UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA v. MICHAEL COSCIA	No. 14-CR-0551 Judge Harry D. Leinenweber

GOVERNMENT'S RESPONSE TO DEFENDANT'S SECOND MOTION FOR A NEW TRIAL

The UNITED STATES OF AMERICA, by and through its attorney, JOHN R. LAUSCH, JR., United States Attorney for the Northern District of Illinois, hereby respectfully responds to defendant's second motion for a new trial. For the reasons set forth below, defendant's motion should be denied in its entirety.[1]

I. BACKGROUND

Defendant was indicted on six counts of commodities fraud, in violation of 18 U.S.C. § 1348(1), and six counts of spoofing, in violation of 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2). (ECF 1.) The charges arose out of his use of software programs on Chicago Mercantile Exchange ("CME") and Intercontinental Exchange ("ICE") commodities markets to execute a bait-and-switch scheme. (*Id.*) Defendant's scheme worked by: (1) placing "small" orders to buy or sell commodities at preferential prices that did not exist on the market; (2) placing successive "large" orders on the opposite side of the market to create illusory supply or demand; and (3) cancelling

[1] "ECF" refers to pleadings filed in this case, followed by the docket number. "Mem." refers to the Memorandum of Law in Support of Defendant Michael Coscia's Motion for a New Trial, and "Tr." refers to the transcript of trial proceedings, followed by the applicable page number.

large orders once defendant's small orders were filled at the preferred price. (Tr. 196–99, 475, 653–54, 700–01.) Using this practice thousands of times for ten weeks, defendant made $1.4 million in illegitimate profits. (Tr. 1088.)

After assessing, over a seven-day trial, the parties' exhibits and trading data, dueling experts, and defendant's own testimony, the jury convicted defendant on all counts. (ECF 84.) In April 2016, five months after the verdict, defendant made an informal request to ICE for the data underlying ICE's trial summary charts. (ECF 139.) This request was rebuffed, and defendant served a trial subpoena on ICE, which ICE moved to quash. (*Id.*; *see also* ECF 145.) The Court granted ICE's motion in part, and defendant later received responsive data from ICE in June 2016. (ECF 147; ECF 222, Shenoi Decl., Ex. 3.) Moreover, in May and June 2016, defendant received data underlying CME's trial summary charts.[2] (*See* ECF 156-1; Mem. 5.)

Relying on these post-trial disclosures, defendant requested a probationary sentence, arguing—as here—that: (1) "proof of [his] outlier status was based on faulty evidence"; (2) he "did not have an unusually high cancellation rate"; and (3) ICE's post-trial disclosures established that the figures used in its Summary Chart 6 were inaccurate. (ECF 156, at 10, 12–13, 15, 34–35.) The government, in response, illustrated how "all of defendant's new data analysis is flawed and irrelevant," and requested a custodial sentence. (ECF 157, at 6, 26.)

[2] On January 18, 2019, the government's undersigned counsel requested that defense counsel disclose when and how defendant sought this data from CME. Defense counsel responded, on January 22, that it would be a "substantial burden" to obtain this information, but confirmed that defendant did not have before trial the CME data on which his current motion relies.

The Court rejected defendant's request for probation, calculated defendant's Guidelines range at 70–87 months' imprisonment (based on factors including a two-point obstruction-of-justice enhancement predicated on defendant's perjury at trial), and varied downward to impose a total custodial term of 36 months. (*See* ECF 159, 162.) The Seventh Circuit affirmed defendant's convictions and sentence. *United States v. Coscia*, 866 F.3d 782, 795–98, 803 (7th Cir. 2017).

Recycling his contentions from sentencing, defendant moves—now, a second time (*see* ECF 97, 110)—for a new trial, contending that post-trial disclosures from CME and ICE are "newly-discovered evidence" and that later indictments rebut the government's assertion at trial that defendant's trading patterns were unique. These claims lack merit, and the Court should deny defendant's motion.

II. ARGUMENT

A. Legal Standard Governing Motions For A New Trial Based On Newly-Discovered Evidence

Motions for a new trial pursuant to Federal Rule of Criminal Procedure 33—as defendant makes here—"are disfavored, and properly granted only in the most extreme cases." *United States v. Jenkins*, 218 F.R.D. 611, 613 (N.D. Ill. 2003) (citing *United States v. Linwood*, 142 F.3d 418, 422 (7th Cir. 1998)); *see also United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994) ("A jury verdict in a criminal case is not to be overturned lightly, and therefore a Rule 33 motion is not to be granted lightly.") "In order to receive a new trial based on newly discovered evidence, defendants must demonstrate that the evidence '(1) came to their knowledge only after trial; (2) could not have been discovered sooner had due diligence been

exercised; (3) is material and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a retrial.'" *United States v. Eads*, 729 F.3d 769, 780 (7th Cir. 2013) (quoting *United States v. Ryan*, 213 F.3d 347, 351 (7th Cir. 2000)).

