No. 16-3017

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL COSCIA,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 14-cr-551
The Honorable Judge Harry D. Leinenweber

PETITION FOR REHEARING *EN BANC* OF DEFENDANT-APPELLANT MICHAEL COSCIA

KOBRE & KIM LLP

111 W. Jackson Boulevard
17th Floor
Chicago, Illinois 60604
+1 312 429 5100

Michael S. Kim
David H. McGill
Melanie L. Oxhorn

DENTONS US LLP

233 S. Wacker Drive, Suite 5900
Chicago, Illinois 60606
+1 312 876 8000

Stephen J. Senderowitz
Marilyn B. Rosen

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3017

Short Caption: United States v. Michael Coscia

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✓] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Michael Coscia

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kobre & Kim LLP, Dentons US LLP, Sullivan & Cromwell LLP, Stetler, Duffy & Rotert, Ltd.,

Thompson Coburn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Michael S. Kim Date: 08/21/2017

Attorney's Printed Name: Michael S. Kim

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: Kobre & Kim LLP

111 W. Jackson Boulevard, 17th Floor, Chicago, Illinois, 60604 (revised address)

Phone Number: 312-429-5100 (revised phone number) Fax Number: 212-488-1220

E Mail Address: michael.kim@kobrekim.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3017

Short Caption: United States v. Michael Coscia

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✓] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Michael Coscia

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kobre & Kim LLP, Dentons US LLP, Sullivan & Cromwell LLP, Stetler, Duffy & Rotert, Ltd.,

Thompson Coburn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ David Harrison McGill   Date: 08/21/2017

Attorney's Printed Name: David Harrison McGill

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** X

Address: Kobre & Kim LLP

111 W. Jackson Boulevard, 17th Floor, Chicago, Illinois, 60604 (revised address)

Phone Number: 312-429-5100 (revised phone number)   Fax Number: 212-488-1231

E Mail Address: david.mcgill@kobrekim.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3017

Short Caption: United States v. Michael Coscia

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Michael Coscia

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kobre & Kim LLP, Dentons US LLP, Sullivan & Cromwell LLP, Stetler, Duffy & Rotert, Ltd.,

Thompson Coburn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Melanie L. Oxhorn Date: 08/21/2017

Attorney's Printed Name: Melanie L. Oxhorn

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Kobre & Kim LLP

111 W. Jackson Boulevard, 17th Floor, Chicago, Illinois, 60604 (revised address)

Phone Number: 312-429-5100 (revised phone number) Fax Number: 212-488-1220

E Mail Address: melanie.oxhorn@kobrekim.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3017

Short Caption: United States v. Michael Coscia

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Michael Coscia

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kobre & Kim LLP, Dentons US LLP, Sullivan & Cromwell LLP, Stetler, Duffy & Rotert, Ltd.,

Thompson Coburn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Stephen J. Senderowitz Date: 08/21/2017

Attorney's Printed Name: Stephen J. Senderowitz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Dentons US LLP 233
S. Wacker Drive, Suite 5900, Chicago, Illinois 60606

Phone Number: 312-876-8000 Fax Number: 312-876-7934

E Mail Address: stephen.senderowitz@dentons.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3017

Short Caption: United States v. Michael Coscia

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Michael Coscia

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kobre & Kim LLP, Dentons US LLP, Sullivan & Cromwell LLP, Stetler, Duffy & Rotert, Ltd.,

Thompson Coburn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Marilyn B. Rosen Date: 08/21/2017

Attorney's Printed Name: Marilyn B. Rosen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Dentons US LLP

233 S. Wacker Drive, Suite 5900, Chicago, Illinois 60606

Phone Number: 312-876-8000 Fax Number: 312-876-7934

E Mail Address: marilyn.rosen@dentons.com

rev. 01/15 GA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND RULE 35(b) STATEMENT IN SUPPORT OF REHEARING *EN BANC*

