

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

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

**JITESH THAKKAR AND EDGE FINANCIAL TECHNOLOGIES, INC.’S
MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Defendants Jitesh Thakkar (“Jitesh”) and Edge Financial Technologies, Inc. (“Edge Financial”), for their memorandum in support of their Motion for Summary Judgment, state as follows:

INTRODUCTION

After more than a year of litigation that cost Jitesh Thakkar his career, his reputation, his business, and his life savings, the Department of Justice failed to prove that Jitesh conspired with or aided and abetted trader Navinder Sarao’s scheme to engage in spoofing. At Jitesh’s criminal trial, the truth came out: Jitesh, the owner of a small software company in Chicago, did not know that Sarao would use a computer program that Jitesh’s company developed to engage in spoofing and did not agree with Sarao to spoof. Even Sarao, the government’s star witness, admitted at trial that Jitesh was not involved in committing a crime with him.

Despite the lack of the evidence against Jitesh revealed by the criminal case, the CFTC now pushes this corresponding civil case forward based on the same conduct and same evidence

alleged in the criminal case, which the DOJ and CFTC developed through a multi-year joint investigation. During that investigation, the government obtained every relevant document and interviewed all of the key witnesses multiple times. Nonetheless, the evidence at trial established that Jitesh did *not* know that Sarao was spoofing thousands of miles away.

Just as in the first trial, the aiding and abetting claims in this case fail because Jitesh and Edge Financial did not know Sarao would use the computer program Edge Financial developed to engage in illegal trading, and Jitesh and Edge Financial did not intend to further Sarao's illegal trading. There is no evidence to the contrary, and Jitesh and Edge Financial are entitled to summary judgment in their favor. The CFTC proposes to launch a second investigation via civil discovery in this case because their first investigation established that Jitesh and Edge Financial did not knowingly aid Sarao's spoofing. This waste of the Court, the government, and the Defendants' resources must be rejected.

FACTUAL BACKGROUND

I. Jitesh Founds Edge Financial Technologies

Jitesh Thakkar is the founder and owner of Edge Financial Technologies, a small software company in Illinois. *See* Defendants' Local Rule 56.1 Statement of Undisputed Material Fact ("SOF"), ¶ 2, which is incorporated by reference herein. Jitesh immigrated to the United States from India with his family when he was 13 years old and became a naturalized citizen. SOF, ¶ 6. Jitesh lives in Naperville, Illinois with his wife and two young children. SOF, ¶ 2. After graduating from the University of Illinois at Chicago with a degree in computer engineering, Jitesh worked in technology roles for other companies for many years. SOF, ¶ 7. In 2007, Jitesh decided to start his own business to provide technology consulting and custom products to the financial industry. *Id.*

Since opening Edge Financial in 2007, Jitesh and Edge Financial have provided a variety of products and services to a wide range of financial industry clients, including risk monitoring programs, back office technology integrations, and custom trading platforms. SOF, ¶ 8. Edge Financial products, such as its “kill switch” product KillSwitchPlus and its risk response program RiskResponder, help companies meet certain regulatory requirements and help reduce risks in the trading industry. *Id.* Before Jitesh was indicted, Edge Financial rented a small office in a shared office space in Chicago and employed between four and eight employees over its decade in business. SOF, ¶ 9. Edge Financial paid each of its employees between approximately \$63,000 and \$97,000 a year, plus health insurance and a discretionary bonus. *Id.* Between 2010 and 2015, Edge Financial’s yearly revenues ranged from \$572,192.00 to \$944,046.00, and its employees worked on projects for between ten and twenty different customers at any given time. SOF, ¶ 10.

II. Navinder Sarao Contacts Edge Financial, Greenline Financial Technologies, and YJT Solutions to Develop a Trading Program that Sarao Formulated after Working with Other Programmers

In late 2011, a London-based trader named Navinder Sarao reached out to Edge Financial and two other software companies, Greenline Financial Technologies (“Greenline”) and YJT Solutions, to develop a custom trading program that Sarao designed. SOF, ¶ 11. Sarao received the names of these three companies from a previous programmer he worked with and copied and pasted the exact same message into emails to all three companies. *Id.* Sarao’s emails to the companies detailed the functions Sarao wanted for his program. SOF, ¶ 12. One of the functions Sarao requested for his program was a “back-of-the-book” checkbox option that Sarao could turn on or off for every trade. *Id.* Although the CFTC’s entire case is based on the allegation that this function made Sarao’s orders less likely to be executed when turned on, Sarao admitted that he wanted to use the back-of-the-book function for both genuine and spoof orders. *Id.*

Sarao wanted to use Greenline to develop his program, but Greenline was not able to work on the project, although not for any moral or legal reason. SOF, ¶ 13. After Greenline told Sarao it was not available to work on the project, Sarao continued to communicate with Edge Financial and a programmer from YJT Solutions about developing his program. In response to Sarao's email detailing the functions he wanted for his program, the YJT Solutions programmer explained his understanding of each of the functions, including the back-of-the-book function. SOF, ¶ 14. The YJT Solutions programmer explained that he understood that if the back-of-the-book function was flagged for an order, "anytime another order of greater than 20 lots appears at the same price, the [quantity] is increased then decreased by 1 to move the order to the back of the queue." *Id.* Although the YJT Solutions programmer offered to develop Sarao's program with the back-of-the-book function, Sarao ultimately selected Edge Financial to create his program. SOF, ¶ 15.

