UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

U.S. COMMODITY FUTURES TRADING COMMISSION,	:	CIVIL ACTION NO. 15-cv-09196
PLAINTIFF,	:	Hon. Amy J. St. Eve
v.	:	
IGOR B. OYSTACHER and 3 RED TRADING LLC,	:	
DEFENDANTS.	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

With their Motion for Judgment on the Pleadings ("Motion") (Dkt. #164), Defendants provide the Court with the opportunity to dispose of their constitutional arguments. Defendants claim that the spoofing provision of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6c(a)(5)(C) (2012), and the Commission manipulation regulation, 17 C.F.R. § 180.1 (2015), are unconstitutionally vague, and that the spoofing provision violates the non-delegation doctrine. None of these arguments have merit. The spoofing provision is clear, and Defendants' conduct, as alleged in the Complaint, falls clearly within that language. Indeed, a court in this District recently rejected a similar vagueness challenge to the spoofing provision. *United States v. Coscia*, 100 F. Supp. 3d 653, 659 (N.D. Ill. 2015). Furthermore, the manipulation regulation closely tracks SEC Rule 10b-5, which has long withstood constitutional scrutiny. Finally, the non-delegation doctrine has nothing to do with the statutory claims brought under the spoofing provision. The Commission therefore respectfully requests that this Court deny the Motion.

II. LEGAL STANDARD

A Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Buchanan-Moore v. Cty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2010). To state a claim, the "[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). When reviewing a complaint for sufficiency, a court must accept well-pleaded facts as true. *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665-66 (7th Cir. 2013). A court must also draw all reasonable inferences in favor of the plaintiff. *Teamsters Local Union No. 705 v. Burlington Northern Santa Fe, LLC*, 741 F.3d 819, 823 (7th Cir. 2014).

III. VAGUENESS FRAMEWORK

Laws that regulate persons or entities must give fair notice of what conduct is prohibited or required. *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). A law is impermissibly vague, and violates due process, where the law "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (internal quotation marks and citation omitted).

When reviewing a vagueness challenge, a court operates under the strong presumption that a law passed by Congress is valid. *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). A vagueness challenge "swims against our case law's current, which requires us, if we can, to construe, not condemn, Congress' enactments." *Skilling v. United States*, 561 U.S. 358, 403 (2010). A law need not be drafted with mathematical certainty to be valid. *United States v. Antzoulatos*, 962 F.2d 720, 726 (7th Cir. 1992). Instead, "if a reasonable person . . . would have known that [his] conduct was at risk, and enforceable guidelines exist, the due process concerns are overcome." *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 987 (7th Cir. 1999). Furthermore, three factors in this case raise the already substantial bar in a vagueness challenge.

First, the presumptive validity of a statute is even stronger in the context of economic legislation, which is the context here. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The Supreme Court has explained that "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action"; "[i]ndeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id*. In other words, laws addressing economic activity are less likely to be found vague, since they are "directed at people who are assumed to have some expertise and some ability to demand clarification." *Record Head Corp. v. Sachen*, 682 F.2d 672, 676 (7th Cir. 1982).

Second, where, as here, the law in question contains a scienter element, a vagueness challenge carries a "very difficult" burden. *United States v. Calimlim*, 538 F.3d 706, 711 (7th Cir. 2008). "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499. In addition, a scienter requirement "significantly diminishes the statute's susceptibility to discriminatory enforcement." *United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993).

Finally, when the law in question does not implicate First Amendment rights, as is the case here, a court must view a vagueness challenge on an "'as-applied' basis – that is, whether the statute is unconstitutionally vague in light of the facts of the case at hand." *United States v. Stephenson*, 557 F.3d 449, 456 (7th Cir. 2009). This means that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 495. Such "a vagueness challenge may not rest on an argument that the law is vague in its hypothetical applications, but instead the challenger must show that the law is vague as applied to the facts of the case at hand." *United States v. Brierton*, 165 F.3d 1133, 1139 (7th Cir. 1999).

IV. APPLICATION OF VAGUENESS LAW TO THIS CASE

Defendants argue that both the spoofing provision and the manipulation regulation are unconstitutionally vague as applied to them. With respect to the spoofing provision, Defendants are squarely at odds with the language of the statute, the allegations in the Complaint, and the

Coscia decision upholding the statute. With respect to the manipulation regulation, Defendants are squarely at odds with decades of jurisprudence in the analogous securities context.

A. Spoofing

The spoofing provision states: "It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity 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 provision thus explicitly defines spoofing as entering an order with the intent to cancel the order before execution. Because this is an economic statute with a scienter requirement,[1] Defendants face a higher hurdle with their vagueness challenge. *See supra* Part III. Even under the generally applicable standard, Defendants' arguments are meritless.

