed good faith instruction was "inconsistent with Seventh Circuit case law, the upshot of which is that no good faith instruction is needed or appropriate in a fraud case because you have to find bad faith to be guilty of fraud." Tr. 1344:7-1345:1. For that reason, in both *United States v. Johnson*, 874 F.3d 990, 1002 (7th Cir. 2017), and *United States v. Lunn*, 860 F.3d 574, 579-80 (7th Cir. 2017), the Seventh Circuit held that defendants charged with wire fraud and bank fraud, respectively, were not entitled to a good faith instruction.[18]

The Seventh Circuit's reasoning applies with equal force here. To convict Vorley and Chanu on the substantive wire fraud counts, the jury was required "to find bad faith, and specifically the intent to commit fraud." *Johnson*, 874 F.3d at 1002. And because "it is impossible to intend to deceive while simultaneously acting in good faith," the defendants' proposed good faith instruction "would have been at best redundant." *Lunn*, 860 F.3d at 580, *quoting United States v. Mutuc*,

538; 18 U.S.C. §§ 1341 & 1343 Definition of "Intent to Defraud," p. 548 (2020 Ed.).

[18] A conclusion in line with that of most other circuits. *See United States v. Chavis*, 461 F.3d 1201, 1209 n.1 (10th Cir. 2006) (collecting cases and concluding that "[t]he other circuits to address the matter have held, at least as a practical matter, that a district court is not required to give a separate good-faith-defense instruction in a fraud case because a finding of the intent to defraud, which is an element of the crime, . . . necessarily implies that there was no good faith").

349 F.3d 930, 936 (7th Cir. 2003). And, at worst, it would have utterly confused the jury, leaving it to ponder how a defendant who engaged in conduct with the specific intent to cheat others out of money could simultaneously be acting in "good faith."

The defendants' attempts to distinguish their proposed good faith instruction from the instructions requested in *Johnson* and *Lunn* are unpersuasive. To illustrate their point that not all deceptive conduct is fraudulent, they offer the analogy of a poker game, in which a successful bluffer is not guilty of fraud because the rules of the game permit the making of false statements about what cards one holds. That's a fair description of poker (as far as it goes), but the analogy is flawed. That the rules of poker permit some deception does not, of course, mean that they permit all deception. To make the defendants' poker analogy apt, we have to focus on the representation used to deceive. Instead of false representations about the cards one holds, which are permitted by the rules, consider that the rules nevertheless require players to use only the cards they were dealt. A player who lays down four aces but fails to disclose that he had one of those aces up his sleeve before the deal is, of course, cheating—that is, deceiving the other players by means of an implicit misrepresentation concerning his bet—notwithstanding that the rules allow bluffing. The argument that the defendants advance—"I thought I could misrepresent my intention to execute these orders because iceberg orders and 'fill or kill' orders are permitted" is the functional equivalent of the card shark's claim, upon discovery of the ace up his sleeve, that "I thought I could add an ace to my hand because the rules allow bluffing." Neither is terribly convincing.

But the Court didn't refuse the defendants' proffered instruction because it was offered in support of a weak argument; the Court refused it because it was unnecessary. Because intent to defraud and good faith are polar opposites, good faith can be argued as the absence of intent to defraud (and vice versa). Since the defendants did not testify, any argument that they acted in good faith would necessarily have been made on the basis of circumstantial evidence, but any argument that the evidence supported an inference of good faith could easily be couched instead as an argument that the evidence showed that the defendants did not have the required intent to defraud. The Court explained the point at length at the final jury instruction conference:

> They are polar opposites, and what can be argued as good faith can also be argued as the absence of evidence sufficient to prove the defendants guilty of participating in a scheme to defraud, of intending to defraud, or making materially false or fraudulent statement or omission.
>
> So I don't see the need to set this up … as a theory of defense. The government has the burden of proving the charges beyond a reasonable doubt. In order to do so, it has to prove intent to defraud, materiality, participation in the scheme to defraud, and that's what I think it's proper to instruct the jury in, not … setting up as, you know, some

> kind of defense that the defendants had, … good faith belief that they could cancel an order at any time or that … the CME rules permitted deception without caveat.
>
> [Y]ou can make the arguments about those things and the tag line to that is that's how you know, ladies and gentlemen, that there was no intent to defraud here. We don't need to set up a stalking horse of they did this in good faith; therefore, they're not guilty. That's where I think the risk of jury confusion lies.

Tr. 2126. Even the defendants' proposed good faith instruction acknowledges the equivalence between good faith and the absence of intent to defraud: "If the defendant acted in good faith, then he necessarily lacked the intent to defraud . . . . The defendant does not have the burden of proving his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud." Defs.' Request for Good Faith Instruction at 5.

Given this equivalence, it is not surprising to find that nowhere in their briefs do the defendants detail any argument they were unable to make in the absence of their good faith instruction. And the proof of the pudding is in the eating; review of the defendants' closing arguments shows that they had no difficulty couching arguments about their good faith understanding of what the rules permitted as arguments that they had no intent to defraud because they were doing what the CME and Deutsche Bank had always allowed. Vorley's counsel, for example, repeatedly argued that his conduct was consistent with

CME and Deutsche Bank rules and was therefore not fraudulent. *See, e.g.*, Tr. 2086-87 ("What have you learned about trading on the CME? . . . You're trying to manipulate their impression of what's going to happen next. ***That's not fraud. It's allowed***."); Tr. 2103 ("All the traders were trying to disguise their strategies. And the prosecutors can't come in here years and years and years later and say the way they competed way back then was fraud."); Tr. 2103 ("He [Vorley] did the job the way he was taught and the way he thought he was supposed to do it. His supervisors never told him any different. Compliance never told him any different. The exchange never told him any different."). Chanu's attorney sounded the same notes. *See, e.g.*, Tr. 2133 (after describing highly competitive market place that "allowed for all sorts of secrecy and deception," in which defendants were always "under the watchful eye" of compliance, "[t]he bottom line . . . is that there is absolutely no evidence that Cedric acted with any criminal intent, much less criminal intent to defraud").

The defendants nevertheless also insist that the proposed good faith instruction was needed to convey their theory that Vorley and Chanu did not think their COMEX orders included representations about their intent to trade, but the instructions given to the jury would not permit the jury to convict the defendants without proof beyond a reasonable doubt that they knew that their orders misrepresented their intent to trade. The jury was instructed that, to convict on the wire fraud counts, it must find that a defendant "knowingly devised or participated in the scheme to defraud" charged in the indictment. Tr. 2201:1-3. And the jury was instructed that a person acts "knowingly" if he "realizes what he is doing and is aware of the nature of his conduct and does not act through ignorance, mistake or accident." Tr. 2200:9-11. Based on this instruction, if the jury believed that Vorley and Chanu believed that their COMEX orders did not carry implied misrepresentations of their intent to trade, then it could not have found, beyond a reasonable doubt, that the defendants "knowingly" participated in the scheme to defraud—a scheme which, by definition, includes "a materially false or fraudulent pretense, representation or promise." Tr. 2201:6-7. As a result, the proposed "good faith" instruction was unnecessary as to this theory as well.

Simply put, there is no such thing as good faith fraud. Saying that the defendants placed orders they didn't intend to trade with a good faith belief that it was proper to do so is no different than saying that the defendants didn't intend to defraud anyone by placing orders they didn't want to trade because they believed it was proper to do so. The defendants' contention that one can deceive in good faith is, at bottom, an attempt at misdirection. They wanted the instruction to focus the jury on deception that was permitted by the rules rather than the deception that was charged: misrepresenting their intent to execute orders at the time the orders were placed. But the defendants weren't charged with wire fraud for misrepresenting their true level of trading interest by placing iceberg orders; they were charged with committing wire fraud by falsely representing that they intended to execute orders that they did not, in fact, intend to execute. In the context of the defendants' poker analogy, they weren't charged with bluffing about the cards in their hands, but for failing to disclose the aces up their sleeves. And, again, they were permitted to argue that if they honestly believed that hiding the aces up their sleeves—*i.e.*, their intent not to execute orders—was permitted conduct, they did not have the requisite intent to defraud. Repeating the point by substituting "good faith" for lack of intent to defraud would have accomplished nothing other than confusing the jury about the distinction between good faith and lack of intent to defraud. The defendants' proffered good faith instruction was entirely unnecessary and its absence did not deprive the defendants of a fair trial.

Even if the defendants' proposed good faith instruction weren't redundant and therefore unnecessary and confusing, it was properly rejected because it misstates the law. The defendants' premise —that they acted in good faith and without the intent to defraud if they honestly believed that their trading strategy was permitted by the applicable marketplace rules—is wrong. The defendants' good faith belief that certain conduct is permitted by the CME, a private exchange not charged with interpreting or enforcing federal law and without the power to bless otherwise illegal conduct, is not equivalent to a good faith belief that an individual is not acting fraudulently vis-à-vis counterparties in the marketplace; unlike the latter, the former will not dictate a jury's finding that the defendants acted without the intent to defraud. *Compare Dial*, 757 F.2d at 167-68 (upholding the defendants' mail and wire fraud convictions though there was "no statute, regulations, or Board of Trade rule that specifically forbid[] insider trading in commodity futures . . . , or block trading, or trading ahead" at the time of the defendants' conduct).

As the defendants themselves insisted throughout the trial, they were charged with wire fraud, not violating CME rules.[19] Even if the jury was convinced that the defendants believed that they were in compliance with CME rules while spoofing, that belief would not immunize them from a wire fraud charge. Devising a scheme to cheat others out of money or property by means of false representations is a federal crime, even if not prohibited by CME rules (or even if the rules purported to expressly permit such conduct). The CME might purport to allow dueling to settle disputed trades, but that would not provide a legal defense to the surviving dueler. A rule that purported to allow traders to make material misrepresentations to counterparties in order to deceive or cheat them out of money or property—that is, to commit wire fraud—would be equally ineffective. So, an instruction that says a defendant who "honestly believed that his trading strategy was permitted by the applicable marketplace rules" acted, ***as a matter of law***, in good

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[19] The defendants requested and received an instruction saying spoofing or violation of trading rules is not sufficient evidence, standing alone, to convict. The flip side of that coin is also true: compliance with CME rules, standing alone, does not establish innocence. *Cf. United States v. Brown*, 871 F.3d 532, 537 (7th Cir. 2017) ("[A] police officer's compliance with the rules of his department is neither sufficient nor necessary to satisfy the Fourth Amendment's reasonableness requirement. . . . [I]f compliance with departmental policy were the applicable legal standard, the police department itself would become the arbiter of Fourth Amendment reasonableness.")

faith and without the intent to defraud, is simply wrong.[20] Committing wire fraud is not a permissible trading strategy.

B. The Defendants Were Not Entitled to the Proposed "Essential Elements of the Bargain" Jury Instruction.

The defendants also contend that it was error for the Court not to instruct the jury according to Second and Eleventh Circuit law on the scope of a "scheme to defraud." The defendants proposed to instruct the jury that "[t]he wire fraud statute is not violated where a defendant's conduct does no more than cause the alleged victim to enter into a transaction he or it may otherwise have avoided" and that the defendants' misrepresentations violated the wire fraud statute only if they went to "the nature or quality of the contract he was offering for sale or sold." Defs.' Redline of Court's Proposed Jury Instructions (Sept. 3, 2020); Tr. 1341:20-1342:22. Vorley and Chanu maintain that failure to give the instruction was prejudicial "because the Court's jury instructions defined 'scheme to defraud' in a manner that included a scheme to deceive through

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[20] This is not to say that it was wholly irrelevant whether the defendants' trading violated the CME's rules; whether the CME permitted traders to place orders with the intent to cancel is probative in determining whether COMEX orders carried an implicit representation of the offeror's intent to trade and whether a trader's representations about their intent to trade were material to counterparties. And, again, the defendants were permitted to—and did—argue that the evidence failed to show that they intended to deceive or cheat counterparties because they believed that the rules permitted other types of deception.

the use of *any* false representations." Defs.' Joint Rule 33 Mot. at 7.

The defendants' contention that "any" false representation was sufficient for conviction is flatly wrong; to convict, jurors had to conclude that the defendants' representations were not only false, but material, defined for the jury as "capable of influencing the decision of the persons to whom it was addressed." Tr. 2202:19-22 (Seventh Circuit pattern instruction on the definition of "material"). Further, and as just discussed, the instructions required the jury to find that the defendants made the alleged misrepresentations with the specific intent to defraud; that is, to deceive or cheat them out of money or property. And for the reasons already discussed in rejecting the defendants' argument that they should be acquitted because their scheme did not involve a false representation regarding the "essential elements of the bargain," *see supra* Section I.C, the proposed instruction was not necessary to adequately instruct the jury on the elements of the offense, nor was it consistent with the law of this circuit.

C. Special Agent Luca Did Not Offer "Legal Opinion" Testimony About an Electronic Chat Message, and the Chat Was Properly Admitted.

Next, the defendants argue that a portion of FBI Special Agent Luca's testimony was an improper and prejudicial legal opinion, and that the chat that was the subject of that testimony should not have been admitted in the first place. On October 2, 2007, Vorley wrote to a trader at another bank that "UBS and this spo[o]fing is annoying me / its illegal for a start." GX 80. This chat was admitted against Vorley, without questions about its substance, during the government's direct examination.[21] Tr. 1897:22-1898:9. The meaning of the statement was, however, addressed at length during the defense's cross-examination. Tr. 1929:12-1933:20. The cross-examination focused on two issues. First, that the "over-the-counter interbank callout" process, in which "one bank calls another bank and asks for a two-way price in certain defined quantities of gold and silver," was also known as spoofing. Tr. 1926:23-1927:5; Tr. 1928:23-1929:2. And second, that the phrase "just not cricket," which Vorley used in the same chat, could be understood to mean "something contrary to traditional standards of fairness." *See* Tr. 1930:10-12; Tr. 1933:8-12 (using a definition of the phrase from the Oxford English Dictionary). After pursuing these lines of questioning, the defense asked Agent Luca whether it was fair to say that, in the chat, "Mr. Vorley appears to be moaning about bluffing in the over-the-counter interbank callout process"—and Agent Luca agreed. Tr. 1933:17-20.

On redirect the next morning, the government showed Agent Luca the chat again, and then asked, without objection, whether he believed "that this discussion is talking about conduct, the same as what

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[21] A limiting instruction, however, was given when the exhibit was admitted, advising the jury that the exhibit was admissible only against Mr. Vorley and that it was not admitted as evidence that spoofing was illegal when the statement was made (*i.e.,* for its truth), even though the statement was nonhearsay under Rule 801(d)(2)(A). Tr. 1897:22-25.

we've heard about during this trial," and he responded "Yes." Tr. 2016:16-19. After the Court *sua sponte* called for a sidebar to ensure that the government would properly segregate Agent Luca's opinion testimony, the Court cautioned the jury that Agent Luca was offering opinion testimony based on his specialized training, rather than his personal observations, and that the jury was not required to accept his opinion testimony as credible. Tr. 2018:8-2019:7. The government then asked, "And just looking at the first line here where Mr. Vorley says, 'UBS and this spoofing, it's annoying me,' and the next line, 'It's illegal for a start,' is it your understanding that Mr. Vorley is referring to something illegal?" Tr. 2019:22-2020:1. Agent Luca agreed, and when prompted for an explanation, he explained that in his opinion, the conduct Vorley was referring to as "illegal" was "the placing of non-bona fide orders in order to influence the decisions of the market." Tr. 2020:2-13. The defendants did not address this testimony in re-cross.

This testimony was properly admitted and did not deny the defendants a fair trial.[22] First, the chat was properly admitted against Vorley as a statement of a party opponent under Federal Rule of Evidence 801(d)(2)(A). The defendants contend that the statement should have been stricken because the government "utterly failed to lay [the] foundation" that the chat pertained to spoofing on the anonymous electronic exchange. Defs.' Joint Rule 33 Mot. at 8-9.

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[22] As noted, the exhibit in question was admitted only against Vorley. Mr. Chanu claims nonetheless that he was the victim of spillover prejudice. *See* Defs.' Reply 9, ECF No. 366.

But as the Court noted at the pre-trial conference, the government was not required to "prove that the statement means what the government says it means" in order to lay an adequate foundation for the statement's admission. Pre-Trial Conference Tr. 79:18-80:1, ECF No. 305. The chat, on its face, involved one of the defendants describing "spoofing" as "illegal," and the government presented opinion testimony from Agent Luca that, in the context of the entire exchange, "this discussion is talking about conduct, the same as what we've heard about during this trial," Tr. 2016:16-19, and more specifically, that the conduct addressed in the chat was "the placing of non-bona fide orders in order to influence the decisions of the market," Tr. 2020:12-13. That testimony—on which the defendants did not cross-examine Agent Luca—was certainly sufficient to confirm the relevance of the chat. Whether the document referred to a (deceptive, and allegedly illegal) form of electronic trading, as the government contended, or to (legal, but unsportsmanlike) bluffing on the interbank exchange system, as defendant Vorley argued, was a question of fact properly left to the jury.[23]

Second, Agent Luca's testimony was not an improper legal opinion. FRE 702 permits an expert witness to offer opinion testimony if such testimony is

[23] To the extent that the defendants maintain that Luca's testimony on redirect was inconsistent with his prior testimony agreeing that Vorley was "moaning about bluffing in the over-the-counter interbank callout process," it bears noting that it was, of course, the province of the jury to assess the credibility of the witnesses and that the defendants made no such argument at trial in any event.

both based on the expert's scientific, technical, or other specialized knowledge and helpful to the jury to understand evidence or determine a fact at issue. But it is jury's role to apply principles of law, as explained by the judge, to the facts in evidence, so "[a]s a general rule . . . an expert may not offer legal opinions." *Jimenez v. City of Chicago*, 732 F.3d 710, 721 (7th Cir. 2013). However, Agent Luca's testimony was not a "legal opinion" merely because the underlying chat used the term "illegal." Agent Luca testified that, in his opinion, based on his specialized training and experience reviewing chat messages in financial fraud investigations, Vorley used the term "spoofing" in this context to refer to "the placing of non-bona fide orders in order to influence the decisions of the market." Tr. 2020:12-13. This is no more a legal opinion than Professor Venkataraman's expert testimony that, in his opinion, the defendants' trading strategies were not economically rational or consistent with a desire to have their large, visible orders filled. Agent Luca did not draw a legal conclusion as to whether spoofing was illegal at the time of the conversation, nor did he opine, based on the chat, that Vorley knew any of his own trading conduct was illegal. Moreover, the Court specifically instructed the jury that Vorley's chat was "not admitted as evidence that 'spoofing' was illegal when the statement was made"; that Agent Luca's opinions "should not be regarded . . . as having some special insight into the meaning" of chats based on his work in this case; and that the jury was not required to accept his opinion testimony at all. Tr. 1897:22-25; Tr. 1845:17-1846:2. That the chat may have been "prejudicial in the extreme" or "contrary to the defendants' principal trial defense," Defs.' Joint Rule 33

Mot. at 9, is due entirely to Vorley's seeming admission of the illegality of a form of trading that he, himself, engaged in, not to an impermissible "legal" opinion offered by Special Agent Luca. The opinion testimony was proper and a new trial is not warranted on this basis.

D. Special Agent Luca's Dual-Role Testimony Was Permissible and Adequately Differentiated.

The defendants also challenge Agent Luca's dual-role lay and expert testimony on the basis that "the government deliberately blurred the lines in a way that caused unfair prejudice and jury confusion." Defs.' Joint Rule 33 Mot. at 10. They allege that the government "[led] Agent Luca in and out of fact and expert testimony such that a jury could not be reasonably expected to distinguish between the two" and that this "zig-zagging" meant that the jury "could not understand at any given moment whether Agent Luca was providing testimony as an expert or describing his observations as the case agent." *Id.* at 11-12.

The Seventh Circuit "allow[s] the practice of permitting case agents to testify as both fact and expert witnesses," but has "repeatedly warned of the 'inherent dangers' of such dual-role testimony." *United States v. Jett*, 908 F.3d 252, 267 (7th Cir. 2018). Among those dangers are that a jury "may unduly credit the opinion testimony" based on jurors' perception that a case agent was privy to facts not presented at trial; that a jury may be "smitten by an expert's 'aura of special reliability'"; and, most importantly, that "dual-role testimony will confuse the jury." *Id.* (citations omitted). To that end, the Seventh Circuit has established best-practices for dual-role testimony by a case agent: the Court should encourage the government to present the expert and lay testimony separately; after the government has laid its foundation and established the agent's qualifications, the Court should instruct the jury that the testimony that follows is based on the witness's opinion based on training and experience, not firsthand knowledge; and the Court should include a jury instruction "aimed at curbing the risks of dual-role testimony." *Id.* at 269-70.

Each of the precautions outlined in *Jett* was taken to minimize the risk that Agent Luca's testimony would either confuse, or be deemed especially reliable by, the jurors. In its order denying the defendants' motion in limine to preclude Agent Luca's testimony, the Court stated that it would "require the government to segregate Agent Luca's lay and expert testimony entirely" and "elicit any opinion evidence from Agent Luca in a single session of testimony," noting that the government would not be permitted to recall Agent Luca for the purpose of providing additional opinion testimony once he had been called for that purpose once. Order at 1-2, ECF No. 314. Those instructions were reiterated to the government in a sidebar shortly after Agent Luca was sworn in and after his qualifications were established, *see* Tr. 1815:9-22, and the Court inquired with the government as to how the testimony would be structured, so the Court could instruct the jury accordingly, Tr. 1815:23-1816:13. The government indicated it would begin with fact testimony, so the Court instructed the jury that the testimony it was about to hear was "based on [Agent Luca's] personal knowledge and his perceptions as a fact witness," and that, until the Court indicated otherwise, Agent Luca's testimony would not draw on his experience as an FBI agent or any other specialized training. Tr. 1816:22-1817:6.

Later in Agent Luca's testimony, the government signaled that it was going to pivot to expert opinion testimony, explaining to the witness that there were going to be some "questions now based on [his] training and experience as an agent" to interpret some of the phrases used in the defendants' chats. Tr. 1845:4-8. At that point, the Court interjected to instruct the jury that "the testimony you're about to hear is based or purports to be based on Agent Luca's specialized training and experience as an FBI agent investigating the types of cases that he's testified about." Tr. 1845:10-14. The Court explained that the testimony that followed would be "different from the testimony that he ha[d] offered up to this point, which [was] based – [was] testimony on facts, not Agent Luca's opinion." Tr. 1845:15-17. The Court also explained that the jury was not required to accept Agent Luca's opinion testimony, and that the jury should weigh it as it did opinion testimony from other witnesses; the Court reminded the jury that Agent Luca's opinions were "not based on his work as the case agent" in the defendants' case and "should not be regarded to you as having some special insight." Tr. 1845:15-1846:2. At the end of the opinion portion of Agent Luca's testimony, the Court interjected again to explain that the remainder of Agent Luca's testimony "will be as a fact witness, again, not as a witness with specialized knowledge or specialized training that he is drawing on." Tr. 1873:6-10.

The Court took a similarly cautious approach to the government's questioning on redirect. When the government began to elicit opinion testimony, the Court called a sidebar *sua sponte*, and warned the government that "opinion testimony from Agent Luca . . . needs to be clearly labeled as such," and that "any questions you have about opinion testimony need[] to come," because the Court was going to advise the jury again, at the end of Agent Luca's opinion testimony, that the remainder of his testimony would be fact-based. Tr. 2016:22-2017:8. At that point, the Court instructed the jury that "[w]e are in the portion of [Special Agent Luca's] examination where the government will be eliciting further opinion testimony," and that the Court would "advise [the jury] when that portion of the testimony is complete." Tr. 2018:8-2019:6. After a brief round of questioning, the government's redirect examination concluded.

Finally, in addition to these warnings during Special Agent Luca's testimony, the Court issued, nearly verbatim, the dual-role testimony jury instruction initially approved by the Seventh Circuit in *United States v. Garrett*, 757 F.3d 560, 570 (7th Cir. 2014) and endorsed in *Jett*. 908 F.3d at 270 (concluding "[t]his formulation, or something similar, better informs the jury of its task—to weigh expert testimony and lay testimony separately, under their respective standards"); *see* Tr. 2198:1-15 (jury charge).

So, the defendants' version of events—that the Court "was forced to give ***four*** separate instructions to the jury in a belated attempt to clarify whether Agent Luca was wearing a fact or expert hat at any given time"—is, charitably characterized, misleading. Defs.' Rule 33 Mot. at 12 (emphasis in original). At the Court's instruction, the government aggregated Agent Luca's opinion testimony into a single section of its direct examination. After Agent Luca was qualified, the Court explained to the jury that he was going to testify as a fact witness; marked off the beginning and end of his opinion testimony with an explanation of how the jury should consider such testimony; and gave a similarly robust instruction when opinion testimony was elicited again on redirect, which was prompted by the defense's own cross-examination of the witness. When the government's questioning got too close to the line, the Court reined it in. *See* Tr. 1858:19-1859:3 (at a sidebar requested by the government to ensure its questioning was not "going beyond what the Court thought was appropriate"). The Court also refused the government's request to question Agent Luca using a demonstrative that superimposed the defendants' contemporaneous chats onto charts of the defendants' trading data, to ensure the jury would not be confused or unduly influenced by that testimony. Tr. 1875:5-1876:6. In a trial chockful of technical information about the workings of the precious metals futures trading markets, trading data analyzed at the millisecond level, and sophisticated economic and statistical analysis, it is a discredit to the jury to suggest they were so hopelessly confused by the clearly demarcated shifts between Agent Luca's fact and opinion testimony as to require a new trial.

And, even where proper procedures are not followed, admission of dual-role testimony is harmless if there is other convincing evidence of guilt. *Jett*, 908 F.3d at 267, 270, *citing United States v. Stewart*, 902 F.3d 664, 683 (7th Cir. 2018) (the test for harmless error is "whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded"). As in *Jett*, Special Agent Luca's expert testimony was fairly limited to the interpretation of certain words and phrases used in the defendants' chats, like "posi," "PnL," "bid it up," "got that up 2 bucks," "flashing bids," and "down to 6." *Compare Jett*, 908 F.3d at 266 (explaining that qualified case agents may explain terms with which their professional experience has given them "particular familiarity"). "Even disregarding Agent [Luca's] limited expert testimony," *id.* at 270, the jury saw and heard convincing evidence of the defendants' guilt, most notably the defendants' trading data itself, David Liew's testimony as a Deutsche Bank colleague who engaged in similar conduct, and Professor Venkataraman's analysis of the defendants' trading during the charged episodes and across several years of trading. Given the precautions taken, the admission of Special Agent Luca's limited interpretation of certain terms used by the defendants as they narrated their spoofing in real-time—none of which, outside of the defendants' challenge regarding his alleged "legal opinion," they substantively take issue with as "wrong, misleading, or disputable," *id.* at 267—does not warrant a new trial.

E. The Jury Was Not Unduly Coerced During its Deliberations.

The defendants next argue that the Court's instructions to the jury to keep deliberating after juror notes indicated that deliberations were deadlocked were unduly coercive given that the trial took place during the COVID-19 pandemic. Defs.' Joint Rule 33 Mot. at 13. Every criminal defendant "being tried by a jury is entitled to the uncoerced verdict of that body." *United States v. Banks*, 982 F.3d 1098, 1102 (7th Cir. 2020), *citing Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). A verdict is coerced "when jurors surrender their honest opinions for the mere purpose of returning a verdict." *Id.* (citation omitted). The risk of juror coercion is evaluated based on the totality of the circumstances from the juror's perspective. *Id.* The inquiry is "objective and focuses on the situation facing the juror." *Id.* If the totality of the circumstances suggests a "clear impermissible risk of juror coercion," courts will "presume that the error prejudiced the defendant and seriously affected the fairness of the proceedings." *Id.*

The case went to the jury late in the day on September 22, 2020; little, if any, deliberation could have occurred that afternoon. At 1:17 p.m. on Wednesday, September 23, the Court received a note indicating that the jurors were split, nine votes to two.[24] Tr. 2239:8-13. The note stated the two jurors in

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[24] The vote breakdown was included despite the Court's clear instructions not to include such information in notes to the Court. *See* Tr. 2207:14-16 ("If you send me a message, do not, do not

the minority would "not be persuaded [the] other way," and asked the Court "[w]here do we go from here." *Id.* The Court gave the parties time to confer; the government requested that the jury be instructed to continue its deliberations, and the defense, after just four hours of deliberations, asked the Court to declare a mistrial and hung jury. Tr. 2239:22-2240:18. The Court observed that the jury had been "deliberating a little over four hours in a trial that continued past a week," which was "not a very long deliberation process," and denied the mistrial, concluding that the note did not indicate that the jury would be unable to reach a unanimous verdict if it continued to deliberate. Tr. 2241:1-13. The Court decided it would send a response to the jury that read, "Please continue your deliberations." Tr. 2241:22-24. At the time, the defense filled out its request for a mistrial by noting that the "pressures from the COVID circumstances and restrictions that they're operating under," along with the continuing uncertainty about whether the ill juror was suffering from COVID, was "impacting this environment as well." Tr. 2242:2-6.

The Court also received several notes indicating that the jury was having difficulty with the electronic evidence system during that first full day of deliberations. At approximately 9:30 a.m., the jury asked for a tech person to help them access the

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include the breakdown of any votes that you may have conducted."). The jury seemingly realized their mistake shortly thereafter and sent another note to the Court urging it to "[p]lease disregard the first letter" and reiterating "[w]e can't come to a unanimous decision." Tr. 2244:6-12.

evidence. Tr. 2221:4-8. Shortly after 11 a.m., another note asked whether the Court could provide the jury with a demonstrative the government had used during its closing, which included a summary of the charged counts with "corresponding dates, defendants, and exhibits." Tr. 2224:14-17. At that point, the Court realized that the jury had not been provided with a copy of the redacted indictment, and copies were sent to the jury room with a note reminding the jury that the indictment is not evidence. Tr. 2225:5-2232:7. As the indictment issue was being resolved, the jury sent another note asking whether there was a list of exhibits and voice recordings and reiterating that they were having issues locating it on the screen being used to view the evidence. Tr. 2232:8-14. After conferring with the parties, the Court responded that the only "exhibit list" available is the list provided by the JERS system;[25] the Court told the jury that if it required technical assistance in locating that list, to send another note and a technician would be sent to help. Tr. 2235:14-18. Finally, later in the afternoon, the Court received another note from the jury asking it to confirm that the jury had a complete list of exhibits submitted and noting that it did not have access to any recordings. Tr. 2247:2-8. A tech person was again sent back to the jury room to try to resolve these issues.