Edge Financial was not, however, the first company Sarao worked with to develop his trading program. As early as January 2009, years before Sarao first contacted Edge Financial, Sarao independently developed the functionality he wanted for his custom trading program, including the back-of-the book function. SOF, ¶¶ 16-21. Sarao first worked with a programmer in the Netherlands named Michel Polder to build the trading program he designed. SOF, ¶ 17. Beginning in early 2009, Polder worked with Sarao for approximately nine months to create Sarao's program. *Id.*; SOF, ¶ 52. Sarao explicitly told Polder that he wanted to use the program to spoof the market. SOF, ¶ 18. In emails, Sarao told Polder, "[i]f I am short, I want to spoof it down" and "[i]f I keep entering the same clip sizes, people will become aware of what I am doing, rendering my spoofing pointless." *Id.* Polder was ultimately unable to complete the program to Sarao's liking, so Sarao engaged a second programmer from Trading Technologies—a very successful software company—to complete the program. SOF, ¶¶ 18-19. Sarao worked with the

programmer from Trading Technologies for 12 to 18 months. SOF, ¶ 19. Sarao was also explicit about spoofing with the programmer from Trading Technologies.¹ *Id.* Like Polder, the programmer from Trading Technologies was not able to complete Sarao's program and referred Sarao to Greenline, Edge Financial, and YJT Solutions to complete the program. SOF, ¶¶ 11, 19. Unluckily for Jitesh and Edge Financial, Sarao selected Edge Financial to complete his program.

III. Edge Financial Develops the Program based on Sarao's Specifications and Receives \$24,200 for its Work

In late 2011 and early 2012, after Sarao selected Edge Financial to develop his program, Jitesh negotiated a price and standard business contract with Sarao on behalf of Edge Financial. SOF, ¶ 21. In order to get a better price on the program, Sarao tricked Jitesh about how successful of a trader he was. SOF, ¶ 22. Although Sarao made more than \$40 million trading between 2009 and 2015, while negotiating a price with Edge Financial, Sarao fooled Jitesh into thinking he was a small-time trader. *Id.* For example, at one point during their discussions, Sarao told Jitesh that \$15,000 was a "hell of a lot of money" to Sarao. *Id.* Because Jitesh believed Sarao was a struggling trader, Sarao and Edge Financial agreed that Sarao would pay Edge Financial \$24,200 to develop Sarao's program. SOF, ¶ 23. Edge Financial also retained the rights to resell the program, but never attempted to resell the program to any other traders. *Id.* Sarao paid Edge Financial \$4,200 in 2011 for its work on the program and the remaining \$20,000 in 2012. *Id.* Sarao's payments accounted for 0.64% and 2.68% of Edge Financial's annual revenues in 2011 and 2012 respectively. SOF, ¶¶ 10, 23.

After receiving Sarao's specification for the program, Jitesh assigned the project to Edge Financial programmer Mitul Patel for development. SOF, ¶ 24. Jitesh did not program any of the

¹ Despite these explicit discussions about spoofing, neither Polder nor the programmer from Trading Technologies were ever charged criminally or civilly for their work on Sarao's program. SOF, ¶ 20.

code for Sarao's program himself and told Mitul that the "NAVTrader project [Sarao's program] is fixed cost project, so sooner you finish it the better." *Id.* During the entire development process, Sarao never discussed the "deep details" of his trading strategy with Jitesh. SOF, ¶ 25. Sarao also told Jitesh that he would use the program in European and American markets, and the program needed to work on all contracts on these exchanges, not just the S&P E-mini market. SOF, ¶ 26. Unlike his conversations with the two previous programmers, Sarao was not explicit with Jitesh about how he planned to use the program. SOF, ¶ 27. In fact, in his initial email to Edge Financial, Sarao said that he needed the program to "catch all flash orders and spoofers that flash on the bid," suggesting that he was actually trying to catch wrongdoers in the market. *Id.* Sarao admits that he was much more careful about how he spoke to Jitesh than he was with the previous programmers and admits did not explicitly discuss his intentions to spoof with Jitesh. SOF, ¶¶ 18-19, 27, 52.

The fact that Sarao did not share the details of his trading strategy was not unusual to Jitesh. SOF, ¶ 28. Trading strategies are a trader's propriety "secret sauce," and traders rarely reveal their entire trading strategy to programmers. *Id.* Because Sarao never discussed the details of his trading strategy with Jitesh, both Jitesh and Edge Financial programmer Mitul Patel believed that the back-of-the-book function that Sarao wanted for his program was a type of "fill or kill" order, a legitimate order type that anyone can enter on the Chicago Mercantile Exchange. SOF, ¶ 29. Jitesh included his understanding that the back-of-the-book orders were "fill or kill" orders in the business contract that he sent to Sarao in January 2012. *Id.* at Ex. F ("make join orders fill or kill..(he doesn't want to be hit on the join orders)").

