Vorley Wire Fraud Ruling Inconsistent with Precedent and the Commodity Exchange Act

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I. INTRODUCTION

On October 21, 2019, an Illinois federal district court denied defendants' motion to dismiss a criminal indictment accusing two former precious metals traders, James Vorley and Cedric Chanu, of engaging in criminal wire fraud.[1] Although its charges plainly sounded in spoofing, which the Commodity Exchange Act ("CEA") specifically prohibits,[2] the government chose not to charge the traders with spoofing and instead charged only wire fraud and conspiracy to commit wire fraud involving a financial institution,[3] which carry significantly longer limitations periods.[4] Accordingly, the case presented an issue of first impression for the court: "whether a scheme to defraud commodities traders by placing 'spoofing' orders—orders that the

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[1] *United States v. Vorley*, No. 1:18-cr-00035, Memorandum Opinion and Order, ECF No. 119 (N.D. Ill. Oct. 21, 2019) (hereinafter "Order"); *see* Criminal Indictment, ECF No. 12 (hereinafter "Indictment"). Unless otherwise specified, ECF numbers referenced herein pertain to the *Vorley* criminal case.

[2] *See* 7 U.S.C. § 6c(a)(5)(C).

[3] *See* Indictment ¶¶ 2, 19, 21, 25. The government's original Complaint included additional charges under the CEA's anti-spoofing provision and the criminal commodities fraud statute, *see* Criminal Complaint, ECF No. 1, but the government ultimately removed those charges from the Indictment—most likely to avoid a statute of limitations bar. *See generally* Memorandum in Support of Defendants' Motion to Dismiss the Indictment, ECF No. 76, at 5 (hereinafter "MTD Memorandum"); Order at 34 n.31.

[4] The Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") extends the statute of limitations to ten years for wire fraud "affect[ing] a financial institution" but affords no similar extension for commodities fraud (which carries a six-year limitations period, *see* 18 U.S.C. § 3301) or spoofing (which carries a five-year limitations period). *See* 18 U.S.C. § 3293(2).

trader intends to withdraw before they can be filled—can constitute wire fraud."[5] The court ruled in the affirmative, holding that the "spoofing scheme alleged in the indictment adequately charges violations of the wire fraud statute."[6]

However, in so holding, the court did what the Seventh Circuit has cautioned against when interpreting the wire fraud statute: it "put together broad language from courts' opinions on several different points so as to stretch the reach of the mail and wire fraud statutes far beyond where they should go."[7] The *Vorley* court's ruling holds serious implications for commodities market participants; not only does it find that wire fraud exists absent an affirmative misrepresentation or a duty to disclose, it also undercuts and arguably renders superfluous the CFTC's anti-manipulation regulations.

II. THE *VORLEY* ORDER

The *Vorley* Indictment alleges that, between December 2009 and November 2011, the defendants placed precious metals futures orders that were "intended to create and communicate false and misleading information about supply or demand (i.e., orders they did not intend to execute) in order to deceive other traders."[8] The defendants allegedly placed orders on one side of the market with the intent to cancel them before execution (so-called "Spoofing Orders"),[9] many (but not all) of which were in fact canceled before execution.[10] The Indictment alleges that the defendants contemporaneously placed orders on the opposite side of the market that they intended to execute ("Primary Orders"),[11] and in doing so, intended to profit by allegedly "misleading [other traders] about the likely direction of the commodity's price and making the defendants' Primary Orders, on the other side of the market, look attractive."[12] Because the Spoofing Orders allegedly were intended "to deceive other traders" and communicate "materially false and misleading information regarding supply and demand," the government contends that the orders themselves constitute "material misrepresentations" of the defendants' intent to trade them.[13] On this basis, the government charged the defendant traders with wire fraud,[14] but refused to charge them with spoofing, commodities fraud, or manipulation.