After the government and defense teams were informed that the jury was again having issues

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[25] The Jury Evidence Recording System ("JERS") was used so that the jury could review the parties' evidence without paper copies. The jury room had a JERS computer, a touch-screen monitor for the jury to select an exhibit to display, and a wide-screen monitor.

accessing the evidence, the parties inquired whether a representative might be allowed into the jury room to confirm that all of the evidence was properly loaded into the JERS system. Tr. 2250:4-2251:9. At the end of the day, the jury was called into the courtroom and reminded to avoid seeking out information or inadvertently learning information about the case from any source outside the court; the Court also told jurors it was working to resolve their technical difficulties. Tr. 2258:10-2259:15. After the jurors left the courthouse, IT employees accompanied representatives from each party and the Court into the jury room to investigate the technical issues and discovered that jurors had access to two copies of the defense exhibits, but none of the government's exhibits. Tr. 2263:18-24. The Court issued a curative instruction to the jury the next morning, Thursday, September 24, which advised jurors of the technical error, explained that the government's exhibits had not been among the materials they had viewed the day prior, and instructed them to resume their deliberations. Tr. 2271:6-21.

Around noon on September 24, Juror No. 12 informed the Court that she had travel planned from Friday, September 25, through Sunday, September 27, and inquired whether the jury collectively, or she individually, could be excused from deliberations the next day and return the following week. Tr. 2273:22-2274:15. The defense indicated its belief that "the best course here is to maybe have a day off tomorrow," Tr. 2275:3-23, citing apprehension that the juror's concern about losing money (or other jurors' concern for her, if they knew of her dilemma) might have a coercive influence on deliberations. The Court declined the suggestion to take Friday off, noting that prolonging the deliberation schedule was just as likely to inconvenience jurors who had plans the following week and would be inconsistent with what the jurors had been instructed as to the schedule of deliberations (*i.e.*, that they would take place each weekday until concluded). Tr. 2276:2-23. Later that afternoon, the Court responded to the juror's note, informing her that it could not accommodate her request to change the schedule of jury deliberations. Tr. 2284:10-22.

At nearly 4 p.m. on September 24, the Court received another jury note that stated, "after deliberating for the last two days and after reviewing each count, the conclusion is not unanimous on any counts." Tr. 2282:5-7. The note also said that "[w]e, the jurors, do not see further deliberations resulting in any unanimous decisions." Tr. 2282:7-8. Again, the Court gave the parties time to confer. The government observed that, given the technical issues the day before, the jury had been deliberating with the benefit of the government's evidence and the indictment in front of it only since that morning; accordingly, the government asked the Court to deliver the *Silvern* instruction.[26] Tr. 2282:14-18. The defense renewed its

[26] In *United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973), the Seventh Circuit set out the appropriate charge for deadlocked juries in both criminal and civil cases. The charge instructs jurors that the verdict "must represent the considered judgment of each juror" but must be unanimous; encourages jurors to "consult with one another and to deliberate with a view to reaching an agreement" and to "not hesitate to reexamine your own views and change your opinion if convinced it is erroneous"; and warns jurors

motion for a mistrial. Tr. 2282:19-22. The Court agreed that it was appropriate to call the jury in and read the *Silvern* instruction before asking them to continue their deliberations and denied the defendants' mistrial motion. Tr. 2282:23-2283:6. When the jurors had reassembled in the courtroom, the Court acknowledged their note reporting that they had not reached a unanimous verdict and read the *Silvern* instruction. Tr. 2285:16-2286:9. The jury then returned to the jury room at approximately 4:15 p.m. to resume its deliberations. Tr. 2286.

About forty-five minutes later, Juror No. 12 sent another note, writing, "It has been two days, and I know for sure that the outcome of this deliberation will not change. There is no moving of the minds that are already made up regarding their decisions. We have reviewed every piece, gone over notes . . . for memory and still the same results." Tr. 2286:24-2287:10. She also wrote that she wanted to finish her jury service, and assured the Court she would return on Monday, adding, "I know nothing will change." Tr. 2287:6-9. The defense again renewed its motion for a mistrial, asserting that "it's growing increasingly coercive in there." Tr. 2287:12-20. The motion was denied, and the Court responded by note that the juror's presence, and the presence of all the other jurors, was required the next day for deliberations to continue. Tr. 2289:16-20. No further notes were received until 3:52 p.m. the next day, Friday, September 25, when the Court was

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not to "surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

informed that the jury had reached its verdict. After the verdicts were announced, the Court polled the jury and each juror affirmed that the jury's verdict was his or her own verdict as well. Tr. 2295:14-2296:23.

Neither the content of the Court's two instructions to continue deliberations, nor the context in which those instructions were delivered, suggests jurors were coerced into returning a verdict. The jurors received standard written and verbal instructions to continue their deliberations that the Seventh Circuit has repeatedly held to be "neutral and not coercive." *United States v. Kramer*, 955 F.2d 479, 489 (7th Cir. 1992); *see also United States v. D'Antonio*, 801 F.2d 979, 983-84 (7th Cir. 1986) (holding that an instruction to "continue to deliberate" after a jury-declared impasse is "perfectly content-neutral and carrie[s] no plausible potential for coercing the jury to surrender their honest opinions for the mere purpose of returning a verdict") (internal quotations omitted). And the Court's decisions to instruct the jury to continue deliberations, rather than to grant the defense's motions for mistrial, were reasonable in context: the first note declaring deadlock was sent after the jury had been "at most . . . deliberating a little over four hours in a trial that continued past a week," Tr. 2241:1-8, and the second note, which prompted the reissuance of the *Silvern* instruction, came only a few hours after the jury had resumed its deliberations with the government's evidence in front of it. Tr. 2282:4-2283:6.

That the Court was aware that the jury was split nine to two, at least at the time of the first note, did not make its instruction to continue deliberating per se coercive. *See Kramer*, 955 F.2d at 489 (that the district court knew there was one holdout juror when it instructed the jury to continue its deliberations did not make any difference as to the coerciveness of the *Silvern* instruction; the instruction "simply did not influence the jurors to find the [defendants] guilty or not guilty" and "the holdout juror remained free to persuade other jurors to acquit the [defendants]"). In fact, unlike in *Kramer*, the Court did not know whether the two "holdout" votes were to convict or acquit—and given that the jury was, at that point, deliberating without any of the government's evidence in front of it, it is just as plausible that the two "holdout" jurors were votes to convict. *Compare id.* at 488-89 (the district court received several notes that the vote remained "the same as the others, deadlocked, eleven guilty, one not guilty").

The jury, moreover, did not return a verdict until almost a full day after the Court reread the *Silvern* instruction, and it did not convict either defendant of all the counts he was charged with, "indicating that rereading of the instruction did not pressure jurors to 'surrender their honest opinions for the mere purpose of returning a verdict.'" *United States v. Cardena*, 842 F.3d 959, 975 (7th Cir. 2016) (citation omitted); *see also Banks*, 982 F.3d at 1105 (observing that, after a *Silvern* instruction, "longer deliberations indicate the jurors took time to reexamine their own views and consult with one another," while "shorter deliberations may support an inference of a coercive effect of the majority running roughshod over the minority") (internal quotations and alterations omitted). And when the jury returned its verdicts, each of the jurors was polled and each confirmed that the jury's verdicts reflected their individual views as well. *See United States v. Polichemi*, 219 F.3d 698, 710-11 (7th Cir. 2000) (citing juror's response when polled in rejecting argument that juror's change in verdict at 4:30 p.m. on a Friday afternoon was coerced).

Vorley and Chanu concede that, "[i]n normal circumstances," the Court's instructions to the jury "might not have been coercive," but maintain that the specter of COVID-19 and the ongoing risk of infection as deliberations continued prompted jurors to compromise their honestly held beliefs and "agree[] to a split verdict at approximately 4:00 pm on a Friday so that they could return to the safety of their homes." Defs.' Joint Rule 33 Mot. at 13-15. But the defendants' argument as to this point is pure conjecture—there is absolutely nothing in the record to suggest that the jurors were gripped with concern that "each day that deliberations continued, they had to put their physical health at additional risk," or that any juror felt pressured with a "Hobson's choice" between maintaining their honestly held beliefs about the sufficiency of the evidence and prioritizing their own physical health. *Id.* at 14-15. And though the defendants confidently assert that "[t]he jurors' COVID-19 concerns clearly were heightened" after learning a juror was hospitalized with COVID-like symptoms, *id.* at 14, the record suggests just the opposite: the eleven jurors who retired for deliberations had affirmatively declined the opportunity to consult with a medical professional after learning of their potential COVID exposure from the hospitalized juror, though they had shared a jury room with him for more than a week. Not surprisingly, then, none of the notes the Court received reporting deadlock registered any concern about COVID exposure as a reason to end the deliberations. Moreover, the Court received myriad other notes throughout the trial with juror concerns about missing out-of-state work commitments, Tr. 1633:11-16; medical appointments, Tr. 1977:8-1978:1 (asking for an accommodation to be made in order for the juror to attend a doctor's appointment on October 1, 2020, should evidence presentation or jury deliberations last that long, and noting the jury "had no way of knowing how long the case might last"); and pre-planned travel, but none indicating any discomfort regarding its COVID precautions or invoking COVID risk as a reason to be excused from the jury. To the contrary, and as discussed, Juror No. 12 informed the Court she had planned a cross-country trip for September 25 through September 27 but was willing and able to return to jury service the following Monday (after taking at least two commercial flights and staying in a hotel).

Finally, it also bears noting that the defendants took positions that belie their stated concerns, now, about jurors' preoccupation regarding their potential exposure to COVID. As an initial matter, of course, the defendants chose to go forward with the trial during the pandemic; surely they would not have done so if they believed that concerns about COVID exposure might influence the jury's deliberations in as little as four hours (the point at which they first began asserting that COVID concerns were coercing the jury and warranted a mistrial). And during the trial, on the day the case went to the jury, the defendants balked at precautions the Court suggested to allay juror concerns about potential COVID exposure upon learning that one of the jurors may have been infected. *See* Tr. 1981:1-1982:13 (arguing that it was "unnecessary" to adjourn for the day to allow jurors to get rapid COVID tests and for the courtroom and jury room to be cleaned, stating "I just can't believe that any time somebody experiences any symptoms of a cold or a flu, that that means that everything has to be shut down and, you know, cleaned"). Perhaps most tellingly, during the jury's deliberations, the defendants urged the Court to give the jury the day off from deliberations on Friday, September 25 (after having objected to a day's continuance to permit all jurors to mitigate concerns about COVID-19 exposure) to accommodate the request of a juror (who had reported that the jury was hopelessly deadlocked) to fly half-way across the country and back over the weekend, a request that, if granted, would have exacerbated the risks of exposure to Juror No. 12 and to other jurors upon her return and would have ***extended*** the jury's deliberations into the following week. Tr. 2275:3-13. Whatever considerations may have animated the defendants to take these positions, they do not appear to have included concerns that COVID fears would coerce the jurors to render quick, compromised, verdicts.

In sum, the totality of the circumstances here—even taking into account the uniquely challenging circumstances created by the COVID-19 pandemic—did not create a risk of juror coercion. The jury received two neutrally-worded instructions to continue its deliberations after it indicated it was deadlocked, once by note and once by redelivery of the *Silvern* instruction; those instructions came after relatively short periods of deliberation, so a unanimous verdict still seemed possible; and the jury ultimately returned a mixed verdict nearly a day after receiving the *Silvern* charge. Neither the Court's knowledge of the vote breakdown when it delivered its initial instruction to continue deliberations, nor the (scant) evidence of jurors' concerns about the ongoing risk of COVID exposure create the presumption that the Court's instructions to continue deliberations seriously affected the fairness of the proceedings.

F. Professor Venkataraman's Spreadsheet of Spoofing Sequences Is Not Newly Discovered Evidence Under Rule 33(b)(1).

Finally, the defendants argue that the post-trial disclosure of a spreadsheet of 5,902 alleged "spoofing sequences" considered by Professor Venkataraman in calculating the loss caused by defendants' spoofing activity for use at sentencing warrants a new trial. They maintain that the loss calculation list is exculpatory evidence, first, because it does not include 13 of the government's 61 trading episodes that were presented at trial, and second, because it includes "*almost no instances of alleged spoofing*" after September 28, 2012, the date that Deutsche Bank sent Vorley and Chanu a presentation on Dodd-Frank's anti-spoofing provision. Defs.' Suppl. Rule 33 Mot. 1-2, ECF No. 361 (emphasis in original). In the defendants' view, the omission of these episodes from Professor Venkataraman's loss calculation supports the defense theory that Vorley and Chanu believed that their trading strategy was a permissible tactic until Deutsche Bank informed them otherwise and undermines the prosecution's argument in summation that the defendants continued to spoof after that training. Had the defense had access to this spreadsheet during trial, they argue, the defendants likely would have been acquitted on the counts of conviction.

Motions for a new trial on the basis of newly discovered evidence "are not favored by the courts and are viewed with great caution." *United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. 1982) (citation omitted). However, under Rule 33(b)(1), a new trial may be appropriate where "additional evidence (1) was discovered after trial, (2) could not have been discovered sooner through the exercise of due diligence, (3) is material and not merely impeaching or cumulative, and (4) probably would have led to acquittal." *United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016). A Rule 33(b)(1) motion may also be used to raise "*Brady*, *Giglio*, and other constitutional claims." *Id.*

As an initial matter, Professor Venkataraman's list of "spoofing sequences" is not *Brady* material that the government was required to disclose before trial. *See* Defs.' Suppl. Rule 33 Mot. at 2. The discovery of undisclosed *Brady* material may warrant a new trial if the evidence in question was favorable, suppressed by the prosecution, and material to the case. *United States v. Ducato*, 968 F. Supp. 1310, 1314 (N.D. Ill. 1997). "[F]or purposes of the government's obligations under *Brady* and its progeny," however, "it is axiomatic that the government need not disclose information that does not come into existence until after trial." *Id.* at 1315 (citation omitted); *see also United States v. Veras*, 860 F. Supp. 471, 479 (N.D. Ill. 1994) (noting that the "Seventh Circuit limits this court's *Brady* analysis to the effect of the allegations which the government knew and failed to disclose at trial"). The defense offers no evidence that the spreadsheet existed before trial, urging only that ***if*** it did, it should have been disclosed. Defs.' Suppl. Rule 33 Mot. at 2. As his affidavit establishes, however, Professor Venkataraman developed the spreadsheet in response to DOJ's post-trial, pre-sentencing request "to calculate the amount of loss suffered by other market participants" due to the defendants' spoofing. Venkataraman Aff. at 3, ECF No. 364-1. His analysis entirely "postdated the defendants' convictions." Gov't Resp. Opp'n at 26, ECF No. 364.

The defendants' contention that the government's loss calculation spreadsheet undermines its trial evidence is premised on a second erroneous assumption, namely that the spreadsheet "purports to identify all trading in the gold and silver futures markets by [the defendants and Liew] between March 2008 and July 2013 that the prosecution and its expert, Professor Venkataraman, consider to be part of the same course of conduct or common scheme or plan as the offenses of conviction." Defs.' Suppl. Rule 33 Mot. at 1. Neither the government nor Professor Venkataraman profess the spreadsheet to be an exhaustive listing of the defendants' fraudulent trading. Rather, the government explains that, in preparation for sentencing, it asked Professor

Venkataraman to calculate the losses caused by the defendants' fraudulent trading but instructed Professor Venkataraman to exclude trades with certain attributes from his analysis. Specifically, the government instructed Dr. Venkataraman to exclude spoofing involving traders other than Vorley, Chanu, and David Liew, and for the data after late 2009, to exclude spoofing using any technique other than layering groups of 10-lot visible orders. Venkataraman Aff. at 5 (noting that he was instructed to limit his analysis to certain trading sequences with particular attributes); Gov't Resp. Opp'n at 27-28. Omitting trades with those criteria excluded 13 of the 61 trial episodes from the list of "spoofing sequences" used for loss calculation purposes and eliminated most of the trades that post-dated the Deutsche Bank presentation from September 2012 first warning traders about Dodd-Franks' anti-spoofing measure.

Demonstrating that they can find fault with any action the government takes, the defendants construe the government's use of criteria that exclude trades from consideration at sentencing—***and therefore results in a lower loss calculation asserted against the defendants***—as evidence that undermines the evidence presented at trial. But the government has not changed its position on whether the sixty-one trial episodes involved spoofing, *see* Gov't Resp. Opp'n at 29 n.13 ("[T]he government's position remains firm that each and every one of the 61 Trial Episodes . . . involved fraudulent and manipulative trading."), and there is no basis to construe its decision to apply more conservative criteria at sentencing as an acknowledgment that the methodology it used to identify fraudulent trades at trial was flawed. The government notes many reasons it opted not to include the full universe of trades it deems fraudulent in its loss calculation, *id.* at 29, and these boil down to the entirely reasonable and permissible objectives of simplifying its evidentiary presentation at sentencing and mooting arguments that it anticipated the defense would make concerning the calculation of the loss attributable to fraudulent conduct by the defendants. The government's use of more narrow criteria at sentencing also demonstrates respect for the jury's mixed verdict, reflecting the jury's rejection of the conspiracy charge and recognizing that the jury acquitted the defendants on the counts (both pre- and post-September 28, 2012) where, instead of layering groups of 10-lot visible orders, Vorley or Chanu placed single, 50- or 100-lot visible orders opposite the primary, iceberg order. The government could, of course, continue to assert that notwithstanding the jury's verdict, the evidence established by a preponderance of the evidence that a conspiracy involving traders other than the defendants and David Liew existed, or that the placement of 100-lot visible orders opposite iceberg orders is indicative of a spoofing trade, but its decision not to fight these battles in the context of a sentencing hearing is hardly a concession and in no way constitutes "exculpatory evidence."

That is because the prosecutors' reasons for not pursuing every possible penny of loss at sentencing (or at trial, for that matter) is not evidence of anything. Even if it could be shown that the prosecutors secretly agree that the defendants are not guilty (and the Court intends no suggestion that is the case), their subjective opinions about the innocence of the defendants would no more constitute exculpatory evidence than their opinions that the defendants are guilty would constitute incriminating evidence. The ***evidence*** implicated by the defendants' motion is not the prosecutors' opinions and arguments, but the trade data presented at trial and Dr. Venkataraman's opinions about that evidence. But the government's decision to narrow the universe of trades it would present at sentencing is certainly not evidence that Professor Venkataraman had any change of heart concerning his opinions at trial—the decision to narrow the criteria used to identify fraudulent trades was not his. Professor Venkataraman's spreadsheet was created by applying government-selected, sentencing-focused criteria to CME trading data used in the prosecution's case at trial. *See* Venkataraman Aff. at 5-10 (explaining how the universe of trading data was narrowed for purposes of loss calculation for sentencing). Nor has the trading data itself changed or been supplemented with new evidence of trading activity not previously disclosed. Its form is new, but the evidence itself—the defendants' trading data—is not.

And, as the government points out, "the underlying CME data on which the post-trial loss analysis was based existed and was produced to the defendants well in advance of trial (and used by them during trial)." Gov't Resp. Opp'n at 27 n.12. The defendants have always had the ability to filter that same universe of data in any way they thought helpful to demonstrate the subjectivity or other flaws in the government's selected criteria for identifying spoofing—a line and method of questioning that, even without this spreadsheet, the defense pursued vigorously at trial. *See*, *e.g.*, Tr. 1492:20-1943:17 (Q: So let me just see if I get this straight. In order to be sure that you weren't cherry-picking, you looked more closely at the episodes that resembled what the prosecutors are charging?); Tr. 1508:6-1509:22 (defense pushing Professor Venkataraman as to whether trading episodes on June 2, 2013, and July 9, 2013, in which the defendants placed 100-lot visible orders, rather than groups of 10-lot visible orders, actually show the same trading pattern as the government's other charts); Tr. 1603:10-1612:10 (defense directed Professor Venkataraman to filter Chanu's trading data from May 11, 2011, in various ways to highlight other, allegedly similar, trading that same day that was not captured in government exhibits); Tr. 1605:15-17 (Q: So the first time you paid attention to this full day's trading record for Mr. Chanu was roughly two days ago, correct?).

Finally, because the spreadsheet is not an exhaustive list of the defendants' spoofing activity in the relevant time period, there is no reason to think its use by the defense would have led to acquittal on the counts of conviction. Based on the government's sixty-one episodes and the other evidence at trial, the jury rationally concluded that, in most of the charged counts before September 28, 2012, the defendants knowingly committed wire fraud. There is no reason to think the defense's use of the "spoofing sequence" spreadsheet during Professor Venkataraman's cross-examination or closing arguments would have changed that outcome. Even if the defense's hypothetical questioning with the spreadsheet led the jury to conclude that Vorley and

Chanu stopped spoofing after the Deutsche Bank training in September 2012, it is unlikely that the jurors would uniformly or inevitably conclude, from that disputed fact, that the defendants' conduct before that date was unknowing. Indeed, the jury convicted both defendants of fraudulent trading prior to the Deutsche Bank presentation despite the fact that 1) the government did not even charge Mr. Chanu with any post-presentation fraudulent trading; and 2) the jury acquitted Mr. Vorley on the only count with which he was charged based on fraudulent trading after that presentation. A juror could just as reasonably infer that after Vorley and Chanu were alerted that United States regulatory entities were taking Dodd-Frank's anti-spoofing provision seriously, the defendants' conduct slowed or stopped because they knew the odds of being caught were much higher and the potential consequences much greater. In any event, such an attenuated possibility that the jurors would evaluate the government's evidence differently falls well short of the showing needed to warrant a new trial. *See United States v. Reed*, 2 F.3d 1441, 1451 (7th Cir. 1993) ("[M]ere speculation or conjecture is insufficient to warrant a new trial."), *citing United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956) (a defendant must demonstrate prejudice "not as a matter of speculation but as a demonstrable reality").

The defendants' argument, based on nothing more than a spreadsheet that repackages the same trading data presented at trial, that the jury "would probably have accepted their arguments" about the defendants' lack of knowledge and "acquitted them on all counts" is baseless speculation. Defs.' Suppl. Rule 33 Mot. at 8. It does not warrant this Court setting aside the jury's verdicts and ordering a new trial.

* * * *

This was a hard-fought trial, with charges presented by able and experienced prosecutors and defenses mounted by top-notch counsel. As the jury's mixed verdict reflects, convictions were not inevitable. For the reasons set forth, however, the Court easily concludes that the jury's verdict that the evidence showed that the defendants engaged in wire fraud was not irrational, but rather was supported by evidence that proved the defendants' guilt beyond a reasonable doubt. That evidence was presented in a fair trial that gave the defendants every opportunity to present and argue their defenses. Accordingly, and for all the more specific reasons set forth above, the defendants' motions for acquittal and for a new trial are denied.

/s/ John J. Tharp, Jr.
John J. Tharp, Jr.
United States District Judge

Date: March 18, 2021

APPENDIX E

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

No. 18 CR 00035

[Filed: July 21, 2020]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
JAMES VORLEY and CEDRIC CHANU,	)
	)
Defendants.	)
	)

Judge John J. Tharp, Jr.

ORDER

Defendants' motion to dismiss the indictment with prejudice based on pre-indictment and post-indictment delay [231] is denied. See Statement below for details.

STATEMENT

On November 15, 2018, the defendants filed a motion to dismiss the indictment for failure to state an offense. Dkt. 75. The premise of the defendants' present motion is that 189 days of non-excludable time elapsed after the completion of briefing on that motion, in violation of the Speedy Trial Act. The defendants also assert that this and other delays have violated their Sixth Amendment right to a speedy trial.

The defendants were indicted on July 24, 2018. The original three-count indictment charged the defendants with conspiring to commit wire fraud affecting a financial institution between December 2009 and November 2011 and charged each defendant with a single substantive count of wire fraud affecting a financial institution. Mr. Vorley was arraigned on August 14, 2018; Mr. Chanu was arraigned on September 25, 2018. On the same day, at the initial status hearing in this case, the parties discussed the status of discovery and the status of a parallel enforcement action by the CFTC. In response to my indication that I would hold another status hearing in 30 days, the government suggested, and defendants' counsel agreed, that the status be further deferred until November 15, a date when a status hearing in the CFTC action had already been set. I agreed to set the status on that date and excluded time through that status "to give counsel the opportunity to obtain and review the discovery materials from the government and to consider what pretrial motions may be appropriate," and, without objection, entered an express finding that on that basis the ends-of-justice outweighed the public and the defendants' interest in a speedy trial. Dkt 50; Dkt 61 (Tr. Sep. 25, 2018) at 9:3-8.

On November 15, the defendants filed a motion to dismiss the indictment and a motion for leave to file an over-sized brief in support of that motion (which was granted). At the scheduled status hearing that day, in response to my question as to whether the defendants were contemplating any other motions, the defendants asked to defer the filing of additional pretrial motions pending resolution of their motion to dismiss. Counsel for defendant Vorley explained:

> the discovery is quite voluminous, so we're hopeful that we can address further motions down the road if necessary. And I think we also—the motion to dismiss is a significant one. The issue before Your Honor is one of first impression, which is essentially can a spoofing case go forward under the wire fraud statute that requires a false statement, which is a position the government has never taken before. So we're hopeful that … when the Court engages with the motion that it may come to the conclusion that it's best to address other issues afterwards as well.

Dkt. 74 (Tr. Nov. 15, 2018) at 6:15-25. Based on the defendants request to "address further motions down the road," I deferred setting a further deadline for the submission of pretrial motions. The government requested an exclusion of time and I responded: "The motion has been filed so the time for briefing and consideration of that motion will be excluded." Dkt. 74 (Tr. Nov. 15, 2018) at 10:23 – 11:1. The defendants did not object to that exclusion of time. The docket entry reporting the status also included a statement regarding the exclusion of time: "Time will be excluded through briefing and ruling on the defendants motion to dismiss pursuant to 18 U.S.C. § 3161(h)(1)(D)." Dkt. 73. Again, the defendants did not object.

After the parties submitted their briefs, I held lengthy oral argument (for one hour and twenty minutes) on the motion to dismiss on January 24, 2019. At the argument hearing, I granted, without objection by the defendants (but over the government's objection), leave for the filing of an amicus brief by the Bank Policy Institute supporting the defendants' motion. Dkt. 87; Dkt. 90; Dkt. 91 (Tr. Jan. 24, 2019) at 3-4. Subsequently, two additional amici—the Chamber of Commerce of the United States and the Securities Industry, Financial Markets Association—sought permission to join the BPI's brief (Dkt.) and a fourth amicus, the Futures Industry Association was granted leave to file its own brief in support of the defendants, again without objection by the defendants. The filing of the amici briefs extended briefing on the defendants' motion by more than two months. Briefing was completed on March 26, 2019. I denied the defendants' motion to dismiss the indictment in a 37-page opinion issued on October 21, 2019.

Following the ruling, a status hearing was held on October 31, 2019. With respect to the defendants' motion to dismiss, I acknowledged that it had taken longer to rule on the motion than had been expected, explaining that it had been a "substantial motion . . . no ordinary boilerplate motion to dismiss," and that I "could understand the defendants not wanting to invest a ton of resources and money" into trial preparation until the motion had been decided. Dkt. 121 (Tr. Oct. 31, 2019) at 16. At the conclusion of the hearing, the government moved to toll the speedy trial clock, the defendants did not object, and I stated that I would "continue to exclude time in view of the complexity of the case, the need to provide additional discovery and to ensure that the defendants have an adequate opportunity to prepare a defense," finding that "the ends of justice in excluding time through November 26 outweigh the public and the defendants' interest in a speedy trial." *Id*. at 34.[1] The defendants did not object.

A superseding indictment was returned on November 26, 2019. Time has since been excluded, for various reasons and without objection by the defendants, through the commencement of trial, which is presently scheduled to begin on September 14, 2020. Following the denial of their motion to dismiss, the defendants have filed a variety of substantive motions (as well as minor motions such as modifications of bond conditions). They did not file the present motion asserting a speedy trial violation until May 20, 2020, some 7 months after they claim the violation occurred.

The defendants argue that 189 days of non-excludable time elapsed from the filing of the motion to dismiss through the October 31 status hearing, violating the Speedy Trial Act, 18 U.S.C. § 3161

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[1] The docket entry memorializing this exclusion of time erroneously refers to the pretrial motion exclusion pursuant to § 3161(h)(1)(D) rather than the ends-of-justice exclusion articulated by the Court. This error reflects a carryover of the citation from the prior entry excluding time.

("STA").[2] They acknowledge that the time from the filing of the motion on November 15, 2018 through the completion of briefing on March 26, 2019 was automatically excluded from the speedy trial calculation by operation of 18 U.S.C. § 3161(h)(1)(D) and that an additional 30 days was automatically excluded while the motion was under advisement pursuant to § 3161(h)(1)(H). They maintain, however, that the balance of time that the motion was under advisement was not subject to any automatic exclusion. They contend, and the government agrees, that additional time was excludable only pursuant to the "ends of justice" exclusion provided in § 3161(h)(7)(A). At the hearing on November 15, 2018, I did not expressly state an ends-of-justice finding that exclusion of additional time was warranted, so the defendants maintain that the time that the motion was not excludable. Since that period exceeded the permissible 70-day period between indictment and trial, the defendants contend that there has been an STA violation and that the indictment should therefore be dismissed with prejudice.

