

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

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| COMMODITY FUTURES TRADING |) | |
| COMMISSION, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 1:18-CV-00619 |
| |) | |
| JITESH THAKKAR AND |) | |
| EDGE FINANCIAL TECHNOLOGIES, INC., |) | |
| |) | |
| Defendants. |) | |
| |) | |

**PLAINTIFF COMMODITY FUTURES TRADING COMMISSION’S RESPONSE AND
OBJECTION TO DEFENDANTS’ RENEWED MOTION FOR SUMMARY JUDGMENT**

After ignoring the CFTC’s requests to meet and confer regarding incomplete document discovery and planned third-party depositions, Defendants have filed a premature Renewed Motion requesting summary judgment in a transparent attempt to block the CFTC from pursuing legitimate and reasonable discovery. Although the CFTC regrets an additional written submission before Defendants present their motion, Defendants’ mischaracterization of the discovery record in this case warrants a response.

First, Defendants state that “document discovery issues have been resolved,” when that is not the case. The CFTC has requested that Defendants meet and confer on two outstanding document discovery issues: (1) the accessibility of data reflecting Defendants’ extensive testing of the software application they programmed for Trader A, and (2) the existence of any instant message communications discussing the software application Defendants programmed for Trader A and whether Defendants’ search and collection of relevant documents included instant

message communications. Defendants' Renewed Motion should not relieve them of their duties to meet and confer.

Second, the CFTC objects to Defendants' Renewed Motion to the extent that Defendants are using this motion to delay depositions properly obtained through Rule 45 subpoenas. Although the CFTC notified Defendants of these subpoenas weeks ago, Defendants have refused to discuss the CFTC's proposed depositions in any way or confirm their availability on the CFTC's requested dates. Defendants' decision now to file the Renewed Motion should not be a basis for preventing any properly served deposition from going forward as scheduled. As explained below, the CFTC's requested depositions of former Edge Financial Technologies, Inc. ("Edge") employees who helped develop the program for Trader A are highly relevant and proportional to the needs of the case.

Finally, Defendants noticed a December 10 presentment date for their motion, even though the Court scheduled a status hearing months ago for December 11. Plaintiff is available on December 10 and requests that the Court and parties address all outstanding issues on that date and vacate the December 11 hearing.

I. Defendants' Renewed Motion is Premature Because Document Discovery is Not Complete

At the September 11 hearing, this Court required Defendants to defer re-filing their motion until "you can confirm that all the document issues have been resolved." *See Ex. 1* at 10:10-12. Several document issues have not been resolved. Plaintiff sought to avoid burdening the Court with these issues and requested to meet and confer with Defendants. Despite Plaintiff's efforts, Defendants have refused to even discuss these issues, opting instead to file the Renewed Motion and to state no such issues existed.

As an initial matter, Defendants have failed to finally confirm that they have produced all relevant documents in their possession, as required by the Court's Standing Order Regarding the Mandatory Initial Discovery Pilot Project. On October 23, 2019, Defendants' counsel responded to the CFTC's counsel that he believed Defendants had produced all relevant documents, but he would reconfirm with his clients that all relevant documents have been produced. *See Ex. 2.* To date, Defendant's counsel has not provided that confirmation.

The CFTC's concern over the completeness of Defendants' document production was prompted by evidence—from a third-party production—that Mr. Thakkar communicated with Edge employees regarding work performed for Trader A using instant messaging (“IM”) chats. *See Ex. 3.* Such IM communications are clearly relevant to the CFTC's claims. Defendants never produced IMs, either in response to the CFTC's May 2015 Voluntary Request or in any document production in this litigation. On November 26, the CFTC asked Defendants to provide basic information regarding the systems Defendants' employees used to communicate via IM and the policies and procedures in place for saving, archiving, and retaining IMs, and invited Defendants to meet and confer on this issue. *See Ex. 4.* Defendants never responded.¹

Moreover, Defendants represented that a hard drive containing potentially significant evidence of Defendants' testing of its program for Trader A was no longer accessible because at some point in time, the hard drive “crashed.” *See Ex. 5* at 5-6. Defendants did not produce the contents of the hard drive. On November 20, and again on November 26, Plaintiff requested that Defendants meet and confer on this issue. *See Ex. 6, Ex. 4.* Again, Defendants never responded.