In moving to dismiss the Indictment, defendants argued black letter law: to prove a scheme to defraud under the wire fraud statute, 18 U.S.C. § 1343,[15] "the government must show

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[5] Order at 1.
[6] *Id.*
[7] *United States v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016).
[8] Indictment ¶ 5.
[9] In its Order, the court termed these orders "Spoofing Orders," rather than the "Fraudulent Orders" used in the Indictment, given that the "principal question presented by the defendants['] motion [to dismiss] is whether these orders constituted a scheme to defraud," and "whether they were, in fact, fraudulent will be determined at trial." Order at 3.
[10] Indictment ¶¶ 2, 4.
[11] *Id.* ¶ 9.
[12] Order at 3.
[13] Indictment ¶¶ 3, 11.
[14] *See id.* ¶¶ 2, 19, 21, 25 (citing 18 U.S.C. §§ 1343, 1349).
[15] The related conspiracy allegations under 18 U.S.C. § 1349 are premised upon the underlying

that [the defendants] made a material false statement, misrepresentation, or promise, or concealed a material fact."[16] Specifically, the defendants contended that in placing "real, at-risk orders that were capable of being filled, and often were filled, before Defendants could cancel them," even without intending to execute them (as alleged), they made no false or misleading statements.[17] The defendants further contended that open-market orders placed on COMEX make no "implied representation about *anything*, let alone the trader's subjective hopes and intentions about the potential future cancellation of the order" or the market's reaction to the order, and in any event, defendants "owed no fiduciary [or other] duty" to disclose such intentions to other market participants.[18]

The court flatly rejected defendants' arguments as "simply wrong."[19] While acknowledging that the defendants made no affirmative representations and had no fiduciary or other duty to disclose the intent behind the Spoofing Orders, the court found that "'the omission or concealment of material information, even absent an affirmative duty to disclose, [is actionable] if the omission was intended to induce a false belief and action to the advantage of the schemer and the disadvantage of the victim.'"[20] Specifically, the court found that the Spoofing Orders "supplied the market with inaccurate information about the likelihood that orders would be executed," thereby creating "an illusion of market movement" by "inducing . . . 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 [the defendants'] 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."[21] The orders constituted "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*."[22] In sum, the court concluded that the alleged Spoofing Orders were intended to and did in fact create "artificial" prices that deceived other market participants.[23] In reaching this conclusion, the court relied heavily upon several cases that do not support the proposition that the creation of an artificial price constitutes wire fraud, including the Seventh Circuit's decision in *United States v. Coscia*.[24]

Notwithstanding its denial of the defendants' motion to dismiss, the court acknowledged the existence of numerous factual questions. "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'

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wire fraud allegations.

[16] *Weimert*, 819 F.3d at 355 (citing *United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009)).

[17] MTD Memorandum at 1-4, 9, 11 ("[W]ithout a false statement or misrepresentation, there simply is no wire fraud.").

[18] *Id.* at 9 (emphasis in original).

[19] Order at 7, 23.

[20] *Id.* at 7 (quoting *Weimert*, 819 F.3d at 355).

[21] *Id.* at 7, 25-26 (citation and internal quotations and alterations omitted).

[22] *Id.* at 26 (emphasis added).

[23] *Id.* at 27.

[24] 866 F.3d 782 (7th Cir. 2017). Other cases upon which the court relied, often inappositely, are discussed *infra*.

Spoofing Orders carried with them any implied misrepresentations is the central fact question presented by the indictment."[25] On a motion to dismiss, however, "the indictment's allegations—not those of the defendants—are the allegations that must be credited."[26] Accordingly, the court found that the question of "[w]hether the defendants made implied misrepresentations"—a "vigorously contested" question of fact—must be settled at trial, not on a motion to dismiss.[27]