While courts must make ends-of-justice findings to exclude time under § 3161(h)(7), those findings do not have to be entered on the record at the time the continuance is granted. "Although the Act is clear that the findings must be made, if only in the judge's mind," it does not specify "precisely when those findings must be set forth in the record of the case." *Zedner v. United States*, 547 U.S. 489, 506-07 (2006). Consistent with

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[2] The 189-day period calculated by the defendants runs from April 25 to October 31, 2019.

Zedner, the Seventh Circuit has repeatedly held that ends-of-justice findings required by § 3161(h)(7) need only be made by the time that the Court rules on a motion to dismiss based on a violation of the Speedy Trial Act. *See, e.g., United States v. Parker*, 716 F.3d 999, 1006 (7th Cir. 2013) ("the court's reasons must be articulated by the time it rules on a defendant's motion to dismiss"); *United States v. Wasson*, 679 F.3d 938, 946 (7th Cir. 2012) ("a court's ends-of-justice findings need not be articulated contemporaneously on the record"); *United States v. Napadow*, 596 F.3d 398, 405 (7th Cir 2010) ("the district court need not explain its findings contemporaneously with its decision to exclude time" under § 3161(h)(7)); *United States v. Rollins*, 544 F.3d 820, 830 (7th Cir. 2008) ("the district court is not required to make the ends of justice findings contemporaneously with its continuance order"). To be sure, it is the better practice to do so, *Zedner*, 547 U.S. at 507 n.7, but *Zedner* and this Circuit's case law recognize that, on occasion, district judges neglect to provide comprehensive explanations of their rulings excluding time under the Speedy Trial Act. When that is the case, Circuit precedent permits the full explanation for the exclusion of time to be made after-the-fact where a question arises as to whether the judge had concluded that time should be excluded based on the ends-of-justice provision.

Here, I concluded at the status hearing on November 15 that an ends-of-justice exclusion of time was appropriate on the basis of the defendants' request to defer further pretrial motion practice until the Court had ruled on the motion to dismiss.[3] The parties had agreed that discovery in the case was voluminous and that there was more to come. I understood the defendants to be requesting a continuance that would permit them to defer the review of that material, and the consideration and preparation of additional motions based on that review, until the Court determined whether the indictment stated a crime. The defendants advertised their motion as presenting a substantial issue of first impression regarding the scope of the wire fraud statute and, in light of that characterization, I acceded to the defendants' request. Rather than set a pretrial motion deadline, I concluded that it was reasonable to grant the defendants' request for a continuance so that they could avoid the potential waste of resources investigating, preparing, and filing additional motions that would result if their motion to dismiss were granted. That continuing the pretrial

[3] The government points to my statement at the October 31 status hearing that I would "continue to exclude time in view of the complexity of the case" as evidence that I had concluded when I excluded time on November 15, 2018 that the complexity of the case justified an ends-of-justice exclusion. While that is a plausible understanding of the Court's statement, that is not, in fact, what the Court meant. Rather, the Court was noting that time up to that point had been excluded, not that I had previously excluded time based on case complexity. That said, had I appreciated that only one month of the period the motion to dismiss was under advisement after briefing was complete was excludable under the automatic provisions of § 3161(h)(1), I would have excluded time for further consideration of the motion to dismiss based on complexity pursuant to § 3161(h)(7)(A). As I noted, the defendants' motion was no "boilerplate" motion to dismiss and I took the time I needed to thoroughly address the arguments of the defendants and the amici.

motion period until the motion to dismiss had been decided would also spare the government and the Court potentially needless work responding to and ruling on other pretrial motions also weighed in favor of granting the defendants' request.

Courts may enter ends-of-justice exclusions to allow defendants additional time to consider and prepare pretrial motions. *Bloate v. United States*, 559 U.S. 196, 214 (2010) ("a district court may exclude preparation time under subsection (h)(7) if it grants a continuance for that purpose based on recorded findings 'that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial'").[4] In *United States v. O'Connor*, for example, the Seventh Circuit upheld the exclusion of time under § 3161(h)(7) where the transcript adequately reflected the judge's conclusion that this

[4] In *Bloate*, the Supreme Court held that the time to prepare pretrial motions is not automatically excludable from the Act's 70–day limit, but is excludable only when a district court makes case-specific findings regarding the ends of justice that would be served by granting a continuance to prepare for and file pretrial motions. *See Bloat*, 130 S. Ct. at 1351–52; *id*. at 1356 ("Our determination that the delay at issue here is not automatically excludable gives full effect to subsection (h)(7), and respects its provisions for excluding certain types of delay only where [the] district court makes findings justifying the exclusion." (footnote omitted)). Prior to the Supreme Court's ruling in *Bloat*, the Seventh Circuit had held repeatedly that "[t]he allowance of a reasonable time for the consideration, possible preparation, and filing of pretrial motions is routinely and necessarily allowed" under the automatic exclusion of § 3161(h)(1)(D). *See*, *e.g.*, *Napadow*, 596 F.3d at 403 ("we have held that the time needed to prepare pretrial motions is excludable).

delay was necessary to give the defense lawyers time to understand the government's case, analyze the evidence, and decide what motions might be appropriate. *O'Connor*, 656 F.3d at 639. Here, I had already excluded time for consideration of pretrial motions under the ends-of-justice provision before the defendants filed their motion to dismiss, *see* Dkt. 50, and similarly concluded that continuing to exclude time on that basis was warranted in view of the defendants' request. The defendants had offered a legitimate rationale for deferring work on pretrial motions rather than merely seeking to delay progress in the case. And, in addition to serving the defendants' interest in conserving resources, granting the motion similarly served the interests of the government and the Court in conserving their resources until it was clear that the government could go forward with the prosecution. Accordingly, in my view—then and now—the exclusion of time while the motion to dismiss was pending was appropriate under the ends-of-justice exclusion provided by § 3161(h)(7)(A).

Unfortunately, I did not articulate the ends-of-justice provision as the basis for excluding time going forward from November 15. Instead, I relied on the automatic exclusions of time for the briefing and consideration of pretrial motions. As a matter of administrative efficiency, where an automatic exclusion of time applies, I generally rely on that provision to exclude time rather than making an additional ends-of-justice finding that also provides a basis for excluding time. Eschewing redundancy paid no dividend here, however; a full articulation of my reasoning would have obviated this motion. I compounded the problem, moreover, by erroneously construing the automatic exclusions applicable to the briefing and consideration of motions to extend to the disposition of the motion, whereas § 3161(h)(1)(H) limits the automatic exclusion for consideration of a pretrial motion to 30 days (that is why I cited only § 3161(h)(1)(D) as the basis for exclusion (*see* Dkt. 73, 74) and omitted reference to § 3161(h)(1)(H)). Having misconstrued the duration of the exclusion, I believed the automatic exclusion provided a sufficient basis to exclude time through the ruling on the motion to dismiss and that there was therefore no need to exclude time pursuant to § 3161(h)(7). That was a mistake, obviously, but not one that prejudiced the defendants. Had I not made that mistake (or had any party noted the Court's error), I unquestionably would have remedied the error by including my determination that the defendants' request to defer other pretrial motions warranted an ends-of-justice exclusion under § 3161(h)(7).[5]

That it took longer than originally anticipated to rule on the defendants' motion to dismiss did not and does not change my view about the propriety of excluding time pursuant to the ends-of-justice provision and the defendants' request to defer additional pretrial motions work. Notwithstanding my intent to "take this up pretty quickly," I understood after review of the briefs and more than an hour of oral argument that it would take more than a month to address the

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[5] As noted above (note 3), I would also have determined that the ends of justice warranted excluding additional time for consideration and ruling of the defendants' motion to dismiss.

defendants' motion. The subsequent participation of four substantial amici, moreover, did not simplify the resolution of the motion or reduce the volume of material that had to be reviewed in order to resolve it. Further, at no point while the motion was pending did the defendants lodge any objection, make any inquiry, or do anything else to suggest that they no longer wanted to defer further progress in the case because it was taking too long to decide the motion to dismiss. Certainly, the defendants were free, notwithstanding the exclusion of time, to review discovery and file any additional motions they wished; the proceedings were not stayed. The defendants, however, were content to wait for the ruling. At some point, continued delay in ruling on the motion might have prompted me, *sua sponte*, to revisit the conclusion that the ends of justice warranted the further exclusion of time for the filing of other motions, but given the defendants' request and particularly in light of the fact that there generally is no interlocutory appeal of the denial of a motion to dismiss an indictment for failure to state an offense, *Flanagan v. United States*, 465 U.S. 259, 263 (1984), I believed the time taken to carefully address the defendants' "significant motion" presenting a case of "first impression" of great interest to industry principals and involving a statute that has been on the books for well over one hundred years was necessary and appropriate.

Having failed to articulate my ends-of-justice finding on November 15, 2018, I have now done so on the docket (Dkt. 252) and reiterate that ruling here. The Court previously excluded the time from November 15, 2018 through October 21, 2019, the date on which the Court ruled on the defendants' motion to dismiss, pursuant to 18 U.S.C. § 3161(h)(1)(D). Dkt. 73. At the time, the Court had also concluded, based on the defendants' request to defer consideration and work on further pretrial motions pending the Court's ruling on their motion to dismiss, and pursuant to 18 U.S.C. § 3161(h)(7)(A) and (B)(iv), that the ends of justice served by excluding the time through a ruling on the motion to dismiss outweighed the best interest of the public and the defendant in a speedy trial by permitting the defendants (as well as the government and the Court) to avoid the substantial burdens and costs associated with numerous additional motions that would be unnecessary were the motion to dismiss granted. This entry supplements the record as to the basis for the exclusion of time through the ruling on the defendants' motion to dismiss the indictment. Accordingly, time having been properly excluded, the defendants' motion to dismiss the indictment based on a violation of the STA is denied.

Even were I to agree with the defendants that there has been a violation of the STA, the dismissal of the case would be without prejudice and the government would have the opportunity to seek another indictment against the defendants. Courts have "substantial discretion" in determining whether dismissal for a speedy trial act violation should be with, or without, prejudice. *United States v. Sykes*, 614 F.3d 303, 309 (7th Cir. 2010). Factors to be considered include the seriousness of the offense, the facts and circumstances of the violation, the impact of reprosecution on the administration of the speedy trial act and on the administration of justice generally, and whether the defendant has been prejudiced by the violation.

Had there been a speedy trial act violation, these factors would all weigh in favor of a dismissal without prejudice. The defendants' contention that the crimes they are charged with committing are not serious (Motion at 12) is not persuasive. Wire fraud affecting a financial institution, punishable by up to 30 years in prison, is a Class B felony, second only to crimes punishable by life imprisonment in the federal classification of offenses. 18 U.S.C. § 1343 & § 3559(a)(2). And more specifically, as this Court has noted before, spoofing—however charged—is a serious crime because it threatens the integrity of financial markets. As for the facts and circumstances of the putative violation, as noted above, the defendants requested that pretrial motions be deferred pending ruling and never objected to the basis the Court identified for excluding time. *Sykes*, 614 F.3d at 310 ("the court was also justified in observing that [defendant] did not bring the delay to the court's attention as the number of nonexcludable days accumulated"); *United States v. Fountain*, 840 F.2d 509, 513 (7th Cir.1988) ("A defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive, prompt attention."). And even if the Court had not contemporaneously concluded that an ends-of-justice exclusion could be made based on the defendants' request, it would have made such a finding had it realized that the automatic exclusion of § 3161(h)(1)(D) would not cover the entire period until ruling. In short, the facts and circumstances of this episode reveal that a mistake was made and that had the mistake been noted the problem would have been cured. That is not a scenario that supports barring the government from seeking to re-charge the defendants. Nor would permitting the government to re-indict adversely affect the administration of justice generally or the speedy trial act specifically. If there was a speedy trial act violation here, it was inadvertent and did not result in any the exclusion of any time that was not properly excludable. This was, at most, an error in documenting the complete reasons justifying the exclusion of time from the speedy trial computation and in no way prejudiced the defendants—who asked for the continuance.

Finally, the defendants also assert that their constitutional right to a speedy trial has been violated. The Sixth Amendment guarantees "the right to a speedy and public trial." U.S. Const. amend. VI. A Sixth Amendment speedy-trial claim turns on the following general factors: "[W]hether [the] delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *O'Connor*, 656 F.3d at 643.

As for length of the delay, the defendants were charged in a criminal complaint filed on January 19, 2018, and the defendants assert that their speedy trial right began at that time. Not so. The Supreme Court has held that a defendant's right to a speedy trial does not begin "before a defendant is indicted, arrested, or otherwise officially accused." *United States v. MacDonald*, 456 U.S. 1, 6 (1982); *see also United States v. Marion*, 404 U.S. 307, 313 (1971), The Seventh Circuit has further held "that the 'official accusation' to which the Supreme Court referred in [*MacDonald*] must be a formal charging document, such as an indictment or information" and that the filing of a complaint, affidavit of probable cause, and detainer" does not start the speedy-trial clock. *United States v. Richardson*, 780 F.3d 812, 813 (7th Cir. 2015). The defendants were not arrested before they were indicted, so their right to a speedy-trial did not begin until they were indicted.[6]

The defendants were indicted on July 24, 2018, not quite two years ago. While there is a presumption that a case that takes more than one year to get to trial violates the constitutional right to a speedy trial, that presumption is rebuttable. Not all trials are created equal and a period of two years or more to trial is not at all uncommon in complex multidefendant criminal cases. *See*, *e.g.*, *O'Connor*, 656 F.3d at 643 (holding

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[6] The defendants' complaints about preindictment delay, moreover, are unconvincing. It has not been disputed that some of the delay was at Mr. Vorley's request to defer an appearance until after the birth of his son in late February and defense counsel also sought further opportunity to meet with DOJ officials in an effort to stave off the indictment. The defendants' principal argument regarding preindictment delay—that the government was seeking to "avoid scrutiny of a tolling order . . . obtained through a fraud on the court," Reply, ECF No. 240 at 12-13 & n.7, is the subject of a separate motion, Dkt. 169, as to which I have not yet issued a ruling but as to which I can presently say that the allegation that the prosecutors perpetrated a "fraud on the court" is not warranted.

delay of 1229 days between indictment and trial did not violate the Sixth Amendment speedy trial provision); *United States v. Robey*, 831 F.3d 857 (7th Cir. 2016) (1076 days); *United States v. Oriedo*, 498 F.3d 593, 597 (7th Cir. 2007) (three years).

In determining the weight to give the length of the delay, moreover, courts "look to the extent to which it exceeds the minimum necessary to trigger the analysis." *Id.* at 597. The excess over the presumptive period of a year can largely be entirely attributed to the defendants because it was their motion, and their request to defer other work while that motion was pending, that halted progress in the case for close to a year. *United States v. Bell*, 925 F.3d 362, 376 (delay attributable to defense counsel's need to prepare and defendants' pretrial motions are attributable to the defendant). In addition to the delay requested by the defendants when they filed their motion to dismiss the indictment, after arraignment, defendant Vorley jointly agreed with the government to defer the initial status hearing in the case of a month, Dkt. 37, and after that initial status, both defendants agreed to exclude time for almost two months for review of discovery and consideration of pretrial motions. Following the ruling on the motion to dismiss the indictment, moreover, the defendants have filed a half dozen pretrial motions, among them several motions to seeking further discovery (Dkts. 141, 161, 169), a motion for the early return of trial subpoenas (Dkt. 151), a motion to suppress statements (Dkt. 144; Vorley only), and the present motion. In addition, the defendants agreed to a pretrial schedule that anticipates the filing of pretrial *Daubert* motions. Other delay, to be sure, can be attributed to the government, particularly delay resulting from its superseding indictment, but the point remains: the defendants bear significant responsibility for the time it has taken to prepare this case for trial. *See*, *e.g.*, *Oriedo*, 498 F.3d at 599 (no speedy trial violation despite delays attributable to the government where defendant "remains responsible for multiple additional and significant delays").[7]

Relatedly, the defendants have not, prior to this motion, adequately asserted their speedy trial rights. Indeed, until they filed this motion, they had not objected to ***any*** exclusion of time. To the contrary, and as discussed above, in hopes of avoiding the burdens and expense of pursuing other pretrial motions, the defendants ***requested*** that the Court defer setting a schedule for the filing of such motions until after it had ruled on their motion to dismiss. *United States v. White,* 443 F.3d 582, 590-91 (7th Cir. 2006) (assertion of speedy trial right three months after court began considering a difficult legal issue "does not weigh strongly" in defendant's favor"). The Court does not

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[7] It must be noted as well that a substantial period of the delay in this case has been attributable to the restrictions on court operations necessitated by the COVID-19 pandemic. But for the restrictions imposed as a result of the pandemic, this case would have been tried in early May, well under two years from indictment. While these restrictions have remained necessary for longer than anyone would like, and might, if they continue indefinitely, at some point grow to constitutional magnitude, delays on the order of those experienced in this case (amounting to about four months at this point) do not implicate the defendants' constitutional right to a speedy trial. These delays have simply been unavoidable.

fault the defendants' rationale, but they cannot be said to have diligently asserted their speedy trial right when they prioritized the conservation of resources over their interest in getting to trial more quickly.[8] *See*, *e.g.*, *United States v. Taylor*, 196 F.3d 854, 862 (7th Cir. 1999) (demand for speedy trial that is inconsistent with requests for delay "is entitled to little, if any, weight"). Nothing prevented the defendants from preparing for trial while their motion to dismiss was pending except their own request that they be permitted to do so.

Finally, the defendants have not been prejudiced by the time it has taken to bring this case to trial. The Seventh Circuit has explained that the prejudice resulting from a delay in trial in light of the interests the Sixth Amendment seeks to protect is that which compromises the interests protected by the Sixth Amendment, which are " (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Bell*, 925 F.3d at 376. Those interests are not implicated here. The defendants have suffered no oppressive pretrial incarceration. They are not detained and have been

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[8] It bears noting that the defendants continue to voice concerns about the need to shape the trial schedule in this case in a manner that permits them to conserve resources and to avoid trial preparation that may have to be repeated if the trial is further delayed due to restrictions arising from the COVID-19 emergency. At the most recent status hearing in this case, on July 15, 2020, counsel for both defendants hedged their positions about whether trial should go forward as scheduled because they did not want to incur the costs of preparing for trial only to have the trial postponed due to COVID-19 issues.

permitted to work and travel during the pendency of this case. And while the Court acknowledges the defendants have suffered hardships as a result of the investigation and prosecution of this case, those sorts of hardships are typical in criminal prosecutions and do not support claims of speedy trial violations. Moreover, the "general anxiety and discomfort in waiting for trial" does not support a speedy trial violation claim, "absent some detriment to the defense." *United States v. Fuller*, 306 F. App'x 297, 300 (7th Cir. 2009). *See, e.g.*, *Thomas*, 933 F.3d at 695 (no speedy trial violation where defendant failed to demonstrate any significant impairment in his defense as a result of the delay"). The defendants have not identified "actual and substantial prejudice" to their defense resulting from the delay. *United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992).

* * * * *

For the foregoing reasons, the defendants' motion to dismiss the superseding indictment with prejudice based on pre-indictment and post-indictment delay [239] is denied.

Date: July 21, 2020

/s/ John J. Tharp, Jr.
John J. Tharp, Jr.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 18 CR 35

[Filed: November 26, 2019]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JAMES VORLEY and CEDRIC CHANU,	)
	)
Defendants.	)
	)

Violations: Title 18, United States Code, Sections 1343 and 2; Title 18, United States Code, Section 1349

JUDGE THARP

MAGISTRATE JUDGE MASON

SUPERSEDING INDICTMENT

COUNT ONE
(Conspiracy to Commit Wire Fraud Affecting a Financial Institution)

The SPECIAL JUNE 2018 GRAND JURY charges:

1. At times relevant to this Superseding Indictment:

The Defendants and Related Entities

a. JAMES VORLEY ("VORLEY") worked from in or around May 2007 until in or around March 2015 as a metals trader at Deutsche Bank AG, where he traded precious metals futures contracts. VORLEY was based in London, United Kingdom.

b. CEDRIC CHANU ("CHANU") worked from in or around March 2008 until in or around December 2013 as a metals trader at Deutsche Bank AG, where he traded precious metals futures contracts. From in or around March 2008 to in or around May 2011, CHANU was based in London, United Kingdom, and from in or around May 2011 to in or around December 2013, CHANU was based in the Republic of Singapore.

c. David Liew ("Liew") worked from in or around July 2009 until in or around February 2012 as a metals trader at Deutsche Bank AG, where he traded precious metals futures contracts. Liew was based in the Republic of Singapore.

d. Deutsche Bank AG, together with its subsidiaries and affiliates, was a global banking and financial services company. Deutsche Bank AG operated in the United States, United Kingdom, Republic of Singapore, and elsewhere, and operated global commodities trading businesses that included the trading of precious metals futures contracts.

e. Deutsche Bank AG was a financial institution within the definition of Title 18, United States Code, Section 20.

Market Background and Definitions

f. A "futures contract" was a type of legally binding contract to buy or sell a particular product or financial instrument at an agreed-upon price and on an agreed-upon date in the future. When the parties to the futures contract (namely, the buyer and the seller) entered into their agreement, the buyer agreed to pay for, and the seller agreed to provide, a particular product or financial instrument at the agreed-upon price on the agreed-upon date in the future.

g. Futures contracts were traded on markets designated and regulated by the United States Commodity Futures Trading Commission ("CFTC").

h. The CME Group Inc. ("CME Group") was a commodities marketplace made up of several exchanges, including the Commodity Exchange, Inc. ("COMEX") and New York Mercantile Exchange, Inc. ("NYMEX"). Each of COMEX and NYMEX was a "registered entity" with the CFTC.

i. Each of COMEX and NYMEX utilized an electronic trading system called "Globex," which allowed market participants to trade futures contracts from anywhere in the world. The CME Group operated Globex using computer servers located in Chicago and Aurora, Illinois.

j. Precious metals futures contracts included gold, silver, platinum, and palladium futures contracts, which were contracts for the delivery of gold, silver, platinum, and palladium, respectively, in the future at an agreed-upon price. Gold and silver futures contracts were traded on COMEX, and platinum and palladium futures contracts were traded on NYMEX, both using the Globex system.

k. Traders using Globex could place orders in the form of "bids" to buy or "offers" to sell one or more futures contracts at various prices, or "levels."

l. Trading on Globex was conducted electronically using a visible "order book" that displayed quantities of anonymous orders (*i.e.,* offers to sell futures contracts and bids to buy futures contracts).

m. An order was "filled" or "executed" when a buyer's bid price and a seller's offer price for a particular contract matched.

n. An "iceberg" order was a type of order that traders could place when trading precious metals futures contracts on COMEX and NYMEX. In an iceberg order, the total amount of the order was divided into a visible portion of a certain pre-set quantity that was visible to other market participants, and a portion of the order (*i.e.,* the remainder of the order) that was not. Whenever the visible portion of the order was filled, the same, pre-set quantity of the remaining, hidden portion automatically became visible; this process repeated until the entire remainder of the order was either executed or canceled.

o. All dates and times referenced in this Superseding Indictment are approximate and inclusive and are in Central Standard Time or Central Daylight Time.

2. From at least in or around March 2008 through at least in or around July 2013, the exact dates being unknown to the Grand Jury, in the Northern District of Illinois, Eastern Division, and elsewhere,

JAMES VORLEY and
CEDRIC CHANU,

the defendants herein, conspired and agreed with others known and unknown to the Grand Jury to commit wire fraud affecting a financial institution, that is, the defendants did knowingly and with the intent to defraud, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations , and promises, transmit and cause to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing the scheme and artifice, all affecting at least one financial institution, including Deutsche Bank AG, as well as other participants in the precious metals futures markets, in violation of Title 18, United States Code, Section 1343.

<u>Purpose of the Conspiracy</u>

3. The purpose of the conspiracy was to deceive other traders by creating and communicating materially false and misleading information regarding supply or demand, in order to induce such traders into trading precious metals futures contracts at prices, quantities, and times that they would not have otherwise, in order to make money and avoid losses for the co-conspirators.

Manner and Means of the Conspiracy

4. It was part of the conspiracy that VORLEY, CHANU, Liew, and others placed one or more visible orders for precious metals futures contracts on one side of the market that, at the time they placed the orders, they intended to cancel before execution (the "Fraudulent Orders") in order to deceive other traders.

5. It was further part of the conspiracy that by placing the Fraudulent Orders, VORLEY, CHANU, Liew, and others intended to create and communicate false and misleading information regarding supply or demand (*i.e.,* orders they did not intend to execute) in order to deceive other traders.

6. It was further part of the conspiracy that this false and misleading information often caused other traders to buy or to sell futures contracts at prices, quantities, and times that they otherwise would not have because, among other things, such traders reacted to the false and misleading increase in supply or demand.

7. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed Fraudulent Orders to buy, which created the false and misleading impression in the market of increased demand, which was intended to manipulate and move commodity futures prices upward.

8. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed Fraudulent Orders to sell, which created the false and misleading impression in the market of increased

supply, which was intended to manipulate and move commodity futures prices downward.

9. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed orders at a lower visible quantity, often in the form of iceberg orders, on the opposite side of the market, that they intended to execute (the "Primary Orders").

10. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed Fraudulent Orders with the intent to artificially manipulate and move the prevailing price in a manner that would increase the likelihood that one or more of their Primary Orders would be filled.

11. It was further part of the conspiracy that the Fraudulent Orders placed by VORLEY, CHANU, Liew, and others were material misrepresentations that falsely and fraudulently represented to traders that VORLEY, CHANU, Liew, and others were intending to trade the Fraudulent Orders when, in fact, they were not because, at the time the Fraudulent Orders were placed, VORLEY, CHANU, Liew, and others intended to cancel them before execution.

12. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others engaged in this false, misleading, and deceptive practice both by themselves and in coordination with other traders at Deutsche Bank AG, including each other, all in furtherance of the conspiracy. When placing Fraudulent Orders by themselves, either VORLEY, CHANU, Liew, and others would place their Fraudulent Orders individually in order to facilitate

the execution of their own Primary Orders, without the placement of a Fraudulent Orders by another trader. By contrast, coordinated placement of the Fraudulent Orders involved one or more additional traders. When engaging in coordinated placement of Fraudulent Orders, VORLEY, CHANU, Liew, and /or one or more other co-conspirators would place one or more Fraudulent Orders on one side of the market in order to facilitate the execution of Primary Orders placed on the opposite side of the market by either VORLEY, CHANU, Liew, or another trader.

13. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others intended to, attempted to, and often did cancel the Fraudulent Orders before any part of the Fraudulent Orders were executed.

14. It was further part of the conspiracy that the Fraudulent Orders placed by VORLEY, CHANU, Liew, and others exposed Deutsche Bank AG to (i) new and increased risks of loss—including in the form of: (a) fees, costs, and expenses incurred through investigations, litigation, and proceedings arising from the underlying conduct; (b) losses associated with the financial risk that the Fraudulent Orders would be executed (despite the traders' intent to cancel the Fraudulent Orders before execution); and (c) reputational harm—and (ii) actual loss, including (a) the payment by Deutsche Bank AG of a $30,000,000 civil monetary penalty to the CFTC on or around January 29, 2018, and (b) fees, costs, and expenses actually incurred through investigations, litigation, and proceedings arising from the underlying conduct.

15. It was further part of the conspiracy that in submitting the Fraudulent Orders and Primary Orders in furtherance of their scheme, VORLEY, CHANU, Liew, and others, transmitted and caused to be transmitted, wire communications from outside the United States into and through the Northern District of Illinois.

16. It was further part of the conspiracy that, for example, on or around November 3, 2010, VORLEY and CHANU, together with Liew, engaged in the coordinated placement of Fraudulent Orders at various prices, in order to facilitate the execution of Primary Orders placed by Liew to trade gold futures contracts.

17. It was further part of the conspiracy that on or around that same day, November 3, 2010, at or around the time they were engaging in the fraudulent activity described in paragraph 16, VORLEY and Liew communicated via electronic chat. During this chat, VORLEY wrote to Liew, in pertinent part, that their activity "was cladssic [sic] / jam it / woooooooooooo . . . . bif [sic] it up." Liew replied to VORLEY, in pertinent part, "tricks from the . . . master."

18. It was further part of the conspiracy that, for example, on or around August 7, 2011, CHANU and Liew engaged in the coordinated placement of Fraudulent Orders at various prices, in order to facilitate the execution of Primary Orders placed by Liew to trade gold futures contracts.

19. It was further part of the conspiracy that on or around that same day, August 7, 2011, at or around the time they were engaging in the fraudulent activity

described in paragraph 18, CHANU and Liew communicated via electronic chat. During this chat, Liew wrote to CHANU, in pertinent part, "i should job it here right / u think?" to which CHANU replied to Liew, in pertinent part, "yup / sell 10k here / i ll help you." Later in the chat, Liew wrote to CHANU, in pertinent part, "u be careful sweetie / dun get given here / lol."

All in violation of Title 18, United States Code, Section 1349.

COUNTS TWO THROUGH SEVENTEEN
(Wire Fraud Affecting a Financial Institution)

The SPECIAL JUNE 2018 GRAND JURY further charges:

20. Paragraphs 1 and 3 through 19 are incorporated herein.

21. From at least in or around March 2008 through at least in or around July 2013, in the Northern District of Illinois, Eastern Division, and elsewhere,

JAMES VORLEY and
CEDRIC CHANU,

the defendants herein, knowingly and with the intent to defraud , having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, transmitted and caused to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing the scheme and artifice—including wire communications in furtherance of the placement of Fraudulent Orders on or around the dates listed in the table below, each constituting a separate count of this Superseding Indictment, from outside the United States to the CME Group in Chicago and Aurora, Illinois—all affecting at least one financial institution, including Deutsche Bank AG, as well as other participants in the precious metals futures markets.