Edge Financial delivered Sarao's program to him in early 2012. SOF, ¶ 30. According to Sarao, the back-of-the-book function that Edge Financial programmed for him was not

programmed 100% the way Sarao requested. *Id.* In fact, Sarao was never “100% comfortable” with the back-of-the-book function Edge Financial programmed. *Id.* The fact that the back-of-the-book function did not work in the way Sarao intended is unsurprising given that Jitesh and Edge Financial did not know that Sarao wanted the back-of-the-book function in order to place spoof orders. SOF, ¶ 31. As Sarao himself admits, he never told Jitesh that he would use the program to spoof and Jitesh never agreed to be part of Sarao’s scheme to spoof the market. SOF, ¶ 52. Although the program did not work 100% the way Sarao wanted it to because Jitesh and Edge Financial did not know its intended purpose, Sarao went on to use the program to trade from his home in London, England.

In the spring of 2012, after Edge Financial delivered the program to Sarao, the CFTC selected Jitesh to serve as a volunteer on its Technology Advisory Committee Subcommittee on High Frequency Trading. SOF, ¶ 32. Jitesh contributed dozens of hours of his time to the Committee—providing his technology expertise to the Committee and engaging in discussions with Committee members about appropriate definitions and regulations related to high-frequency trading. *Id.* Jitesh was proud to serve on the Committee and contribute his technological knowledge to discussions with trading industry experts to educate the CFTC and provide suggestions on proper regulations for the industry. *Id.*

While Jitesh provided assistance to the CFTC through his volunteer work on the CFTC Committee, unbeknownst to Jitesh and Edge Financial, Sarao began using the program Edge Financial delivered to engage in illegal trading 4,000 miles away in London, England.

IV. Unbeknownst to Jitesh or Edge Financial, Sarao uses the Program Years Later to Engage in Spoofing

After receiving his program from Edge Financial in early 2012, Sarao used the program to trade in S&P 500 E-mini market. SOF, ¶ 33. Sarao traded from his bedroom at his parents’ house

in London, England. SOF, ¶ 35. The CFTC alleges that on February 22, 2013 at 10:17:07 CST and February 25, 2013 at 12:48:52 CST, Sarao used the program to place spoof orders into the market. SOF, ¶ 33.

Jitesh had no knowledge of these specific trades. SOF, ¶ 34. In fact, Jitesh did not know the specific details of Sarao's trading and did not know that Sarao would use the program Edge Financial created to engage in illegal trading. *Id.* As Sarao admits, trading requires very quick decisions made in a span of microseconds and milliseconds. SOF, ¶ 36. Sarao concedes that neither Jitesh nor anyone else from Edge Financial was in the room or on the phone with Sarao when he made these micro- and millisecond trading decisions, and neither Jitesh nor anyone else from Edge Financial made *any* decisions about how Sarao traded. *Id.* Sarao did not discuss orders he planned to cancel with Jitesh and did not talk to Jitesh before he made trades. *Id.* Sarao alone decided when to place orders, at what price to place orders, the quantity of his orders, when to turn on or off the back-of-the-book option, and when to cancel his orders. *Id.* In fact, Sarao's own parents, who he lived with his entire life, didn't even know about the illegal trading Sarao engaged in from his bedroom down the hall. SOF, ¶ 35.

Ultimately, Sarao made more than \$12.9 million engaging in spoofing. SOF, ¶ 37. Neither Jitesh nor Edge Financial received any portion of those profits. *Id.* Edge Financial made only the \$24,200 it charged Sarao for the programming work it provided, as agreed in their business contract. SOF, ¶ 52.

V. DOJ and the CFTC Conduct a Joint Investigation into Sarao's Trading, and Jitesh and Edge Financial Voluntarily Provide Information and Documents to the CFTC and FBI During the Investigation

In or around 2014, the CFTC and DOJ began jointly investigating Sarao's trading, and ultimately investigated Jitesh and Edge Financial as well. The CFTC and DOJ's investigation of

Sarao, Jitesh, and Edge Financial involved interviewing dozens of witnesses and obtaining hundreds of thousands of pages of documents. SOF, ¶¶ 38-39. The CFTC and DOJ jointly interviewed at least 15 witnesses during the course of the investigation, including Navinder Sarao, Michael Polder, Paul Denapoli, Terrence Hendershott, Matt Garley, Brian Watson, James Prince, Steve Decker, Karl Denninger, Antonios Hadjigeorgalis, Dean Payton, John Huth, Richard Schell, Hovannes Dermenchyan, and Anand Twells. SOF, ¶ 38. The CFTC and DOJ jointly interviewed some of these witnesses multiple times. *Id.* For example, the CFTC and DOJ jointly interviewed Sarao on at least three different occasions for six days total. *Id.*