III. THE COURT'S RULING IMPROPERLY PERMITS UTILIZATION OF THE WIRE FRAUD STATUTE AS A VEHICLE TO PROSECUTE SPOOFING

In concluding that wire fraud encompasses allegations of "implied misrepresentations" about supply and demand that "artificially manipulat[ed] and mov[ed] prevailing prices,"[28] the government and the court relied on cases that are distinguishable and do not support this conclusion. *First*, each of the wire fraud cases cited by the court involved a fiduciary or other duty to disclose and/or an affirmative misrepresentation, not "implied misrepresentations." *Second*, no facts alleged in the Indictment support the court's inference of "implied" misrepresentations regarding the intent of the defendants' orders, nor do the allegations support any implied misrepresentation about supply and demand. To the contrary, the CEA is clear that traders like the defendants are under no obligation to disclose the intent of their trades or their trading objectives. *Third*, *Coscia* does not support the result in *Vorley* because it involved a different statute, not wire fraud.

A. The Jurisprudence upon which the Court Relied Is Inapposite.

None of the cases upon which the court relied involved circumstances analogous to those in *Vorley*; namely, (1) allegations of wire fraud; (2) the absence of a fiduciary or other duty to disclose; (3) no affirmative misrepresentation; and (4) commodities trading (where, unlike securities trading, no duty to disclose attaches). The *Vorley* court pieced together selected language from dissimilar cases to support its denial of the motion to dismiss, but its conclusion cannot be reconciled with governing case law.

In *United States v. Lack*, for example, the Seventh Circuit affirmed the mail fraud conviction of an individual who stole money from his employer by depositing checks for sales on behalf of his employer into a bank account opened for his personal benefit, endorsed the checks with an official endorsement stamp bearing his employer's name, and set up a live operator telephone answering service that falsely answered with the name of his employer.[29] Similarly, in *United States v. Stephens*, the Seventh Circuit affirmed the wire fraud conviction of

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[25] Order at 6; *see id.* at 27-29 ("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.").
[26] *Id.* at 33.
[27] *Id.* at 37.
[28] *Id.* at 6; Indictment ¶ 10.
[29] 129 F.3d 403, 406 (7th Cir. 1997).

a defendant who submitted false reports seeking cash advances from his employer—even though he did not seek the money for any purpose related to work—reasoning that the request for funds on each report "carried the implied representation that it was for purposes related to work."[30]

The *Vorley* court relied upon both *Lack* and *Stephens* in denying the defendants' motion to dismiss,[31] but comparisons to these cases are inapt. *First*, the defendants in both cases made affirmative misrepresentations—a false endorsement and fake phone answering service, and false reports of cash advances. No similar misrepresentations were alleged in *Vorley*. *Second*, the *Lack* and *Stephens* defendants were employees who owed fiduciary duties of disclosure to their respective employers, whereas no similar duty is alleged in *Vorley*.

In *United States v. Doherty*, the government indicted the defendant for engaging in an elaborate "check kiting" scheme—that 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," which constitutes a "scheme to defraud."[32] Although the *Vorley* court relied upon this language to support its conclusion that implied representations (without any duty) may constitute wire fraud, and that a "scheme to defraud" under the criminal commodities fraud statute has the same meaning as under the wire fraud statute,[33] the underlying facts differ substantially from those in *Vorley*. Unlike the *Vorley* Spoofing Orders, which were real, executable orders, the checks at issue in *Doherty* were not valid orders and were themselves false and forgeries, and thus encapsulated the underlying fraud; they were affirmative representations that the checks were real when they were not. No one disputed that the *Vorley* orders were real; only the traders' implied intent in placing the orders and the perceived effects on the market were questioned.