Count	Date	Start Time	Description of Wire Communication	Defen-dant(s)
2	Feb. 12, 2010	03:52: 21.204 AM	Placement of 11 Fraudulent Orders to sell 10 gold futures contracts each (110 contracts total)	VORLEY
3	Mar. 30, 2010	10:42: 33.165 AM	Placement of 286 Fraudulent Orders to sell 10 silver futures contracts each (2,860 contracts total)	CHANU

4	June 17, 2010	10:19: 31.207 AM	Placement of 10 Fraudulent Orders to buy 10 gold futures contracts each (100 contracts total)	VORLEY
5	Aug. 26, 2010	03:10: 46.989 AM	Placement of 8 Fraudulent Orders to buy gold futures contracts each (80 contracts total)	VORLEY
6	Oct. 7, 2010	8:02: 28.639 AM	Placement of one Fraudulent Order to buy 100 gold futures contracts	VORLEY and CHANU
7	Nov. 3, 2010	02:44: 03.584 AM	Placement of one Fraudulent Order to buy 100 gold futures contracts	CHANU
8	Nov. 3, 2010	02:48: 04.813 AM	Placement of 17 Fraudulent Orders to buy 10 gold futures contracts each (170 contracts total)	VORLEY

9	Apr. 20, 2011	01:42:52.256 AM	Placement of 16 Fraudulent Orders to buy gold futures contracts each (160 contracts total)	CHANU
10	May 5, 2011	02:35:30.310 AM	Placement of 15 Fraudulent Orders to buy 10 silver futures contracts each (150 contracts total)	VORLEY
11	May 11, 2011	08:57:27.095 PM	Placement of 14 Fraudulent Orders to sell 10 silver futures contracts each (140 contracts total)	CHANU
12	Aug. 7, 2011	10:46:06.911 PM	Placement of 40 Fraudulent Orders to buy gold futures contracts each (400 contracts total)	CHANU

13	Aug. 9, 2011	07:59: 18.245 PM	Placement of one Fraudulent Order to buy 50 gold futures contracts	CHANU
14	Sept. 30, 2011	05:02: 36.389 AM	Placement of one Fraudulent Order to sell 100 gold futures contracts and 32 Fraudulent Orders to sell 10 gold futures contracts each (420 contracts total)	VORLEY and CHANU
15	July 13, 2012	03:13: 50.277 AM	Placement of 30 Fraudulent Orders to sell 10 gold futures contracts each (300 contracts total)	CHANU
16	Sept. 14, 2012	02:55:1 5.619 AM	Placement of 22 Fraudulent Orders to sell 10 gold futures contracts each (220 contracts total)	CHANU

17	July 9, 2013	11:52: 04.617 AM	Placement of one Fraudulent Order to buy 100 gold futures contracts	VORLEY

All in violation of Title 18, United States Code, Sections 1343 and 2.

CRIMINAL FORFEITURE ALLEGATION AS TO COUNTS ONE THROUGH SEVENTEEN

22. The factual allegations contained in Counts One through Seventeen of this Superseding Indictment are hereby re-alleged and are incorporated by reference for the purpose of alleging forfeiture to the United States pursuant to Title 18, United States Code, Section 982(a)(2)(A), and Title 28, United States Code, Section 2461(c).

23. Upon conviction of any of the offenses alleged in Counts One through Seventeen, namely, conspiracy to commit and substantive counts of wire fraud affecting a financial institution, in violation of Title 18, United States Code, Sections 1343 and 1349, the defendants, JAMES VORLEY and CEDRIC CHANU, shall forfeit to the United States any and all property, real or personal, which constitutes or is derived from proceeds traceable to the aforementioned offenses, pursuant to Title 18, United States Code, Section 982(a)(2)(A) and Title 28, United States Code, Section 2461(c), and any property traceable to such property. The property to be forfeited shall include, but is not limited to, the following:

A money judgment in favor of the United States of America equal to the value of any property, real or personal, which constitutes or is derived from proceeds traceable to violations of Title 18, United States Code, Section 1343 and 1349.

24. If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;
b. has been transferred or sold to, or deposited with, a third party;
c. has been placed beyond the jurisdiction of the Court;
d. has been substantially diminished in value; or
e. has been commingled with other property that cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b), to seek the forfeiture of any other property of the defendants up to the value of the above forfeitable property and obtain a money judgment in an amount equal to the value of the property involved in the violations.

A TRUE BILL:

____

FOREPERSON

ROBERT A. ZINK
Chief
U.S. Department of Justice
Criminal Division, Fraud Section

By: ___________________ ___________________

Avi Perry	Brian Young
Assistant Chief	Deputy Chief

U.S. Department of Justice
Criminal Division, Fraud Section

APPENDIX G

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

No. 18 CR 00035
Judge John J. Tharp, Jr.

[Filed: October 21, 2019]

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JAMES VORLEY and CEDRIC CHANU,)
)
Defendants.)
)

MEMORANDUM OPINION AND ORDER

This case presents the question of whether a scheme to defraud commodities traders by placing "spoofing" orders—orders that the trader intends to withdraw before they can be filled—can constitute wire fraud. The defendants say no, because wire fraud requires the making of a false statement—an express misrepresentation—and the indictment alleges none. That is not the law. The Seventh Circuit, moreover, has already held that spoofing can constitute a "scheme to defraud" under the commodities fraud statute. As there is no material difference between a scheme to defraud under either statute, the answer to the question presented is, yes: the alleged spoofing scheme alleged in the indictment adequately charges violations of the wire fraud statute. And given that the statute has long been recognized to reach implied misrepresentations, and also requires proof of intent to defraud, the defendants' contention that the statute is unconstitutionally vague as applied to the scheme alleged also fails. The defendants also mount a vigorous challenge to whether the defendants' spoofing orders were, in fact, misleading and material, but those are questions for trial. Accordingly, the defendants' motion to dismiss the indictment is denied.

I. BACKGROUND[1]

Defendants James Vorley and Cedric Chanu were precious metals traders at Deutsche Bank AB. The indictment alleges that for approximately two years, from December 2009 through November 2011,[2] Vorley and Chanu engaged in a scheme to defraud other traders on the Commodity Exchange Inc. ("COMEX")

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[1] Except as otherwise noted, the facts set forth here are based on the indictment. Allegations of the indictment are taken as true only for purposes of this motion.

[2] The brief of *amicus* Futures Industry Association erroneously states that the conduct at issue is alleged to have occurred between 2007 and 2013. Brief at 7, ECF No. 107.

that involved interstate wire communications.[3] COMEX used an electronic trading system called "Globex," which allowed traders to trade futures contracts from anywhere in the world. During the relevant period, Vorley worked in London; Chanu worked first in London and later Singapore. The Globex servers, however, were located in Chicago and Aurora, Illinois, and that is the basis for venue in this District.

The indictment alleges that the defendants sought "to deceive other traders by creating and communicating materially false and misleading information regarding supply or demand, in order to induce other traders into trading precious metals futures contracts at prices, quantities, and times at which they would not have otherwise traded, in order to make money and avoid losses for the coconspirators." Ind. ¶ 4. The mechanics of the alleged scheme are not the focus of the present dispute, so its operation can be briefly described. The defendants would place one or more orders for precious metals futures contracts on one side of the market (bid or offer), intending to cancel the orders before they could be accepted by other traders. The indictment refers to such orders as

[3] The indictment charges the defendants with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and charges each of the defendants with one count of wire fraud, in violation of 18 U.S.C. § 1343. The indictment alleges that the conspiracy and scheme also involved David Liew, a third Deutsche Bank precious metals trader. Liew is not charged in this indictment, however, and has pleaded guilty to a related charge. His involvement has no bearing on the issues addressed in this opinion, so there is no need to refer further to his participation in the alleged scheme.

"Fraudulent Orders" because the defendants did not intend to execute them; instead, these orders were "intended. . . to deceive other traders" about the true supply or demand for the commodity in question. *Id.* (Since the principal question presented by the defendants motion is whether these orders constituted a scheme to defraud, in lieu of "Fraudulent Orders" this opinion will use the statutory and perhaps somewhat less pejoratively sounding term—"Spoofing Orders"—to refer to these orders; whether they were, in fact, fraudulent will be determined at trial).[4] The indictment alleges that the Spoofing Orders "were material misrepresentations" regarding the defendants' intent to trade those orders. *Id.* ¶11. Contemporaneously with placing the Spoofing Orders, the defendants placed what are referred to as "Primary Orders" on the opposite side of the market. Unlike the Spoofing Orders, the defendants intended to execute the Primary Orders, which involved trades that were (at least to the extent that they were visible to the market[5]) of smaller volume.

[4] The Commodities Exchange Act defines "spoofing" as "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. § 6c(a)(5)(C).

[5] The indictment alleges that Primary Orders were often placed as "iceberg orders," which was a type of order permitted on the COMEX in which only a portion of the order (the tip of the iceberg) was visible to other traders; when the visible portion of an iceberg order is filled, another portion becomes visible to the market, with the remainder again hidden. The process repeats until the entire order is executed or any remaining portion is canceled. Ind. ¶ 1.m.

In theory, at least, the defendants profited from the scheme because the Spoofing Orders would deceive other traders about supply and demand, misleading them about the likely direction of the commodity's price and making the defendants' Primary Orders, on the other side of the market, look attractive. Spoofing Orders to buy (bids), for example, would signal (falsely, because the defendants did not really intend to buy) an increase in demand for the commodity in question, thereby putting upward pressure on the market price. *Id.* ¶ 7. Having delivered this false signal of increased demand to the market, the defendants would then execute Primary Orders that had been placed to sell the commodity (offers) at a lower price than the Spoofing Order bid price but at a higher price than the prevailing market price had been before placement of the Spoofing Orders. Being smaller (at least, so far as was known to the market), the Primary Order would not wholly counteract the price impact of the Spoofing Orders, allowing the defendants to capture some of the spread between the preexisting market price and the inflated price bid in the Spoofing Orders.

II. ANALYSIS

The defendants move pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v) to dismiss the indictment for failure to state an offense. They also assert, in the alternative, that the wire fraud statute would be unconstitutionally vague if construed to extend to the defendants' trading activity. In addition, several business and industry organizations have filed briefs as *amici curiae* in support of the defendants' arguments that the alleged spoofing scheme does not constitute wire fraud.[6]

A. The Indictment Adequately Alleges the Crime of Wire Fraud.

An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment is adequate 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, 958-59 (7th Cir. 2010). Facts alleged in the indictment must be taken as true, *United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009), but an indictment need not allege facts sufficient to establish all elements of the offense. "In general, an indictment that tracks the words of a statute to state the elements of the crime is acceptable, provided that the indictment states sufficient facts to place a defendant on notice of the specific conduct at issue. *White*, 610 F.3d at 958-59.[7]

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[6] The Bank Policy Institute, joined by the Chamber of Commerce of the United States of America, and the Securities Industry and Financial Markets Association, submitted one brief. ECF No. 96 ("BPI Br."). The Futures Industry Association submitted another. ECF No. 107 ("FIA Br."). The government filed a combined response to both briefs. ECF No. 111 ("USA Resp. to Amici").

[7] The defendants assert that "conclusory allegations of the essential elements of the charged offense cannot save an indictment from dismissal under Rule 12." Def Mem. at 10, ECF No. 76. They cite no authority for that proposition, however, which

And "[w]hen the charge is mail fraud,[8] this court uses a broad rather than a technical standard to determine the sufficiency of an indictment." *United States v. Palumbo Bros.*, 145 F.3d 850, 868 (7th Cir. 1998).

The defendants acknowledge that the indictment provides adequate notice of the conduct alleged to have violated the wire fraud statute. Oral Arg. Tr. at 45, ECF No. 91. Their argument is that the indictment fails because it does not allege facts that show that they made any false statements. The defendants contend that because the indictment alleges (concedes, from the defendants' perspective) that the orders the defendants placed on the COMEX were real, at-risk, offers that the defendants were obligated to, and did, fill if they were accepted before the defendants could withdraw them, their conduct in placing those orders could not have violated the wire fraud statute. Their argument is simple: Wire fraud requires a false

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seems to be lifted from Supreme Court precedent describing pleading standards in civil, not criminal, cases. The Seventh Circuit has expressly rejected the proposition that the sufficiency of an indictment's allegations should be measured by the pleading standards applicable in civil cases. *United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013) (declining "to adopt the civil pleading standards articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), to assess the sufficiency of a criminal indictment").

[8] It is undisputed that the mail and wire fraud statutes should be interpreted in same manner. *See Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987). This opinion therefore relies, without further acknowledgement of the distinction, on precedent construing both statutes.

statement and in placing the Spoofing Orders they made no false statements. Their orders communicated no representation beyond the terms of the orders themselves—that the bidding or offering party would fill the order at the stated terms if the order were accepted before it is canceled. As it is undisputed—the complaint does not allege otherwise—that the defendants intended to, and did, fill any of their orders that were accepted while open on the market, their orders were, they insist, bona fide rather than fraudulent.

It's not quite that simple. The defendants' arguments come up short in two respects, one legal and one factual. As a question of law, the defendants' argument that a wire fraud conviction requires proof of a false statement is inconsistent with both the history of the wire fraud statute and Circuit precedent. That the indictment alleges no affirmative misrepresentations by the defendants does not mean that the defendants could not have engaged in a scheme to defraud by means of implied misrepresentations. And whether the defendants' Spoofing Orders carried with them any implied misrepresentations is the central fact question presented by the indictment. The defendants insist that real, at-risk, market orders communicate nothing beyond the offer to trade at the terms stated and that the Spoofing Orders did not deceive other traders about anything material to their trading decisions. That factual assault on the allegations of the indictment, however, must be made at trial.

1. Wire fraud does not require proof of a false statement.

The defendants maintain that to prove a wire fraud violation, the government must prove that a defendant made a false statement—an affirmative misrepresentation. "Without a false statement or misrepresentation," they declare, "there simply is no wire fraud." Def. Br. at 11, ECF No. 76. And because the government concedes that the indictment alleges no false statements, Oral Arg. Tr. at 36, ECF No. 91, if the defendants are right to say that wire fraud requires proof of an affirmative misrepresentation, then the allegations fail to set forth the necessary elements of the crime of wire fraud and the indictment must be dismissed.

On this point, however, the defendants are simply wrong. The wire fraud statute proscribes not only false statements and affirmative misrepresentations but also "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." *United States v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016).[9] And that is precisely

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[9] This is but the first of three reasons that the defendants' heavy reliance on *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016) is misplaced. See also *infra* notes 23 and 28. The defendants' position that wire fraud requires a false statement cannot be squared with *Weimert*'s acknowledgment that "actionable deception [under the mail and wire fraud statutes] can include false statements of fact, ***misleading half-truths, deceptive***

what the indictment alleges here: that the defendants did not disclose, at the time they placed their Spoofing Orders, their intent to cancel the orders before they could be executed, inducing by the placement of those orders a false belief about the supply or demand for a commodity, so that the market would move in a direction that favored the Primary Orders, to their benefit and to the detriment of traders in that market who were not privy to the fact that the defendants intended to cancel the Spoofing Orders before they were accepted.

The scheme alleged in this case is materially the same as the commodities fraud scheme charged in *United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017). There, as here, the government prosecuted a trader who had executed a scheme to create the illusion of market movement in one direction by placing large spoofing orders that he intended to withdraw from the market before they could be filled while placing orders on the other side of the market that could be filled at a better price as the market reacted to the spoofing orders.[10] *Id.* at 788-89. After the jury convicted Coscia

omissions, and false promises of future action." *Id.* at 357 (emphasis added).

[10] The defendant in *Coscia* was a high-frequency trader and the spoofing scheme for which he was convicted involved programmed trades. *See* 866 F.3d at 786. The indictment in this case does not allege that the defendants engaged in high-frequency programmed trades, and the defendants' briefs refer to the defendants as "manual" traders. *See*, *e.g.*, Def. Br. at 1 and 7, ECF No. 76. That information lies outside the boundaries of the indictment, but the Court does not understand the government to dispute it. At oral

of violating subsection (1) of the commodities fraud statute, 18 U.S.C. § 1348, the Seventh Circuit upheld the conviction against a challenge—the same challenge the defendants make here—that the scheme was not fraudulent because the spoofing orders "were fully executable and subject to legitimate market risk." 866 F.3d at 799. Acknowledging the truth of the contention, however, the Court of Appeals rejected its relevance. Even though the spoofing orders were executable until canceled, the court held that the spoofing scheme was nevertheless "deceitful" because at the time Coscia placed the spoofing orders, he intended to cancel them. *Id.*; *see also id.* at 800 (the deceitful nature of the spoofing scheme derives from the intent to evade execution of the orders).

In the face of the Seventh Circuit's unequivocal holding that futures orders placed with an undisclosed intent to cancel them before they are filled can be fraudulent, the defendants acknowledge that "there is some precedent" that spoofing violates subsection (1) of the commodities fraud statute and therefore assume

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argument, defense counsel argued that *Coscia* could be distinguished on the basis that the orders there were illusory because Coscia's program was able to cancel most of the spoofing orders (all but .08 %) before execution, whereas no such "spoofing machine" was alleged in connection with the defendants' trading. But the speed at which spoofing occurred does not necessarily distinguish the implied misrepresentations in both cases as to the traders' intent, at the time the order is placed, to have the trade executed. And any such arguments will depend on facts to be determined at trial. *See infra* at 29-30. The indictment alleges that the defendants' intended to cancel the Spoofing Orders before they were filled and, for now, that allegation must be taken as true.

"for the sake of argument" that a scheme to place orders that one intends not to fill constitutes a species of commodities fraud. Def. Br. at 8, 10, ECF No. 76. But, they urge, the failure to disclose such intent is not fraudulent in the context of this case because "mere failure to disclose, absent something more, does not constitute fraud under the mail and wire fraud statutes." *Id*. at 10.

In seeking to limit *Coscia*'s import to commodities fraud charges, the defendants' acknowledgment of the Seventh Circuit's holding is far too grudging. *Coscia* plainly held that a spoofing scheme can constitute a "scheme to defraud." 866 F.3d at 796-97. That holding is controlling authority, binding on this Court, and must be confronted head on: A spoofing scheme like the one the defendants are alleged to have engaged in is a scheme to defraud under the commodities fraud statute. The wire fraud statute, like the commodities fraud statute at issue in *Coscia*, requires proof of a scheme to defraud. Per force, unless a "scheme to defraud" under the commodities fraud statute means something different than a "scheme to defraud" under the wire fraud statute, a spoofing scheme that employs interstate wire communications constitutes wire fraud as well.[11]

[11] Redundancy between these statutes does not suggest that the scope of either should be limited. As the Supreme Court has explained, "[f]or better or worse, redundancy abounds in both the criminal law." *Marinello v. United States*, 138 S. Ct. 1101, 1114–15 (2018). *See also, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1096 (2015) ("Overlap—even significant overlap—abounds in the criminal law."); *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014) ("No doubt, the overlap between the two clauses is

The defendants contend that "scheme to defraud" does mean something different under the wire fraud statute. Wire fraud, they maintain, has a "special requirement"—namely, proof of an affirmative misrepresentation. Oral Arg. 1/24/19 Tr. at 11-12, ECF No. 91. To understand the argument, it is necessary to compare the two statutes. Their language is similar, but their structures are different. The defendants seek to exploit that structural distinction in arguing that the meaning of "scheme to defraud" differs between the two.

As relevant here, the wire fraud statute, 18 U.S.C. § 1343, makes it a crime to use interstate wire communications to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The commodities fraud statute, 18 U.S.C. § 1348, also proscribes any "scheme or artifice to defraud" or to obtain money or property "by means of false or fraudulent pretenses, representations, or promises," but it separates these prohibitions into two subsections. The first, § 1348(1), makes criminal "a scheme or artifice to defraud any person" in connection with a commodity; the second, § 1348(2), makes criminal "a scheme or artifice to obtain, by means of false or fraudulent pretenses, representations, or promises," money or property in connection with a commodities transaction.

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substantial on our reading, but that is not uncommon in criminal statutes"); *Hubbard v. United States*, 514 U.S. 695, 714, n.14 (1995) ("Congress may, and often does, enact separate criminal statutes that may, in practice, cover some of the same conduct").

At bottom, the defendants ground the distinction they claim between a commodities fraud violation and a wire fraud violation on the premise that the commodities fraud statute defines two species of commodities fraud, one that does not require a false statement and one that does. Whereas subsection (2) of the commodities fraud statute requires proof of an affirmative misrepresentation ("false or fraudulent pretenses, representations, or promises"), they observe that subsection (1), under which the defendant in *Coscia* was convicted, requires no such proof. The wire fraud statute, they assert, is therefore different; its elements are "distinct from and far more exacting than the elements of subsection 1 of the commodities fraud statute." Def. Br. at 12. That is so, they contend, because the wire fraud statute—which is not divided into two subsections—does not define two species of fraud, but one. And that single species, the insist, "always" requires a false statement or affirmative misrepresentation. Def. Br. at 11-12, ECF No. 76.

There is no dispute that commodities fraud under § 1348(1) requires no proof of an affirmative misstatement while § 1348(2) does. So said the Seventh Circuit in *Coscia*. 866 F.3d at 796.[12] And in arguing that the wire fraud statute, by contrast, sets forth only one offense, the defendants are also on solid ground; the wire fraud statute does not have subparts and neither the government nor the defendants maintain that a violation of § 1343 may be implicitly subdivided

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[12] As noted *infra*, at __ n.__, this is not the equivalent of saying that the Seventh Circuit was "unwilling to conclude" that spoofing involves a false statement.

into two offenses, one that involves schemes to defraud and another that involves schemes to obtain money or property by means of false or fraudulent pretenses, representations, or promises." Wire fraud, the defendants correctly maintain, makes it one crime to engage in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" by means of interstate wire communications. Where they go astray, however, is in defining that single offense as one that "always" requires proof of "false or fraudulent pretenses, representations, or promises." That the wire fraud statute does not distinguish between violations predicated on false statements and those that are not—that it does not divide schemes to defraud into two distinct categories as does the commodities fraud statute—does not mean that all wire fraud violations require proof of the former. Rather, it merely means that the wire fraud statute extends to all schemes to defraud involving wire transmissions, ***including*** those in which the scheme is carried out by means of false statements. False statements are not required, however, for liability under the mail and wire fraud statutes.

The somewhat peculiar history of the mail fraud statute reveals the defendants' error. As the Supreme Court explained in *McNally v. United States*, 483 U.S. 350 (1987), as originally enacted in 1872, the mail fraud statute set forth "a general proscription against using the mails . . . in furtherance of 'any scheme or artifice to defraud.'" *Id*. at 356. As such, the statute reached all schemes "to defraud" others of money or property. *Id*. at 358-59. "[T]he words 'to defraud,'" the

McNally Court further noted, "commonly refer 'to wronging one . . . by dishonest methods of schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *Id*. at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). The statute included no requirement that the scheme to defraud include false statements.

As such, when enacted the mail fraud statute was consistent with the prevailing meaning of what it meant "to defraud"—a paradigmatic common-law term. *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016) ("*Escobar*"); *Carter v. United States,* 530 U.S. 255, 266 (2000) ("defraud" is a common-law term). And "it is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Escobar,* 136 S. Ct. at 1999; *see also United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992) (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM L. REV. 527, 537 (1947) ("when a term is 'transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it"). Indeed, the Supreme Court has expressly held that "Congress implicitly incorporated [the] common-law meaning" of "defraud" into the mail, wire, and bank fraud statutes. *Neder v. United States*, 527 U.S. 1, 22 (1999).[13] And "when Congress enacted

[13] *Neder* did not involve commodities fraud, so the absence of a reference to the commodities fraud statute carries no negative implication. To the contrary, § 1348 had not yet been enacted when

the wire fraud and bank fraud statutes . . . the well-settled meaning of 'fraud' required a misrepresentation or concealment of material fact." *Neder*, 527 U.S. at 22 (emphasis added). "Because common-law fraud has long encompassed certain misrepresentations by omission," *Escobar*, 136 S. Ct. at 1999, it is reasonable to infer that in generally proscribing a "scheme or artifice to defraud" in enacting the original mail fraud statute in 1872, Congress intended to incorporate the common law's prohibition on fraud by omission as well as fraud by affirmative misstatement. *Cf. Escobar*, at 1999 (prohibition of false or fraudulent claims under the False Claims Act covers frauds by implied misrepresentations by omission as well as by express falsehoods).

The language on which the defendants premise their argument—"or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises"—as not added to the mail fraud statute until 1909. Contrary to the implication of the defendants' argument, the addition of this phrase was not intended to add a false statement requirement to the elements of mail fraud. As the Supreme Court

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Neder was decided. Its post-*Neder* enactment of § 1348, employing the same "scheme to defraud" formulation is further evidence that Congress intended no distinction between the meaning of the phrase in the mail and wire fraud statutes on the one hand and the bank and securities/commodities fraud statutes on the other. *See, e.g.*, *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.").

recounted in *McNally*, the 1909 amendment merely codified the Court's earlier holding in *Durland v. United States*, 161 U.S. 306, 313 (1896), that schemes to defraud include "suggestions and promises as to the future." *See* 483 U.S. at 358-59. Critical to the question at issue in this case, the *McNally* court held that the 1909 amendment worked no change to the meaning of a "scheme to defraud" in the mail fraud statute; it merely "made it unmistakable" that the statute reached the schemes described in the amendment "***as well as other frauds*** involving money or property." *Id*. at 359 (emphasis added).[14] In other words, frauds involving false statements are only a subset of frauds actionable under the mail fraud statute; the statute reaches "other frauds," not involving false statements, as well.

The Supreme Court subsequently confirmed this understanding in *Loughrin v. United States*, 573 U.S. 351 (2014), explaining that *McNally* understood the mail fraud statute to define a single offense: using the mails to advance a "scheme to defraud." *Id*. at 359. "The back half" of the wire fraud statute—*i.e.*, the 1909 amendment—the Court held, did not make any

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[14] The *McNally* Court reached this conclusion on its way to holding that the mail fraud statute did not extend to honest services fraud. That holding, of course, was superseded by the enactment of 18 U.S.C. § 1346, which clarified that the phrase "scheme or artifice to defraud" . . . "includes a scheme or artifice to deprive another of the intangible right of honest services." The legislative extension of the mail fraud statute to schemes to deprive others of the intangible right of honest services, however, does not implicate the question of whether a "scheme to defraud" under the statute requires a false statement.

substantive change to the meaning of that provision; it merely "clarified that the front [*i.e.*, the "scheme to defraud" provision] ***included certain conduct, rather than doing independent work***." *Id.* at 359 (emphasis added). In short, a "scheme to defraud" under the wire statute meant the same thing both before and after the 1909 amendment; the addition of the phrase "by means of false or fraudulent pretenses, representations, or promises" did not limit the crime of mail fraud to schemes accomplished by affirmative misrepresentations. So, yes, the mail fraud statute sets forth "just one offense—using mails to advance a scheme to defraud." But no, a scheme to defraud does not require proof of an affirmative misrepresentation; frauds by omission were actionable under the mail fraud statute when it was enacted and remain so today.

Recognizing that a scheme to defraud under the mail fraud statute does not require a false statement, in *Coscia* the Seventh Circuit expressly approved the district court's use of this Circuit's pattern instructions for mail and wire fraud cases to define the meaning of "scheme to defraud" in the context of a charge of commodities fraud under § 1348(1). As relevant here, the Court of Appeals defined that term as "a plan or course of action intended to deceive or cheat another. ***A scheme to defraud need not involve any false statement or misrepresentation of fact***." 866 F.3d at 799 n.70 (emphasis added). Given that the Seventh Circuit borrowed the definition of a "scheme to defraud" from the mail and wire fraud instructions, the defendants' contention that *Coscia*'s holding that a spoofing scheme constitutes a scheme to defraud is "irrelevant" to an assessment of the wire fraud charge in this case is plainly wrong. If 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.

Coscia, moreover, represents only this Circuit's most recent confirmation of the equivalence of the meaning of "scheme to defraud" across the federal fraud statutes set forth in Chapter 63 of Title 18; it broke no new ground in that respect. The Seventh Circuit expressly confirmed the same point almost thirty years ago, before the commodities fraud statute had even been enacted. In *United States v. Doherty*, 969 F.2d 425 (7th Cir. 1992), the Seventh Circuit held that check-kiting constitutes a scheme to defraud under the bank fraud statute, 18 U.S.C. § 1344. The bank fraud statute plainly served as the model for § 1348, the latter-enacted securities fraud statute, which was in turn subsequently amended in 2002 to include commodities fraud. Addressing subsection (1) of the bank fraud statute, which mirrors subsection (1) of § 1348, the Seventh Circuit held that its plain meaning encompasses check-kiting:

> The plain meaning of "scheme" is a "design or plan formed to accomplish some purpose," or "a plan, design, or program of action to be followed." To "defraud" means "[t]o practice fraud," "to cheat or trick," or "to deprive of a right or property by fraud"; "fraud" means "deceit, trickery, or breach of confidence, used to gain some unfair or dishonest advantage." Check kiting, at root, is a plan designed to separate the bank from its money by tricking it into inflating

> bank balances and honoring checks drawn against accounts with insufficient funds. It certainly is encompassed within the ordinary meaning of the term "scheme to defraud."

Doherty 969 F.2d at 428 (internal citations to sources of quoted phrases omitted).

The *Doherty* court then addressed the defendant's argument that check-kiting cannot constitute a scheme to defraud because it does not involve the making of a false statement or representation (the Supreme Court having held in *Williams v. United States*, 458 U.S. 279 (1982), that presentation of a bank check is not a representation that there are sufficient funds in the account to cash the check). The defendant maintained that the term "scheme to defraud" has the same meaning under the § 1344(1) as it has under the mail and wire fraud statutes, and—like the defendants here—argued that one cannot commit mail or wire fraud without making a false statement or misrepresentation of fact. 969 F.2d. at 429. The Seventh Circuit confirmed the first proposition but squarely rejected the second, holding that violation of the mail and wire fraud statutes requires no affirmative misrepresentation:

> ***We agree with Doherty that "scheme to defraud" means the same thing under §§ 1341, 1343 and 1344*** but our agreement ends there, for we are not persuaded that the term has as cramped a meaning as he contends. . . . Indeed, we have explicitly recognized . . . that ***a course of conduct not involving any factual misrepresentation can be prosecuted as a***

> ***"scheme to defraud" under the mail and wire fraud statutes***.
>
> This should come as no surprise. ***As its ordinary meaning suggests, the term "scheme to defraud" describes a broad range of conduct, some which involve false statements or misrepresentations of fact and others which do not.*** This was commonly understood in 1984 when Congress enacted § 1344. In construing § 1344(1), we must presume that Congress was aware of the settled judicial interpretation of "scheme to defraud" under §§ 1341 and 1343, and that it intended to incorporate that interpretation when enacting § 1344. ***[O]ne need not make a false representation to execute a scheme to defraud***.