The spoofing provision clearly articulates the type of conduct that is prohibited: entering an order with the intent to cancel the order before execution. This is exactly what the Commission alleges in its detailed Complaint. *See, e.g.*, Compl. ¶¶ 2-4, 52-60, 94 (Dkt#1). Specifically, Defendants entered large spoof orders with the intent to cancel the orders before execution. *See, e.g.*, Compl. ¶¶ 3, 54, 87-89, 94. Defendants' true purpose for entering the large spoof orders was to create a false impression of market depth to lure other market participants to join the large spoof orders. *See, e.g.*, Compl. ¶¶ 2, 3, 54, 56, 59. Once these other market

[1] In the most analogous context, courts have repeatedly held that the Securities Exchange Act is economic in nature and subject to lower scrutiny. *See, e.g., SEC v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1048 (9th Cir. 2005); *SEC v. Brown*, 740 F. Supp. 2d 148, 161 (D.D.C. 2010). Though criminal charges may be brought based on violations of the Act, *see* 7 U.S.C. § 13, consistent with its jurisdictional limitations, the Commission seeks only civil penalties here. *See United States v. Sun & Sand Imports, Ltd., Inc.*, 725 F.2d 184, 187 (2d Cir. 1984) (applying lower standard to economic regulation, despite potential criminal penalties, because only civil penalty sought). Even in criminal cases, courts may view statutes as economic regulation. *See Antzoulatos*, 962 F.2d at 726 (money laundering statute); *see also United States v. Doremus*, 888 F.2d 630, 635 (9th Cir. 1989) (criminal mining statute); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 32 (1st Cir. 1989) (Medicare fraud statute).

participants joined the large spoof orders, Defendants would simultaneously cancel their large spoof orders and execute against the orders of the other market participants. *See, e.g.*, Compl. ¶¶ 3, 54, 65-67. Defendants were able to cancel and flip by exploiting a tool designed to avoid cross trades, which would cancel existing orders on the other side of the market when the flip orders were placed. *See, e.g.*, Compl. ¶ 53. This strategy allowed Defendants to buy or sell in quantities and/or at price levels that would not have otherwise been available. *See, e.g.*, Compl. ¶¶ 3, 67, 91. Defendants' intent to cancel the large spoof orders before execution is shown through, among other things: (1) their pattern of cancelling those orders in less than a second and simultaneously flipping to the other side of the market to execute against market participants tricked by the spoof orders; (2) the difference between the fill and cancellation rates for the spoof orders, versus the flip orders; and (3) the placement of the spoof orders to avoid getting filled. *See, e.g.*, Compl. ¶¶ 61-64, 87-89. Finally, the Complaint describes two examples of Defendants' spoofing. Compl. ¶¶ 71-86.

The Complaint sufficiently alleges that Defendants engaged in spoofing by entering orders with the intent to cancel those orders before execution, in direct contravention of the plain language of the spoofing provision. The spoofing provision provides adequate notice of what is prohibited (entering orders with the intent to cancel those orders before execution), and it also provides a clear standard for enforcement (the government must show such intent). As noted above, the scienter standard here diminishes any concerns about notice, *Hoffman Estates*, 455 U.S. at 499, as well as any concerns about arbitrary enforcement, *Jackson*, 983 F.2d at 765. The strong presumption that a law passed by Congress is valid, the clarity of the spoofing provision, the scienter requirement, and the economic nature of the provision all point inescapably to the same conclusion: the spoofing provision is not vague.

Indeed, a court in this District has already upheld the spoofing provision against a similar vagueness challenge. In *United States v. Coscia*, the government criminally prosecuted the defendant for spoofing, in violation of 7 U.S.C. § 6c(a)(5)(C). 100 F. Supp. 3d at 656. In its indictment, the government alleged conduct similar to that alleged here, specifically that the defendant

> entered large-volume orders that he intended to immediately cancel before they could be filled by other traders. Coscia had no intention of filling the orders, but instead devised [his] strategy to create a false impression regarding the number of contracts available in the market, and to fraudulently induce other market participants to react to the deceptive market information that he created.

Id. at 658 (internal quotation marks and citations omitted). Coscia moved to dismiss, raising many of the same arguments proffered here by Defendants, including the supposed confusion in the industry regarding the definition of spoofing, as evidenced by the market participant submissions in connection with the Commission's interpretive guidance. *Id.* at 657. Coscia also argued that the spoofing provision potentially captured legitimate conduct, such as partial fill orders and stop-loss orders. *Id.* at 656. Rejecting Coscia's arguments, the court first noted that, for an as-applied challenge, the defendant could not raise hypothetical conduct not related to the allegations. *Id.* at 658. The court then found that the indictment tracked the language of the statute by alleging that the defendant placed orders with the intent to cancel. *Id.* Finally, the court explained that the scienter requirement did much to destroy any force of the vagueness argument. *Id.* at 659 (quoting *United States v. Cherry*, 938 F.2d 748, 754 (7th Cir. 1991)). In short, "[b]ecause the alleged conduct clearly involves 'bidding or offering with the intent to cancel' the Court does not find § 6c(a)(5)(C) impermissibly vague as applied" to Coscia. *Id.*[2]

[2] For the same reasons, the *Coscia* court recently rejected the defendant's vagueness argument in its order denying the motion for judgment of acquittal and for new trial. *United States v. Coscia*, -- F. Supp. 3d --, 2016 WL 1359370, at *3 (N.D. Ill. Apr. 6, 2016).