Similarly, the court's reliance upon *Dial*[34] for the proposition that mere nondisclosure of intent can constitute an implied misrepresentation under the wire fraud statute is misplaced. Unlike *Vorley*, *Dial* centered upon a broker-customer fiduciary relationship. As the *Dial* court emphasized, "fraud in the common law sense of deceit is committed by deliberately misleading another by words, by acts, or, in some instances—*notably when there is a fiduciary relationship, which creates a duty to disclose all material facts*—by silence."[35] In *Dial*, the defendant futures brokers did not disclose to their customers—to whom they owed a fiduciary duty—that they were trading ahead of customer orders without meeting margin requirements. When one broker "solicited his customers to participate in block orders," he "implicitly represented to them that he would try to get the best possible price. He could have gotten a better price by putting their orders in ahead of the orders he placed for his own accounts and those of his friends," but "[i]n trading ahead of his customers without telling them what he was doing, he was misleading them for his own profit, and conduct of this type has long been considered fraudulent" under the

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[30] 421 F.3d 503, 507 (7th Cir. 2005).
[31] *See* Order at 21-22.
[32] 969 F.2d 425, 428 (7th Cir. 1992). The court also found that "'scheme to defraud' means the same thing" under the mail fraud, wire fraud, and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, 1344. *Id.* at 429.
[33] *See* Order at 15-17.
[34] *See id.* at 18.
[35] *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985) (emphasis added).

federal mail and wire fraud statutes.[36] Accordingly, by virtue of their fiduciary relationship to their customers, the brokers' nondisclosure of this information constituted a misrepresentation where there was a duty to disclose, given that a fiduciary "implicitly represent[s] to [his customers] that he" will try to get them "the best possible price" on their trades.[37] In contrast, the *Vorley* Indictment alleges no similar relationship between the defendants and other market participants, to whom they owed no fiduciary duty.

The *Vorley* court also highlighted that the alleged fraudulent scheme in *Dial* 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 supply and demand by injecting orders that were not backed by margin reserves."[38] The margin requirement, however, was an obligation imposed by the brokerage firm that employed Mr. Dial, and to whom Mr. Dial owed a duty by virtue of his employment contract.[39] By breaching the margin obligation, Mr. Dial shifted the risk of the trade to the brokerage firm, in violation of their agreement.[40] Moreover, Mr. Dial and his supervisor actively misrepresented Mr. Dial's compliance with the brokerage firm rules and hid his conduct from the brokerage firm: "Far from disclosing what they were doing, Dial and [his boss] actively concealed it by using an account with an uninformative name (Multi-Projects) and by . . . ordering the deletion of the Multi-Projects account" from the brokerage company's computer records.[41] As a result, the *Dial* court found that "trading an unmargined account was an *active misrepresentation* [to the brokerage firm] and hence actionable even without a breach of fiduciary duty," thereby expressly linking the absence of the necessity of a fiduciary duty to the defendants' "active misrepresentation."[42] No similar facts are alleged in *Vorley*; to the contrary, the government and the court accepted as true that the orders were placed in compliance with market rules and without any affirmative misrepresentation.[43]

Finally, the *Vorley* court quoted *Weimert* for the proposition that an omission absent a duty to disclose may be wire fraud, but failed to consider the facts of that case.[44] *Weimert*, like *Dial*, centered on a fiduciary employee-employer relationship in which the defendant allegedly inserted himself into a real estate deal and made certain representations about negotiating positions surrounding the deal.[45] The Seventh Circuit overturned the defendant's conviction and

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[36] *Id.*
[37] *Id.*
[38] Order at 18-19 (citing *Dial*, 757 F.2d at 169).
[39] *Dial*, 757 F.2d at 166.
[40] *Id.* at 169.
[41] *Id.*
[42] *Id.* (emphasis added).
[43] *Cf.* 17 C.F.R. § 180.1(b) (active misrepresentations may trigger duty to disclose). The *Vorley* court mischaracterized the nature of the allegations in *Dial* as "*implied misrepresentations* by futures traders made to counterparties about the bona fides of their bids and offers." Order at 35 (emphasis added).
[44] *See, e.g.*, Order at 7, 24, 31-32.
[45] *Weimert*, 819 F.3d at 354.

refused to "treat[] as criminal a person's lack of candor about the negotiating positions of parties to a business deal."[46]

In sum, the cases cited by the *Vorley* court found the existence of either an affirmative misrepresentation or a fiduciary (or similar) duty as a necessary predicate to a wire fraud charge. They do not support the conclusion that open market trading (without more) can imply misrepresentations sufficient to support a wire fraud charge.