Id. (internal case citations and quotations omitted; emphasis added). If, as the Seventh Circuit has instructed, "scheme to defraud means the same thing" under the mail and wire fraud statutes as it does under bank fraud statute, it is difficult to conjure a reason to conclude that it means something different in the context of the commodities fraud statute, which was modeled on, and save for the specific fraud varietal it targets, is substantively identical to, the bank fraud statute.[15] The defendants undertake no such

[15] Several circuits have also held that a "scheme to defraud" under the health care fraud statute, 18 U.S.C. § 1347, which also has the same two-part structure as the commodities fraud statute, means the same thing as a "scheme to defraud" under the wire fraud statute. *See United States v. Bertram*, 900 F.3d 743, 748–49 (6th

explanation; indeed, neither their briefs, nor those of *amici*, even cite *Doherty*.[16]

The *Doherty* opinion also puts the lie to the defendants' bald contention that there are "no prosecutions brought under the mail and wire fraud act where there is not a false representation." Oral Arg. Tr. at 23, ECF No. 91. As *Doherty* observed, this Circuit has repeatedly recognized "that a course of conduct not involving any factual misrepresentation can be prosecuted as a 'scheme to defraud' under the mail and wire fraud statutes." 969 F.2d at 429. The *Doherty* court identified two bookend exemplars, spanning 60 years, of such cases: *United States v. Richman*, 944 F.2d 323 (7th Cir. 1991) and *Fournier v. United States*, 58 F.2d 3 (7th Cir. 1932). In *Richman*, the Court of appeals affirmed mail and wire fraud convictions while rejecting as "an obvious misstatement of the law" an argument that mail fraud requires the making of a false statement "because 'the mail fraud statute proscribes fraudulent ***schemes***' rather than specific misrepresentations to the party to be defrauded." 944 F.2d at 332 n.10 (quoting *United States v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988) (emphasis in original). Decades earlier, in *Fournier*, the Court of Appeals similarly observed, in affirming a mail fraud conviction, that to establish a scheme to defraud, "it is not necessary that there should be actual misrepresentation of an existing fact. It is sufficient if

Cir. 2018), cert. denied, 139 S. Ct. 852, 202 L. Ed. 2d 582 (2019); *United States v. Palin*, 874 F.3d 418, 425 (4th Cir. 2017).

[16] To be fair, however, neither does the Government's.

the proposed venture be presented in such a way as is calculated to carry out the intent to deceive." 58 F.2d at 5.[17]

Indeed, this is not even the first wire fraud prosecution of precious metals commodities traders that has affirmed that implied misrepresentations violate the statute. In *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985), the Seventh Circuit affirmed mail and wire fraud convictions of two futures brokers who had defrauded their customers and other traders by trading ahead of customer orders without meeting margin requirements. This scheme involved no affirmative misstatements but only nondisclosure: the brokers did not disclose, to their customers or to other traders, that they were trading ahead of customer orders and that they were trading without margin. This conduct, the court said, "was a scheme to defraud in a rather classic sense"—namely, "in the common law sense [that] deceit is committed by deliberately misleading another by words, by acts, or, in some

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[17] In addition to *Doherty*, other cases have confirmed the principle in analogous contexts. *See, e.g.*, *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 659 (7th Cir. 2015) (denying motion to dismiss RICO claim based on predicate acts of mail fraud and holding that absence of false statements did not matter to validity of mail fraud allegations because "omission or concealment of material information can be sufficient to constitute mail or wire fraud"); *United States v. LeDonne*, 21 F.3d 1418, 1426 (7th Cir. 1994) (like *Doherty*, affirming bank fraud conviction and holding that a "*scheme to defraud* . . . may or may not include conduct involving false statements or misrepresentations of fact. . . . Put another way, the focus of the offense of a 'scheme to defraud' is on the "intended end result, not on whether a false representation was necessary to effect the result.").

instances . . . by silence." 757 F.2d at 168. Notably, the wire fraud scheme was actionable not only because it deceived the brokers' customers, to whom they owed a fiduciary duty, but also because it deceived other traders, to whom no fiduciary duty was owed, about actual supply and demand by injecting orders that were not backed by margin reserves. "Trading without margin," the *Dial* court explained, "gives a misleading signal, because a signal not backed by any cash." 757 F.2d at 169. Such trades could mislead because they "would lack the stimulus to sober reflection that comes from having to put one's money where one's mouth is." *Id*. That is the same sort of deception at issue in this case: failing to disclose information about commodities orders that was necessary for other traders to understand whether the orders—and the supply and demand they purported to represent—were bona fide.[18]

[18] *Dial* also rebuts the FIA's contention (made without apparent irony) that congressional regulation of the commodities markets "implicitly preclude[s]" application of the wire fraud statute. FIA Br. at 8-13 In *Dial*, the court noted that the defendants had not argued "that the Commodity Futures Trading Act supersedes the federal mail or wire fraud statutes" and concluded that they were "wise not to make the argument." 757 F.2d at 167 (citing *United States v. Brien*, 617 F.2d 299, 309–11 (1st Cir.1980)). In *Brien,* the First Circuit rejected the argument that the CEA occupied the entire field of commodities futures regulation in affirming mail and wire fraud convictions of a group of defendants who operated a boiler room operation selling futures contracts, holding that there was no evidence to overcome the strong presumption against implied repeal of statutes. *Id*. at 310.

The passage of time has done nothing to strengthen the argument. To the contrary, the argument that the mail and wire fraud statutes have no role to play in the regulation of the financial markets stands in marked tension with the fact that in

With respect to its affirmation that trading on the unmargined account constituted a scheme to defraud counterparties, *Dial*, a prosecution under the mail and wire fraud statutes, cannot be meaningfully distinguished from this case.[19]

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the Sarbanes-Oxley Act of 2002, Congress saw fit to increase the maximum statutory penalties for mail and wire fraud from five years to twenty. See SARBANES-OXLEY ACT OF 2002 § 903, PL 107–204, July 30, 2002, 116 Stat 745. Nor can it be squared with the amendment of the securities fraud law, 18 U.S.C. § 1348, in 2009 to make commodities fraud—whether involving affirmative false statements or not—actionable under the general criminal code. See FRAUD AND ENFORCEMENT AND RECOVERY ACT OF 2009 (FERA) § 2(e), PL 111-21, May 20, 2009, 123 Stat 1617.

All this explains, perhaps, why the defendants have advanced no such argument in their briefs. Indeed, they appear to disavow it. Reply at 14 ("Defendants do not contend that Dodd-Frank's anti-spoofing provision preempted any other laws.").

[19] Which is not to say that the defendants don't try. *See* Reply Br. at 9 & n.8, ECF No. 85. They argue that *Dial* involved the placement of riskless orders (because the orders were not backed by margin) whereas their Spoofing Orders were "at risk" orders, but that is not a meaningful distinction. Both cases involve orders that misrepresented the risk that prospective counterparties faced—in *Dial* because the orders were not backed by cash and here because the defendants intended to cancel the orders before they could be executed (and therefore placed them without regard to their financial impact if the scheme did not succeed). More broadly, both cases involved the placement of orders that provided false information to the market about supply and demand. The Spoofing Orders were deceptive in this regard because they (allegedly) signaled the presence of illusory interest in selling or buying the commodity in question and the failure to disclose that they were trading on an account without margin deceived the defendants' counterparties in *Dial* in the same way—by signaling illusory demand. As the Seventh Circuit explained, the orders

Despite this history and precedent, the defendants attempt to support their contention that wire fraud requires an affirmative misrepresentation by tracing a line of cases, beginning with *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294, 299 (7th Cir. 2003), in which (they say) the Seventh Circuit has "held repeatedly" that "the making of a false statement or material misrepresentation" is ***always*** "a necessary element of mail or wire fraud." Opening Br. at 2, ECF No. 76 (emphasis in original). In fact, not one of the cases cited has so held and the entire argument is a house of cards that collapses when *Aztar*, its

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unsupported by margin were similarly deceptive because they "confused the market by signaling the presence of big buyers who had not in fact put up any money." 757 F.2d at 170.

The defendants also argue that the defendants in *Dial* actively concealed the fraudulent nature of the trades at issue, but in doing so conflate the scheme to defraud with the defendants' intent to defraud. The court's reference to evidence that the defendants' efforts to actively conceal the scheme came in the context of discussing their intent, not whether their omissions constituted a scheme to defraud (that is, a scheme that, regardless of intent, would deceive their counterparties). *Id.* (the "defendants' elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing"); *see also id.* at 169 (contrasting breach of fiduciary duty as to employer by means of active concealment with absence of such duty regarding counterparties, but holding that, as to the counterparties, "trading in an unmargined account was an active misrepresentation and hence actionable even without a breach of fiduciary duty").

foundation, is removed.[20] In *Aztar*, the Seventh Circuit held that the RICO claim under review, predicated on mail fraud as the racketeering activity, was so frivolous that it failed to invoke federal subject matter jurisdiction because the statements at issue were not remotely misrepresentations. The court did not so much as advert to the question of whether implied misrepresentations may support a wire fraud scheme to defraud required an affirmative misrepresentation and "passing by such a question in silence does not establish a precedent." *United States v. Keane*, 852 F.2d 199, 203 (7th Cir. 1988). To the contrary, even in describing the elements of mail and wire fraud, the *Aztar* court acknowledged that concealment of a material fact also suffices.

Aztar, then, is a shaky foundation for the defendants' argument and they do nothing to reinforce it by lifting summary statements of the elements of mail and wire fraud offenses from subsequent cases divorced from the factual context the courts were examining. Next in line is *United States v. Stephens*, 421 F.3d 503 (7th Cir. 2005). Apart from the fact that the opinion quotes *Aztar*, the defendants' reliance on this case is inexplicable because the *Stephens* court expressly affirmed that "***a misleading omission is actionable as fraud***." *Id*. at 507 (emphasis added). The court of appeals then went on to reject the defendant's argument that he was not guilty of wire

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[20] "Always" is a word inserted by the defendants; so far as this court has seen, the Seventh Circuit has never employed that term in connection with a discussion of the requirements for mail and wire fraud convictions.

fraud because he had made no misrepresentations or misleading omissions," holding that the defendant had engaged in "the type of pattern of deceit that properly demonstrates a scheme to defraud." 421 F.3d at 509. *Stephens* also relied on the Seventh Circuit's prior decision in *United States v. Lack*, 129 F.3d 403 (7th Cir. 1997), where the court similarly found that the defendant's "pattern of deceit" constituted a scheme to defraud. 129 F.3d at 406. Notably, in *Lack* there is not even a boilerplate statement to the effect that an affirmative misrepresentation is required for a scheme to defraud; rather, the Court reiterated the Supreme Court's explanation in *McNally*, 483 U.S. 350, 358 (1987), that the words "scheme to defraud" in the mail fraud statute "refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value ***by trick, deceit, chicane or overreaching.***" No false statement required.

United States v. Sloan, 492 F.3d 884, 890 (7th Cir. 2007), also invoked by the defendants, similarly fails to shore up their construct. In *Sloan*, the court quoted *Stephens*, quoting *Aztar*, and the case involved both affirmative misrepresentations and misleading "half-truths." It does not remotely support the proposition that the defendants must have made affirmative misrepresentations to be guilty of wire fraud. The same is true of *United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009) (citing *Sloan* and *Stephens*), in which the defendant's liability was premised on "significant" and "material" omissions rather than affirmative misstatements, and of *United States v. Sheneman*, 682 F3d 623, 628-29 (7th Cir. 2012) (quoting *Powell* and

Sloan), where the court easily dismissed the argument that there was no scheme to defraud as a "non-starter" because "there was an abundance of evidence . . . detailing the numerous false statements and material misrepresentations" of the defendant.

The defendants attempt to put a capstone on this tenuous construct by selectively quoting this Circuit's pattern instructions on mail and wire fraud. The defendants quote the pattern instruction that sets out only the bare elements of the offense for the proposition that "the government must prove . . . . that the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise." Seventh Circuit Patt. Inst. §§ 1341, 1343 at 402 (2017 ed.).[21] Invoking these pattern jury instructions is unavailing for several reasons. First, as a matter of law, in *Doherty* the Seventh Circuit rejected precisely the same attempt to rely on this formulation for the proposition that the mail and wire fraud statutes require an affirmative misrepresentation, noting that this Circuit's pattern instructions "were never intended to have the force of law in this Circuit," and that this particular instruction is at odds with Circuit case law to the extent that it suggests that "scheme to defraud" requires an affirmative misrepresentation. 969 F.2d at 429 ("The aforementioned pattern jury instructions notwithstanding, ***one need not make a false***

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[21] This is the citation provided by the defendants. The instruction for the elements of mail and wire fraud appears at page 424 of the current pattern instructions, which include updates made in 2018. *See* http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf.

representation to execute a scheme to defraud.”) (emphasis added).

Second, even on its own terms, the defendants' invocation of the pattern instructions on mail and wire fraud fails. If one turns to the pattern instruction defining the term “scheme to defraud,” as that term is used in the elements instruction, one reads that “A materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or the concealment of material information.” Seventh Circuit Patt. Inst. §§ 1341, 1343 at 427 (through 2018 update) at 427. The committee comments to this pattern instruction similarly note that “cases interpreting the statutes hold that omissions or concealment of material information may constitute money/property fraud without proof of a duty to disclose the information pursuant to a specific statute or regulation.” And the cases cited for this observation include, among others, several upon which the defendants have built their house of cards—specifically *Powell* and *Stephens*. The Circuit's pattern instructions, then, recognize that a scheme to defraud effected by the nondisclosure of material information can constitute a scheme that involves a “false or fraudulent pretense, representation, or promise.”[22]

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[22] The court acknowledges that the committee comments go on to hedge somewhat on the question, stating that “it is not clear that an omission by itself is sufficient to comprise a scheme to defraud.” [428] But the committee's note further explains that the issue providing pause arises in the context of honest services fraud, which is not at issue in this case. And, in any event, the committee's note fails to acknowledge *Coscia*'s express affirmation of an instruction that: “***A scheme to defraud need not involve***

In light of the foregoing, the defendants' contention that wire fraud requires proof of an affirmative misrepresentation is, as stated at the outset of this opinion, simply wrong: misleading omissions are actionable under the mail and wire fraud statutes. As a fallback to their untenable absolutist position, however, the defendants maintain that omissions can suffice for liability under the mail fraud statute "only" where the alleged fraudster owes a fiduciary duty to disclose the omitted information. Def. Br. at 19, ECF No. 76. But that contention is equally flawed.

This Circuit has repeatedly stated that the existence of a fiduciary, regulatory, or statutory duty to disclose material information is not required to make an omission actionable under the mail and wire fraud statutes. Consistent with the proposition that a scheme to defraud does not require affirmative misstatements, the Seventh Circuit has repeatedly acknowledged that "the concept of a misrepresentation," as it applies in the context of the mail and wire fraud statutes, includes not only affirmative misstatements but also "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

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any false statement or misrepresentation of fact." Again, pattern instructions are only authoritative where the court of appeals has expressly affirmed their accuracy—as in *Coscia* and *Doherty*. *United States v. Rainone*, 816 F.3d 490, 495 (7th Cir. 2016) ("pattern jury instructions cannot override precedent"); *Kingsley v. Hendrickson*, 744 F.3d 443, 452 (7th Cir. 2014) (pattern instructions "are persuasive only to the extent that they accurately restate the law of this circuit"), vacated and remanded on other grounds, 135 S. Ct. 2466 (2015).

action to the advantage of the schemer and the disadvantage of the victim." *Weimert*, 819 F.3d at 355 (emphasis added).[23] As the Seventh Circuit observed more than 30 years ago, "[i]t requires no extended discussion of authority to demonstrate that omissions or concealment of material information can constitute fraud . . . cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation." *United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985) (collecting cases). And "while the existence of a fiduciary duty is relevant and an ingredient in some mail fraud prosecutions, it is not an essential in all such cases." *Id.* at 698 (internal punctuation omitted).[24]

This is not to say, of course, that every omission of material fact in the context of any transaction suffices

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[23] *See also id.* at 367 ("[p]roof of a breach of fiduciary duty is neither necessary to nor sufficient proof of mail or wire fraud"). This is the second reason that the defendants' reliance on *Weimert* is misplaced. Their contention that their failure to disclose that they intended to withdraw their orders before they could be executed cannot as a matter of law be deemed fraudulent in the absence of an affirmative duty to disclose arising from a fiduciary relationship simply ignores this clear statement to the contrary by the Seventh Circuit. *See* Def. Br. at 19, citing *Weimert* for the proposition that there is no duty to disclose negotiating positions).

[24] *United States v. Dick*, 744 F.2d 546, 550 (7th Cir. 1984), the case the defendants cite for this proposition, involved a fiduciary relationship, and so supports the more limited proposition that the existence of a fiduciary relationship is relevant to the question of whether a nondisclosure is fraudulent, it provides no support whatsoever for the proposition for which the defendants cite it—that nondisclosure is actionable as mail or wire fraud "only" where it occurs in the context of a fiduciary duty.

to support a mail or wire fraud charge. As the Seventh Circuit further explained in *Keplinger*, "we do not imply that all or even most instances of non-disclosure of information that someone might find relevant come within the purview of the mail fraud statute; nevertheless, under some circumstances concealment of material information is fraudulent." *Id*. Whether a failure to disclose is fraudulent depends on context." *Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1347 (7th Cir. 1995). "A half truth, or what is usually the same thing a misleading omission, is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled." *Id*. at 1348.

Here, the context alleged is a scheme to create the illusion of market movement by placing orders that falsely implied that the defendants intended to trade in the quantities and at the prices reflected by those orders when in fact they intended to cancel the orders before they could be executed. And while it is undisputed that these orders were "real" orders, in the sense that if the defendants failed to cancel them before they were accepted by counterparties the defendants would be required to honor them, they were nevertheless different from other orders on the market because (it is alleged) they supplied the market with inaccurate information about the likelihood that the orders would be executed. The indictment alleges a price manipulation scheme that was dependent on communicating inaccurate information about the likelihood that the defendants' Spoofing Orders would be filled.

Viewed in this context, the defendants' argument that they could not have misled anyone about supply and demand because their orders were "real" and "at-risk" is unpersuasive and, indeed, warrants rejection for the same reason that the Seventh Circuit rejected it in *Coscia*: "it confuses [the question of whether the defendants placed] ***illusory*** orders [not alleged] with [the question of whether those orders created] an ***illusion*** of market movement [which is alleged]." 866 F.3d at 797. Even "real" and "at-risk" orders that create an illusion of market movement can be fraudulent where they inject inaccurate information into the market. And let's not lose sight of the fact (assumed for now to be true) that these orders were not just misleading, but criminal; independent of whether the defendants were committing wire fraud, they were (at least after July 10, 2010) violating the anti-spoofing provision of the Commodities Exchange Act, 7 U.S.C. § 6c(a)(5)(C) and § 13(a)(2). With all this as the background to assess the defendants' conduct, their failures to disclose that the Spoofing Orders were less likely to be filled is no "mere omission" to inform traders about information that they might find relevant to a decision to trade; it is an active misrepresentation of the true supply and demand for the commodities that were the subject of the Spoofing Orders that renders the market price of the commodity less accurate. That is precisely how, in *Dial*, the Seventh Circuit described the defendants' failure to disclose they were trading on an unmargined account: "an active misrepresentation" that could "reduce the accuracy of the market as a device for forecasting price." 757 F.2d at 169.

This case presents an alleged scheme to move the market price of commodities and, in this context, it is reasonable to understand the scheme to rest on the provision of false information to the market. As such, there is no good reason to exempt failures to disclose misleading information from the ambit of the wire fraud statute and certainly the absence of a fiduciary relationship between futures traders is not one. *Cf. Emery,* 71 F.3d at 1348 ("it is not true that if you are not a fiduciary anything goes, short of false statements"). "Fraud and deceit are not legitimate market forces. Fundamentally, markets are information processing systems. The market price is only as "real" as the data that inform the process of price discovery. By the same token, the market price is "artificial" when the market is misinformed." *United States v. Reliant Energy Servs., Inc.*, 420 F. Supp. 2d 1043, 1058 (N.D. Cal. 2006). As alleged, the Spoofing Orders created artificial prices by injecting misleading information into the market that the defendants "intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled." As such, the Spoofing Orders fit comfortably within the ambit of the wire fraud statute's prohibition on false and misleading statements in furtherance of a scheme to defraud, as those statutes have long been understood in this Circuit:

> Under the mail and wire fraud statutes it is unlawful to make false or misleading statements in furtherance of the scheme. ***It is also unlawful to speak half truths or to omit to state facts necessary to make the statements made in light of the circumstances under***

> ***which they were made not misleading***. Absent such circumstances mere omissions do not constitute fraud under the mail and wire fraud statutes. ***The statements need not be false or fraudulent on their face and the defendant need not misrepresent any fact since all that is necessary is that the scheme be reasonably calculated to deceive those to whom the statements are made***.

United States v. Biesiadecki, 933 F.2d 539, 543 (7th Cir.1991) (approved jury instruction).

2. Whether the defendants' trading activity deceived others is a question of fact.

All of this assumes, of course, that the government will be able to prove that when the defendants placed the Spoofing Orders they did not intend to execute them and that those orders in fact misled other market participants. And, at least for purposes of this motion, the defendants do not dispute the foundational facts alleged about their trading. They don't contend that the government has mischaracterized the mechanics, or the objectives, of their trading practices, or even their alleged intent, when placing orders, to cancel them before they could be executed (though quick to add that the defendants intended to honor any orders that were executed before they could be canceled. And if those were the only relevant fact issues, there would be no need for a trial and this case could, indeed, be resolved by the court as a matter of law. *See, e.g., United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988) (distinguishing between an argument that the evidence is insufficient with one based on failure to allege a crime and affirming dismissal of indictment where undisputed facts showed that defendant could not, as a matter of law, be guilty of failing to file currency structuring reports).

But while they do not presently dispute certain subsidiary facts alleged in the indictment to support their argument that they cannot be guilty of wire fraud, the defendants vigorously dispute the central fact question in this case: whether the defendants' orders communicated materially false information to other traders. The Government concedes that the indictment does not allege that either defendant made affirmative false statements in placing the Spoofing Orders. Oral Arg. Tr. at 36, ECF No. 91. But, as discussed in detail in the preceding section, the premise of the indictment is that in placing orders that they did not intend to fill, the defendants deceived and misled other market participants about their trading intentions and, therefore, about the true supply of and demand for the commodity that was the subject of the orders.

The defendants insist that their orders "neither communicated false supply or demand nor implied anything (false or otherwise) about Defendants' subjective hopes or intent." Def. Mem. at 3, ECF No. 76. The *amici* echo the argument. *See, e.g.*, BPI Br. at 8, ECF No. 96 ("When an order is placed on COMEX, the only information conveyed to the market is the commodity to be traded, the price of the order, and the quantity available to trade at that price."); FIA Br. at 5, ECF No. 107 ("Orders to purchase or sell COMEX-listed futures communicate only the futures contract offered to be traded, the price, whether the order is to buy . . . or sell . . . and the quantity of futures contracts to be bought or sold."). The defendants maintain that the Spoofing Orders could not mislead anyone about supply and demand because supply is simply what we call the amalgamation of offers to sell (supply) and to buy (demand) that are open on the market at any given point in time. If the defendants' offers were real, in the sense that they could be filled, they constituted real components of the supply and demand for the relevant commodities when they were open on the market.

But, as discussed in detail in the preceding section, this argument ignores the central allegation that the information about supply and demand that the Spoofing Orders injected into the market was artificial because it was not based on a genuine intent to execute the orders being placed. Whether there was anything false or misleading about the communications the defendants made when they placed Spoofing Orders will depend on what their bids and offers meant to other market participants. What, if anything, beyond commodity, price, and quantity an order conveys is plainly a question of fact and the defendants' arguments about whether their Spoofing Orders carried any implied misrepresentations are arguments about the sufficiency of the evidence that will be presented in the case and have no place in assessing the adequacy of an indictment. Perhaps the defendants are right, and traders do not, as the government alleges, expect that their counterparts necessarily intend, at the time they place an order, to fill that order. Or, perhaps, understanding that Spoofing Orders are criminal under the Commodities Exchange

Act and prohibited on the COMEX, traders do understand that the placement of an order carries with it an implicit statement that the party placing the order intends to fill the order. Perhaps there is no consensus as to the import of an open order on the market. Perhaps traders recognize that unusually large orders may be outliers that cannot be relied upon as indicators of market forces. Given the permitted use of iceberg orders, perhaps traders routinely assume that order volumes are generally understated. Perhaps their own trading strategies are designed to exploit what they perceive to be unusually large orders (perhaps, for example, they try to inject themselves into the spoofing process). Perhaps differences between high-frequency programmed trading and manual trading affect the understanding of what the placement of an order conveys.[25] Perhaps manual trading strategies are independent of micro-changes in the market price or available volume of a commodity.[26]

The answers to these questions are neither self-evident nor undisputed. Citing *Sullivan & Long v.*

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[25] *See*, *e.g.*, note 10, *supra*. As discussed at oral argument, distinctions between high-frequency programmed trading and manual trading might be relevant—that so-called manual trades remain open for significantly longer might, for example, bear on whether it is reasonable to infer an intent to cancel before the order was filled. But whether such distinctions exist and are material requires factual development.

[26] This list is intended neither as a determination that these issues are necessarily relevant to the question of what implicit information the Spoofing Orders communicated to the market nor as an exhaustive catalog of the issues that might bear on that question.

Scattered Corp., 47 F.3d 857 (7th Cir. 1995), however, the defendants insist that this Court may declare, as a matter of law, that the placement of an order on the COMEX carries with it no implied representation of an intent to fill the order. In *Sullivan & Long*, the defendants submit, the Seventh Circuit "rejected out of hand the plaintiff's theory" that short sellers implicitly warrant that they won't short to a degree that jeopardizes their financial security. Def. Br. at 17-18. That's not so. As the discussion makes clear, the plaintiffs in *Sullivan & Long*—unlike the government here—alleged "no representations, true or false, actual or implicit" in connection with the transactions (there, short sales) at issue. 47 F.3d at 864. In the absence of such allegations, it is not surprising that the court concluded that the sales at issue carried no misrepresentations. Moreover, it was actually Judge Posner, rather than the plaintiffs, who suggested (in dicta) that short sales might be argued to carry an implicit warranty that the sales would not jeopardize the short seller's financial solvency, but dismissed the significance (*i.e.*, the materiality) of such a misrepresentation because "there is as yet no rule" that bars shorting to that degree. *Id*. Here, of course, there is such a rule; given that spoofing, as a matter of law, constitutes a crime, the defendants' argument that this court can declare, as a matter of law, that futures trades carry no implicit warranty that they are not unlawful due to lack of intent to fill the order, is quite unpersuasive.[27]

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[27] It bears noting as well that the fundamental premise of the Seventh Circuit's holding in *Sullivan & Long* is that short selling promotes the central goal of the securities laws—namely "to

The defendants' attempt to liken the scheme charged here to those merely involving "sharp dealing or unethical conduct," which fall outside the ambit of the mail and wire fraud statutes, fails for similar reasons: the conduct at issue here is alleged to involve market manipulation; it cannot be dismissed as a matter of law as merely part of the deception inherent in typical arms-length business negotiations. The defendants rely on the Seventh Circuit's opinion in *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016) for this argument. There, the Seventh Circuit reversed a wire fraud conviction where the evidence addressed "not material facts or promises but rather parties' negotiating positions," which the court defined as "the preferences, values, and priorities" of the parties. *Id.* at 366. Statements as to those subjective elements, the court held, "are not material for purposes of mail and wire fraud." *Id.* at 364. The deception alleged in this case does not involve "negotiating positions," but rather the (alleged) fact that the defendants did not intend to execute the orders they placed on the market.

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prevent practices that impair the function of stock markets in enabling people to buy and sell securities at prices that reflected undistorted . . . estimates of the underlying economic value of the securities traded." 47 F.3d at 861. Short selling, the court concluded as a matter of law, "accelerate[s] rather than retard[s] the convergence between the price of a stock and its underlying economic value." *Id.* The practice has, therefore, exactly the opposite effect of a spoofing scheme, which is alleged to have distorted the economic value of the commodities that were the subject of the spoofing orders. Presumably, however, the defendants do not agree that a practice that accelerates rather than retards the divergence of between the price and value of a commodity constitutes a scheme to defraud as a matter of law.

Independent of the application of the wire fraud statute, the conduct alleged is criminal and failing to disclose that a bid is unlawful cannot be said, as a matter of law, to be immaterial.[28] Indeed, in *Weimert* the majority distinguished a good faith "stalking horse" bidder from "a bidder who does not actually mean to follow through on the bid, but whose bid is being used by the seller to trick another potential bidder to make or increase a bid." 819 F.3d at 364-65.[29] The Court expressly declined to extend its holding that failure to disclose negotiating positions is not wire fraud to that circumstance because the evidence in *Weimert* was clear that the bid at issue "was anything other than a good-faith bid." *Id*. at 365.

Ultimately, whether the defendants' "Spoofing Orders" were "anything other than a good-faith bid" must be resolved at a trial. But for purposes of addressing the defendants' motion, this question (and the subsidiary questions on which it depends) must be answered in the government's favor.[30] The indictment,

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[28] This is the third reason that the defendants' reliance on *Weimert* is misplaced. *See supra* notes 9 and 23.