Likewise, Defendants' alleged conduct in this case clearly involves entering orders with the intent to cancel the orders before execution. The spoofing provision, as applied to Defendants, is therefore not vague.

B. Manipulative and Deceptive Devices

The Commission Regulation prohibiting manipulative and deceptive devices states, in relevant part:

> It shall be unlawful for any person, directly or indirectly, in connection with any . . . contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly . . . [u]se or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud . . . .

17 C.F.R. § 180.1. The Regulation addresses economic activity and contains a scienter requirement, so it is subject to a lower standard of scrutiny. Regulation 180.1 was promulgated under Section 6(c)(1) of the Act, 7 U.S.C. § 9(1), which, in relevant part, prohibits the use or employment, or attempted use or employment, of "any manipulative or deceptive device or contrivance" in connection with futures.

Congress modeled Section 6(c)(1) of the Act after Section 10(b) of the Securities Exchange Act of 1934: "[Section 6(c)(1) of the Act] is patterned after the law that the SEC uses to go after fraud and manipulation; that there can be no manipulative devices or contrivances. It is a strong and clear legal standard that allows regulators to successfully go after reckless and manipulative behavior." 156 Cong. Rec. S3333-01 (daily ed. May 6, 2010) (statement of Sen. Cantwell) (emphasis added). Likewise, the Commission modeled Regulation 180.1 after SEC Rule 10b-5: "Given the similarities between CEA section 6(c)(1) and Exchange Act section 10(b), the Commission deems it appropriate and in the public interest to model final Rule 180.1 on SEC Rule 10b-5." Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg.

41,398, 41,399 (July 14, 2011). The Commission modeled Regulation 180.1 on SEC Rule 10b-5 to benefit from the extensive jurisprudence in the securities context,[3] as such jurisprudence would "provide[ ] the public with increased certainty because the terms of the Exchange Act Section 10(b) and SEC Rule 10b-5 have withstood challenges to their constitutionality in both civil and criminal matters." *Id.* (emphasis added).

Regulation 180.1 contains nearly identical language to SEC Rule 10b-5,[4] and it is well-settled that that Rule is constitutionally sound. For example, in *United States v. Persky*, the Second Circuit held that neither Section 10(b) nor Rule 10b-5 were unconstitutionally vague. 520 F.2d at 286-88. The court found that while the statute and the rule contained general legal terms, no reasonable person would have difficulty in understanding those terms. *Id.* at 287 (quoting *Coplin v. United States*, 88 F.2d 652, 657 (9th Cir. 1937)). Regulation 180.1, containing nearly identical language, likewise passes constitutional muster.

Moreover, for decades courts have interpreted and applied the language of Rule 10b-5 to condemn a wide swath of conduct that undermines genuine forces of supply and demand. As the court explained in *SEC v. Resch-Cassin & Co.*: "Th[e] prohibition with respect to manipulative activity is not confined to any particular kind of manipulation, but as more specifically defined in Rule 10b-5 is necessarily designed to outlaw every device used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage." 362 F. Supp. 964, 975 (S.D.N.Y. 1973) (internal quotation marks and citation omitted). And a mirage is

[3] The Commission also noted that because of the differences between the securities and derivatives markets, securities case law would serve as guiding, but not necessarily controlling, precedent. 76 Fed. Reg. at 41,399.

[4] There are certain operative words in Regulation 180.1 that are not in Rule 10b-5, such as "use," "intentionally or recklessly," "attempt," and "manipulative," but these are all well-established legal terms. For example, "manipulative" is used in Section 10(b) of the Securities Exchange Act, and that section has long withstood a vagueness challenge. *See United States v. Persky*, 520 F.2d 283, 286-88 (2d Cir. 1975).

exactly what the Commission alleges: Defendants placed large orders on one side of the market to create a false impression of market depth, and Defendants did so to lure other market participants into placing orders on the same side of the market. Defendants then simultaneously canceled those spoof orders and placed orders on the other side of the market to execute against the orders of the tricked market participants by converting a tool originally intended to prevent cross trades into a weapon of spoofing and manipulation. Compl. ¶ 100. This scheme, as alleged, falls well within the plain language of Regulation 180.1. The Regulation provides Defendants with clear notice that their scheme was illegal, and it contains a concrete standard for enforcement. The Regulation is therefore not vague as applied to Defendants.

V. NONE OF DEFENDANTS' ARGUMENTS HAVE MERIT

Despite the clarity of the spoofing provision and Regulation 180.1, and the well-reasoned case law supporting their constitutional validity, Defendants raise a multitude of arguments, none of which have merit. The Commission will address these arguments in turn.

A. There Is No Debate that Defendants' Conduct Is Illegal

Defendants raise industry participant concerns surrounding the spoofing provision,[5] Mot. at 2-9, but none of these concerns have anything to do with the conduct alleged in the Complaint. In fact, the industry participants condemn the type of conduct alleged in the Complaint. Ironically, Defendants' own exhibits to the Motion prove these points.