B. The Alleged Facts Do Not Support an Inference of Implied Representations.

Weimert, in some ways, is similar to *Vorley*, in that orders in the commodities markets are often analogized to negotiations. The *Weimert* court set forth a simple example: "suppose a seller is willing to accept $28,000 for a new car listed for sale at $32,000. A buyer is willing to pay $32,000, but he first offers $28,000."[47] The parties negotiate and ultimately agree on $30,000. "Each side has gained from deliberately false misrepresentations about its negotiating position. Each has affected the other side's decisions. If the transaction involves interstate wires, has each committed wire fraud, each defrauding the other of $2000? Of course not."[48] As the *Weimert* court explained, negotiating parties, and certainly sophisticated businessmen like those in *Vorley*, "do not expect complete candor about negotiating positions, as distinct from facts and promises of future behavior."[49]

Similarly, commodities traders seek to buy low and sell high without disclosing their views about value. They often will submit orders that may not reflect their true assessment of the market, and do not disclose their market views, risk tolerance, or trading strategy. They thus may submit orders designed to bluff or signal misdirection, to hide their trading positions. Traders also frequently cancel orders for innumerable reasons, often seconds (or less) after entering them, and are not required to divulge those reasons to other market participants. And traders may employ different types of orders, such as "fill or kill" or icebergs. These practices are accepted and common in the industry. It is an axiom of commodity futures markets that traders owe no duty of disclosure to other market participants, absent an independent contractual duty or some affirmative misrepresentation.[50] Commodities trading is not like securities trading, which sets forth a complex disclosure regime that imposes duties of disclosure on many of its participants. No similar disclosure regime is imposed on commodities traders.

Nothing in the Indictment suggests that the defendants, in placing their orders in the market, acted inconsistently with these norms or made any statements or representations (implied

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[46] *Id.* The court also noted that "a breach of fiduciary duty combined with a mailing or wire communication is insufficient alone to establish mail or wire fraud." *Id.* at 367.
[47] *Id.* at 357-58.
[48] *Id.* at 358.
[49] *Id.*
[50] *Cf.* 17 C.F.R. § 180.1(b) ("Nothing in this section shall be construed to require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.").

or otherwise) about the orders or regarding supply and demand.[51] No IMs, emails, or phone calls with other market participants are alleged. Notwithstanding the Indictment's allegation that the defendants' orders carried an implicit message that the defendants were "intending to trade . . . when, in fact, they were not,"[52] no facts are alleged to support this implicit message, other than the orders themselves. For example, the Indictment does not allege that the defendants represented or said something implying that their orders would remain in the market for a certain period of time or would not be cancelled. Moreover, neither the government nor the court cited any case law finding that commodity futures orders imply some representations about the market or future trading. And it was undisputed that Mr. Vorley and Mr. Chanu intended to and did honor any Spoofing Orders that other market participants accepted.[53]

Instead, the government alleges in the Indictment that the defendants were silent, and that other market participants were fooled by "artificial[]" price movements caused by the Spoofing Orders that were "intended to manipulate . . . commodity futures prices."[54] Other market participants were deceived, not by any representations, but by "misleading impression[s]" of supply and demand caused when the Spoofing Orders were layered opposite the Primary Orders and moved "prevailing price[s]."[55] It also is axiomatic in criminal law that intent is not enough to prove a crime; there must be harm and, in the case of fraud, some deception. The only deception (and harm) alleged are the artificial price movements cause by the alleged scheme. The Indictment thus does not allege a wire fraud claim; it alleges a commodities manipulation claim.