[29] *Cf. Wharft (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("To sell an option while secretly intending not to permit the option's exercise is misleading, because a buyer normally presumes good faith.").

[30] *Weimert*, it is also relevant to note, was decided on summary judgment, on the basis of an extensive factual record that included testimony before the SEC. Here, by contrast, the defendants' arguments are, as yet, unsupported by evidence. At this juncture, the Court is required to accept the truth of the indictment's allegations that the Spoofing Orders "were material

while lacking allegations that the defendants made false statements to carry out their scheme, alleges that the defendants' orders implicitly misrepresented their intention to trade and therefore deceived other traders about the true state of supply and demand in the market. On a motion to dismiss, the indictment's allegations—not those of the defendants—are the allegations that must be credited. Taking all of the facts alleged in the indictment as true, the indictment describes a scheme to defraud commodities market participants by deceiving them about the direction of the market by the placement of Spoofing Orders—that is, orders that they intended to cancel before they could be executed. And because the scheme alleged involved the use of interstate wire communications, the indictment adequately charges violations of the wire fraud statute.

B. The Wire Fraud Statute Is Not Unconstitutionally Vague.

The defendants also argue that the wire fraud statute is unconstitutionally vague as applied to the scheme alleged in the indictment. A challenge that a statute is unconstitutionally vague is a due process challenge. "To satisfy due process, a penal 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);

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misrepresentations" about their intention to execute the Spoofing Orders they placed. Ind. ¶11.

see also United States v. Hausmann, 345 f3d 952, 958 (7th Cir. 2003) (rejecting vagueness challenge to honest services mail and wire fraud). That is, "the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." *Skilling*, 561 U.S. at 412.

As for notice, the defendants' vagueness challenge fails because the very same reasons that underlie the conclusion that the alleged spoofing scheme is actionable under the wire fraud statute also rebut the asserted lack of notice. The defendants acknowledged as much during oral argument in stating that "the primary value of going through the vagueness analysis is actually to show, for the reasons Mr. McGovern has just gone through, what a radical departure permitting the government to go forward with wire fraud charging this conduct would be . . . ." Oral Arg. Tr. at 18, ECF No. 91. Having concluded that the wire fraud statute has long encompassed implied misrepresentations, and that its application here does not represent a radical expansion in the statute's reach, the defendants' argument that the statute does not provide fair notice that implied misrepresentations can be actionable as wire fraud also fails; it is no more persuasive when presented in the context of a vagueness challenge.

Noting that their conduct predates the *Coscia* prosecution, the defendants protest that they had no notice that spoofing would be deemed to constitute wire fraud. The novelty of this prosecution, however, is in large measure a function of the novelty of the scheme. As the Seventh Circuit explained in *Coscia*, spoofing is a relatively new phenomenon aided by the development of high-frequency programmed trading. The mail and wire fraud statutes can, of course, be applied to new fact contexts; fraud is "as versable as human ingenuity." *Weiss v. United States,* 122 F.2d 675, 681 (5th Cir. 1941). The defendants, moreover, heap too much weight on the fact that in *Coscia* the government did not charge wire fraud. The reasons why an indictment includes some charges and not others are often inscrutable and in any event there is certainly no rule that requires the government to include in an indictment every conceivable charge.[31] And it is entirely inaccurate to say, as the defendants do, that "the Seventh Circuit in *Coscia* was unwilling to conclude" that spoofing involved the making of a false statement; the Court of Appeals merely noted that no such proof was needed under subsection (1) of the commodities fraud statute.

The premise that this prosecution represents a novel use of the wire fraud statute, moreover, depends upon the granularity of the scheme's description. As the Seventh Circuit characterized the spoofing scheme

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[31] The defendants speculate that the government charged wire fraud in this case rather than commodities fraud because the statute of limitations for wire fraud is longer. Def. Br. at 4, ECF No. 76. Accurate or not, the premise is unremarkable; prosecutors often resort to charging statutes that provide a longer limitations period to preserve a prosecution—sometimes successfully, sometimes not. *Cf. United States v. Banyan*, 933 F.3d 548, 551 (6th Cir. 2019) (observing that government would have prevailed had it charged mail or wire fraud in mortgage loan fraud scheme, but blew that statute and instead charged bank fraud, with a longer limitations period, resulting in acquittal because mortgage lenders were not financial institutions).

in *Coscia*, it was a market manipulation scheme designed "to pump and deflate the market"—in other words, it was akin to the "pump and dump" schemes that have frequently been prosecuted under the mail and wire fraud statutes. *See, e.g.*, Pickholz et al., *Recent trends in securities-related mail and wire fraud prosecutions—Market manipulation* 21 SEC. CRIMES § 6:36 (Nov. 2018 Update) ("Mail fraud charges are routinely included in prosecutions charging market manipulation, especially so-called "pump-and-dump" schemes"; collecting cases). What the defendants claim as unprecedented is really not the use of wire fraud to charge a market manipulation scheme, but the prosecution of such a scheme based on implied, rather than express, misrepresentations. As discussed, however, implied misrepresentations have long been actionable under the mail and wire fraud statutes. And, as *Dial* illustrates, implied misrepresentations by futures traders made to counterparties about the bona fides of their bids and offers have been recognized in this Circuit as actionable under the wire fraud statute. That degree of granularity easily passes constitutional muster.

As for the second prong—arbitrary enforcement—the defendants argue that prosecuting spoofing as wire fraud would open the door to prosecutions based on the employment of routine and expressly permitted trading practices such as fill-or-kill and iceberg orders that, like spoofing orders, obscure the effect of the order on supply and demand.[32] Reply at 14, ECF No. 85. The

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[32] To the extent that the defendants and *amici* contend that applying the wire fraud statute to implied misrepresentations will

comparison is inapt, however, for at least two reasons, both having to do with intent. First, as the government observes, these routine practices do not involve the placement of orders that the traders do not intend to fill. What is alleged to be illusory here is not the orders themselves but the intent that animates them. The Spoofing Orders (it is alleged) impliedly misrepresented the defendants' intention, at the time they were placed, to fill the orders. Prosecuting a scheme to deceive the market in that manner does not open the door to prosecutions based on routine trading practices that do not involve similar deception about

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permit prosecutors to run amuck and wreak havoc on the operation of the commodities markets, there are two ready responses. First, placing orders that aren't intended to be executed is already unlawful, under both the CEA and the commodities fraud statute. If assessing a trader's intent to execute a trade at the time the order is placed is a dire problem for the commodities markets (neither the defendants nor *amici* have identified evidence that making spoofing criminal has chilled trading or had any other adverse effects), it is a problem that has existed at least since 2010; that horse is out of the barn, yet Congress has seen no need to adjust its approach. And second, to the extent the argument is based on policy considerations, rather than interpretations of the statute itself, the argument is misdirected. *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017) ("[e]ven if we were persuaded that Amgen had the better of the policy arguments, those arguments could not overcome the statute's plain language"); *United States v. Thompson*, 901 F.3d 785, 787 (7th Cir. 2018), cert. denied, 139 S. Ct. 1618 (2019) "policy-based reasons" for adopting a different interpretation of a statute "are best suited for the policymakers, not the courts."). Whether criminal enforcement of a statute represents good policy or bad policy is not part of this court's task in assessing a vagueness challenge. The test is whether the statute provides fair notice and precludes arbitrary enforcement.

whether the order is a bona fide representation of a trader's intent to execute a trade at the price bid or offered.

Second, the defendants ignore entirely the requirement of intent to defraud. The Supreme Court has repeatedly observed, however, that "[i]nstead of adopting a circumscribed view of what it means for a claim"—or here a scheme—"to be false or fraudulent, concerns about fair notice and open-ended liability can be effectively addressed through strict enforcement of . . . materiality and scienter requirements." *Escobar*, 136 S. Ct. at 2002 (cleaned up). A scienter requirement, in particular, "alleviates vagueness concerns, narrows the scope of the prohibition, and limits prosecutorial discretion." *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 149, 150 (2007; internal quotation marks and brackets omitted)). The wire fraud statute requires proof both that the misrepresentation (whether express or implied) is material and that the scheme be executed with intent to defraud. These elements effectively mitigate any risk that applying the mail fraud statute to spoofing will invite arbitrary enforcement of traders engaged in routine trading practices. Indeed, they also mitigate concerns about inadequate notice. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed").

* * *

In short: Wire fraud does not require proof of affirmative misstatements; implied misrepresentations will also suffice. That has long been clear and since intent to defraud is also required under the statute, its application to a spoofing scheme does not implicate vagueness concerns. Whether the defendants made implied misrepresentations, whether they were material, and whether the defendants intended to defraud other market participants are questions of fact. As they are vigorously contested, they must be resolved at trial. The defendants' motion to dismiss the indictment is denied.

/s/ John J. Tharp, Jr.
John J. Tharp, Jr.
United States District Judge

Dated: October 21, 2019

APPENDIX H

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

Case No. 18 CR 35-1, 2

[Filed: January 25, 2019]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
JAMES VORLEY and CEDRIC CHANU,	)
	)
Defendants.	)
	)

Chicago, Illinois
January 24, 2019
10:12 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN J. THARP, JR.

APPEARANCES:

For the Plaintiff:	U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION - FRAUD SECTION BY: MR. CORY E. JACOBS 1400 New York Avenue, N.W. Washington, DC 20005
For Defendant Vorley:	DECHERT LLP BY: MR. ROGER ANSON BURLINGAME 160 Queen Victoria Street London EC4V 4QQ
For Defendant Chanu:	ROPES & GRAY LLP BY: MR. MICHAEL T. McGOVERN 1211 Avenue of the Americas New York, NY 10036
For Proposed Amicus Bank Policy Institute:	MORGAN, LEWIS & BOCKIUS LLP BY: MR. KENNETH M. KLIEBARD MR. GREGORY T. FOUTS 77 West Wacker Drive 5th Floor Chicago, IL 60601

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(Proceedings heard in open court:)

THE CLERK: U.S.A. v. Vorley and Chanu, 18 CR 35, 1 and 2.

Counsel, please come to the lectern.

MR. JACOBS: Good morning, Your Honor. Corey Jacobs for the United States.

THE COURT: Good morning.

MR. BURLINGAME: Roger Burlingame for James Vorley.

MR. McGOVERN: Good morning, Your Honor. Michael McGovern on behalf of Cedric Chanu.

THE COURT: Okay. All right. We're here to talk about the motion to dismiss.

Let me ask, there was also -- it's not noticed for today, but there was a motion to -- for leave to file an amicus brief?

MR. KLIEBARD: Good morning, Your Honor. Ken Kliebard and Greg Fouts of Morgan Lewis. We represent the Proposed Amicus Bank Policy Institute, so --

THE COURT: Anticipating that this might be an item of discussion, counsel is present in advance of the notice date.

MR. KLIEBARD: Correct, Your Honor.

THE COURT: All right.

Either side object?

MR. McGOVERN: No, Your Honor.

MR. BURLINGAME: No, Your Honor.

MR. JACOBS: The government would object, Your Honor. We believe that this is particularly untimely given that it was filed just yesterday, a day before today's hearing. The government has already filed its opposition, and the defendants have had the opportunity to file their motion and their reply. The government doesn't believe that the issues here are particularly complex as it relates to the wire fraud statute and the use of the wire fraud statute to prosecute the defendants' conduct here, and the government doesn't believe that an amicus brief is necessary to inform this Court how to rule on what should be a fairly straightforward issue, at least as far as the government humbly and respectfully sees it.

THE COURT: All right. I'm going to allow it. I will allow any party that wants to respond an opportunity to respond. We'll talk about that response after we've had our discussion of the motion to dismiss.

I'll consider it, and I'll consider the responses. I don't know that -- I don't know that policy arguments are going to be particularly persuasive in a case that is predicated on a motion to dismiss an indictment based on the wire fraud statute; but in the interest of giving every consideration to the relevant issues, I'll accept the filing, or I'll grant the motion for leave to file by February 6th I think was the date you requested. And, again, we'll talk about the response and how long you think you need to respond before that; a limit of 15 pages.

All right. I think that --

MR. KLIEBARD: Thank you, Your Honor. We appreciate that, and we will try to keep our arguments focused. Again, from our perspective, from our client and its constituent members, there are implications far reaching from extending that -- the wire fraud statute that could implicate not just criminal but also civil cases based on the fact that wire fraud is typically used as a predicate act for pleading RICO. So we think it's an important issue and just wanted to touch on those ramifications.

THE COURT: All right. So your motion is granted. You're welcome to stick around.

MR. KLIEBARD: We will. If it's okay with Your Honor, we'll return to the gallery.

THE COURT: That's fine.

MR. KLIEBARD: Thank you, Your Honor.

MR. FOUTS: Thank you, Your Honor.

THE COURT: Okay.

I don't have oral argument very often, but what I anticipate is each side take 15 to 20 minutes, present your arguments. I will probably interrupt you; I may not. I may have other questions once you've said your piece. So it's not the Seventh Circuit or the Second Circuit or any circuit, so proceed with a little less formality than the Court of Appeals.

But it's your motion, so I'll hear first from the defendants and then the government. And I'm sure there will be the opportunity for both sides to get any rebuttal discussion that you think you need to make.

But let's start with the defendant.

MR. McGOVERN: Great. Thank you, Your Honor. Michael McGovern again on behalf of Cedric Chanu.

Your Honor, as you know, we filed this motion and the briefing jointly with Mr. Burlingame's firm on behalf of Mr. Vorley. So what we're going to endeavor to do here is split this up so we're not repeating the same arguments. If it's agreeable to the Court, I'll address the Rule 12(b) argument, which is essentially the fundamental argument that the indictment fails to state an offense that's cognizable under the wire fraud statute. Mr. Burlingame will take a few minutes to address the issue that would be presented if the Court disagrees with us on issue No. 1, that we would then present and bring forward these constitutional due process issues of vagueness and the like.

So with that background, I know the Court has read the briefs. I'm going to try to take this at a very high level but focus in on what we think are some of the really important core issues that in the end we think should inform and will inform the Court's decision.

As we said in our briefs, this is an issue of first impression, not just in this circuit but really across the country. It's also an issue, as I'll explain in a little bit, that's a very narrow legal issue.

And the starting point for us in framing the issue for the Court is that unlike in *Coscia* and unlike in every other spoofing prosecution that the government has brought to date, this is the only case where the government has chosen to proceed solely on the wire fraud statute.

And at the same time that the government is pursuing this exceptional approach, extraordinary, unprecedented approach, they're making two key concessions. One is that the defendants in this case, Mr. Vorley and Mr. Chanu, made no express misrepresentations to any of their counterparties on the COMEX.

The second key concession that the government makes is that the defendants owed no fiduciary duty of disclosure to any of those counterparties.

So that then brings us to the narrow legal issue that's presented, and that issue is this: May the government, as a matter of law, proceed to trial on the novel theory that live, open market, at-risk orders on the COMEX that the defendants placed carried with them an implied misrepresentation of the defendants' subject of intent to trade. That is the issue. And as we laid out in our briefs, and I'll reiterate in a much more summary fashion, the controlling precedent here and not just from the Seventh Circuit but also from the Supreme Court makes abundantly clear that the answer to that question is no. But before I get to that precedent, I do want to pause briefly on the government's suggestion that the issue that's presented here is a question of fact as opposed to a question of law.

What the government says is having brought this indictment, extraordinary as it is, under the wire fraud statute, it is now appropriate to leave it to a jury to determine the question whether open market, at-risk orders contain an implied representation of a trader's subject of intent to trade. With all due respect to the government, that suggestion that this is a jury issue is not only absurd for reasons I'll point out, but it's directly contrary against the controlling precedent of the Supreme Court and the Seventh Circuit. When you look at the government's briefs, they say that, and then they proceed to cite not a single case that stands for that proposition. The reason is that every single case that we cite in our briefs stands for the exact opposite proposition, which is this is a question of law. That is the legal doctrine that was acknowledged by the Supreme Court in *Williams* and many years later in *Skilling*. It is the legal principle that is acknowledged by the Seventh Circuit in numerous cases we rely on. It's *Reynolds*; it's *Kusik*; it's *Sullivan & Long;* it's *Weimert*, most recently in 2016.

And when the courts confront this question, they say not only is this a legal question for a judge to decide, but in doing so, the courts have a special obligation under the wire fraud statute to make sure that they construe that statute narrowly so that district judges do not enter into the business of creating or defining common-law crimes. That was the express statement in *Reynolds*. I think it's the principle that animates the Supreme Court's decision in *Skilling*, and it's the principle that's reiterated time and again by the Seventh Circuit. Even in one case, *Kusik*, Judge Posner said, look, as a matter of law, the defendant was entitled to a jury instruction that his statements did not carry an implied representation as to his intent or as to the monies on account. So that's a nonstarter for the government. This is a legal question, and it's on -- it's the burden, unfortunately, of the Court to decide it as a question of law. Deferring it to a 12-person jury would not only be out of accordance with that precedent. It would be -- it simply would open up the definition of the criminal code to 12 laypersons, and that's not what's intended by the Supreme Court or the Seventh Circuit.

So that then brings us to the question of law. And as I said, it is a narrow one, and it is this: Where, as in this case, as it is conceded in this case, a party to a contract does not owe a fiduciary duty to his or her counterparty, a mere nondisclosure cannot support a conviction under the wire fraud statute. That is the principle. And that is the black-letter law, again, of the Seventh Circuit, and it's informed by the Supreme Court precedent that's behind that. That's the Supreme Court's decision in *Williams*, no implicit statement as a matter of law. That is what Judge Posner found as a matter of law in *Sullivan & Long*. That is what the Seventh Circuit found again in *Reynolds*. And that is what the Seventh Circuit said most recently in *Weimert*.

In fact, in *Weimert*, the Seventh Circuit went even further. The Seventh Circuit said that actually some affirmative deceit is to be expected. And keep in mind, in this case the government is not alleging affirmative deceit. They're alleging mere nondisclosure. But in *Weimert*, the Seventh Circuit said when you're talking about contracting parties, especially sophisticated counterparties, the mere nondisclosure of the one party's intentions -- and I'll give you the exact quote. "Deception and misdirection about a party's values, priorities, preferences, and reserve prices are common in negotiation." And a nondisclosure or even active deception as to those matters cannot found a wire fraud charge.

THE COURT: Are you -- are you arguing that the -- that these issues of, you know, what constitutes a false statement or a misrepresentation under the wire fraud statute is different than, say, a general common-law conception of what is a fraudulent statement?

MR. McGOVERN: Yes. I think that the first question you raise is a distinctly legal question, as I said, that the Seventh Circuit has time and again said is a legal question for the Court. Whether particular conduct carries with it an implied misrepresentation or whether a mere nondisclosure of a negotiating position can be the foundation of a wire fraud charge, there the answer is not only yes, it's a legal question; second of all, the answer is no, it cannot be.

THE COURT: But my question is you say that -- can that be the predicate for a wire fraud conviction? No. Okay. Is it your position that that's because the wire fraud statute is unique somehow, or that that -- that is actually not unique and that that is a general tenet of common-law fraud?

MR. McGOVERN: No. No. I take your point, Your Honor. It is unique to the wire and mail fraud statute, and the Seventh Circuit has said this time and again.

Unlike 1348(1), which was at issue in *Coscia*, and unlike the Dodd-Frank anti-spoofing provision that likewise was at issue in *Coscia*, both of those, the Seventh Circuit said, can be founded upon deceptive conduct that lacks an affirmative misrepresentation. The wire fraud statute is unique or certainly materially different from those statutes that were at issue in *Coscia*.

What sets the wire fraud statute apart -- and the government concedes this point; it's in the Seventh Circuit pattern instruction -- that within the scheme to defraud element, there is the special requirement that the scheme to defraud involved the making of a material misrepresentation. That sets wire fraud apart, and that's what makes this case so extraordinary.

What we have said in our briefs is we are right on the law here, and the government is wrong. The allegations in this case do not fit this statute. That will never impede the government from continuing to prosecute and bring cases, spoofing cases under the statutes that were affirmed as appropriate for those prosecutions in *Coscia*, which is the commodities fraud statute, 1348(1), not 1348(2). And, remember, the government went out of their way to assure the Seventh Circuit that they were not alleging an affirmative misrepresentation because they couldn't. And for whatever reason, they have decided not to proceed under those statutes and for the first time try to anchor a prosecution to the wire fraud statute alone. And there they have run headlong into that special requirement of the wire fraud statute, which is the affirmative misrepresentation element. And that is where they fail.

Your Honor, I'll also just reiterate that the black-letter law that we point to again is that in a non-fiduciary context, again, what the government concedes is the case here: These are counterparties, sophisticated counterparties, contracting with each other on an open market exchange, non-fiduciaries. In that context, mere nondisclosure, call it what you will, is not actionable under the wire fraud statute. The government cannot get away from that legal principle, and it dooms their case.

What they try to do is say, well, but it's not a mere nondisclosure case. It's an implied misprepresentation case. If that principle were accepted, then it would allow the government to do an end around all of that case law, all that non-fiduciary duty case law by simply reframing every nondisclosure case as an implied misrepresentation case.

It is purely semantics, Your Honor. And time and again -- and, frankly, the way we get there is we say, what cases does the government cite for this extraordinary proposition that they can do an end-around from the nondisclosure case law by reframing it as an implied misrepresentation? They cite three cases: *Dial*, *Stephens* and *Lack*.

We go and we read the cases. All three of them are fiduciary duty cases. All three of them say that the violation of the wire fraud statute -- and it was between employer and employee or investor and broker -- that this was a violation that occurred because the fiduciary had an affirmative duty to disclose the facts that weren't disclosed.

I'll also mention that *Dial* in particular has been identified as an active concealment case. It was decided in 1985, which, you know, this is almost 30 years or 25 years before *Skilling*; so I think whatever *Dial* says, it said it a long time ago. But *Reynolds* came along four years later in 1989, and they specifically said, look, let's not overread the *Dial* case. *Dial* is a fiduciary duty case. It is a case of active misrepresentations and active concealment; the creation of a dummy trading account and then the deletion of that trading account to avoid discovery of the fraud, an extraordinary case. And that's the case the government brings forward to say in this non-fiduciary duty context, we can do an end-around nondisclosure case law by alleging an implied misrepresentation. It doesn't do it for them. Same thing about *Lack* and *Stephens*. It's an employer/employee fiduciary duty context where essentially the employee was trying to rip off the employer. It doesn't get the government where it wants to go.

THE COURT: Well, let me ask you about the relevance of another case.

As I was reading these briefs, the case that came to my mind was *Universal Health v. Escobar* where this same debate seems to have played out in the context of the False Claims Act and the question of, you know, do claims that are -- that contain no affirmative misrepresentation, a demand for payment for some service. Nevertheless, the Supreme Court said that is subject to this theory of implied certification, which sounds a lot to me like the implied misrepresentation theory that is being debated here.

And the Supreme Court seems to have come out harkening back to my earlier question saying this -- and I understand this is False Claims Act versus wire fraud, but it goes back to my question. The predicate for the Supreme Court's ruling in *Escobar* was let's go back to common-law fraud principles, and it's black-letter common-law fraud that not only an affirmative misrepresentation but a misrepresentation by omission can constitute a fraudulent statement. And from there it goes on to say, I'm shortcutting, but that is why under the False Claims Act, which has the same requirement of the false statement; nevertheless, an implied certification can be actionable under the False Claims Act.

So why doesn't that speak to this argument in the context of the wire fraud statute?

MR. McGOVERN: Well, for a number of reasons.

There actually are -- I think two opinions that come to mind are *Reynolds* from 1989, Seventh Circuit, again, criminal case under 1343; and most recently *Weimert* in 2016, again, criminal case under 1343. They canvass those general common-law principles that are sometimes applied in the civil context, which, of course, would be the False Claims Act context that you're talking about, and they do acknowledge that there are statements in the restatement of contracts where certain things about common-law fraud can be taken out of context, misread.

But where the Seventh Circuit always comes back to is they say we are unaware of any case where a criminal conviction under the wire fraud statute has been sustained on the basis of a mere nondisclosure by a non-fiduciary. That is -- that is the end result. And they are at pains to distinguish cases like *Dial* to say that's an active concealment case. It's not a mere misrepresentation or implied misrepresentation case.

Judge Posner in *Sullivan & Long*, he said as a matter of law, a contract -- in that case it was a naked short -- simply does not carry as a matter of law an implicit representation of an intention to sell that stock, the stock that's being shorted.

So I think, yes, in the common-law fraud context in the restatement, are there general principles that lurk out there and that get invoked in the civil context from time to time? Yes, maybe. This is -- this is quite different. This is a criminal charge under 1343 where time and again the Seventh Circuit says absent an affirmative misrepresentation to the market, and then in *Weimert* two years ago said even some measure of affirmative deceit to the market in a contracting scenario, in an open market with sophisticated counterparties will be tolerated under wire fraud in a criminal context. You cannot make a criminal case out of that sort of implied misrepresentation or nondisclosure theory.

So I do think that I take the Court's point that there is some language maybe in *Escobar*, but it doesn't get the government where it wants to go here. And I think this case cannot be squared. It simply cannot be squared with *Sullivan & Long*, *Weimert*, *Reynolds*, and frankly all of the Seventh Circuit unbroken precedent over the last 30 years. This is not a criminal case based on what they concede, which is no affirmative misrepresentations and no fiduciary duty.

Your Honor, let me -- I think this dovetails with my last point, which is if -- and that's why we make it in the subjective mood. We always say, look, we are confident the Court will agree with us on the first point. But if the Court were to disagree with us and perhaps, you know, latch on to some of these principles that the Court is rightly pointing out do lurk out there, albeit in the civil context, what would that mean for this particular criminal prosecution? And what we say is that to disagree with us would simply just raise a constitutional issue, which was that it would be that the wire fraud statute would be unconstitutional as applied from a due process point of view. And this is what Mr. Burlingame will speak to because there's a history here, as this Court well knows, around spoofing and whether it would ever be prosecuted criminally and when it was first prosecuted criminally. The Seventh Circuit in *Coscia* said with the passage of Dodd-Frank, Congress put the trading community on notice for the first time that this was subject to criminal prosecution under the Dodd-Frank statute. No one -- and I'm taking Mr. Burlingame's thunder here, but I won't go too far down that road.

But I do think the last thing I'll say is if the Court disagrees with us, then it simply raises all these much more fundamental constitutional issues. And I think *Skilling* is another case where the Supreme Court recognized that this is why we have to narrowly construe the wire fraud statute because it raises other issues if we don't.

But, conversely, I will end by saying if the Court agrees with us, that will not impede the government's continuing ability to bring spoofing cases, just like they did in *Coscia*, just like they're doing down the hallway in Judge Lee's courtroom, just like they did in the *Zhao* case where this Court recently took a plea. Those cases, assuming the facts support them, can continue to be prosecuted as they were intended to be prosecuted, which is under Dodd-Frank and under 1348(1) of the commodities fraud statute, which is what was approved by the Seventh Circuit in *Coscia*.

THE COURT: Okay.

MR. McGOVERN: Thank you, Your Honor.

THE COURT: Mr. Burlingame.

MR. BURLINGAME: Thank you, Judge.

Briefly I think the primary value of going through the vagueness analysis is actually to show, for the reasons Mr. McGovern has just gone through, what a radical departure, permitting the government to go forward with wire fraud charging this conduct, would be because it highlights the instability that it would create and the unfair results that it would create for defendants.

So the first prong of the vagueness analysis is notice as to what the statute says, that the person being charged is aware that they are violating the terms of the statute. And I think it's worthwhile going and putting yourself in the shoes of the defendants in 2009 to 2011 and trying to imagine how they would have been on notice that in 2018 their open market orders would be construed to carry an implied representation at all, let alone an implied misrepresentation. So that job of being a trader doesn't carry any fiduciary-like responsibilities. It's exactly the opposite; you're trading in an open market environment with competitors.

And the job, as iceberg orders recognize, is to essentially conceal what you are trying to do. You want to disguise your intent. If you have to buy an enormous amount of gold that day, if you tell the market, I'm going to have to buy this amount by the end of the day, the market is going to run away from you, and you're going to end up paying a lot more. So the existence of the iceberg order shows that that is fundamentally part of the job, is there is a mechanism on your computer that allows you to execute a large order piece by piece because of the recognition that telling the whole market what your intent is is fundamentally at odds with what you're doing as a trader.

So I think in that context, the idea that these two people should have known that by entering legitimate orders into the market that could be hit, the government is not contesting that, that they are communicating anything to these counterparties other than I'm willing to buy, I'm willing to sell, here's the amount, here's the price, would be completely shocking to them, let alone that they are making a false communication by not pairing that communication of the order with some sort of disclosure about what their subjective intent is as to what they hope will happen to that order during the period it's on the market.

And I think it's worth sort of noting as a parenthetical that even if they wanted to communicate that subjective intent, it's not -- it's so outside of the realm of what they're doing, there's no function to allow them to do that. They are placing legitimate order into the market, and I think it would be -- it's a sort of flabbergasting leap to suggest at that time they should be on notice that that order is making this implied communication.

THE COURT: So let me just understand.

MR. BURLINGAME: Sure.

THE COURT: Because in the brief, you know, there was -- cites at least one case that talks about a transaction is not a communication. I'm understanding you to not dispute that a bid or an offer is a communication, but it is a communication limited to I am willing to buy at X price, or I am willing to sell at X price.

MR. BURLINGAME: I think a bid or an offer conveys exactly what it conveys, which is the direction of the order, the quantity, and the price, and nothing more.

THE COURT: Okay.

MR. BURLINGAME: So I think that's the sort of perspective from sitting behind the trading desk at Deutsche Bank. And then if you flash out in 2009, and you say, okay, well, let's look at what the law is at this stage, and should I have notice if I was on top of what the law is, for all the reasons that Mr. McGovern just went through, there is nothing that you can find, there's no precedent that you can find that allows you to conclude by making this open market order, it carries along a little sidecar this implied statement and in this instance what's alleged to be an implied myth statement.