B. Defendant Is Not Entitled To A New Trial Based On Immaterial Trading Data That Was Obtainable Before Trial

Based on post-trial disclosures from CME and ICE, defendant challenges the layout of summary charts offered at trial. But defendant has not established that this information was previously unavailable through pretrial due diligence. And as impeachment evidence, the proffered trading data cannot justify a new trial.

1. The "new" trading data was discoverable through the exercise of pretrial due diligence

Prior proceedings make clear that defendant's principal tact was to challenge the constitutionality of the anti-spoofing provision, 7 U.S.C. § 6c(a)(5), at a time when there was a dearth of case-law regarding its enforcement. Defendant's prior counsel vigorously pursued that strategy before this Court and the Seventh Circuit.

Only after trial and the denial of his original Rule 33 motion did defendant seek CME's and ICE's underlying trading data, and his arguments at sentencing—regurgitated here—turn on those post-trial disclosures. But as the Seventh Circuit notes, the newly-discovered-evidence rule is not designed to undo jury verdicts because of later-devised defense theories: "Ingeniously developed evidence by hindsight should not be permitted to be substituted for that which was readily subject to development at trial." *United States v. Hedgeman*, 564 F.2d 763, 769 (7th Cir. 1977). Yet that is precisely what defendant attempts to do here, having pursued

one failed strategy at trial, and then using a Rule 33 motion to pursue a different strategy at retrial with the hope of a different outcome.

Unlike evidence of subsequent spoofing indictments, which defendant rightly contends he "could not have discovered . . . through his own due diligence, since the indictments were not returned until after he was convicted" (Mem. 34), defendant fails to recount any efforts to obtain the trading data forming the basis of his motion *before* trial.[3] As a panel of the Seventh Circuit recognized, a "lack of diligence is enough to doom [a] motion" for a new trial. *United States v. Thomas*, 492 F. App'x 690, 692 (7th Cir. 2012) (unpub'd) (citing *United States v. Taylor*, 600 F.3d 863, 869–70 (7th Cir. 2010)).

Where, as here, the sought-after records were obtainable through compulsory process, a "lack of due diligence" is established whenever those records were: (1) not subpoenaed; or (2) defendant fails to seek a trial continuance to obtain those records. *United States v. Nero*, 733 F.2d 1197, 1205 (7th Cir. 1984); *see also United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. 1982) ("[A] defendant's 'claim of diligence is seriously undermined by the failure of the defense to have a subpoena issued for the witness or to request a continuance on the basis of (the witness') unavailability.'").

Defendant did not subpoena the ICE trading data until April 2016, five

[3] By failing to argue the point in his opening brief, defendant waives any argument in reply that he exercised due diligence in seeking this trading data from ICE and CME. *See United States v. Luna*, No. 10 CR 176-1, 2011 WL 663062, at *10 (N.D. Ill. Feb. 14, 2011) ("Arguments raised for the first time in a reply brief are waived.") (citing *United States v. Diaz*, 533 F.3d 574, 577 (7th Cir. 2008)).

months after the jury's verdict. (*See* ECF 139.) And while defendant complains he did not receive additional trading data and disclosures from CME or ICE until after trial (Mem. 5–6), he fails to establish: (1) that he subpoenaed this information before trial or requested a continuance pending its receipt; or (2) that a request for a continuance on this basis was rejected.

For its part, this Court continued the trial date on four occasions, citing the interests of justice and the parties' need for adequate preparation time. (*See* ECF 12, 29, 38, 40.) And yet, defendant never sought additional time to subpoena the records he claims are so critical to his new, post-trial defense theory.

In sum, where defendant failed to subpoena before trial the trading data that forms the basis for his motion, or to seek a continuance of the trial date so that he could receive the sought-after data, he has no basis to claim that he exercised due diligence. *See Nero*, 733 F.2d at 1205; *Oliver*, 683 F.2d at 228. Defendant's failure in this regard is—alone—fatal to his Rule 33 motion. *See Thomas*, 492 F. App'x at 692.

2. Merely offered for impeachment, the new trading data is not "material" under the newly-discovered evidence rule

Through CME's and ICE's post-trial disclosures, defendant aims to impeach certain trial summary exhibits. Yet "'impeachment evidence cannot provide the basis for a new trial'" under Rule 33. *Kitchen v. United States*, 227 F.3d 1014, 1022 (7th Cir. 2000) (quoting *United States v. Austin*, 103 F.3d 606, 609 (7th Cir. 1997)).