During the course of their investigation, DOJ and CFTC also collected documents and information from Jitesh and Edge Financial. On May 11, 2015, while Jitesh was already under investigation by the DOJ, the CFTC sent Edge Financial a Voluntary Request for Documents. SOF, ¶ 39. Edge Financial cooperated with the Voluntary Request for Documents, engaging an attorney to assist it with producing documents to the CFTC. *Id.* Edge Financial collected and turned over all emails from all Edge Financial employees related to Sarao, turned over the source code for Sarao's program, and turned over all other relevant documents in its possession to the CFTC. *Id.* Edge Financial also provided additional written information to the CFTC. *Id.* Although responding to the CFTC's voluntary document request cost Jitesh and Edge Financial significant time and expense, Jitesh and Edge Financial wanted to do everything they could to cooperate with and assist the CFTC's investigation because they had nothing to hide. *Id.* In addition to providing documents and information voluntarily to the CFTC in 2015, Edge Financial again produced over 38,000 pages of documents and communications to the DOJ in 2018. *Id.*

Beyond providing tens of thousands of pages of documents to the government, Jitesh also voluntarily sat for over 97 minutes of interviews with the FBI in 2017. SOF, ¶ 40. The FBI visited

Jitesh unannounced at his home on September 12, 2017 and December 21, 2017. SOF, ¶ 41. Even though the government knew Jitesh was represented by counsel in the CFTC matter, the FBI went to Jitesh's home without notice to interview him without counsel present. *Id.* It was 7:00 in the morning when the FBI showed up at Jitesh's home and his kids were getting ready for school, but Jitesh voluntarily allowed the FBI in and answered all of the FBI agents' questions. *Id.* Special Agent Brent Potter acknowledged that Jitesh tried to answer all of the FBI's questions, never said he wanted to stop the interview or did not want to speak to the FBI anymore, and did not cut off the FBI interviews. *Id.* The FBI secretly recorded both interviews. SOF, ¶ 42. The FBI did not tell Jitesh that they were recording the interviews because they wanted to Jitesh to be forthright and did not want to put Jitesh on his guard. *Id.* Jitesh maintained his innocence during these interviews and confirmed time and time again that he did not know that Sarao would use the program to engage in spoofing. *Id.* During the December 2017 interview, Jitesh also asked the FBI if he was in trouble or under investigation. SOF, ¶ 43. The FBI lied to Jitesh and told him he was not under investigation (*id.*), but the government arrested Jitesh at his home less than a month after the interview. SOF, ¶ 45.

VI. The Government Charges Jitesh with Conspiracy and Aiding and Abetting and the CFTC Files a Corresponding Civil Complaint against Jitesh and Edge Financial

Despite the fact that Jitesh maintained his innocence during multiple voluntary interviews with the FBI, voluntarily produced all relevant Edge Financial documents to the CFTC in response to its document request, and was told he was not under investigation, the DOJ filed a criminal complaint against Jitesh on January 19, 2018. SOF, ¶¶ 39, 43-44. The FBI arrested Jitesh at his home in front of his family that same day. SOF, ¶ 45. The government did not provide Jitesh with any warning and did not allow him to voluntarily surrender, even though he was represented by counsel and fully cooperated with the government's investigation. SOF, ¶ 39, 45.

Days later, the CFTC filed this civil action based on the same interactions between Jitesh and Sarao that the DOJ alleged in the criminal complaint. SOF, ¶ 46. Further demonstrating the CFTC and DOJ's coordination in their investigations of Jitesh and Edge Financial, on January 29, 2018, the DOJ issued a press release detailing the charges against Jitesh and others stating, "[t]he enforcement actions were announced by Acting Assistant Attorney General John P. Cronan of the Justice Department's Criminal Division, Deputy Assistant Director Chris Hacker of the FBI's Criminal Investigative Division and Director James McDonald of the U.S. Commodity Futures Trading Commission's (CFTC) Division of Enforcement." SOF, ¶ 47.

After the CFTC filed its parallel civil complaint against Jitesh and Edge Financial, the DOJ told Jitesh's attorney that any plea deal Jitesh would be offered would be worse if he did not plead guilty before indictment and before receiving the government's discovery. SOF, ¶ 48. Jitesh's attorney explained to the DOJ attorneys that the allegations in the complaint were insufficient to establish Jitesh's guilt and that Jitesh strongly professed his innocence, and asked to meet with their supervisors to ask them to give him an opportunity to review the discovery before making a plea decision. *Id.* The DOJ informed Jitesh's attorney in writing that they would not meet with him. *Id.* Because Jitesh knew he was not guilty, he refused the DOJ's plea offer, and the government moved forward and indicted Jitesh. *Id.*

It was not until October 2018—eight months after Jitesh was indicted—that DOJ supervisors finally agreed to meet with Jitesh's attorney. SOF, ¶ 49. Jitesh's attorney flew out to Washington, DC to meet with the DOJ supervisors on October 24, 2018. *Id.* Jitesh's attorney informed those supervisors that based on all of the documents he reviewed and discussions he had with Jitesh and other witnesses, he believed Jitesh was actually innocent. *Id.* However, the DOJ refused to drop the charges against Jitesh, and the case moved forward to trial.