The industry participants' primary concern was legitimate conduct that, in their view, could be captured under a literal reading of the spoofing provision. This legitimate conduct included larger orders in pro rata allocation markets, entered with the desire to get a smaller fill

[5] The Commission received industry participant comments regarding the spoofing provision in response to an Advance Notice of Proposed Rulemaking, 75 Fed. Reg. 67,301 (Nov. 2, 2010), as well as a Proposed Interpretive Order, 76 Fed. Reg. 14,943 (Mar. 18, 2011). In addition, on December 2, 2010, the Commission hosted a full day roundtable with a panel of industry participants discussing spoofing.

quantity; market makers "chasing a market" linked to other markets; canceling orders due to changing market conditions; high frequency traders entering and canceling orders, adding liquidity to the market; limit orders; and stop orders. *See* Letter from Futures Industry Association to Commission (Dec. 23, 2010) ("FIA Letter") (Dkt. #163-3) at 6-7 (larger order in pro rata allocation market, chasing a market, changing market conditions); Letter from Managed Funds Association to Commission (Dec. 28, 2010) ("MFA Letter") (Dkt. #164-4) at 7-8 (larger order in pro rata allocation market, high frequency traders); Letter from CME Group to Commission (Jan. 3, 2011) ("CMEG Letter") (Dkt. #164-5) at 8-9 (larger order in pro rata allocation market, limit order); CFTC, Staff Roundtable on Disruptive Trading Practices (Dec. 2, 2010) ("Roundtable Transcript") (attached as Exhibit A) [6] at 32:5-21, 44:19-45:5, 60:6-61:3 (changing market conditions, larger order in pro rata allocation market, stop order).

The Complaint has nothing to do with these industry concerns. There are no allegations about the entry of larger orders in pro rata allocation markets,[7] or a market maker chasing a market, or an HFT providing liquidity, or a limit or stop order, or changing market conditions. Defendants' attempt to raise the hypothetical concerns of the industry, which are unrelated to the allegations in the Complaint, fails in the as-applied context. *See Levas & Levas v. Vill. of Antioch*, 684 F.2d 446, 451 (7th Cir. 1982) ("But a finding of unconstitutional vagueness cannot be based on uncertainty at the margin, or on a parade of bizarre hypothetical examples . . . .").

[6] The transcript of the roundtable is also available on the Commission website at http://www.cftc.gov/idc/groups/public/@swaps/documents/dfsubmission/dfsubmission24_120210-transcri.pdf.

[7] In fact, none of the allegations relate to pro rata allocation markets. As alleged in the Complaint, the allocation methodology for the relevant markets is FIFO, Compl. ¶ 24, and Defendants used FIFO allocation to their advantage by placing their orders behind existing orders, Compl. ¶¶ 61-62.

Furthermore, although the spoofing provision does not require manipulative intent, the industry participants uniformly condemn placing orders with such intent.[8] *See* FIA Letter at 6; MFA Letter at 8; CMEG Letter at 8; Roundtable Transcript at 36:12-16, 61:4-20. As articulated by CME Group in a comment letter to the Commission, the difference between illegal spoofing and legitimate conduct was "the intent to enter non bona fide orders for the purpose of misleading market participants and exploiting that deception for the spoofing entity's benefit," CMEG Letter at 8, which is exactly what the Commission alleges here. *See supra* Part IV.A.

Although Defendants cite to industry participants in support of their Motion, these same participants denounce the type of flipping conduct alleged in the Complaint. For example, Defendants cite to CME Group, Mot. at 4, but Defendants fail to mention the flipping pattern that CME Group gave as an illustration of wrongful conduct:

> For example, assume that a market is 6 bid for 100 contracts, with 100 contracts offered at 7. A party enters four 250-contract offers at 7 solely for the purpose of creating the appearance of substantial selling interest, indicating that the market is likely to trade lower, and incenting other market participants to join the offer. The inside market depth changes to 100 x 1,250 as a result of other participants responding to the new market condition reflected by the party's deeper non bona fide offers. The party subsequently cancels his 1,000-lot offer and simultaneously enters an order to buy 300 contracts at 7, thereby causing the market to move from 6 bid to 7 bid. Parties who initiated positions at a price of 7 are now short at the bid price and pay the offer price of 8 to unwind what now appears to be an

[8] In the Interpretive Guidance and Policy Statement ("Final Guidance"), the Commission declined to adopt the manipulative intent standard recommended by industry participants, noting that such a standard would create redundancy with the anti-manipulation provisions of the Act. 78 Fed. Reg. 31,890, 31,892 (May 28, 2013). The Commission did reiterate:

> Because CEA section 4c(a)(5)(C) requires that a person intend to cancel a bid or offer before execution, the Commission does not interpret reckless trading, practices, or conduct as constituting a "spoofing" violation. Additionally, the Commission interprets that a spoofing violation will not occur when the person's intent when cancelling a bid or offer before execution was to cancel such bid or offer as part of a legitimate, good-faith attempt to consummate a trade. Thus, the Commission interprets the statute to mean that a legitimate, good-faith cancellation or modification of orders (e.g., partially filled orders or properly placed stop-loss orders) would not violate section CEA 4c(a)(5)(C).

