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WILL "AIDING AND ABETTING" CLAIMS EXTEND THE NET OF SPOOFING LIABILITY?

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Since the first criminal conviction for spoofing in 2015, and the many cases brought thereafter by the U.S. Commodity Futures Trading Commission ("Commission") charging spoofing, there has been widespread recognition in the derivatives industry that traders who engage in spoofing and the firms who employ them may be liable for such misconduct. What has not been understood is that the net of spoofing liability might extend beyond trading—and even beyond market participants. That changed when the Commission brought an enforcement action against Jitesh Thakkar and his company, Edge Financial Technologies—not for unlawful trading but instead for alleged aiding and abetting by developing software programs that were used in a trader's spoofing.[1] The U.S. Department of Justice ("DoJ") brought similar criminal charges against Thakkar around the same time.[2] This marks the first time that aiding and abetting laws have been used in the context of spoofing—but the extent of Government reach remains to be seen, especially in light of the Justice Department's lack of success at trial earlier this year against Thakkar. Considering the evidence introduced at trial and the factors required for an aiding and abetting charge, the net may not widen as far as the Government is attempting to stretch it.

This article begins with a discussion of the cases brought against Mr. Thakkar, and then considers issues raised by these efforts to extend liability, including (1) whether the allegations meet the strict standards for aiding and abetting established by the Supreme Court and Seventh Circuit Court of Appeals and (2) whether non-traders will be held liable for manipulative trading activity.

THE CASE AGAINST THAKKAR

The Commission alleges that Thakkar aided and abetted spoofing by Navinder Sarao. *Comm'n Complaint* at ¶ ¶ 1-4.[3] According to the Commission, Thakkar worked with Sarao over the course of four years to develop and support software functionality that enabled Sarao to enter bids or offers to avoid execution, and thus commit spoofing. *Id.* at ¶ 2. Sarao is notorious for having earlier been charged with spoofing over several years, including as a cause of the Flash Crash in May 2010. He pled guilty to a few instances of spoofing (not including those involving the Flash Crash) and settled civil charges brought by the Commission for the same; his sen-

tencing was postponed pending his cooperation with governmental authorities.[4] Sarao testified at the criminal trial against Thakkar as part of Sarao's cooperation agreement. Notwithstanding Sarao's testimony against Thakkar, however, the Justice Department was unable to secure a guilty verdict against Thakkar, instead facing an acquittal on the conspiracy to commit spoofing charge and a deadlocked jury on the aiding and abetting count.[5] DoJ decided to dismiss its complaint and not pursue its remaining charge against Thakkar.[6] Undeterred, the Commission has determined to pursue its civil complaint against Thakkar.[7]

REQUIREMENTS FOR AIDING AND ABETTING CLAIMS

The requirements to establish aiding and abetting under § 13(a) of the Commodity Exchange Act (CEA), 7 U.S.C.A. § 13c(a), are the same as that for the general criminal aiding and abetting statute, 18 U.S.C.A. § 2. *See Damato v. Hermanson*, 153 F.3d 464, 472-73, Comm. Fut. L. Rep. (CCH) P 27378 (7th Cir. 1998); *see also Bosco v. Serhant*, 836 F.2d 271, 279 (7th Cir. 1987) (noting that the CEA's § 13c(a) legislative history shows that "the aiding and abetting provision was modeled on, and was intended to be interpreted consistently with," 18 U.S.C.A. § 2). The federal aiding and abetting statute states that a person who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal." 18 U. S. C.A. § 2. As the Supreme Court has interpreted the statute, a person is liable for aiding and abetting a crime "if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. U.S.*, 572 U.S. 65, 71, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014).

In *Rosemond,* the Court clarified the intent requirement, holding that criminal aiding and abetting can be established only "when a person actively participates in a criminal venture with full knowledge of the circumstances" constituting the charged offense. *Id.* at 77. Rosemond had been charged with aiding and abetting a drug trafficking operation while carrying a gun. He argued that the jury instruction stating that he need only know that his accomplice used a firearm did not satisfy the intent requirement for aiding and abetting the drug trafficking. *Id.* at 69-70. The Supreme Court agreed, finding that "the intent must go to the specific and entire crime charged" and holding that full knowledge requires the defendant to know the extent and character of the scheme which he was allegedly aiding and abetting. *Id.* at 76-77. Thus, in *Rosemond,* the intent element required that defendant knew of the drug trafficking scheme and that the principal's use of the firearm was in furtherance of the drug trafficking. The Court further held that the intent requirement necessitates that such knowledge be in advance of the crime—so that the defendant had a chance to "make the relevant legal (and indeed, moral) choice" and "do something with it—most notably, opt to walk away." *Id.* at 78. The Seventh Circuit's pattern jury instruction for an aiding and abetting claim has incorporated *Rosemond* and boiled it down to the definition that defendant "knowingly participated in the criminal activity and tried to make it succeed." Seventh Circuit Pattern Criminal Jury Instruction 5.06.