C. Mr. Coscia Was Not Charged with Wire Fraud.

Although *Coscia* involved spoofing, the government did not charge wire fraud; instead, it charged commodities fraud under 18 U.S.C. § 1348(1).[56] The Seventh Circuit distinguished "*illusory* orders with an *illusion* of market movement," finding that Mr. Coscia "designed a scheme to pump and deflate the market through the placement of large orders . . . and thus sought to manipulate the market for his own financial gain."[57] The *Vorley* court characterized the alleged spoofing scheme before it as "materially the same as the commodities fraud scheme" charged in *Coscia*,[58] but this overlooks an important difference: *Coscia* did not involve wire fraud charges.[59]

18 U.S.C. § 1348 (the statute at issue in *Coscia*, under which Mr. Vorley and Mr. Chanu were *not* charged) criminalizes "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 . . . subsection (1), under which the defendant

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[51] *Cf. id.*
[52] Indictment ¶ 11.
[53] *See* Order at 6, 25.
[54] Indictment ¶¶ 7-8, 10.
[55] *Id.*
[56] *Coscia*, 866 F.3d at 785.
[57] *Id.* at 797 (citation and internal quotations omitted; emphases in original).
[58] Order at 7.
[59] MTD Memorandum at 3, 12; *see* Order at 8-9.

in *Coscia* was convicted, requires no such proof."[60] The wire fraud statute, in contrast, is not divided into two subsections, and thus defines only one "species" of fraud, which (as discussed above) historically has required an affirmative misrepresentation or a duty to disclose.[61] Thus, § 1348 is broader, and covers more conduct, than the wire fraud statute. That the government charged Mr. Coscia under subsection 1348(1), which requires no affirmative misrepresentation, underscores the fact that the conduct at issue in *Coscia*—an alleged spoofing scheme similar to that alleged in *Vorley*—involved no affirmative misrepresentations and thus was not wire fraud. Put simply, *Coscia*'s interpretation of § 1348 says nothing about the scope of wire fraud, and the *Vorley* court's attempts to analogize the two[62] misses the mark.

The scheme alleged in *Coscia* involved allegations of price impact and the creation of artificial prices in the market.[63] *Coscia* was charged with "deceiv[ing] market participants" about market prices[64]—a traditional form of manipulation covered by the securities and commodities fraud statutes, which focuses on the creation of an artificial price.[65] This is different from wire fraud, where the case law has focused on specific representations made in wire communications. If a "scheme to defraud" under the wire fraud statute, 18 U.S.C. § 1343, covers the same conduct prohibited by the criminal commodities fraud statute, 18 U.S.C. § 1348, query why Congress bothered to undertake amending 18 U.S.C. § 1348 to cover commodities fraud (in addition to securities fraud) in 2009.[66] Indeed, the wire fraud statute existed when Congress expanded § 1348 to cover commodities fraud, and if wire fraud encapsulated all commodities fraud, Congress would have had no reason to enact a separate commodities fraud statute.

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[60] Order at 10; *see* MTD Memorandum at 11-12. Subsection 1 of 18 U.S.C. § 1348 prohibits in relevant part the knowing execution or attempted execution of a "scheme or artifice [] to defraud any person in connection with any commodity for future delivery," and subsection 2 prohibits any such scheme or artifice "to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery."

[61] Order at 10; *see* MTD Memorandum at 11-12.

[62] *See* Order at 15.

[63] *See, e.g.*, Order at 27 ("As alleged, the Spoofing Orders created artificial prices . . . ."); *Coscia*, 866 F.3d at 785 (Mr. Coscia allegedly "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").

[64] *Coscia*, 866 F.3d at 800.

[65] *Coscia* also involved unique facts, which differed significantly from those at issue in *Vorley*. Mr. Coscia allegedly commissioned and used "preprogrammed algorithms to execute commodities trades in high-frequency trading," for example, which cancelled approximately 99.5% (or more) of his large orders (alleged Spoofing Orders) prior to execution, and Mr. Coscia's cancellations represented 96% of all cancellations in the relevant market during the period in which he employed this software. *Coscia*, 866 F.3d at 787, 789, 795-96. These algorithms thus had a deceptive and manipulative purpose, and Mr. Coscia's conduct accordingly fell squarely within the parameters of the commodities fraud statute. *See id.* at 797.