Id. at 31,896.

> unfavorable position in light of the changed market condition. The party who purchased the contracts at 7 sells at a price of 8 to those parties exiting their positions.
>
> In the foregoing example, the participant entered orders that he did not intend to execute for the purpose of misleading other market participants and exploiting that deception by simultaneously withdrawing his own offer and entering a buy order to take advantage of participants who were misled by his non bona fide offers. Such activity does not contribute to a fair or well-functioning market and should be prohibited.

CMEG Letter at 8 (emphasis added).

Likewise, Defendants cite to the roundtable testimony of a high frequency trader, Mot. at 5, but that same trader noted the following illegitimate behavior: "[W]hat is clearly not legitimate would be sending in, you know, 1000 lot because it's going to lead people to think there's more demand, you know, in the market than there truly is in order to get them to, you know, either join the bid or in order to lift the offer." Roundtable Transcript at 36:6-11 (emphasis added). The trader also stated that submitting and canceling orders to create the appearance of market depth was spoofing. *Id.* at 93:18-94:3.

Finally, Defendants cite to the roundtable testimony of a proprietary trader, Mot. at 5-6, but Defendants omit the fact that the trader condemned flipping as wrongful:

> As far as canceling orders and where you draw the line, what's okay and what's not okay, you know, my general thought is that somebody who enters a large order, who really has no intent of buying but actually wants to sell, you know, or has no intent of selling but actually wants to buy, so, is entering an order in the opposite direction to what they actually want to do, and demonstrates a repeated pattern of entering those orders, getting other people to join them, pulling them and then, you know, going the other way -- I think that it's fair to say that that's an unacceptable practice.

Id. at 44:6-18 (emphasis added). In short, the industry participants view flipping patterns, such as that alleged in the Complaint, as the literal paradigm of illegal conduct.[9]

B. The Commission Adequately Alleges Intent to Cancel

Defendants suggest that there are no well-pleaded allegations of the intent to cancel, Mot. at 15, but that argument flat out ignores the Complaint. The Commission alleges the intent to cancel at practically every turn, and the Commission points to Defendants' pattern of order entry, cancellations, and flips, the comparative fill and cancel rates of the spoof orders versus the flip orders, and the placement of the spoof orders to avoid being filled in support of that intent. *See supra* Part IV.A. Defendants complain that: (1) there is no direct evidence of intent to cancel; (2) Defendants could have been canceling orders for legitimate reasons; and (3) Defendants were not placing orders to avoid being filled. Mot. at 15-17. The first argument relates to the character of evidence, while the second and third arguments are essentially denials of the allegations. None of these arguments are permissible for the Motion.[10] Instead, this Court must accept the well-pleaded allegations of the intent to cancel as true.

[9] Long before the enactment of the spoofing provision, the industry recognized the wrongfulness of entering and canceling non bona fide orders. For example, in 2002 CME fined Jeffrey Scott Waters for placing misleading bids, where Waters placed excessively large orders and subsequently canceled the majority of those orders. *See* http://www.nfa.futures.org/basicnet/Case.aspx?entityid=0270831&case=0220394BC&contrib=CME. Consistent with that view, the SEC charged spoofing conduct under Section 10(b) of the Exchange Act and Rule 10b-5 as early as 2001. *In re Blackwell*, Exchange Act Release No. 8030, 2001 WL 1408738 (Nov. 5, 2001). Similarly, prior to the spoofing provision, the Commission charged spoofing conduct under other provisions of the Act, such as causing non bona fide prices to be reported, 7 U.S.C. § 6c(a)(2)(B), and filing misleading reports of market conditions, 7 U.S.C. § 13(a)(2). *In re Bunge Capital Markets, Inc.*, CFTC No. 11-10, 2011 WL 12885858 (Mar. 22, 2011).

[10] Moreover, these arguments miss the substantive mark. Regarding direct evidence, as noted in the Reply in Support of its Motion for Preliminary Injunction ("PI Reply"), courts routinely rely on circumstantial evidence for intent. PI Reply at 7-8 (Dkt. #137-1). Regarding changing market conditions, the Commission alleges, and the evidence shows, that Defendants were not canceling orders because of market conditions; instead, they were canceling spoof orders meant to lure in other market participants. Regarding the placement of spoof orders at the top of the book, as noted by the example of CME Group, spoofing may include placing orders at the top of the book (but on the opposite side of one's true intentions). CMEG Letter at 8.

C. The Spoofing Provision Defines "Spoofing"

Defendants next claim that the spoofing provision does not define what spoofing is, so that Defendants had no notice that their conduct was spoofing. Mot. at 17-21. Given the plain language of the statute, this argument is frivolous. The spoofing provision states: "It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity 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 spoofing provision thus defines "spoofing" in the parenthetical directly following that word.