And then if you could gaze into your crystal ball in 2011 and see forward to 2017, you would get great reassurance because you would see that in 2017, the government is arguing in *Flotron* and in *Coscia*, Judge, no need to find a misstatement in this case; this is spoofing; there's no -- we're not operating under the prongs of the statutes that require a misstatement; you can rule for us expressly disavowing it, and then the Seventh Circuit --

THE COURT: Is that really an express disavowal, or is that just saying, you know, that's not our theory here, it's not what we charged and we don't need to go there, and sticking to what you charged? I mean, how is that a disavowal? Surely the government didn't --

MR. BURLINGAME: Well, I believe Your Honor was a prosecutor, and certainly when I was a prosecutor, the idea was to charge the person with as many crimes as possible for the same conduct. And I think it speaks volumes that when there was no need, just sort of strategic compulsion to try to charge the case creatively, the way the government charged the case and what it expressly said it was not charging was something that required a false statement. And I think that the Seventh Circuit is saying before we rule on this case, let us include a sentence saying we are proceeding under the prong of this statute that does not require a false statement speaks volumes about what the government's view of the statute was at that time that -- or at least certainly was not putting anyone on notice as of 2017 that a false statement was implicit in spoofing.

So I think that if you're Cedric Chanu and James Vorley in 2009 or 2011, you're looking into your crystal ball. You see what the government is doing in 2017. You say, oh, the terrain actually a full six years from now still squares with what my understanding is of the market, which is when I'm sending an order out there into the market, I'm not communicating anything other than my order. And it's not until 2018 when you're charged in this case that you're first put on notice that, in fact, that order does carry this implied misrepresentation. And obviously that's precisely what the -- you know, what the void for vagueness disallows.

THE COURT: So your contention is that the -- there are -- and I -- you've described what the indictment charges as essentially a market manipulation scheme. Is it your position that there are no criminal prosecutions of market manipulation schemes brought under the wire fraud act or the mail fraud act?

MR. BURLINGAME: I think it's simpler than that. It's that there's no prosecutions brought under the mail and wire fraud act where there is not a false representation, and there is no case which has found an implied misrepresentation where there's no fiduciary duty.

THE COURT: Period?

MR. BURLINGAME: Period.

THE COURT: Okay.

MR. BURLINGAME: So -- and then I think you can look at it.

So that's sort of prong one: What's the notice? Is it unfair to the defendants to hold them accountable for what the law is determined to be years in the future by the prosecutor?

And I think the second problem and one of the things that's animating the Seventh Circuit's precedent -- especially in *Weimert* there's a very long discussion about it -- is the uncertainty that it creates if you -- if you do start finding that implied misrepresentation.

And in the brief, we talked about, you know, that there is such a thing as a fill-or-kill order, which is I am -- you know, I want this amount at this price, in this direction; I want to buy it, and I'm going to set that -- if it gets bought in two seconds, I'm happy; if it doesn't get bought, it's off the market -- that that trade, what the two communications that go out into the market between that fill-or-kill order and the so-called fraudulent orders that are alleged in this case are indistinguishable. They are exactly the same trade looking at the two of them. And what distinguishes them, according to the prosecution, is that in the trader's head, they have an idea that I don't -- even though this trade can be executed, I don't want this trade to be executed. I intend for this trade not to be executed because I have another purpose.

And I think that, you know, it's very clear how quickly that opens up huge line drawing problems. So what if I'm entering my fill-or-kill order because, you know, I'm worried that the market has topped out and it's not going to go any higher, but I'm very much hoping that it will go higher? So I have an intent that my fill-or-kill order won't be executed. Am I now violating the law? Is there a way for me to figure out? What do I have to do in order to understand what wire fraud prohibits? I have to call the prosecutor and find out what -- you know, what their opinion is on what communication needs to go along with my open market order.

And then I think you see exactly the same sort of line drawing orders with, well, what -- if this -- if my open market order has this sidecar of my intent and some other thing implicit to it, well, what else is implicit in my order? And I think that's what the Bank Policy Institute is focused on its motion supporting its application to file its amicus is the havoc that this creates on the markets once you start reading in obligations that aren't on the face of the statute, that these markets are extremely complicated and obviously, you know, hugely busy. And if you start suddenly changing the terrain by saying this order that everyone understands contains three things actually carries implied communications, all sorts of trading strategies that are being pursued suddenly come into doubt, and you're creating uncertainty.

And I think the most extreme example of this line drawing problem is the iceberg orders themselves which are -- apparently the government has no issue with, but they are an express version of the conduct that's being aimed at here, which is I'm misrepresenting to the market through this function on my computer what is the liquidity that I hope to perform that day. So I actually want to do a thousand, and I'm letting the market see one; and as soon as that one gets bought, another one comes in its place. It's expressly deceptive.

So is an iceberg order now wire fraud? There's no way of knowing because under the logic that animates this indictment, it is. But, again, the only way you can tell is to call up the prosecutor and find out what DOJ's view of the wire fraud statute is as of 2018; don't call in 2017 because at that point they're expressly disavowing that there's any communication necessary to bring the case.

So I think that, you know, you don't need to reach this analysis, but the value in that analysis and the value in what the Bank Policy Institute is also bringing to your attention is how radically this context that we're in is different from the normal motion to dismiss in a criminal case, which, you know, I have never seen in practice.

So it seems like that's the radical step, but, in fact, what is being urged on the Court by the government here is to adopt a theory that's never been adopted, and that is radically unfair to the defendants because they have no notice that this conduct triggers wire fraud and creates significant instability in all sorts of commercial dealings.

So I think in that lens, that's why the vagueness lens is important to look at. It's not only the right result to dismiss the indictment, but it's actually the extremely conservative result. It's the result that keeps the law as it is.

THE COURT: Let me ask you as well as Mr. McGovern my *Escobar* question because *Escobar* also addressed a vagueness challenge to -- as I said, as I read the briefs, I said, I heard this debate somewhere before, and it's in *Escobar*. And in *Escobar*, the Supreme Court said, you know, in addressing the -- and, again, it's not a criminal case. I understand that. But, you know, conceptually, you know, what the Supreme Court said was, you know, the issues about notice and, you know, open-ended liability isn't really an issue about whether a statement is false or fraudulent, and it's a question of scienter and materiality. And it said, you know, those questions, concerns about -- quote, "Concerns about fair notice and open-ended liability can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements."

We have materiality and scienter requirements for the wire fraud. Why are those not adequate to mitigate the vagueness concerns in the context of the wire fraud statute? I mean, false claims, civil, but you want to talk about pervasive conduct, I mean, wide-ranging conduct that has lots of variations, lots of potential for confusion, yet the Supreme Court seemed to say, look, you've got a scienter requirement. If somebody is doing these things and the government can prove beyond a reasonable doubt that they intended the effect of this is to defraud, you know, another party, and it's got to be -- you know, the statements, the misrepresentations, have to be material to the other party's course of conduct, why isn't that enough?

MR. BURLINGAME: Well, I think the answer is that the Seventh Circuit has underlined repeatedly that there is a false statement requirement in -- under the wire fraud statute. And if you take -- if you read that an implied false statement based solely on the conduct carries that burden that you're reading that provision out of law.

I also think that the criminal context matters significantly. When you read through these decisions, they're littered with the phrase of -- that, you know, reading statutes, criminal statutes must be done with lenity if there's any debate about the clarity of the statute. And I think it takes you back to the initial portion of my argument which is the notice provision and how you are on notice that you are violating wire fraud.

And I think that, Your Honor, as Mr. McGovern said, there is no difficult -- the only reason that we are in the box that we're in here arguing about wire fraud is because the government elected to charge this case solely under the wire fraud statute. And so there is not

-- this is not taking this -- we're not asking the Court to take the step of finding that spoofing can now run amuck in the United States of America. It's that the wire fraud statute needs to be interpreted consistent with Seventh Circuit principles; and that as the Seventh Circuit goes on about in *Weimert*, it can't be -- it can't be allowed to run amuck and cause havoc in commercial dealings.

THE COURT: Let me -- I might be shifting back to Mr. McGovern here, but my last question for the moment, what does false pretenses mean in the statute, in the wire fraud statute?

MR. McGOVERN: So I'll take that one.

And I think the best authority on this is Judge Posner's decision -- I believe it may have been *Kusik*, but I'll double-check that -- but he actually said there may have been a time that false pretenses was thought to mean something other than a false representation, the pretense or the presentation of a false token. But he then says that distinction has been eradicated. There is no difference between a false representation and a false pretense, meaning that in cases under the wire fraud statute, whether you're alleging false pretense or a false representation, you must prove an affirmative misrepresentation to the market.

So there is -- that is a distinction without a difference. I know the government tries to make something out of that by having two arguments. But according to Judge Posner's decision, they have only one argument, and that argument fails for the reasons we say.

The other thing I'll say while I have the chance, Your Honor, in addition to Mr. Burlingame's point, if one were to graft *Escobar* into the criminal context and then say, well, doesn't intent to fraud pretty much cure any vagueness concern, there are plenty of cases, including *Skilling,* where the Court does say that as long as there is an intent element, that reduces some of the vagueness considerations or concerns. But to graft *Escobar* into the criminal context under 1343, you would, in one fell swoop, eradicate all of the case law of the Seventh Circuit on nondisclosure. And you make that -- those cases irrelevant.

THE COURT: Well, *Escobar* pretty much eradicated all of the case law in the Seventh Circuit on implied that said there's no implied certification theory either. That was -- *Sanford-Brown* was the case that was expressly overruled by *Escobar*. So I'm just saying, there's precedent for at least the Supreme Court doing that. I don't do it every day.

MR. McGOVERN: Right. Right. And I would have expected, you know, them to say that we're overruling *Williams*; we're overruling *Skilling*; we're overruling all these other cases in the criminal context. That they're not doing.

And as we say in our brief, it's not merely inconsistencies that may be between two federal court decisions. There is a fundamental reason why nondisclosure cases are treated differently and are limited to the fiduciary context because otherwise, as Mr. Burlingame said, in open market contracting scenarios, you would have utter disruption if the -- as the Court said in *Weimert*, if it was now incumbent upon non-fiduciaries to begin to anticipate what creative theories of implied misrepresentation might the government come up with tomorrow, you simply could not operate in market like that, and certainly not with the threat of a criminal prosecution hanging over your head.

MR. BURLINGAME: Which is exactly what drives the *Radley* decision, which is by far the closest decision that there has been to the facts of this case.

THE COURT: All right. I was going to cut you off, but the Seventh Circuit in *Coscia* said *Radley* is inapt.

MR. BURLINGAME: Take that?

MR. McGOVERN: Well, they said -- I don't think that they said it was inapt. It's certainly inapt under 1348(1), which is where the Court found in *Coscia* that the deceptive conduct at issue in *Coscia*, which is quite extraordinarily different from the conduct alleged here, those were essentially not at-risk orders that were illusory, in the words of the Seventh Circuit.

What they said there is that *Radley* is not a perfect match with this case because these are illusory orders in *Coscia*. In *Radley*, they were at-risk orders that could have been hit, and, therefore, did not carry an implied misrepresentation with them. I think *Radley* is fully in accord with *Sullivan & Long,* which is a Seventh Circuit decision where it was naked short selling, and, again, it was -- it does seem like Judge Posner writes so many of these decisions as we know, but, again, he says this order, this open market, at-risk order contained no representation, express or implied.

So I don't think *Coscia* is at odds with *Radley* at all, and it's certainly not at odds with *Sullivan*.

THE COURT: Okay. I'm going to hear from the government.

MR. JACOBS: Thank you, Your Honor.

I will try to keep this fairly concise because I believe that the issue that is before this Court is fairly concise and is fairly narrow, and the question here is whether the indictment as it's pleaded on its face is legally sufficient; in other words, does the indictment state all the elements of the crime charged and does it allow the defendants to prepare a defense, and we would submit that it unequivocally does. I don't think that there's any doubt that the defendants very clearly understand the charges against them.

I think what we need to focus on here, and I think that Your Honor has really hit the nail on the head, is what is the representation that is being made to the market when a trader places an order in that market. And what we're talking about here is the *bona fides* of that order, the *bona fides* of the placement of an order and what is the defendants' present intention at the time they are placing that order into the market. We fully expect that the defendants will make a full thwarted argument that at the time they are placing that order into the market it is communicating nothing, let alone anything about the *bona fides* of that order. And I --

THE COURT: Well, let me -- we clarified that I think they're, as I'm understanding it, conceding that actually the order does have some communicative purpose. It says I am willing to trade X, or, you know, trade this commodity at this price, you know, buy, sell, whatever the nature of the order, you know, I am willing, as opposed to what you seem to be saying this communicates is I subjectively want and hope to fill this order, which I understand they do not agree.

MR. JACOBS: I believe that's right. I believe that's right as I understand it the way Your Honor just explained it. What this order is communicating is not only the ability for this order to be filled, which we agree throughout our brief it can be filed. But what is the willingness, what is the present intention of the trader to have that order actually be filled at the time they were placing that order? And at the time they were placing that order, the defendants intend to cancel that order before it ever could be filled. In other words, it's injecting false information into the market about supply and demand to trigger and induce other traders into taking an action based on that false representation.

I believe that's really the way Your Honor framed it as the precise issue here, and we know that as a matter of law, wire fraud can be sustained with an implied representation. Now, the question here is whether the fraudulent orders communicated an implied representation. And we will submit evidence that they did, to Your Honor's point.

THE COURT: Before you get to the evidence --

MR. JACOBS: Of course.

THE COURT: -- their position is even broader than I completely understood, that there has never been a conviction under the wire fraud statute based on an implied representation theory. Do you agree or disagree?

MR. JACOBS: Well, we would disagree.

THE COURT: What are those cases?

MR. JACOBS: So we believe that the *Stephens* and *Lack* case stand for the proposition that an implied representation is sufficient to support a conviction for wire fraud. The defendants say that those cases turn on the fact that there was a fiduciary relationship, but we make very clear in our brief, on page 15 of our brief, that those cases don't, in fact, turn on that proposition but stand rather on the deception and false pretenses in the defendants' communicative conduct. And, in fact, *Stephens* on a close read we submit stands for the proposition that communicative conduct carrying an implied representation can constitute a scheme to defraud. We also believe that that's consistent with a close read of *Dial*.

THE COURT: Go ahead.

MR. JACOBS: So I wanted to make sure I addressed that point.

The notion that fill-or-kill orders or iceberg orders could somehow be prosecuted here and that the defendants would have to call the prosecutor to ask whether those could be prosecuted, I think that's really just a specious argument because what we're looking at here is what is the intention again of the trader at the time they're placing the orders in the market. Do they intend to cancel those orders at the time they're placing those orders in the market? When someone is placing an iceberg order into the market, if they're doing it lawfully, it's not their present intention at the time that they're placing that iceberg order in the market to cancel it. That's what we're looking at here, what is their intention at the time they're placing this order.

THE COURT: Well, so here's -- you know, I think this is the principal dispute. I mean, it's not -- it's not 1348(1). It's 1343. 1340- -- I understand the argument to be that essentially you're conflating the intent element and the false statement element. And, you know, you talk about this, you know, you talk about the intent with which the orders were placed. And, you know, going in *Coscia*, they talked about the intent with which the orders were placed. But intent is a separate element from false statement. The statement itself has to be false, and you have to intend to defraud someone in the employment of that statement. And it seems to me the argument here is that the government is conflating this idea of intent and false statement. If you've got a scheme to defraud, an artifice to defraud, you've got some course of conduct that's being pursued with an intent to defraud others, but that in and of itself is not enough to make, you know, any statement you made in furtherance of that fraud a misrepresentation. The statement itself has to be false.

So they say you concede that there are no affirmative misrepresentations, no affirmative misstatements that are at issue here. Do you agree with that?

MR. JACOBS: Yes.

THE COURT: All right. So when you talk about intent, don't we have to segregate that from, you know, what message the statement itself -- you know, not what they intend to do with the statement, but what is the statement itself saying or representing to some other party? And their argument is as a matter of law, it does not carry any representation about their subjective intent beyond, I'm willing to do this trade at this price.

So, you know, I'm struggling with what is the falsity that you claim because, you know, going back to icebergs and fill-or-kill orders, if those are legitimate and you can go to the market and say, you know, here's an order, but your subjective intent is actual -- you know, so you're telling the market there's X amount of supply or demand associated with this order when in reality there's nine times as much lurking beneath the surface of the order, why -- how is that different?

MR. JACOBS: Well, I would submit that it's because you're still telling the market, I am a *bona fide* seller, or, I am a *bona fide* buyer, at a certain price.

THE COURT: Why are you not a *bona fide* seller or buyer if you are bound to honor that trade if somebody accepts your bid or your offer?

MR. JACOBS: Because at the time you are placing that order, it is your intent to cancel that order before it could ever be executed. You're not putting real information into the market about supply and demand.

And I believe I have a case, it stems from *Radley*, and I think that it's fairly instructive. So *Radley* cites to *Reliant Energy Services, Inc.*, 420 F.Supp.2d 1043.

And in *Reliant*, the Court says, "The dissemination of false information into a commodities market has long been recognized as a form of price manipulation. This is as it should be. Fraud and deceit are not legitimate market forces. Fundamentally, markets are information-processing systems. The market price is only as 'real' as the data that informs the process of price discovery. By the same token, the market price is 'artificial' when the market is misinformed. Just as price artificiality implies misinformation, a specific intent to create an artificial price implies fraud or deceit." The Court finds that to be --

THE COURT: But why aren't -- and I'm sorry to interrupt, but I just -- I think -- it's not clear to me why that doesn't beg the question. We say "artificial." Well, what's artificial? These are not -- I mean, I totally get it if these are fake orders, if these are illusory orders in the sense that, you know, they're fraudulent -- wrong word -- you know, somebody made them up, put them on without authorization, and somebody -- I mean, if they're fake in that sense, then obviously, you know, they're being -- whatever consequence they cause in the market is going to be artificial.

But we're talking about not fake orders but real orders in the sense that while that order is on the market for whatever period of time, short or long, it's subject to acceptance by a counterparty, and the trader is obligated to honor that contract. Why is that artificial?

MR. JACOBS: And it's our position that when that order is being placed into the market, because there is no intent, there's no willingness at the time the order is being placed into the market for that order to be executed, that it is creating artificial supply or artificial demand in the market because there is no intent at the time it's being placed for it to actually be filled, for it to actually be executed. It's being injected and cancelled before it can actually be hit. That's the intent at the time it's being placed, and it's being placed with that intent to deceive other traders and to trick other traders into the market as to actual supply or actual demand, where someone actually intends and is willing for their order to be executed or filled at the time they're placing that order into the market.

THE COURT: So I go back to you're predicating the argument on the trader's intent. The trader's intent seems to be a separate element from the question of whether the statement employed in the scheme to defraud is itself false. I mean, you could still have a fraudulent scheme predicated on a truthful statement, maybe not under -- I mean, I understand we're debating that under the wire fraud, but under 1348(1).

But that -- doesn't that just make the point that -- you know, the wire fraud statute is something different. And if we're talking about implied certification, I mean, if somebody is to be defrauded by the false statement, I mean, it's got to be -- what does that statement, if not an affirmative misstatement, what does it carry? What does it communicate that is false? It is an order being put on the market that says, I'll do this deal at X price. And the intent is if somebody accepts it that you'll do that deal at X price. I'm having trouble understanding what difference it makes to the falsity of the statement as opposed to the intent of the maker, you know, whether he hopes or that, you know, no one will actually fill this order or not, or whether he intends to leave it on for, you know, 2 nanoseconds or 1 nanosecond. Nobody intends to leave their orders on the market indefinitely, I would assume. Everyone intends to pull them off if they're not hit after some period of time. So why is it artificial at, you know, 2 nanoseconds but not at 5 nanoseconds?

MR. JACOBS: I would just again submit that what it is communicating to the market is that I am a -- that I am a *bona fide* seller, that I am willing and able to have my order be executed, not that it is just able to be executed.

THE COURT: But they are -- do you disagree that your bid or offer says, I am ready, willing, and able to execute this deal?

MR. BURLINGAME: That's all it says.

MR. JACOBS: But at the time the order is placed, it's not their intent for it to ever be executed. So by placing that into the market with the intent to cancel it before it could ever be executed, it is incorrectly informing the market.

THE COURT: Let me go at it this way. In *Coscia,* where Judge Ripple said and I think was quoting the government -- the closest I can get off the top of my head, it's not that the orders -- the orders were illusory; it's that the price movement was an illusion, what does that mean?

MR. JACOBS: Well, I believe that that's consistent with what *Reliant Energy Services* was saying. It's saying that the Court -- in *Reliant*, the Court says the Court is not departing from the existing judicial formulation of commodities price manipulation rather than -- rather, the Court is simply making explicit what has always been implicit, and that is if one intends to deceive the market into setting a price different from the price that would otherwise prevail, one intends to create an artificial price. And I would submit that that's exactly what's happening when the defendants are placing the orders in the market. But with the intent to cancel them before they're being executed, they are deceiving the market into setting a price that's different from the price that would otherwise prevail.

THE COURT: But don't we have to distinguish then -- to me when I read Judge Ripple saying it's not that the orders are illusory, it's that the market movement is an illusion, that's telling me -- that says to me and it makes sense in the context of the discussion, which was 1348(1), of saying it's -- these aren't illusory orders. These are real orders. And the issue isn't the truth or falsity of the order. It's the overall scheme and the use to which you're putting these orders. That's what's actionable under 1348(1), and we don't -- it doesn't matter that the orders themselves are not illusory. Why isn't that a reasonable interpretation of what Judge Ripple is saying there?

MR. JACOBS: Well, we would submit that whether the order is communicating anything to the market is the question of fact for the jury, that that is a question that the jury can answer after it's had the opportunity to hear evidence from someone who was involved in this scheme with the defendants, who we expect will testify that when this order was being placed into the market, they knew it was communicating information to the market about whether this person was a *bona fide* seller or a *bona fide* buyer. That was the purpose of placing this into the market, to communicate this information into the market. And by doing that, by placing those orders into the market with that implied representation and really that implied misrepresentation, that was moving the market price, and that was setting a price different from the price that would otherwise prevail at that time.

MR. McGOVERN: Your Honor, may I reply on your question on *Coscia* and that statement about --

THE COURT: Hold your thought.

MR. McGOVERN: Okay.

THE COURT: Let Mr. Jacobs continue.

MR. JACOBS: Well, I want to make sure I have addressed that point. I think -- I hope I have.

THE COURT: Well, you've addressed it. I have to grapple with it all still. I'm not ruling from the bench.

MR. JACOBS: Well, I think that the cases that I've cited, the cases cited in the brief make clear that an implied representation is certainly sufficient to support a wire fraud conviction. And I would submit that whether in this instance the orders that were placed communicated anything to the market is a question of fact for the jury, but as it's alleged in the indictment, I would submit that it's plainly sufficient. There is an allegation in the indictment that these orders communicated information to the market, again, that they communicated information about the *bona fides* of that particular order. And whether the jury adopts that or rejects that is really a question for the jury.

But at this juncture, in looking at the motion to dismiss the indictment for its facial sufficiency, I would respectfully submit that the indictment as a matter of law has pled everything it needs to to be found sufficient at this time.

I also just want to talk briefly about the *Flotron* and *Coscia* decisions too. The government's decisions in those two cases -- the defendants have said that the government in those cases expressly abjured or expressly disavowed any notion that they could have proceeded under a wire fraud theory.

We disagree with that. We think that the way Your Honor had previously I think explained it and highlighted it in your colloquy with the defendants is accurate, that the defendants in that case were simply saying we're just proceeding under a commodities fraud theory or a spoofing theory. So we don't need to turn to this question of whether a misrepresentation is required and whether we need to instruct the jury on that. So I don't think there was any express disavowment of that by the government. Even if there were, I don't think it would apply to this case. It certainly wouldn't bind this case. But I don't think that there was any express disavowment or express abjurement of that in most cases.

And to the extent that the defendants are concerned that proceeding under a wire fraud theory would somehow open the floodgates to further prosecutions based on what the prosecutor subjectively believed to be fraud, again, I think that's really bound by the government having to prove, as this Court is well aware from its colloquy, that there is not only the intent to defraud, but at the time the order was placed into the market that it was communicating a misrepresentation to the market. And whether or not the government can prove that and whether or not it can meet that burden we would respectfully submit is an issue for a jury to decide once it has the opportunity to hear evidence on that particular point.

THE COURT: All right.

MR. McGOVERN: So, Your Honor, I'll just respond briefly to a couple of points.

First of all, the one that Mr. Jacobs began and ended with, which is that this indictment is sufficiently pleaded from a notice point of view. We're not making a notice argument, as the Court knows. We're not moving for a bill of particulars asking for more specificity. We're saying that the indictment as pleaded does not state an offense under the wire fraud statute. Those are two completely different legal principles.

Second of all, the Court asked whether it is the defendants' position that no court has ever found an implied representation without more to be actionable under 1343. I would just add the clarification that what we said is outside of the fiduciary context.

THE COURT: The fiduciary context, I understand.

MR. McGOVERN: Exactly. Because Mr. Jacobs went on, when you said what cases do you have, he cited three fiduciary duty cases: *Dial*, *Lack*, and *Stephens*. He has invited the Court to engage in a close reading, as I know this Court will. A close reading of those three cases yield not only the fact that fundamentally they were fiduciary duty nondisclosure cases, but to the extent the Court went further to say that there was more that went beyond nondisclosure, they called each of them active concealment cases, and in particular *Dial*. In *Dial*, the Seventh Circuit said we need not decide whether absent the act- -- active concealment here, the mere mis- -- you know, nondisclosure would have been sufficient. But, again, it's a fiduciary duty case, so they could have easily had that conclusion, but that's not our case at all.

What was remarkable in listening to the argument is how many times Mr. Jacobs moved in response to the Court's questions between intention to trade and willingness to trade. He started to use them interchangeably, which really points up the vagueness issue and really the uncertainty of the government's theory here.

As the Court pointed out, an order on the COMEX is an offer to trade at a specific volume and a specific price, nothing more than that. Is there a subjective willingness to trade? I would say absolutely for the reasons the Court points out, which is if that order is hit, and keep in mind we're talking about the defendants here, manual traders trading against machines, high-frequency trading algorithms, the possibility of being hit by an algorithm was more, more substantial, far more substantial than anything in *Coscia*.

So when these guys went into the market and they put on these manual trades, they were not only entertaining the possibility, but they were communicating a willingness to trade. And if they were hit, they traded. So to start, you know, moving between, well, I don't mean -- I mean intention; well, I kind of mean hope -- fundamentally it's the same thing, is that you cannot premise wire fraud on what was going on in the trader's mind. As the Court said, a fill or kill is the same thing. I sure hope I don't get hit. But -- and if I don't get hit within .5 nanoseconds, I'm coming off the market; no difference.

Then the last thing. On the *Coscia* point, as we read *Coscia*, the Court there found that the orders were both illusory and created an illusion of market movement. It's in different -- and I know the sentence the Court is referring to is they say that on appeal, *Coscia* confuses the idea of illusory orders with the illusion of market movement. But what we interpret the Court to be saying there is because the orders were illusory, which means that they were essentially not at risk, they created, in turn, an illusion of market -- of market movement that amounted to a deceptive practice under 1348(1).

But *Coscia* does not find, the Court does not find in *Coscia* that those were at-risk orders. In fact, they find the exact opposite, that they were fake orders. All but .08 percent of them were fake orders that said they couldn't be --

THE COURT: Well, what distinguishes those orders in *Coscia* from the orders here? Because, I mean, I don't remember the numbers, but some percentage of those orders were hit.

MR. McGOVERN: Correct. Yes. I think it was .08 percent of the orders were actually hit. But what the Court repeatedly says in *Coscia* is through this deceptive device, which was an HFT trading algorithm, 99.9 percent of the orders he put on the market, on both sides of the market, were unhittable because of the speed with which he could cancel, that it created cumulatively an illusion of market movement. These were fundamentally not at-risk trades. And the Court wasn't going to vacate a 1348 conviction because .08 percent of those trades ultimately did get hit, notwithstanding the algorithm and the way that it had been preprogrammed by *Coscia*.

THE COURT: All right.

MR. BURLINGAME: It's a radically different context, Judge. I mean, the way I think of it is *Coscia* is illusive with the football yanking it away before the orders are actually illusive. And this is, you know, the algorithms have 5,000 separate decisions to decide on whether or not to kick the football that's in place.

THE COURT: Understanding all that, that's factual context.

MR. BURLINGAME: That's the factual context that's alleged in the indictment I think is the key difference.

THE COURT: Well, to the extent it matters to understanding whether those orders are illusory or not, why isn't that relevant --

MR. BURLINGAME: Because the government hasn't pled that the orders --

THE COURT: -- in the context of the motion to dismiss?

MR. BURLINGAME: The government hasn't pled that the orders are illusory here. There's no spoofing machine that's been created, and that's not part of the allegations in this case.

I think I just wanted to make one -- sorry.

THE COURT: Go ahead.

MR. BURLINGAME: I just wanted to make one final point, which is that, you know, I agree with Mr. McGovern about you can see the way the sort of -- the government's argument is like sand falling through your fingers when you ask -- that there is a necessary step in their argument about what's being communicated to the market somehow has to be false and the tension that is there with -- that the order is actually real and executable.

And what I wanted to draw attention to, and I think it's particularly interesting in light of *Weimert*, is that the orders that there is an actual contract on are different from the so-called fraudulent orders. So the transaction that takes place is on the primary order on one side of the market where that's the transaction that ultimately is executed. And what's being said here is that the person who executes that transaction has been defrauded because after they have executed that transaction, a transaction on the other side of the market has been taken off because -- because that trader did not intend to keep it out there for a longer period of time. And the buyer of the -- of the transaction had in their mind the assumption that that order would stay out there longer based on what they assumed about the possible duration of this other trade. And I think *Weimert* speaks directly to how -- how outside of bounds for the wire fraud statute that is in the Seventh Circuit.

THE COURT: Okay. All right.

Mr. Jacobs, any last words?

MR. JACOBS: Just very briefly.