Mr. Coscia was the first person to be convicted under a provision of the Commodity Exchange Act ("CEA") criminalizing trading activity that "is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. § 6c(a)(5)(C). The resolution of his appeal raises a question of exceptional importance to the U.S. commodity futures markets: whether the CEA's anti-spoofing provision criminalizes trading algorithms designed to cancel orders in response to conditions subsequent to the placement of the order. In holding that Mr. Coscia's use of conditional cancellation parameters in his trading algorithm "clearly indicate an intent to cancel" and that the use of these parameters "clearly falls within the confines of the conduct prohibited by the statute" (Op. 22), the Panel misapplied its own newly-articulated test for distinguishing lawful and unlawful trading, and expanded the standard for "intent to cancel" to encompass the mere hope or expectation of cancellation.[1] The resulting judicial guidance makes it impossible for traders to determine which types of conditional cancellation logic are lawful and which are criminal, enhancing the risk of unconstitutional arbitrary enforcement by executive branch agencies.

---

1 Citations to "Op." are to the Panel's August 7, 2017 Opinion in this matter. Citations to "Dkt." are to the District Court record. Citations to

On appeal, Mr. Coscia challenged the constitutionality of the spoofing provision as applied to his orders, all of which were subject to legitimate execution risk and cancelled only upon the occurrence of one of three subsequent contingencies: "(1) after the passage of time, (2) if the small orders were filled, or (3) if a single large order was filled." Op. 22, 24. In particular, Mr. Coscia argued that, if literally construed, the CEA's anti-spoofing provision would criminalize a wide range of commonplace trading activity and industry-standard cancellation protocols based purely on the subjective intent imputed to a trader, and that the statute failed to provide fair notice of this extreme aim.

In rejecting Mr. Coscia's constitutional challenge, the Panel fashioned a new test for distinguishing lawful from unlawful trading: "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." Op. 24. This distinction is the bedrock of the Panel's decision – it is the standard by which the Government's decision to apply the spoofing statute to Mr. Coscia was measured, and presumably the standard that will be applied to future prosecutions. Yet, under the Panel's own test, Mr. Coscia's orders should have been found lawful because his conditional cancellation protocol fits squarely within the safe harbor the Panel created for cancellations "following a

"Tr." are to the consecutively numbered pages of the trial transcript. Citations to "Gov't Ex." and "Def. Ex." refer to the parties' trial exhibits.

condition subsequent to placing the order." His criminal conviction is thus the very epitome of arbitrary enforcement.

Despite the objective (and undisputed) evidence of the conditional cancellation protocols utilized by Mr. Coscia, the Panel asserted without factual basis in the record that "Mr. Coscia did not place orders with intent to cancel *under certain circumstances*—he placed orders with the present intent to *always cancel* the large orders." Op. 24 n.45 (emphasis in original). Because this conclusion cannot be reconciled with the actual trading algorithm (and the Panel's own characterizations of it), it would appear that the Panel applied a new and expansive definition of "intent" that encompasses the mere *hope* or *expectation* of cancellation. In other words, under the Panel's confusing standard, the question of whether a trader who places an otherwise lawful order with subsequent conditions for cancellation is committing a crime turns entirely on whether the trader hoped or expected the order would be filled. This novel construction of "intent" is at odds with long-standing precedent from this Court and the Supreme Court, and its application to markets where the vast majority of orders are cancelled before execution – often based solely on the passage of time – threatens to chill trading activity and reduce liquidity in markets of vital national importance.

Rehearing *en banc* should be granted to provide much needed clarity as to whether placing orders with the intent to cancel them before execution upon the occurrence of a subsequent market condition, such as the passage of time or a partial fill, is "legal" (as the Panel's new test suggests and Mr. Coscia reasonably presumed), or whether placing orders with a conditional cancellation protocol is illegal under the anti-spoofing provision (as the Panel concluded in relation to Mr. Coscia).

FACTUAL AND PROCEDURAL BACKGROUND

A. Order Cancellations Are Commonplace In The Relevant Markets.

By 2011, high-speed, algorithmic trading comprised approximately 65% of all trading activity in the commodity futures markets. Tr. 1143. Algorithmic traders use pre-programmed trading logic to place, cancel, or execute orders within milliseconds. *See* Tr. 239, 668-70, 743-44, 1159-60; Def. Ex. 504.