In addition to this authority, there are several cases addressing the elements of aiding and abetting under § 13 (a) of the CEA which are similar in scope and which the court deciding the Commission's case will undoubtedly consider. In the

Seventh Circuit, aiding and abetting claims specifically under the CEA requires (in addition to proof of the underlying violation by the principal) that the aiding and abetting defendant (1) have known that the principal intended to commit the acts which violate the CEA, (2) have intended to further the principal's CEA violation, and (3) have committed some act in furtherance of the principal's scheme. *See In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation*, 801 F.3d 758, 765, Comm. Fut. L. Rep. (CCH) P 33533, 2015-2 Trade Cas. (CCH) ¶ 79278 (7th Cir. 2015). These elements are consistent with the caselaw defining the requirements for a criminal aiding and abetting claim, *supra* at 3, albeit without yet referring to *Rosemond*'s refinement as to the intent requirement.

It is notable that cases within the Seventh Circuit deciding aiding and abetting claims in the financial markets have found the allegations wanting. For example, the Seventh Circuit in *Dairy Farmers* affirmed summary judgment for the defendants, holding that a dairy distributer did not aid and abet a dairy marketing cooperative's scheme to fix prices. *Id.* The Court found that plaintiffs, direct purchasers of dairy products, did not present evidence that the dairy distributor knew about or intended to further the price manipulation scheme, including on the basis of the distributor's trading employees' testimony that they were unaware of any plan to affect the price of milk futures. *Id.; see also Damato,* 153 F.3d at 473 (affirming dismissal where plaintiffs did not allege knowledge or intent necessary for aiding and abetting); *In re Rough Rice Commodity Litigation*, 2012 WL 473091 at *8 (N.D. Ill. 2012) (dismissing complaint on basis that plaintiffs did not allege that defendants acted in furtherance of the CEA violation).

The case law establishes that the element that defendant knew of and intended to further violations of the CEA requires that such knowledge and intent be specific to the principal's unlawful activity, and not merely knowledge of and an intent to further the principal's general trading activity. *Braman v. The CME Group, Inc.*, 149 F. Supp. 3d 874, Comm. Fut. L. Rep. (CCH) P 33600, 2015-2 Trade Cas. (CCH) ¶ 79382 (N.D. Ill. 2015). The court in *Braman* held that the financial exchanges were not liable for aiding and abetting any spoofing or antitrust violations, finding that plaintiffs alleged only that the exchanges knew of high frequency trading activity (which does not in itself violate the CEA) and did not allege knowledge of acts in violation of the CEA or any intent to further them. *Id.* at 891.

AIDING AND ABETTING LAW AS BEING APPLIED TO THAKKAR'S CASE

The Government's cases against Thakkar test the boundaries of the aiding and abetting requirements. At least in the criminal case, the test failed. Although the Commission bears a lower burden of proof, *i.e.*, preponderance of the evidence, the evidence introduced at Thakkar's criminal trial raises a serious question of whether the Commission will fare any better than DoJ did.

The Commission's complaint alleges that Thakkar and Edge designed a "Back of Book" software functionality which allowed Trader A to (1) modify orders in a way that placed orders at the back of the queue and (2) immediately cancel orders as soon as other orders were hit or lifted by another market participant. *Comm'n Complaint* at ¶ 16. The Commission then alleges that Thakkar "understood that Trader A intended to use the Back-of-Book function to place spoof

orders." *Id.* at ¶ 27. At the criminal trial, Sarao's testimony as to Thakkar's knowledge amounted to his considering Thakkar to be "knowledgeable about trading" and Sarao's further believing that Thakkar should have "put two and two together" as to Sarao's spoofing. Unless the Commission can develop additional evidence, this seems shaky support for this element of an aiding and abetting claim. *See Braman,* 149 F. Supp. 3d at 891.