Faced with this clear definition, Defendants argue that because the parenthetical description could include, in Defendants' view, legitimate orders, such as stop-loss orders, partial fill orders, or fill or kill orders, the description must not be the definition of spoofing. Mot. at 18-20. As an initial matter, though Defendants (and the industry) continually raise stop-loss orders, partial fill orders, and fill or kill orders as examples technically falling under the definition of spoofing, this is not correct. A stop-loss order is entered with the intent to execute if the price falls (or rises) to a certain level. A partial fill order is entered with the intent to execute any or all of the quantity of the order, with the cancellation of any remainder. A fill or kill order is entered with the intent to execute all of the order or none of it. As the *Coscia* court correctly observed, these are not orders entered with the intent to cancel the orders prior to execution. 100 F. Supp. at 659 (citing Final Guidance, 78 Fed. Reg. at 31,896).

Furthermore, Defendants' argument is merely a disingenuous attempt to challenge the definition of spoofing based on hypothetical conduct not related to the Complaint, which Defendants cannot do in an as-applied challenge. Indeed, all of Defendants' citations are to cases involving facial challenges. *See City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (facial challenge to loitering statute); *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (facial challenge to state flag contempt statute); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (facial challenge to libel statute).[11] There is no question that "bidding or offering with the intent to cancel the bid or offer before execution" is the definition of spoofing and applies to Defendants' alleged conduct.

D. Defendants' Challenge to the Catch-All Phrases of the Spoofing Provision Fails

Defendants spill much ink regarding the phrases "of the character of" spoofing, or "commonly known to the trade as" spoofing. Mot. at 21-24. In Defendants' view, these phrases address conduct that is not spoofing but somehow like spoofing, and they wonder what such conduct would look like. Mot. at 21-22. Defendants' ruminations are for naught, because the Commission alleges that Defendants engaged in spoofing, *see supra* Part IV.A. The Commission does not allege that Defendants engaged in conduct that is not spoofing but somehow like spoofing. Once again, in an as-applied challenge, Defendants may not raise uncertainty at the margins or hypotheticals that do not apply to them. *Levas & Levas*, 684 F.2d at 451.

In the Complaint, the Commission does reference the spoofing provision and the phrases "of the character of" and "commonly known to the trade as" spoofing. These phrases are best understood as catch-all phrases meant to define the outer boundaries of the spoofing provision. Recognizing the axiom that "[t]he methods and techniques of manipulation are limited only by the ingenuity of man," *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971), the spoofing provision contains the phrases "of the character of" and "commonly known to the trade as" in order to capture the behavior of wrongdoers attempting to hide behind technicalities. The best

[11] Moreover, none of these cases support the claim that "spoofing" must mean something other than the parenthetical description. Mot. at 20. Instead, these cases mean that if the definition of a crime includes legitimate First Amendment conduct, then the definition is facially vague.

parallel example of this is in the options sphere, where the Act contains similar language. Commission Regulation 1.3(hh), 17 C.F.R. § 1.3(hh), defines commodity option as any transaction that, *inter alia*, is an option, is held out to be "of the character of" an option, or is "commonly known to the trade as" an option. This provision prevents market participants from formalistically evading the regulatory requirements that apply to options dealers, *see* 17 C.F.R. § 32.2, by claiming that they are not technically dealing in options. For example, in *CFTC v. Trade Exchange Network Ltd.*, the defendants claimed that their financial instruments were not options since they did not have a strike price, as well as other characteristics of a narrowly defined option. 117 F. Supp. 3d 29, 35 (D.D.C. 2015). The court looked beyond that narrow definition and analyzed whether the instrument was of the character of an option, or commonly known to the trade as an option. *Id.* at 35-37.

To be clear, this is not a case that tests the outer boundaries of the spoofing provision. The allegations in the Complaint fall squarely within the definition of spoofing, *i.e.*, entering an order with the intent to cancel the order before execution. And conduct that falls squarely within a statute's prescription *a fortiori* falls within the outer boundaries of any catch-all provisions. Defendants point to the market participant witnesses proffered by the Commission as proof positive that the Commission's allegations test the outer boundaries of the spoofing provision, Mot. at 23, but this argument fails for a number of reasons. First, for a motion for judgment on the pleadings, the Court can only look to the well-pleaded allegations in the Complaint. Second, even setting aside the legal standard for the Motion, the Court recognized that the market participant testimony was offered for and relevant to the following purposes:

> I am not going to consider any statements by these market lay witnesses as expert testimony on what spoofing in the legal context means. But these witnesses, from looking at their affidavits, are testifying -- as Mr. May did -- about their personal observations of Mr. Oystacher's trading activities. That is directly relevant to --

> and I am assuming the CFTC is going to link up the testimony we heard with Mr. Oystacher. I will hear the testimony next week, but I am assuming they are going to link up Mr. May's personal observations of the trading to Mr. Oystacher, in particular.
>
> Given that they are testifying based on their personal observations at the time in question regarding the conduct that is at issue in this preliminary injunction, it is directly relevant as to his conduct, the impact it had on the market. It provides helpful background information on this trading.