VII. Jitesh is Acquitted of Conspiracy Mid-Trial and the Government Dismisses the Aiding and Abetting Charges against Him

Although the government attempted to convict Jitesh of multiple felonies despite his actual innocence, at Jitesh’s criminal trial, the truth that Jitesh did not know about Sarao’s criminal scheme came out.

The truth began to come out days before trial when the government attempted to lower its burden of proof. Apparently realizing that they would be unable to prove that Jitesh *actually knew* about Sarao’s criminal scheme—because Jitesh in fact *did not know* that Sarao would use the program to engage in spoofing—the DOJ attempted to lower its burden of proof six days before trial by notifying Jitesh that it would ask the Court to give an “ostrich instruction” to the jury so that it would not have to prove Jitesh had actual knowledge of Sarao’s criminal scheme. SOF, ¶ 50. The Court denied the DOJ’s request because the DOJ advanced its case on an actual knowledge theory up until six days before trial and did not include a proposed ostrich instruction in the multiple draft jury instructions submitted to the Court over the course of the preceding four months. *Id.* Thus, the trial moved forward on an actual knowledge theory, which is the same burden the CFTC has in this case.

During its case-in-chief, the government called: Timothy McCourt, a managing director at CME who testified about trading and markets; Navinder Sarao, who testified about his trading and interactions with Jitesh; Richard Haynes, an economist at CFTC who testified about the CFTC subcommittee Jitesh served on; Lisa Pinheiro, a “number cruncher” who testified about Sarao’s trading and whose firm was paid over \$1.6 million by the government in connection with Jitesh’s case pre-trial; Mihran Yenikomshian, an expert who testified about the functions of the computer code; and two FBI agents, Special Agents A. Wesley Nevens and Brent Potter, who interviewed Jitesh, as witnesses. SOF, ¶ 51. Out of all of the government’s witnesses, only Sarao testified

about direct interactions with Jitesh during the relevant time period, and that testimony did not help the government's case. Among other things, Sarao testified that:

- He did not tell Jitesh that he was going to use the program to spoof. SOF, ¶ 52.
- At the time he was supposed to be in a criminal conspiracy with Jitesh, he “didn’t consider that [they] were colluding to commit crimes[.]” *Id.*
- At the time of the alleged conspiracy, Sarao did not think Jitesh was involved in committing a crime. *Id.*
- Sarao started spoofing and tricking other traders to make money in 2009, years before he first met Jitesh. *Id.*
- Jitesh never told Sarao that he agreed to be part of a scheme to spoof the market. *Id.*
- Jitesh never told Sarao he agreed to spoof the market with Sarao. *Id.*
- Mitul Patel, not Jitesh, wrote Sarao’s program. *Id.*
- Sarao provided the specifications for the program, and the software was created based on those specifications. *Id.*
- There was nothing about spoofing in the business consulting agreement between Sarao and Edge Financial. *Id.*
- Sarao was not 100% sure that Jitesh knew Sarao was spoofing the market because “without being explicit, it’s impossible to be 100% sure.” *Id.*
- Sarao thought Jitesh was “smart enough” to know Sarao would use the program to spoof, but Sarao admitted that he was diagnosed with Asperger’s, which impacts the way he perceives other people and impacts the way he perceives other people’s communications with him. *Id.*
- Sarao did not “use the term spoofing, market manipulation, et cetera” with Jitesh. *Id.*
- Even with the back-of-the-book function, there was still a risk that Sarao’s spoof orders could be hit or traded. *Id.*
- Sarao asked Jitesh to change the name that Edge Financial gave the program, NAVTrader, because he didn’t want his name associated with a program he would use to commit crimes, but he did not tell Jitesh why he wanted the name changed and Edge Financial never changed the name of the program. *Id.*
- Sarao only paid Edge Financial the \$24,000 agreed to in their business contract, which was payment for Edge Financial’s hourly work on the program. SOF, *Id.*

In addition to this telling testimony at trial, Sarao also told the FBI in a January 2018 interview that he wanted to use the back-of-the-book function for *both genuine and spoof orders*. SOF, ¶ 12.