As the SEC Commissioner stated in 2010, "[w]e know that, in the ordinary course, many high frequency trading firms cancel 90 percent or more of the orders they submit to the markets." Dkt. 27-3. Trial testimony showed that some high-frequency traders in the relevant markets cancel 98% of their orders before execution. Tr. 1164-65. High-frequency trading is synonymous with high cancellation rates. Tr. 239.

Orders are often cancelled very quickly in the commodity futures markets in which Coscia traded. Indeed, nearly *630 million* orders were cancelled *within a second* in the relevant markets during the ten weeks at issue. Dkt. 156-1 ¶ 13

B. As The Panel Acknowledged, It Is Common And Lawful To Cancel Orders Upon The Occurrence Of Subsequent Conditions.

Widely used order types allow traders to place and cancel orders quickly based on the occurrence of specified conditions. For example:

- "Fill-or-kill" orders are programmed to cancel if not filled immediately. Tr. 1165.
- "Fill-and-kill" orders are immediately filled in whole or in part, with any remaining quantities cancelled. Tr. 1165-66.
- "Good-till-date" (or "Time-to-Live") orders are programmed to cancel within a defined period of time. Tr. 1165; *see* Tr. 1013.
- "Partial-fill" orders are subject to cancellation after partial execution. Tr. 238, 1149-50.
- "Stop-Limit" orders are designed to buy or sell a position only if market prices move in an adverse direction. Tr. 1166-67.

Leading exchanges officially authorize all of these order techniques and recognize them as economically rational and legitimate. Tr. 237-38, 1156, 1165-66; Def. Ex. 207.

It is also common industry practice for algorithmic traders to incorporate conditional cancellation protocols into trading algorithms that provide for cancellation of orders in response to a subsequent condition, such as the passage of time or a partial fill. Indeed, one of Mr. Coscia's purported "victims" testified that the use of such protocols is "routine for any algorithms that's designed." Tr. 676-77; *see also* Tr. 536-37, 1159-60, 1164-54.

C. Mr. Coscia's Trading Algorithm Was Programmed To Cancel Orders Upon The Occurrence Of Subsequent Conditions.

In August 2011, Mr. Coscia began using a trading algorithm for commodity futures listed on CME and ICE exchanges that was designed to facilitate trading by creating a "lopsided market." *See* Tr. 558, 599, 875-78. The algorithm would first place an order on one side of the market at the best available price, and then place a set of larger orders on the other side. Tr. 254-55, 478-79, 559-560. The "large" orders would be placed at levels approaching the best price in the market: the first order would be two levels away, the second order would be one level away, and the third order would be at the best available price. *Id.*

Mr. Coscia's program, like most trading programs, included a conditional cancellation protocol. Tr. 676-77, 882-84, 1160. If the smaller order was executed, the program would cancel the remaining orders and enter another series of orders in the opposite direction to re-establish a lopsided market. All of Mr. Coscia's orders (both large and small) were programmed to cancel if one of his large orders was partially filled. Tr. 896. His orders would also cancel after being available to trade for 100 to 450 milliseconds, which is a long time by high-frequency trading standards, given that algorithmic traders are capable of executing orders within 1 to 10 milliseconds. *See* Gov't Ex. Quote Trader Settings; Tr. 676, 744, 768, 1142-43. In sum, Mr. Coscia's "program would cancel the large orders (1) after the passage of time, (2) if the small orders were filled, or (3) if a single large order was filled." Op. 22.

D. Procedural History.

On October 1, 2014, the U.S. Attorney's Office (N.D. Ill.) brought a criminal case against Mr. Coscia alleging six counts of spoofing and six counts of commodity fraud based on a common nucleus of facts. A jury convicted Mr. Coscia on all counts.