Tr. 5:17-6:8 (Apr. 22, 2016) (attached as Exhibit B). Thus, the Court was not going to consider any testimony providing a legal interpretation of the spoofing provision. Instead, the Court considered the testimony of the market participants for their personal knowledge of Defendants' conduct and how such conduct affected them and the market. In other words, the market participants provided fact evidence related to Defendants' spoofing.[12]

E. The Final Guidance Is Consistent with the Spoofing Provision

Defendants claim that the Final Guidance does not cure the spoofing provision's purported vagueness, Mot. at 24-27, and is contrary to the text of the statute, Mot. at 29-30. These arguments fail because: (1) the spoofing provision is not vague, *see supra* Part IV.A., so there is no vagueness to be cured by the Final Guidance; (2) the Final Guidance is not reviewable final agency action; and (3) the Final Guidance is entirely consistent with and reiterates the clear standard in the spoofing provision, that an order entered with the intent to cancel the order prior to execution is spoofing.

As an initial matter, the Final Guidance is not a rule promulgated under 7 U.S.C. § 6c(a)(6). Final Guidance, 78 Fed. Reg. at 31,890 n.4 (explaining that the Commission chose to provide interpretive guidance rather than promulgate a binding rule). To the extent Defendants attempt to challenge the Final Guidance on its face, they may not do so because the document is

[12] The market participants' personal knowledge regarding Defendants' order activity, including its anomalous nature and manipulative result, is also consistent with the Commission's expert testimony.

not reviewable final agency action. *See* 5 U.S.C. § 704 (2012). While a legislative rule is reviewable in court, a guidance document (or "general statement of policy") is not. *Ctr. for Auto Safety & Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 807 (D.C. Cir. 2006); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 412 (D.D.C. 2014) (interpretive guidance not reviewable final agency action). Unlike a legislative rule that has the force of law and is reviewable, non-reviewable agency guidance apprises the public of the agency's views on what existing law requires, *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004), or how it intends to enforce the governing statute, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). That is what the Final Guidance does here. It states that the Commission issued "this interpretive guidance and policy statement ('interpretive statement') to provide market participants and the public with guidance on the manner in which it intends to apply the statutory prohibitions set forth in section 4c(a)(5) of the CEA." Final Guidance, 78 Fed. Reg. at 31,890. Accordingly, insofar as Defendants contest the views set forth in the Final Guidance, their challenge may not be heard.

Defendants also claim that the Final Guidance failed to provide them with notice because it does not mention the speed of cancellations or flipping as evidence of spoofing, Mot. at 25, but the Final Guidance is flexible and does not need to list every single conceivable consideration. Instead, the Final Guidance states: "When distinguishing between legitimate trading . . . and 'spoofing,' the Commission intends to evaluate the market context, the person's pattern of trading activity (including fill characteristics), and other relevant facts and circumstances." 78 Fed. Reg. at 31,896. The speed of Defendants' cancellation of spoof orders, as well as the pattern of flipping to the opposite side of the spoof orders, are both relevant to Defendants' intent to cancel. Indeed, the Final Guidance gives the specific example of entering orders to create the appearance of false market depth, *id.*, which is exactly what the Commission alleges.

Defendants' argument that the examples of spoofing in the Final Guidance are "clearly broader than the scope of the Spoofing Statute," Mot. at 27, also fails because each example shows orders entered without the intent to execute them. 78 Fed. Reg. at 31,896. Instead, the orders are entered for other purposes, such as: (i) overloading the quotation system; (ii) delaying another person's execution; (iii) creating an appearance of false market depth; or (iv) creating artificial price movements. *Id.* All of these examples are consistent with the spoofing provision's touchstone of entering orders with the intent to cancel before execution.

F. The Non-Delegation Doctrine Has Nothing to Do with this Case

In addition to vagueness, Defendants also claim that the spoofing provision violates the non-delegation doctrine. Specifically, Defendants argue that "the Spoofing Statute and its corresponding grant of regulatory authority lack any intelligible principle and therefore effectuate an unconstitutional delegation of power to both the CFTC and the federal courts." Mot. at 30. But there is no delegation at issue here: the Commission's spoofing claims arise directly under 7 U.S.C. § 6c(a)(5)(C). And there is no non-delegation doctrine concerning the judicial authority of federal courts. The doctrine is simply inapplicable to this case.

The non-delegation doctrine is rooted in the Constitutional separation of powers and provides that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Congress may delegate legislative functions to a non-legislative body only if it supplies an "intelligible principle" to guide that body. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). A non-delegation challenge claims that a regulation promulgated by a non-legislative body is invalid because Congress failed to provide an intelligible principle to that body. For example, in *Panama Refining Co. v. Ryan*, at issue were regulations promulgated by the Department of Interior regarding petroleum transportation. 293 U.S. 388, 406 (1935). Similarly, in *Schechter Poultry*, at issue was the "Live Poultry Code," a set of regulations promulgated by the President. 295 U.S. at 521-22. Likewise, in *Whitman v. American Trucking Associations, Inc.*, at issue were air quality regulations promulgated by EPA. 531 U.S. 457, 463 (2001). Thus, at a minimum, there must be a regulation from a non-legislative body for the doctrine to apply.