[66] *See* Order at 19 n.18 (citing Fraud and Enforcement and Recovery Act of 2009 (FERA) § 2(e), Pub. L. 111-21, 123 Stat. 1617 (May 20, 2009)).

The impropriety of the *Vorley* market orders did not arise from the allegedly "fraudulent" nature of the orders, but rather from the traders' use of the orders (along with other orders) as part of a scheme to move market prices. It is the intent combined with the market harm that renders it manipulative, and therefore deceptive. Stated simply, there was nothing inherently false about the *Vorley* Spoofing Orders. They may violate the spoofing prohibition or artificially induce others to trade at artificial prices, but they are not wire fraud.

IV. CONCLUSION

The *Vorley* court's decision carries profound implications for the CEA's anti-manipulation provisions. Under the rationale set forth in *Vorley*, all forms of fraud and manipulation (including spoofing) are the same and may be prosecuted under the wire fraud statute. This ignores the distinctions made in the CEA, which broadly prescribes three forms of fraud and manipulation: (1) traditional fraud (misrepresentation or omission where there is a duty to disclose), (2) fictitious transactions or other actions disruptive to price formation (*e.g.*, wash or prearranged trades), and (3) price manipulation.[67] Each has developed certain standards of proof and prerequisites under the regulations and case law; each also may be pursued criminally on its own merits.[68] If the court's ruling is correct, however, these distinctions are eliminated, and each may be criminally prosecuted simply because the trades occurred on an electronic exchange. CFTC Rule 180.2, 17 C.F.R. § 180.2 (which prohibits non-fraud-based manipulation), and the criminal commodities fraud statute are rendered superfluous because the government may charge any alleged spoofing scheme or other type of manipulation as wire fraud. Congress cannot have had such an illogical result in mind when, in connection with Dodd Frank, it enacted two separate anti-manipulation provisions in the CEA, 7 U.S.C. §§ 9(1), 9(3),[69] and prohibited spoofing—all well after the wire fraud statute had been on the books for years.

The *Vorley* decision's ramifications extend to commodity market participants as well. Indeed, *Vorley* holds that the placement of an order on a commodity futures exchange may be interpreted after the fact to carry with it any number of implicit representations to other market participants—notwithstanding that commodity market participants have no affirmative duty to disclose. Accordingly, if a trader places real, active orders in the market that the government considers "spoof orders," the trader has not only potentially violated the CEA, but also allegedly

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[67] *See* 7 U.S.C. § 9. The CEA also criminalizes other noncompliance with its rules and regulations. *See, e.g.*, 7 U.S.C. § 13(a).

[68] *See generally In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013); CFTC Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,407 (Rule 180.2 "will be guided by the traditional four-part test that has developed in case law," which requires "that a person must act with the requisite specific intent. In other words, recklessness will not suffice under final Rule 180.2."); *id.* at 41,398 ("final Rule 180.1 implements the provisions of CEA section 6(c)(1) by prohibiting, among other things, manipulative and deceptive devices, i.e., fraud and fraud-based manipulative devices and contrivances employed intentionally or recklessly . . .").

[69] *See Ratzlaf v. United States*, 510 U.S. 135, 141 (noting the Court's "'deep reluctance' to interpret statutory provisions 'so as to render superfluous other provisions in the same enactment'") (citation omitted).

defrauded other market participants (without making any representations) and committed criminal wire fraud, which then gives the government a powerful tool to extend the statute of limitations. This has the potential to open the prosecutorial floodgates, arming the government with ammunition to charge decade-old conduct not under the CEA—the very statute enacted to prohibit the conduct at issue—but as wire fraud, extending the statute far beyond what Congress envisioned and rendering superfluous both the commodities fraud statute and the CEA provisions Congress enacted to prohibit spoofing and price manipulation. This cannot have been the result Congress intended. In sum, the *Vorley* decision was misguided and wrongly decided.