Following the government's case, Jitesh moved for acquittal under FRCP 29. SOF, ¶ 53. Jitesh argued that the government was unable to establish that he had the requisite knowledge or mental state to support the aiding and abetting charges and that the conspiracy count must be dismissed because the other alleged party to the conspiracy admitted that there was no conspiracy. *Id.* In ruling on the motion for acquittal, the Court acknowledged that “Rule 29 creates a huge hurdle that defendants have to overcome,” that the evidence is viewed in the light most favorable to the government under Rule 29, that all inferences are drawn in favor of the government, and that most motions for acquittal are *pro forma*—made only to preserve the record. SOF, ¶ 54. Despite this high burden, the Court granted Jitesh's motion for acquittal on the conspiracy count, finding that no jury could reasonably find—and there was no evidence to support—that there was an agreement between Jitesh and Sarao to engage in spoofing. SOF, ¶ 55. In reaching that decision, the Court pointed out that: Sarao never mentioned spoofing to Jitesh even though he did with previous programmers; Sarao surmised that Jitesh “must have known” that the program could be used for spoofing, but never did anything to confirm that thought; Sarao did not go into great detail about his trading strategy with Jitesh; Sarao tried to fool Jitesh into thinking he was a small-time trader; and at the time of the contract, Sarao did not think Jitesh was involved with him in committing a crime. *Id.* The Court also noted that the government alleged a two-person conspiracy, but the government's own witness and the only other member of the alleged conspiracy testified that he and Jitesh didn't have an agreement and, in fact, he did not want an agreement with Jitesh. *Id.* As for the aiding and abetting counts, the Court found the government had a “thin

case,” after previously noting that there were “evidentiary issues” with the government’s aiding and abetting case, but under the high bar of Rule 29, the Court allowed the aiding and abetting counts to go to the jury. SOF, ¶ 56.

Following Jitesh’s acquittal on the conspiracy count, the parties gave closing arguments and the jury began deliberating. After deliberating for two days, the jury informed the Court that they were unable to reach a unanimous verdict and did not think additional time would change that result. SOF, ¶ 57. The Court declared a mistrial on the remaining aiding and abetting counts and allowed any jurors that wanted to speak to the attorneys to do so. *Id.* Three jurors came out to speak to the attorneys and informed the attorneys that the jury voted 10 to 2 in favor of finding Jitesh not guilty of the aiding and abetting charges. SOF, ¶ 58. Following this result, the DOJ decided not to retry the case, and the Court dismissed the remaining counts against Jitesh with prejudice. *Id.*

Although the Court acquitted Jitesh on the conspiracy charge and the government dismissed the aiding and abetting charges against Jitesh, Jitesh has not been able to gain back what he lost due to the unfounded allegations against him. All but one of Edge Financial’s employees either quit when the charges were filed or had to be let go because Edge Financial lost many of its customers when the government filed the civil and criminal cases, and Edge Financial could no longer afford to pay employees. SOF, ¶ 59. Edge Financial was also forced to close its Chicago office. *Id.* Although Jitesh was acquitted on the conspiracy charge and the remaining charges against him were dropped, most of Edge Financial’s customers have not returned. *Id.* Since Edge Financial lost many of its customers, Jitesh began searching for a new job to support his family. SOF, ¶ 60. Many companies that Jitesh applied to simply would not talk to him, likely due to the stigma of the charges against him. *Id.* Finally, in July 2019, after looking for a job for several

months, Jitesh started a job as a programmer at a small company. *Id.* Jitesh's new job has much lower compensation than his job at Edge Financial, and Jitesh does not have the management role he had at Edge Financial at his new job. *Id.* Jitesh also incurred over half a million dollars in legal fees defending himself in his criminal cases and faces hundreds of thousands of dollars in additional legal fees to fight the CFTC's civil case. SOF, ¶ 61. However, Jitesh continues to fight this case because he knows that he and Edge Financial did not violate the CEA. *Id.*

Despite the result of the criminal trial, the hardship Jitesh went through and continues to go through following these charges, and the clear evidence that Jitesh did not know Sarao would use the program that Edge Financial developed to spoof, the CFTC continues to push this case forward. At this point however, all of the facts of the case are on the table, and those facts are insufficient to find that Jitesh or Edge Financial aided or abetted Sarao's violations of the CEA as the CFTC alleges. The CFTC conducted an extensive, years-long investigation that led to no evidence of wrongdoing by Jitesh or Edge Financial. Now, Jitesh and Edge Financial are entitled to summary judgment in their favor on the CFTC's claims.

ARGUMENT

I. Legal Standard

“Summary judgment is appropriate when ‘the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *In re Dairy Farmers of America, Inc. Cheese Antitrust Litig.*, 60 F. Supp. 3d 914, 946 (N.D. Ill. 2014) (quoting Fed. R. Civ. P. 56(a)). “Summary judgment should be granted when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.’” *Shroff v. Rosenthal Collins Group, LLC*, 2009 WL 2704582, *3 (quoting Fed. R. Civ. P. 56(c)).