On appeal, Mr. Coscia argued that the anti-spoofing provision is impermissibly vague and authorizes arbitrary enforcement to the extent that it has been construed to criminalize his intent to cancel orders upon the occurrence of a subsequent contingency. The Panel recognized that such conditional cancellations are lawful, yet nonetheless upheld the application of the spoofing provision to Mr. Coscia's trading on the ground that it "falls well within the core of the anti-spoofing provision's prohibited conduct[.]" Op. 22, 24. The Panel reasoned that spoofing, as manifested by Mr. Coscia's conditional trading logic, was "meaningfully different from legal trades such as 'stop-loss-orders [. . .] or 'fill-or-kill orders' [. . .] because those orders are designed to be executed upon the arrival of *certain subsequent events*." Op. 24 (emphasis in original). According to the Panel, "[t]he fundamental difference is that legal trades are cancelled only following a condition subsequent to placing the order, whereas orders placed in a spoofing scheme are never intended to be filled at all." *Id.*

ARGUMENT

The Panel recognized that algorithmic traders may lawfully cancel orders based on the occurrence of pre-programmed contingencies (as they do on a virtually constant basis in the markets at issue), yet arbitrarily failed to apply that standard to Mr. Coscia's trading algorithm, which cancelled orders only upon the occurrence of subsequent contingencies. Its decision leaves substantial doubt as to the legality of a vast array of conditional cancellation protocols and order types that, at least until now, had been widely understood to be legitimate, while also leaving Mr. Coscia imprisoned based on a vague and arbitrary prohibition. This is beyond what the Constitution permits.

A. The Panel's Failure To Coherently Distinguish Mr. Coscia's Conditional Trading From "Legal Trades" Underscores The Constitutional Infirmity Of The Anti-Spoofing Statute.

Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). When neither the statutory text nor the legislative history unambiguously establish Congressional intent, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," which "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota v. United States*, 471 U.S 419, 427 (1985). A statute that authorizes arbitrary enforcement by "sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application," is also constitutionally impermissible. *Ashton v. Kentucky*, 384 U.S. 195, 199 (1966).

In light of these principles, the Panel apparently recognized the need to distinguish between lawful and unlawful order and cancellation activity in markets in which traders regularly place orders with intent to cancel them upon the occurrence of subsequent conditions, such as the passage of time or trading activity. According to the Panel, the "fundamental difference" between legal and illegal trading is that "legal trades are cancelled only following a condition subsequent to placing the order, whereas orders placed in a spoofing scheme are never intended to be filled at all." Op. 24; *see also id.* at 24 (recognizing stop-loss-orders and fill-or-kill orders are lawful "because those orders are designed to be executed upon the arrival of *certain subsequent events*") (emphasis in original). Thus, under the Panel's own interpretation of the anti-spoofing provision, the statute prohibits the placement of an order with an absolute and unconditional intent to cancel before execution, but does *not* prohibit the placement of an order with intent to cancel before execution upon the occurrence of subsequent contingencies.

The problem with the Panel's decision is that it failed to consistently apply the Panel's own test for what constitutes lawful trading to the charged conduct. As explicitly recognized by the Panel, Mr. Coscia's trading algorithm provided for the cancellation of orders only if one of three subsequent conditions was satisfied: "(1) after the passage of time, (2) if the small orders were filled, or (3) if a single large order was filled." Op. 22. Under the Panel's reasoning, the use of such conditional cancellation protocols cannot sustain a finding of unqualified intent to cancel an order before execution:

- First, placing an order with the intent to cancel it after a predetermined amount of time passes is conditional, commonplace, and consistent with "Good-till-date" (also referred to as "Time-to-Live") orders, which are exchange-approved order types that allow traders to rapidly enter and exit the market. *See* Tr. 676-77, 679, 1109, 1013, 1165-66.

- Second, placing an order with the intent to cancel it after another order is executed on the other side of the market is conditional, commonplace, and consistent with rational economic behavior, as evidenced by the Government's witness who testified that it would be "routine" for an algorithm to cancel an order "because something else trades in the market." Tr. 676-77.

- Third, placing an order with the intent to cancel it upon partial execution evinces intent to accept a partial fill, and the District Court's jury instructions confirm that partial fills are lawful. Dkt. 85 at 25-26. Cancelling the balance of an order after a partial fill (which establishes a new price and new market condition) is also consistent with sound risk management, since demand from multiple counterparties for a given order may signal an information gap, and that the market is poised to move against a trader's position. *See* Tr. 896-98, 953-54.