¹ In addition, the CFTC has identified additional internal Edge Financial Technologies, Inc. email communications produced by third parties that are highly relevant to the core factual issue in this case, whether Defendants knew that Trader A intended to use the software application they programmed for Trader A to engage in spoofing. The existence of these email communications, and their absence from any production from Defendants to date, raise questions regarding the scope of Defendants' search for documents, the potential existence of any additional relevant documents, and Defendants' record retention that the CFTC intends to pursue with further written discovery.

Because these document discovery issues have not yet been resolved, Plaintiff requests that the Court deny Defendant's motion as premature and order Defendant to meet and confer with Plaintiff consistent with Defendant's discovery obligations.

II. The CFTC's Requested Depositions are Relevant and Proportional

The CFTC is seeking to take depositions of four former Edge employees who helped develop and test the software application program for Trader A.² Plaintiff provided notice to Defendants before attempting to serve Rule 45 subpoenas on these former Edge employees and asked Defendants' counsel to confirm whether or not he would be representing them. Defendants never responded, but instead filed the Renewed Motion suggesting that the CFTC must make a preliminary showing of relevance before it can proceed with these depositions.

Nothing in the Renewed Motion prevents Plaintiff from proceeding to take depositions on the dates noticed that were properly served in accordance with Rule 45.³ Nevertheless, there is ample evidence in the discovery record demonstrating the clear relevance and importance of the testimony of these former Edge employees. After all, the CFTC has sued Edge for aiding and abetting Trader A's spoofing, and the collective knowledge of Edge, including the knowledge of former Edge employees involved in programming the software application, is relevant.

In addition, the CFTC seeks the testimony of these former employees who helped Mr. Thakkar develop the software application program to pressure-test Mr. Thakkar's claim that he had no knowledge of Trader A's intentions. Such depositions are reasonable. For example, on January 24, 2012, Mr. Thakkar appears to have prepared notes of a conversation with Trader A about Trader A's requirements for the software application and sent them to Mitul Patel, one of

² The CFTC does intend to take depositions of other individuals in addition to these four as well as a Rule 30(b)(6) deposition of Edge.

³ As of the filing of this Response, the CFTC has successfully served one of the four former Edge employees, Daniel Wu, and has arranged for his deposition to take place on December 17, 2019 in Milwaukee, Wisconsin.

the former Edge programmers that the CFTC seeks to depose. *See Ex. 7*. In these notes, Mr. Thakkar stresses to Mr. Patel regarding Trader A that “(he doesn’t want to be hit on the join orders),” a clear and direct statement of Mr. Thakkar’s knowledge that Trader A intended to use the software application to place orders that he did not intend to result in executed trades, in violation of Commodity Exchange Act’s prohibition against spoofing. Mr. Patel’s testimony will be important in shedding light on the context and circumstances in which these notes were prepared, the role they had in Mr. Patel’s work in developing the program, and Mr. Thakkar’s understanding of Trader A’s trading objectives and intentions.

III. The Court and Parties Should Address All Outstanding Issues on December 10

Defendants’ noticed a December 10 presentment date for their motion, despite that the Court scheduled a December 11 status hearing months ago. Plaintiff is available on December 10, but requests that the Court and parties address all outstanding issues on that date and vacate the December 11 hearing, for efficiency.

PLAINTIFF COMMODITY FUTURES TRADING COMMISSION

By: /s/Thomas L. Simek

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and thereby caused service of the foregoing document via electronic notice on all parties and counsel of record.

/s/ Thomas L. Simek

Attorney for the Plaintiff