“Once the moving party has set forth the basis for summary judgment, the burden then shifts to the nonmoving party who must go beyond mere allegations and offer specific facts showing that there is a genuine issue for trial.” *Id.*; *see also In re Dairy Farmers*, 60 F. Supp. 3d at 947 (“To avoid summary judgment, the opposing party must go beyond the pleadings and ‘set forth specific facts showing that there is a genuine issue for trial.’”) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)); *Vaccariello v. Sehant*, 1985 WL 4869, *6 (N.D. Ill. Sept. 20, 1985). “A genuine dispute of material fact ‘exists only if there is enough evidence upon which a reasonable jury could return a verdict in’ the nonmovant’s favor.” *In re Dairy Farmers*, 60 F. Supp. 3d at 947 (quoting *Swetlik v. Crawford*, 738 F.3d 818, 826 (7th Cir. 2013)). *See also Shroff*, 2009 WL 2704582, at *3. “The nonmoving party must offer more than ‘[c]onclusory allegations, unsupported by specific facts’ in order to establish a genuine issue of material fact.” *Shroff*, 2009 WL 2704582, at *3 (quoting *Payne v. Pauley*, 337 F.3d 767, 774 (7th Cir. 2003)). Additionally, “[t]he non-moving party ‘must do more than simply show that there is some metaphysical doubt as to the material facts.’” *In re Dairy Farmers*, 60 F. Supp. 3d at 947 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). “A party will be successful in opposing summary judgment only if it presents ‘definite, competent evidence to rebut the motion.’” *Shroff*, 2009 WL 2704582, at *3 (quoting *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000)). “In other words, the ‘mere existence of a scintilla of evidence in support of the [non-movant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” *In re Dairy Farmers*, 60 F. Supp. 3d at 947 (quoting *Anderson*, 477 U.S. at 252).

Here, summary judgment is appropriate because there are no disputed material facts and Defendants are entitled to judgment as a matter of law. No further discovery is needed because

the entire record was fully developed in the multi-year joint DOJ/CFTC investigation and the subsequent criminal case that resulted in an acquittal on the conspiracy count and dismissal of the aiding and abetting counts following a 10-2 vote in favor of acquittal. The government interviewed all relevant witnesses (including 97-minutes of FBI interviews with Jitesh), Defendants produced all of the relevant documents in their possession to the CFTC and DOJ, which totaled more than 38,000 pages, and the testimony of Sarao and other witnesses was presented at trial. Based on that extensive record, it cannot be disputed that the CFTC does not have sufficient evidence to support its claims so that a reasonable jury could find in its favor. The CFTC investigated this case for five years and found no evidence that Jitesh or Edge Financial knew Sarao would use the computer program Edge Financial developed based on Sarao's specifications to engage in illegal trading. The CFTC should not be given years more to investigate this case just because their initial investigation failed to find any evidence of wrongdoing by Jitesh or Edge Financial. Summary judgment should be granted in favor of Defendants.

II. Jitesh and Edge Financial are Entitled to Summary Judgment on both Aiding and Abetting Counts because the Evidence Establishes that Jitesh and Edge Financial Did Not Know of Sarao's Intent to Violate the CEA and Did Not Intend to Further Sarao's Violations

The undisputed material facts developed in the multi-year joint DOJ/CFTC investigation and the subsequent criminal case and jury trial show that Defendants did not know of Sarao's spoofing or manipulative or deceptive practices and did not attempt to aid those schemes. Accordingly, the CFTC cannot prove either of its aiding and abetting counts, and Defendants are entitled to judgment as a matter of law.

In the Seventh Circuit, there are two steps to establishing an aiding and abetting claim under the CEA. First, the plaintiff must demonstrate the components of a claim against the

principal.² *In re Dairy Farmers of America, Inc. Cheese Antitrust Litig.*, 801 F.3d 758, 765 (7th Cir. 2015); *see also Braman v. The CME Group, Inc.*, 149 F. Supp. 3d 874, 890 (N.D. Ill. 2015) (“To prevail on an aiding and abetting claim, plaintiffs must first prove the components of a . . . claim against a principal”). Second, the plaintiff must prove that the defendant “(1) had knowledge of the principal’s intent to commit a violation of the CEA . . . ; (2) had the intent to further than violation; and (3) committed some act in furtherance of the scheme.” *In re Dairy Farmers*, 801 F.3d at 765; *see also Braman*, 149 F. Supp. 3d at 890 (“To state a claim for aiding and abetting liability under [the CEA], plaintiffs must allege that defendants: (1) had knowledge of the [principal’s] intent to violate the Act; (2) had the intent to further that violation; and (3) committed some act in furtherance of that objective.”); *Vaccariello*, 1985 WL 4869, at *6 (“in order to show aider and abettor liability, a plaintiff must demonstrate the defendant had actual knowledge of the scheme, intent to further the scheme, and rendered substantial assistance”). “A plaintiff ‘seeking to state a cause of action for aiding and abetting liability under . . . the CEA must allege that the aider and abettor acted knowingly.’” *Braman*, 149 F. Supp. 3d at 891. Absent evidence of intent, summary judgment must be granted. *See In re Dairy Farmers*, 801 F.3d at 765 (affirming summary judgment where “there is no evidence in the record supporting an inference that [the defendant] intended to further” the principal’s violation of the CEA); *Braman*, 149 F. Supp. 3d at 891 (granting motion to dismiss where “Plaintiffs here fail to allege that the defendants had knowledge of any violation on the part of the [principals]”).