To be sure, the algorithmic trading logic utilized by Mr. Coscia is the perfect distillation of his intent. Indeed, there is no evidence in the record to suggest that his programmer, Jeramiah Park, failed to implement the design that Mr. Coscia intended.[2] Rather, all of the

[2] The Panel's opinion conflates Mr. Park's description of "ping" orders – what Mr. Park characterized as "decoy" orders – with the order

evidence and testimony pertaining to the development of Mr. Coscia's trading algorithm confirms that it functioned as intended by placing orders that were subject to cancellation only after subsequent conditions materialized in the marketplace.

Against this evidentiary backdrop, the Panel's holding that "legal trades are cancelled only following a condition subsequent to placing the order" should have rendered Mr. Coscia's trading *lawful*. Op. 24. Every order Mr. Coscia placed was, as a matter of mathematical design, subject to cancellation only upon a "condition subsequent." *Id.* Under the Panel's own interpretation of the anti-spoofing provision, therefore, his trading should have been deemed "meaningfully different" from the conduct proscribed by the statute. *Id.* That the Panel instead invoked conditional trading logic to both exemplify lawful trading and sustain Mr. Coscia's conviction is clear evidence of arbitrary enforcement.

B. The Panel Appears To Have Criminalized Mere Hope Or Expectation Of Cancellation.

As demonstrated above, Mr. Coscia's orders were not placed with an unconditional intent to cancel before execution; they were canceled if and only if a specified condition occurred, a circumstance that is commonplace in the industry and that the Panel recognized to be lawful. Because the Supreme Court has condoned the application of a

---

activity charged by the Government. In any event, as the trial evidence makes clear, ping orders are commonly utilized in the marketplace to ascertain market conditions. Tr. 498, 527-28, 919.

conditional intent standard only under circumstances where Congress clearly intended that legislative aim, *see, e.g., Holloway v. United States*, 526 U.S. 1 (1999), and because no such circumstances are apparent from the anti-spoofing statute (or its legislative history), Mr. Coscia's conditional intent could not have sustained his spoofing conviction. Rather, it appears that the Panel predicated its decision, at least implicitly, on a novel – and unprecedented – interpretation of the specific intent standard to criminalize the mere *hope* or *expectation* of an otherwise lawful action – in this case, the cancellation of an order. This extraordinary expansion of the specific intent standard warrants further review by the Court for at least two reasons.

First, the implicit adoption of an intent standard that criminalizes the mere hope or expectation of securing an otherwise lawful objective contravenes decades of jurisprudence from this Court and the Supreme Court. Under these precedents, specific intent requires more than mere "knowledge" that a particular result will follow from one's conduct. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 405 (1980) ("In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent"); *accord United States. v. Manganellis*, 864 F.2d 528, 533 (7th Cir. 1988) (observing that commentators have noted that "something more than knowledge is required for specific intent crimes"). To demonstrate specific intent, the Government must make an affirmative showing of "heightened culpability" and "specific purpose" to violate the law. *Bailey*, 444 U.S. at 405. Because knowledge alone cannot sustain a finding of specific intent, *a fortiori* the mere hope or expectation that an order will be cancelled before execution is also insufficient.[3]

Second, given the current realities of the U.S. commodities futures markets, where the vast majority of all orders are cancelled prior to execution, the application of a "hope" or "expectation" standard of specific intent would transform virtually every trader in these markets into a criminal, subject to prosecution at the Government's unfettered discretion. While a rational juror might have concluded that Mr. Coscia hoped or expected that his "large" orders would be cancelled before they