So I think the *Coscia* case, I do think that is -- the facts of the case, not the indictment, not the charges, but factually I do think it is very similar. I think that the speed at which orders were cancelled in the *Coscia* case compared to here, I think that's somewhat irrelevant. I would suggest that to the extent that the orders were deemed illusory in *Coscia*, because they were just placed and cancelled so quickly, they are similarly illusory. They would be similarly illusory here.

And simply because a person in this case is engaged in this activity manually, by physically using a computer to place and cancel the orders, I don't think that makes it any different than an algorithm doing it, which is simply placing and cancelling those orders without a person manually using a computer mouse to do the same. I would submit that the facts of that case lend themselves very similarly to this case.

THE COURT: Well, I mean, you could certainly ask the question. I mean, you know, how long does an order have to be on the market before it stops communicating, you know, what you say is -- or to be consistent -- not to be inconsistent with a representation that this is, you know, a willing trader? I mean, doesn't it go to that? I mean, does the manual versus high frequency distinction matter? Because I assume that the defendants doing this manually are tens, hundreds of times, millions of times slower than the computer in doing that, so their orders, the quote-unquote fraudulent orders are on the market for a much longer period of time before they're cancelled out, I would assume.

MR. JACOBS: And I would -- I take your point, and I would submit that there really is no litmus test. There is no black-or-white answer as to how long something needs to stay on an open market for it to be more or less illusory.

I would just submit that that fact, however long something was placed on the market, is ripe for argument. It's something that someone can look at to understand what someone was communicating or trying to communicate or signal to the market. That's ripe for argument, and I would submit that that's ripe for a jury to be looking at and to decide what weight they would like to give that.

THE COURT: Doesn't every trader intend to withdraw an unfilled order at some point? I mean, every trader -- so isn't inevitably part of -- to the extent there is a message, the message on placing an order is if this order isn't filled, at some point, I'm going to withdraw it. I'm not going to leave it on the market indefinitely. So -- and if that's true, how is that materially different than what you say the message was here, which is, you know, I don't intend to leave these on long enough to get executed?

MR. JACOBS: I think that is a material difference. I think when you're placing the order, there might be a period in time where you say, I'm placing this order, and if it stays on the market too long without it being filled, I'm going to cancel the order. But at the time you're placing that order, it's not your intention at that point in time to cancel the order before that ever could happen. And I think that's a material difference, and it's precisely that action which is manipulating the market, and it's tricking other traders in this case.

THE COURT: All right.

MR. McGOVERN: Your Honor, just one point of clarification.

To the extent that from the podium Mr. Jacobs just referred to these orders as illusory, that contradicts the affirmative allegation in the indictment that those orders were at risk. And I don't think he can constructively amend the indictment now to try to wedge this into *Coscia* where it doesn't belong.

MR. BURLINGAME: And -- oh.

THE COURT: All right. This is -- I'm reaching the point of saturation. I'm sure your reservoirs are deeper than mine.

This is very interesting. I appreciate what are really excellent briefs and argument here this morning. As I've indicated, I will allow the filing of the amicus brief.

My intention is to take this up quickly before this all drains back out and is replaced by something else. And so I would like the briefing to conclude fairly promptly, and it's my intention to try to rule pretty promptly as well.

So understanding that, how long do you want to respond?

MR. JACOBS: If we could have three weeks. If the Court would be amenable to that, we would appreciate it. One of my colleagues, as you know, or might know I think from last time, is just on trial down in Miami. So to the extent that I have other things going on, I would just appreciate a little bit of time to take a look at this and address it for the Court.

THE COURT: All right. Okay.

Is that --

MR. BURLINGAME: Yeah.

THE COURT: You're welcome to file a response. As I'm generally understanding the tenor of things, this brief is going to be consistent with arguments that you've made. So I don't need another brief that just says, boy, they really said in 15 pages what we said in 2 very deeply. But --

MR. BURLINGAME: Could be very satisfying to write that, Judge.

THE COURT: I'm sure it would. But, you know, I will leave it to your discretion as to whether you want to spend time filing a response or not.

So 21 days would be February 27th (sic), and I'll take it up -- we don't need any -- there won't be any further reply brief or anything else. And I'll take this up as quickly as I can and rule as quickly as I can so we can know whether you're going to the Seventh Circuit or we're going to move forward here.

Okay. Anything else we need to address today?

MR. BURLINGAME: No, Judge.

MR. JACOBS: Just do you want to put a date down?

MR. McGOVERN: Our inclination, Judge, is to wait until the Court decides this issue and then set a date after that.

MR. BURLINGAME: If necessary, yeah.

THE COURT: Yeah. I don't know that there's a reason to come in if I haven't ruled on this yet. So I'll either set a date or I won't, depending on the ruling.

MR. McGOVERN: Exactly.

MR. JACOBS: Great.

THE COURT: Okay.

MR. BURLINGAME: Thank you, Judge.

MR. McGOVERN: Thank you, Your Honor. Appreciate it.

THE COURT: All right. Thank you.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Kelly M. Fitzgerald	*January 25, 2019*
Kelly M. Fitzgerald	Date
Official Court Reporter	

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois -
CM/ECF LIVE, Ver 6.3.1
Eastern Division

Case No.: 1:18-cr-00035

[Filed: October 31, 2019]

DOCKET ENTRY 120

MINUTE entry before the Honorable John J. Tharp, Jr. as to James Vorley, Cedric Chanu: Status hearing held on 10/31/2019. Defendants' presence previously waived. Status hearing set for 11/26/2019 at 9:00 AM. Before the next status hearing, Government will have provided at least the substance of the anticipated superseding indictment, the particulars of the trading sequences that it expects to present at trial, and the supplemental email discovery and related TAR categorization. Without objection, time will be excluded to 11/26/2019 pursuant to 18 U.S.C. § 3161(h)(1)(D) due to complexity of the case, the need for the Government to produce additional Discovery and to ensure Defendants have adequate opportunity to prepare a defense to the anticipated superseding indictment. Mailed notice (air,) (Entered: 10/31/2019)

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois -
CM/ECF LIVE, Ver 6.3.1
Eastern Division

Case No.: 1:18-cr-00035

[Filed: November 15, 2018]

DOCKET ENTRY 73

MINUTE entry before the Honorable John J. Tharp, Jr. as to James Vorley, Cedric Chanu: Status hearing held and continued to. Defendants' motion for leave to file brief in excess of fifteen pages 71 is granted; no appearance on 11/27/18 is required. Defendants expect to file their motion promptly. The parties should also contemporaneously file an agreed briefing schedule or a motion to set briefing that sets out the parties' respective proposals. Time will be excluded through briefing and ruling on the defendants motion to dismiss pursuant to 18 U.S.C. § 3161(h)(1)(D). Mailed notice (air,) (Entered: 11/15/2018)

APPENDIX K

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

Case No. 18 CR 35-1, 2

[Filed: November 15, 2018]

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
-vs-)
)
JAMES VORLEY and CEDRIC CHANU,)
)
Defendants.)
)

Chicago, Illinois
November 15, 2018
10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN J. THARP, JR.

APPEARANCES:

For the Plaintiff:	U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION - FRAUD SECTION BY: MR. CORY E. JACOBS MR. MICHAEL THOMAS O'NEILL 1400 New York Avenue, N.W. Washington, DC 20005
For Defendant Vorley:	DECHERT LLP BY: MR. ROGER ANSON BURLINGAME 160 Queen Victoria Street London EC4V 4QQ DECHERT LLP BY: MR. CHRISTOPHER S. BURRICHTER 35 W. Wacker Drive, Suite 3400 Chicago, IL 60601
For Defendant Chanu:	ROPES & GRAY LLP BY: MR. MICHAEL T. McGOVERN (phone) MS. HELEN GUGEL MS. MEGAN McENTEE 1211 Avenue of the Americas New York, NY 10036

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(Proceedings heard in open court:)

THE CLERK: 18 CR 35, U.S.A. v. Vorley and Chanu. I'm calling in --

(Clerk placing phone call.)

THE CLERK: Hello?

THE COURT: We're a couple of minutes early. That might be the problem.

THE CLERK: Oh, we are. Sorry.

MR. BURLINGAME: That sounds hopeful.

THE CLERK: Hello?

THE COURT: Have a seat. Let's take a couple of minutes.

Counsel, were you trying to reach somebody?

MS. McENTEE: We're just waiting for another member of Mr. Chanu's defense team.

THE COURT: We'll give them until 10:00, and we'll try again at 10:00 just to make sure we've got everybody that wanted to be involved.

MR. O'NEILL: Thank you, Judge.

(Recess.)

(Clerk placing phone call.)

MR. McGOVERN: Yes, hi. This is Michael McGovern from Ropes & Gray on behalf of defendant Cedric Chanu.

THE COURT: All right. Mr. McGovern, this is Judge Tharp. Is there anyone else you were expecting to be on the line?

MR. McGOVERN: Not from the Chanu defense team, Your Honor.

And thank you, Your Honor, for allowing me to participate by phone. I'm overseas, and I appreciate it.

THE COURT: That's fine.

To the counsel in the courtroom, are we expecting anybody else on the phone line?

MR. BURLINGAME: No, Judge.

THE COURT: So we have Mr. McGovern on the phone on behalf of Mr. Chanu.

Let's have your appearances in court here.

MS. GUGEL: Helen Gugel and Megan McEntee on behalf of the defendant Cedric Chanu as well.

MR. BURLINGAME: And Roger Burlingame and Chris Burrichter on behalf of James Vorley.

MR. O'NEILL: Good morning, Your Honor. Michael O'Neill and Cory Jacobs on behalf of the United States.

THE COURT: And which of you is which?

MR. JACOBS: Cory Jacobs.

Good morning, Your Honor.

THE COURT: All right. Good morning.

All right. We're here for a status. Where do things stand?

MR. O'NEILL: Yes, Your Honor.

The government -- the discovery in this case is proceeding. The government has produced the bulk of the discovery to date, including recently, Your Honor, the government has identified for the defense the universe of coordinated events from which the government may offer evidence of the alleged fraudulent orders in its case-in-chief in trial, and we've provided that kind of potential universe to the defendants which the government believes would be sufficient and to aid them in preparation of the defense. And there's additional discovery that will be forthcoming as well, and we've been coordinating with defense counsel on that matter, Your Honor.

We understand that the defense have filed a joint motion to dismiss, and as noted in the papers, the government has no objection to exceeding the standard page limit; however, the government will be opposing the motion and would respectfully request an opportunity to digest the brief. And if it's amenable to the Court, the parties have begun to confer about a potential briefing schedule for opposition and reply and would defer to Your Honor's preference in terms of whether we may submit a proposed order setting forth an agreed briefing schedule, or if Your Honor would like us to come back for a status as to when the government may file its opposition, and the defendants, their reply.

THE COURT: Okay. That was news to me. When did you file your motion?

MR. BURLINGAME: We filed the motion to seek the Court's permission to file an oversized brief yesterday so that we could address --

THE COURT: All right.

MR. O'NEILL: We were hoping to address the scheduling issues while we're all here in Chicago today.

THE COURT: Okay. I'm sorry. The last I looked at this yesterday that had not been filed yet.

Certainly if the parties can come to an agreement as to a briefing schedule, as long as it's something within reason, that's perfectly fine, so I'll give you the opportunity to do that. I would not anticipate there will be a problem with that, and I would certainly expect people to be accommodating over the holidays in that regard.

So I will leave that to you. If you're unable to come to an agreement, then it's the plaintiff's motion, so -- or excuse me -- the defendants' motion. I'll look to the defendants to file something to propose a briefing schedule, and I'll resolve it on papers if necessary, or at least call you back in to talk about it.

Okay. And as far as the motion for -- so is there a motion here for an oversized brief?

MR. BURLINGAME: Yeah, that's consented to.

THE COURT: Okay. And that will be granted.

All right. What else do you have to add?

MR. O'NEILL: Nothing further from the government at this time, Your Honor.

THE COURT: Okay.

Defendants?

MR. BURLINGAME: I think that's it, Judge. We'll be back to you with a proposed schedule.

MS. GUGEL: That's right.

THE COURT: At this juncture, understanding you're still getting your arms around materials, beyond the motion to dismiss, which is a little like saying beyond the iceberg that's ahead, that's not -- there are no tea leaves there to read. I haven't looked -- I didn't even know the motion had been filed.

Any other motions being contemplated at this point?

MR. BURLINGAME: Judge, as the government alluded to, the discovery is quite voluminous; so I think that we're hopeful that we can address further motions down the road if necessary.

And I think we also -- the motion to dismiss is a significant one. The issue before Your Honor is one of first impression, which is essentially can a spoofing case go forward under the wire fraud statute which requires a false statement, which is a position the government has never taken before.

So we're hopeful that -- you know, that the Court -- when the Court engages with the motion that it may come to the conclusion that it's best to address other issues afterwards as well.

THE COURT: All right. Just so I'm understanding completely, is the position in the motion that the wire fraud statute requires a false statement?

MR. BURLINGAME: It is. It is. The sort of -- in summary, the story of the motion is the complaint initially covered a seven-year period, from 2008 to 2015, following a spoofing investigation and charged spoofing, commodities fraud, and wire fraud; and commodities fraud and spoofing are how all other spoofing cases have proceeded.

Following the complaint, the defendants went in and presented exculpatory evidence to the government that beginning about four months after Dodd-Frank created spoofing, Deutsche Bank, where both defendants worked, began an internal compliance monitoring system to flag potential trades that might run afoul of Dodd-Frank. And over the following years, the hundreds of trades by both of the defendants were flagged and then cleared as being compliant with by Deutsche Bank.

So the defendants who were working at Deutsche Bank and well aware that all of their trading activities were being monitored are doing this activity openly for a period of years. The trades are being flagged as being potentially questionable and no one is saying anything to them.

So we went to the government and said, you know, in a fraud case where good faith is an absolute defense, we think you have the wrong guys. And the response was to move forward with the indictment but to then shrink the charging period so it's now only two years and ends a month before the compliance monitoring began; but to get rid of that later conduct requires the government to then use the FIRREA wire fraud affecting a bank statute with a ten-year statute of limitations. So they're in a bit of a box in that that wire fraud statute does require false statements, and spoofing is a crime which is based on entering real orders into the market. It's basically a market manipulation scheme that's alleged.

And so our brief is, you know, this could have been charged the way it was originally charged, and it would be a very -- the typical criminal case where a motion to dismiss is obviously very difficult. But here you've got a real issue in that they -- in past spoofing prosecutions, the government has run away from the need to allege false statements and has specifically disavowed false statements being required for a spoofing conviction.

THE COURT: Okay.

Do you want two-minute rebuttal?

MR. O'NEILL: Your Honor, I appreciate that.

Firstly, I think we would disagree with -- the government would disagree with the characterization of the background that defense counsel has offered, and I think we would differ as to whether there was -- the characterization of some of that evidence as exculpatory.

But in any event, Your Honor, the indictment, the current charging instrument, the indictment before the Court on which this case is charged, is, in the government's view, a streamlined and straightforward charging instrument that rather than allege spoofing as is -- can be done and has been done in other matters, this is a straightforward wire fraud charge, a vanilla wire fraud case, and we will gladly address the merits of the motion in our opposition; but in terms of the alleged scheme to defraud, false pretenses, the government will submit an opposition outlining how the indictment does state a claim for a conspiracy and wire fraud.

And, you know, the counts, the substantive counts in particular, Count Two and Count Three of the indictment, are events and examples of the coordinated fraud in which the defendants participated where the government will offer at trial the evidence that will include testimony as well as a corroboration of the testimony of our cooperating witness by written communications as well as trade and order data.

So that is the logic, among the logic of the two substantive counts that have been charged in Counts Two and Three, this sort of trifecta of evidence that the government will bring to bear on those charges.

THE COURT: Okay. Well, I look forward to reading the briefs.

All right. Why don't you finish your conferring about a briefing schedule. Just file an agreed motion, assuming you've got an agreement, or if it's not agreed, file something setting out your respective positions. And if I think we need to reconvene, I'll set something; otherwise I'll just rule. And based on that briefing schedule, I'll then set a further status hearing in the case. All right.

Anything else then?

MR. BURLINGAME: No, Your Honor.

THE COURT: And I'm sorry. I'm leaning back in my chair, so Mr. McGovern has probably not heard half of that.

Okay.

MR. McGOVERN: No, I heard it all, Judge, and I appreciate it. Thank you.

THE COURT: That's how we'll proceed.

MR. BURLINGAME: Thank you, Judge.

MR. O'NEILL: Thank you, Your Honor.

MR. McGOVERN: Thank you, Your Honor.

MR. O'NEILL: Your Honor, if I may. Forgive me.

Will time -- there will be a motion to exclude?

THE COURT: The motion has been filed, so the time for briefing and consideration of that motion will be excluded.

MR. O'NEILL: Thank you, Your Honor.

THE COURT: All right.

MR. BURLINGAME: Thank you, Judge.

MR. McGOVERN: Thank you, Judge.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

<u>/s/Kelly M. Fitzgerald</u>	*<u>November 15, 2018</u>*
Kelly M. Fitzgerald	Date
Official Court Reporter	

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 18 CR 35

[Filed: July 24, 2018]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JAMES VORLEY and CEDRIC CHANU,	)
	)
Defendants.	)
	)

JUDGE THARP
MAGISTRATE JUDGE MASON

Violations: Title 18, United States Code, Sections 1343 and 2; Title 18, United States Code, Section 1349

COUNT ONE
(Conspiracy to Commit Wire Fraud Affecting a Financial Institution)

The SPECIAL JUNE 2018 GRAND JURY charges:

1. At times relevant to this Indictment:

<u>The Defendants and Related Entities</u>

a. JAMES VORLEY ("VORLEY") worked from in or around May 2007 until in or around March 2015 as a trader at Deutsche Bank AG, where he traded precious metals futures contracts. VORLEY was based in London, United Kingdom.

b. CEDRIC CHANU ("CHANU") worked from in or around March 2008 until in or around December 2013 as a trader at Deutsche Bank AG, where he traded precious metals futures contracts. From in or around March 2008 to in or around May 2011, CHANU was based in London, United Kingdom, and from in or around May 2011 to in or around December 2013, CHANU was based in the Republic of Singapore.

c. David Liew ("Liew") worked from in or around July 2009 until in or around February 2012 as a trader at Deutsche Bank AG, where he traded precious metals futures contracts. Liew was based in the Republic of Singapore.

d. Deutsche Bank AG, together with its subsidiaries and affiliates, was a global banking and financial services company. Deutsche Bank AG operated in the United States, United Kingdom, Republic of Singapore, and elsewhere, and operated global commodities trading businesses that included the trading of precious metals futures contracts.

e. Deutsche Bank AG was a financial institution within the definition of Title 18 U.S.C. § 20.

<u>Market Background and Definitions</u>

f. A "futures contract" was a type of legally binding contract to buy or sell a particular product or financial instrument at an agreed-upon price and on an agreed-upon date in the future. When the parties to the futures contract (namely, the buyer and the seller) entered into their agreement, the buyer agreed to pay for, and the seller agreed to provide, a particular product or financial instrument at the agreed-upon price on the agreed-upon date in the future.

g. Futures contracts were traded on markets designated and regulated by the United States Commodity Futures Trading Commission ("CFTC").

h. CME Group Inc. ("CME") was a commodities marketplace made up of several exchanges, including COMEX.

i. COMEX used an electronic trading system called Globex, which allowed traders to trade futures contracts from anywhere in the world. CME operated Globex using computer servers located in Chicago and Aurora, Illinois.

j. Traders using Globex could place orders in the form of "bids" to buy or "offers" to sell one or more futures contracts at various prices, or "levels."

k. Trading on Globex was conducted electronically using computers. Electronic traders could see a visible "order book" that displayed a certain number of visible price levels on both the bid and offer sides, as well as the total volume of anonymous orders (i.e., bids to buy and offers to sell futures contracts) at each of those visible price levels.

l. An order was "filled" or "executed" when a buyer's bid price and a seller's offer price for a particular contract matched.

m. An "iceberg" order was a type of order that traders could place when trading futures contracts on COMEX. In an iceberg order, the total amount of the order was divided into a visible portion of a certain pre-set quantity that was visible to other traders, and a portion of the order (i.e., the remainder of the order) that was not. Whenever the visible portion of the order was filled, the same, pre-set quantity of the remaining, hidden portion automatically became visible; this process repeated until the remainder of the order was either fully executed or canceled.

n. Precious metals futures contracts included gold, silver, platinum, and palladium futures contracts, which were contracts for the delivery of gold, silver, platinum, and palladium, respectively, in the future at an agreed-upon price. The gold, silver, platinum, and palladium futures contracts were traded on COMEX, using the Globex system.

o. When referenced in this Indictment, all dates are approximate and inclusive.

2. From at least in or around December 2009 through at least in or around November 2011, in the Northern District of Illinois, Eastern Division, and elsewhere,

JAMES VORLEY and
CEDRIC CHANU,

the defendants herein, conspired and agreed with others known and unknown to the Grand Jury to commit wire fraud affecting a financial institution, that is, the defendants did knowingly and with the intent to defraud, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, transmit and cause to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing the scheme and artifice, all affecting at least one financial institution, Deutsche Bank AG, in violation of Title 18, United States Code, Section 1343.

Purpose of the Conspiracy

3. The purpose of the conspiracy was to deceive other traders by creating and communicating materially false and misleading information regarding supply or demand, in order to induce such traders into trading precious metals futures contracts at prices, quantities, and times that they would not have otherwise, in order to make money and avoid losses for the co-conspirators.

Manner and Means of the Conspiracy

4. It was part of the conspiracy that VORLEY, CHANU, Liew, and others placed one or more visible orders for precious metals futures contracts on one side of the market that, at the time they placed the orders,

they intended to cancel before execution (the "Fraudulent Orders") in order to deceive other traders.

5. It was further part of the conspiracy that by placing the Fraudulent Orders, VORLEY, CHANU, Liew, and others intended to create and communicate false and misleading information regarding supply or demand (i.e., orders they did not intend to execute) in order to deceive other traders.

6. It was further part of the conspiracy that this false and misleading information often caused other traders to buy or to sell futures contracts at prices, quantities, and times that they otherwise would not have because, among other things, such traders reacted to the false and misleading increase in supply or demand.

7. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed Fraudulent Orders to buy, which created the false and misleading impression in the market of increased demand, which was intended to manipulate and move commodity futures prices upward.

8. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed Fraudulent Orders to sell, which created the false and misleading impression in the market of increased supply, which was intended to manipulate and move commodity futures prices downward.

9. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed orders at a lower visible quantity, often in the form of iceberg

orders, on the opposite side of the market, that they intended to execute (the "Primary Orders").

10. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others placed Fraudulent Orders with the intent to artificially manipulate and move the prevailing price in a manner that would increase the likelihood that one or more of their Primary Orders would be filled.

11. It was further part of the conspiracy that the Fraudulent Orders placed by VORLEY, CHANU, Liew, and others were material misrepresentations that falsely and fraudulently represented to traders that VORLEY, CHANU, Liew, and others were intending to trade the Fraudulent Orders when, in fact, they were not because, at the time the Fraudulent Orders were placed, VORLEY, CHANU, Liew, and others intended to cancel them before execution.

12. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others engaged in this false, misleading, and deceptive practice both by themselves and in coordination with other traders at Deutsche Bank AG, including each other, all in furtherance of the conspiracy. When placing Fraudulent Orders by themselves, VORLEY, CHANU, Liew, and others would place their Fraudulent Orders individually in order to facilitate the execution of their own Primary Orders, without the placement of a Fraudulent Order by another trader. By contrast, coordinated placement of the Fraudulent Orders involved one or more additional traders. When engaging in coordinated placement of Fraudulent Orders, VORLEY, CHANU, Liew, and/or one or more

other co-conspirators would place one or more Fraudulent Orders on one side of the market in order to facilitate the execution of Primary Orders placed on the opposite side of the market by either VORLEY, CHANU, Liew, or another trader.

13. It was further part of the conspiracy that VORLEY, CHANU, Liew, and others intended to, attempted to, and often did cancel the Fraudulent Orders before any part of the Fraudulent Orders were executed.

14. It was further part of the conspiracy that the Fraudulent Orders placed by VORLEY, CHANU, Liew, and others exposed Deutsche Bank AG to (i) new and increased risks of loss—including in the form of: (a) fees, costs, and expenses incurred through investigations, litigation, and proceedings arising from the underlying conduct; (b) losses associated with the financial risk that the Fraudulent Orders would be executed (despite the traders' intent to cancel the Fraudulent Orders before execution); and (c) reputational harm—and (ii) actual loss, including (a) the payment by Deutsche Bank AG of a $30,000,000 civil monetary penalty to the CFTC on or around January 29, 2018, and (b) fees, costs, and expenses actually incurred through investigations, litigation, and proceedings arising from the underlying conduct.

15. It was further part of the conspiracy that in submitting the Fraudulent Orders and Primary Orders in furtherance of their scheme, VORLEY, CHANU, Liew, and others, transmitted and caused to be transmitted, wire communications from outside the

United States into and through the Northern District of Illinois.

16. It was further part of the conspiracy that, for example, on or around November 3, 2010, VORLEY and CHANU, together with Liew, engaged in the coordinated placement of Fraudulent Orders at various prices, in order to facilitate the execution of Primary Orders placed by Liew to trade gold futures contracts.

17. It was further part of the conspiracy that on or around that same day, November 3, 2010, at or around the time they were engaging in the fraudulent activity described in paragraph 16, VORLEY and Liew communicated via electronic chat. During this chat, VORLEY wrote to Liew, in pertinent part, that their activity "was cladssic [sic] / jam it / woooooooooooo . . . . bif [sic] it up." Liew replied to VORLEY, in pertinent part, "tricks from the . . . master."

18. It was further part of the conspiracy that, for example, on or around August 8, 2011, CHANU and Liew engaged in the coordinated placement of Fraudulent Orders at various prices, in order to facilitate the execution of Primary Orders placed by Liew to trade gold futures contracts.

19. It was further part of the conspiracy that on or around that same day, August 8, 2011, at or around the time they were engaging in the fraudulent activity described in paragraph 18, CHANU and Liew communicated via electronic chat. During this chat, Liew wrote to CHANU, in pertinent part, "i should job it here right / u think?" to which CHANU replied to Liew, in pertinent part, "yup/ sell 10k here / i ll help

you." Later in the chat, Liew wrote to CHANU, in pertinent part, "u be careful sweetie / dun get given here / lol."

All in violation of Title 18, United States Code, Section 1349.

COUNT TWO
(Wire Fraud Affecting a Financial Institution)

The SPECIAL JUNE 2018 GRAND JURY further charges:

20. Paragraphs 1 and 3 through 19 are incorporated herein.

21. From at least in or around December 2009 through at least in or around November 2011, in the Northern District of Illinois, Eastern Division, and elsewhere,

JAMES VORLEY,

the defendant herein, knowingly and with the intent to defraud, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, transmitted and caused to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing the scheme and artifice—including wire communications made on or around November 3, 2010, from outside the United States to the CME, involving the placement of

Fraudulent Orders—all affecting at least one financial institution, Deutsche Bank AG.

All in violation of Title 18, United States Code, Sections 1343 and 2.

<u>COUNT THREE</u>
(Wire Fraud Affecting a Financial Institution)

The SPECIAL JUNE 2018 GRAND JURY further charges:

22. Paragraphs 1 and 3 through 19 are incorporated herein.

23. From at least in or around December 2009 through at least in or around November 2011, in the Northern District of Illinois, Eastern Division, and elsewhere,

CEDRIC CHANU,

the defendant herein, knowingly and with the intent to defraud, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, transmitted and caused to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing the scheme and artifice—including wire communications made on or around August 8, 2011, from outside the United States to the CME, involving the placement of Fraudulent Orders—all affecting at least one financial institution, Deutsche Bank AG.

All in violation of Title 18, United States Code, Sections 1343 and 2.

CRIMINAL FORFEITURE ALLEGATION AS TO COUNTS ONE THROUGH THREE

24. The factual allegations contained in Counts One through Three of this Indictment are hereby re-alleged and are incorporated by reference for the purpose of alleging forfeiture to the United States pursuant to Title 18, United States Code, Section 982(a)(2)(A), and Title 28, United States Code, Section 2461(c).

25. Upon conviction of any of the offenses alleged in Counts One through Three, namely, conspiracy to commit and substantive counts of wire fraud affecting a financial institution, in violation of Title 18, United States Code, Sections 1343 and 1349, the defendants, JAMES VORLEY and CEDRIC CHANU, shall forfeit to the United States any and all property, real or personal, which constitutes or is derived from proceeds traceable to the aforementioned offenses, pursuant to Title 18, United States Code, Section 982(a)(2)(A) and Title 28, United States Code, Section 2461(c), and any property traceable to such property. The property to be forfeited shall include, but is not limited to, the following:

A money judgment in favor of the United States of America equal to the value of any property, real or personal, which constitutes or is derived from proceeds traceable to violations of Title 18, United States Code, Section 1343 and 1349.

26. If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;
b. has been transferred or sold to, or deposited with, a third party;
c. has been placed beyond the jurisdiction of the Court;
d. has been substantially diminished in value; or
e. has been commingled with other property that cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b), to seek the forfeiture of any other property of the defendants up to the value of the above forfeitable property and obtain a money judgment in an amount equal to the value of the property involved in the violations.

A TRUE BILL:

____
FOREPERSON

SANDRA L. MOSER
Acting Chief
U.S. Department of Justice
Criminal Division, Fraud Section

By: <u>*s/ Michael T O'Neill*</u>
Michael T. O'Neill
Trial Attorney

____
Cory E. Jacobs
Trial Attorney

U.S. Department of Justice
Criminal Division, Fraud Section
1400 New York Avenue, N.W.
Washington, D.C. 20530

APPENDIX M

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1343

§ 1343. Fraud by wire, radio, or television

Effective: January 7, 2008

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.

18 U.S.C. § 3161

§ 3161. Time limits and exclusions

Effective: October 13, 2008

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section

3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.