The Seventh Circuit has held that a claim for aiding and abetting a violation of the CEA is subject to the same proof as a claim for criminal aiding and abetting. *Bosco v. Serhant*, 836 F.2d

² Defendants do not concede that the CFTC will be able to prove Sarao engaged in spoofing or manipulative or deceptive practices, but do not address Sarao’s alleged crimes in this motion because they are entitled to summary judgment regardless of Sarao’s liability.

271, 279 (7th Cir. 1987) (rejecting the plaintiffs’ argument that civil aiding and abetting requires less proof of participation in the principal’s scheme than criminal aiding and abetting). Indeed, aiding and abetting under the CEA “was modeled on, and was intended to be interpreted consistently with, the federal statute that makes aiding and abetting a crime.” *Id.* As the Seventh Circuit explained,

we have previously noted that the CFTC, the agency charged with the administration of the statute, has interpreted aiding and abetting liability under the CEA as coterminous with the criminal standard of aiding and abetting liability. . . . Indeed, the language employed in §§ 13(a) and 22(a)(1) of the CEA is virtually identical to that employed in the federal aiding and abetting statute, 18 U.S.C. § 2. . . . The elements that a plaintiff must allege to state a claim for aiding and abetting liability under § 22 of the CEA are therefore the same elements that must be established to prove a violation of 18 U.S.C. § 2.

Damato v. Hermanson, 153 F.3d 464, 472-73 (7th Cir. 1998) “Aiding and abetting in the criminal law requires not only knowledge of the principal’s objective but a desire to help him attain it.” *Bosco*, 836 F.2d at 279. Where there is no evidence such a desire, summary judgment should be granted. *Id.*

Here, the undisputed material facts show that Defendants did not know that Sarao would use the program Edge Financial developed to engage in spoofing or manipulative or deceptive practices, and Defendants did not intend to further such conduct. Jitesh repeatedly and consistently denied any knowledge that Sarao intended to use the software program for spoofing during his interviews with the FBI. SOF, ¶ 42. Sarao also admitted at trial that he did not tell Jitesh that he was going to use the program to spoof. SOF, ¶ 52. Sarao never told Jitesh that he would use the program to spoof, and Jitesh never agreed to be part of a scheme to spoof the market. *Id.* Unlike Sarao’s conversations with the previous programmers who were not charged, Sarao never used the word “spoofing” with Jitesh and was much more careful in how he spoke to Jitesh about his intentions for the program. SOF, ¶¶ 19, 52. Sarao never went into great detail about his trading

strategy with Jitesh, and he even told Jitesh in an email that he wanted to use the program's functionality to catch spoofers. SOF, ¶¶ 25, 27. As Jitesh set forth in Edge Financial's business contract with Sarao and reiterated to the FBI many times, he thought Sarao's "back of the book" function was a legitimate "fill or kill" order type. SOF, ¶ 29. Further, Sarao himself admits that he wanted to use the back-of-the-book function for both genuine and spoof orders. SOF, ¶ 12. Jitesh's understanding of a legitimate purpose for the back-of-the-book function is further supported by the fact that the programmer from YJT Solutions also did not appear to see anything inherently problematic about Sarao's specifications and offered to develop the program. SOF, ¶ 15. And even Sarao himself did not believe Jitesh was involved with him in committing a crime. SOF, ¶ 52. Thus, the government produced no witness or documentary evidence showing Defendants knew or intended to further Sarao's alleged crimes.

Moreover, circumstantial evidence also supports Defendants' lack of knowledge or intent to aid Sarao's alleged wrongdoing. Neither Jitesh nor Edge Financial received any portion of Sarao's \$12.9 million in profits from his spoofing. SOF, ¶¶ 37, 52. It flies in the face of reason that Jitesh would risk his thriving, legitimate business for a meager \$24,000 payout (0.64% and 2.68% of Edge Financial's annual revenues in 2011 and 2012) to aid Sarao in violating the CEA. Indeed, Jitesh served on the CFTC's own Technology Advisory Committee Subcommittee on High Frequency Trading *to help the CFTC*, providing technological expertise to the Committee. There is no evidence that Jitesh intended to go against the CFTC by helping Sarao violate the CEA.

Based on the entire record compiled in the criminal case and in the CFTC's joint investigation with the DOJ, there is no evidence to support a factual dispute on the issue of Defendants' knowledge or intent. The undisputed material facts show that Defendants did not know that Sarao planned to use the program for spoofing or for manipulative or deceptive practices

and did not intend to aid Sarao's violations of the CEA. Thus, Defendants are entitled to judgment as a matter of law, and the Court should grant summary judgment on both counts.

CONCLUSION

For these reasons, Defendants Jitesh Thakkar and Edge Financial Technologies, Inc. respectfully request that the Court grant their Motion, enter judgment in their favor, award Defendants their costs and fees, and grant such other and further relief as this Court deems proper.

Dated: September 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2019, the foregoing was filed electronically with the Clerk of the Court to be served upon all attorneys of record by operation of the Court's electronic filing system.

/s/ Renato Mariotti