[3] It is also conceivable that the Panel redefined the "intent to cancel" standard as "intent to manipulate by cancelling" – indeed, neither the District Court nor the Panel was able to articulate the "core" of what the spoofing statute prohibits without characterizing it as a form of manipulation. *See, e.g.*, Op. 2, 5-6, 20 n.40 (describing spoofing as involving "artificial" market movements and "manipulative cancellations"). Yet Congress deliberately chose to bifurcate the CEA's prohibition on "disruptive" practices, which appear in Section 4 (codified at 7 U.S.C. § 6c), from its prohibitions on "manipulative" practices, which appear in Section 6 of the CEA (codified at 7 U.S.C. § 9); *see also* 7 U.S.C. § 7(a)(2) (categorizing the disruptive practices provisions as distinct from manipulation). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same [a]ct, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rusello v. United States*, 464 U.S. 16, 23 (1983) (internal citation and quotation marks omitted). This is perhaps why the CFTC "interprets the prohibitions in CEA Section 4c(a)(5) to be distinct statutory provisions from the anti-manipulation provisions in Section 753 of the Dodd-Frank Act" (Section 6 of the CEA). *See* CFTC Antidisruptive Practices Authority, 78 FR 31890-01, 31892 (May 28, 2013). Simply put, if Congress had intended the crime of spoofing to be a subspecies of manipulation, there would have been no need to categorize it separately.

were executed, no reasonable person in Mr. Coscia's position in 2011 would have had fair notice that the anti-spoofing provision would be interpreted in such a sweeping manner as to criminalize a very common and perfectly rational thought process. *See Stoller v. CFTC,* 834 F.2d 262, 266-67 (2d Cir. 1987) (reversing the CFTC's order and finding that "the commonplace nature of [Stoller's] trading, combined with the absence of enforcement, would further buttress a reasonable inference that the conduct was permissible"); *see also Liparota*, 471 U.S. at 425-27 ("Congress *could* have intended that this broad range of conduct be made illegal [. . . but] given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation.") (emphasis in original).

Ultimately, irrespective of whether the Panel predicated its decision on a finding of conditional intent or a finding that Mr. Coscia hoped or expected to cancel his orders before execution, the decision contravenes well-settled law and should be reconsidered.[4]

---

[4] After rehearing, Mr. Coscia's commodity fraud convictions should fall with the spoofing convictions. The Panel upheld Mr. Coscia's commodity fraud convictions precisely because, "at the time he placed the large orders, he intended to cancel the orders." Op. 29. To the extent that the Court concludes that Mr. Coscia's conditional trading satisfied the Panel's definition for what constitute "legal trades" or otherwise determines the anti-spoofing provision impermissibly encourages arbitrary enforcement, there would no longer be a factual predicate for a finding that Mr. Coscia acted with fraudulent intent. *See, e.g., United States v. O'Hagan*, 92 F.3d 612, 627 (8th Cir. 1996), *rev'd on other grounds*, 521 U.S. 642 (1997) (vacating securities fraud counts and then vacating mail fraud counts based on the same underlying conduct).

CONCLUSION

For the reasons set forth above, Mr. Coscia respectfully requests that the Court grant his petition for rehearing *en banc*.

Dated: August 21, 2017
Chicago, Illinois

Respectfully submitted,

KOBRE & KIM LLP

By: /s/ Michael S. Kim
Michael S. Kim
David H. McGill
Melanie Oxhorn

111 W. Jackson Boulevard, 17th Fl.
Chicago, Illinois 60604
+1 312 429 5100

DENTONS US LLP
Stephen J. Senderowitz
Marilyn B. Rosen

233 S. Wacker Drive, Suite 5900
Chicago, Illinois 60606
+1 312 876 8000

Attorneys for Michael Coscia

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2017, service of the foregoing document was made to all counsel of record via ECF.

Upon notice of this Court's acceptance of the electronic petition for filing, I certify that I will cause thirty copies of the petition to be transmitted to the Court within 3 days of that notice date.

Dated: August 21, 2017
Chicago, Illinois

KOBRE & KIM LLP

By: /s Michael S. Kim
Michael S. Kim
Michael.Kim@KobreKim.com

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because this petition contains 3,595 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Bookman Old Style, Font Size 12.

Dated: August 21, 2017
Chicago, Illinois

KOBRE & KIM LLP

By: /s Michael S. Kim
Michael S. Kim
Michael.Kim@KobreKim.com