Here, there is no regulation at issue with respect to the spoofing charges. As Defendants admit, Congress did not require the Commission to issue any regulations. Mot. at 2 (describing a "permissive obligation" to issue rules); *see also* 7 U.S.C. § 6c(a)(6) ("The Commission may make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary . . . ." (emphasis added)). And as they also admit, the Commission has not done so. Mot. at 9 (noting that the Commission has not issued any rule or final order). Instead, the Commission determined to proceed directly under the spoofing provision, enacted by Congress, using Congress' own legislative authority. *See* 78 Fed. Reg. at 31,890 n.4 (noting that the statute is self-effectuating). In this case, the Commission alleges that Defendants violated the spoofing provision, a statute, so there is no delegation issue.

Put another way, because the Commission has not exercised delegated legislative authority, Defendants can point to no injury from any delegation, so they lack standing to raise a non-delegation argument. In the cited cases above, the relevant parties were the object of regulation by the executive branch. *Whitman*, 531 U.S. at 463; *Schechter Poultry*, 295 U.S. at 508; *Panama Refining*, 293 U.S. at 410-11. Because the regulated party was actually harmed by (or in imminent harm of) the regulation created by the non-legislative body, the regulated party could then challenge the delegation of legislative power to that body. Here, there is no regulation created by a non-legislative body, no injury from such a regulation, and therefore no standing to raise a non-delegation argument.

Even if the Commission had exercised delegated legislative authority, which it has not, Defendants' argument would still fail because Congress may delegate legislative functions if it supplies an "intelligible principle" for the delegation. *J.W. Hampton*, 276 U.S. at 409. The Supreme Court has found the doctrine violated only twice, both times in 1935. In *Panama Refining*, the Court found that the enabling statute gave the executive branch "unlimited authority to determine the policy and to lay down the prohibition." 293 U.S. at 415. Similarly, in *Schechter Poultry*, the Court found that the enabling statute contained "no standards for any trade, industry or activity." 295 U.S. at 541. In every other instance, the Supreme Court has upheld the statute under the intelligible principle rubric, with standards as general as not "unduly or unnecessarily complicate[d]," "generally fair and equitable," and in the "public interest." *Whitman*, 531 U.S. at 474 (internal quotation marks and citations omitted).

Here, Defendants claim that "spoofing" is the phrase that fails to provide an intelligible principle,[13] yet that phrase is explicitly defined in the statute as "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. § 6c(a)(5)(C). This is a far cry from *Schechter Poultry*, where Congress delegated to the President the ability to approve "codes of fair competition," with "fair competition" undefined. 295 U.S. at 531. And the definition of spoofing contained in the provision is far more specific than statutes found by the Supreme Court

[13] Defendants also complain that the rulemaking authority of Section 4c(a)(6) of the Act contains no intelligible principle, Mot. at 34, but as stated, *supra*, no regulations have been promulgated under that Section, so there is nothing to challenge under the non-delegation doctrine. Moreover, the phrase "disruptive of fair and equitable trading" contained in the Section is more specific than other standards held to be constitutionally acceptable. *See Whitman*, 531 U.S. at 474 (listing examples of general standards upheld).

to pass constitutional muster. *See Whitman*, 531 U.S. at 474. Thus, even if the non-delegation doctrine were not wholly irrelevant, Defendants' argument would still fail.[14]

Finally, Defendants' statement that Congress has unlawfully delegated legislative functions to the Court is groundless. While the non-delegation doctrine restrains Congress from delegating legislative authority to either coordinate branch, *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("Congress generally cannot delegate its legislative power to another Branch."), it has not done so here. The Court's task is simply to interpret and apply a statute, which is "emphatically the province and duty of the judicial department." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

VI. CONCLUSION

Defendants' constitutional arguments are much ado about nothing. They ask this Court to invalidate a statute passed by Congress and signed into law by the President for a litany of unserious and irrelevant reasons. That statute, the spoofing provision, is due presumptive validity, is clear, and clearly applies to Defendants' alleged conduct. Furthermore, Defendants' cursory challenge to Regulation 180.1 borders on frivolous, considering the long-standing constitutionality of the nearly identical securities analogue. The Commission therefore respectfully requests that this Court deny the Motion.

[14] Defendants again point to the market participant witnesses proffered by the Commission for the preliminary injunction hearing, and they claim that the Commission is delegating to the market participants the authority to define the spoofing provision. Mot. at 35-37. Once again, Defendants may not look to the evidence proffered in a motion for judgment on the pleadings, but even beyond that point, the market participants were offered for fact evidence of Defendants' spoofing, and the Court explicitly limited their testimony to such evidence. *See supra* Part V.D.

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Respectfully Submitted,

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