The Commission's case is equally challenged in proving that Thakkar acted with the intent to further Sarao's spoofing scheme. Here, the Commission alleges in conclusory fashion that he "intended to help Trader A engage in spoofing," and that Thakkar understood both the intent of the spoofing orders and how the Globex matching system moved orders to the back of the queue (thus making them less likely to be executed). *See, e.g., Comm'n Complaint,* ¶¶ 4, 20, 29. Particularly in view of the *Rosemond* requirements, and given that Thakkar was not a market participant and likely not trained on the laws against spoofing or other manipulative trading, it may be quite difficult for the Commission ultimately to prove this element. Ignorance of the law is not a defense, of course, but Thakkar's asserted lack of background and understanding of spoofing and manipulative trading may cut against any inference that he necessarily recognized or intended to further such a scheme. The Commission has relied on Thakkar's serving on the Commission's Technology Advisory Committee, Subcommittee on Automated and High Frequency Trading, in 2012 and 2013, and the fact that this group addressed spoofing among other topics. *Comm'n Complaint,* ¶¶ 9, 33. But even with evidence at trial that Thakkar not only served on the Committee but also led certain of the Committee's presentations, the Justice Department was unable to persuade the jury of Thakkar's knowledge of what constitutes spoofing. The Commission will be challenged in proving that Thakkar understood and intended to further Sarao's spoofing scheme.

ARE NON-TRADERS WITHIN THE REACH OF SPOOFING LAW?

Both the Commission and DoJ have been aggressive in charging cases related to spoofing, and the industry has watched with keen interest as the cases seem to expand the scope of their reach. The first non-trader case in this area charged a futures commission merchant with a failure to supervise under Reg. 166.3 for not promptly or thoroughly investigating trading activity identified by financial exchanges as suggesting a pattern of spoofing or manipulative or deceptive trading. *In the Matter of Advantage Futures LLC et al., CFTC Docket No. 16-29*, 2016 WL 5582341 (Sept. 21, 2016). The case garnered a lot of attention for seeming to foist the responsibility of policing the markets on FCMs.

The charges brought against Thakkar and his company are still further afield, and not even within the universe of market participants. These cases represent an attempt to expand liability for violations of the CEA to persons beyond those who participate in the financial markets and are registered to do so (or are exempt). The cases raise the question: how wide will the Government attempt to extend the net of liability for spoofing? The failure of the criminal case suggests that perhaps the net has already been stretched too far. The strict requirements for aiding and abetting claims are intended to constrain an over-

expansive reach in cases such as this—but the precise limits of that reach are not yet clear, and the Commission seems determined to push hard until that limit is reached.

ENDNOTES:

[1]Complaint, *Commodity Futures Trading Comm'n v. Jitesh Thakkar and Edge Fin. Techs., Inc*., No. 1:18-cv-00619 (N.D. Ill. Jan. 28, 2018) ("Comm'n Complaint"), Dkt. No. 1. Defendants have denied the Commission's claims in their Answer. *Id.*, Answer and Affirmative Defenses to Complaint for Injunctive Relief, Civil Monetary Penalties, and Other Equitable Relief (Aug. 7, 2019), Dkt. No. 26.

[2]*United States v. Jitesh Thakkar*, No. l:18-cr-00036 (N.D. Ill. Jan. 19, 2018). The Justice Department also included a charge for conspiracy to commit spoofing.

[3]The Commission in its complaint refers to Sarao as "Trader A." *Comm'n Complaint*, 1.

[4]Order, *United States of America, v. Navinder Singh SARAO.*, 2016 WL 8792307 (N.D. Ill. 2016), Dkt. No. 58. Sarao is scheduled to be sentenced on September 26, 2019.

[5]*CFTC v. Thakkar et ano*., supra n.1, Minute Entry on Apr. 4, 2019, Dkt No. 10 and Order entered Apr. 19, 2019, Dkt. No. 119.

[6]United States' Motion To Dismiss Indictment With Prejudice, *U.S. v. Thakkar*, *supra* n. 2, Dkt. No. 132 (Apr. 23, 2019).

[7]The docket reflects that the parties discussed settlement, and further that, most recently, the discussions were not successful and the case is proceeding. *CFTC v. Thakkar et ano*., supra n.1, Minute Order entered July 17, 2019, Dkt No. 25.