For example, defendant challenges ICE Summary Chart 6 ("ICE 6") based on ICE's post-trial disclosures. (Mem. 5–7, 28–29.) To that end, defendant takes the term "Order cancellation comparison" in ICE 6—stripped of context—and claims the

underlying data reflects that he "represented a fraction of one percent of all order cancellations," rather than the 96% figure in ICE 6. (Mem. 7.) But ICE 6 does not compare defendant's and other market participants' *gross* cancellation rates. Rather, ICE's compliance director, John Redman, testified that ICE 6 notes "how frequently a large order was cancelled following the trading of a small order in the other direction." (Tr. 304–05.) This subspecies of cancellations, as the government argued in closing, is probative of defendant's intent to: (1) cancel large orders when he placed them; and (2) use his large orders as "bait" to artificially "move the market" and enable his small orders to be filled at favorable prices. (Tr. 1445–48.) Based on ICE's post-trial disclosures, defendant also notes that the figure in ICE 6 should be revised from 96% to 91%.[4] (Mem. 8.) At bottom, defendant proffers ICE's post-trial disclosures to: (1) show that defendant's *gross* cancellation rates were *de minimis* compared against other traders; and (2) highlight ICE's error in tallying the particular cancellations at issue in ICE 6. But these are simply impeachment tactics, which "'cannot provide the basis for a new trial.'" *Kitchen*, 227 F.3d at 1022.

Similarly, citing CME's post-trial disclosures, defendant challenges CME Summary Chart 5 ("CME 5") on the grounds that it: (1) excludes "modifications" in calculating total cancellations; (2) compares defendant's cancellation rates against trading firms rather than individual traders; and (3) combines large and small

[4] Defendant's assertion that the "methodology" underlying this figure "was never explained during trial" (Mem. 7) is directly refuted by the testimony of Mr. Redman. (*See* Tr. 304–05.) And ICE's post-trial disclosure that the 91% figure "is based on an ICE system tool that, for regulatory purposes, generates an alert when the tool detects suspicious trading activity" is consistent with Mr. Redman's testimony. (*See* ECF 222, Shenoi Decl., Ex. 3, at 1.)

orders in calculating defendant's "Volume Rank," rather than using large orders only. (Mem. 12–14, 29–31.) Much like defendant's challenges to ICE 6, these are simply further impeachment uses. What is more, as noted above, defendant fails to establish how this evidence—even if offered substantively—"could not with due diligence have been discovered earlier." *Austin*, 103 F.3d at 609–10 (denying motion for new trial where newly-discovered evidence served merely to impeach prosecution's experts and, if offered substantively, could have been discovered pretrial through reasonable diligence). Defendant's impeachment gambit does not, accordingly, justify a new trial.

3. Defendant cannot establish that his belatedly acquired trading data would result in a likely acquittal at retrial

Defendant complains that CME's and ICE's trial summary charts failed to evince an "apples-to-apples" comparison. (Mem. 13–14.) Through his retained expert, defendant purports to offer such a comparison, yet fails at that task. And defendant's misleading presentation of CME's and ICE's post-trial disclosures would not likely result in an acquittal, as is necessary to justify a new trial under Rule 33.

For instance, defendant claims that the "cancellations" figures in CME 5 are inaccurate, because they omit "modifications." (Mem. 12, 29–30.) But as the government noted in rebutting the same argument at sentencing (ECF 157, at 6), defendant's spoofing algorithm was not programmed to *modify*—but to *cancel*—large orders. So, accounting for modifications has no value here except to mislead, where defendant's cancellation and fill rates remain frozen, while other traders'

cancellation rates (which now include modifications) increase while their fill rates decrease.

Defendant also alleges CME 5 is flawed because it "combined large and small orders in calculating 'Volume Rank,'" whereas (according to defendant) "the apples-to-apples comparison should be of large orders placed to large orders filled." (Mem. 13.) Yet the government's expert—Hank Bessembinder—testified that defendant's large-order fill rate offers only a partial picture, overlooking his successive attempts to *cancel* orders filled milliseconds before his cancellation instructions arrived. (*See* Tr. 1352–55.) That is, certain of defendant's large orders were filled *despite* his efforts to cancel those same orders in the moments before they were consummated.

Further, defendant contends that his order-to-trade-size ratios[5]—as depicted in ICE Summary Chart 3 ("ICE 3")—are not unusual, because "[d]ata provided by CME after trial conclusively proves that there were many dozens and even hundreds of traders with [ratios] greater than [defendant's] for each of the 17 commodities traded on the CME[.]" (Mem. 16.) So arguing, defendant glosses over his misleading juxtaposition of data from CME markets against data from ICE markets, without ever establishing: (1) that CME and ICE markets are comparable (*i.e.*, "apples-to-apples"); or (2) what defendant's order-to-trade-size ratios were for each of the seventeen CME commodities. Crucially, defendant's proffered evidence does not rebut the assertion that defendant's order-to-trade-size ratio *vastly*

[5] An "order-to-trade size ratio" compares "the average size of an order placed into the market compared to the average trade that actually resulted from" that order, or—put differently—a comparison of "what orders go into the market compared to what actually gets . . . filled." (Tr. 295.)

outpaced anyone else trading over the same period on the Brent crude-oil market depicted in ICE 3.

Next, defendant claims the fill-rate differential for his large and small orders on CME markets was not unusual, because CME's post-trial disclosures show that "in every one of the 17 CME markets, many dozens and even hundreds of traders had fill rate differentials greater than [defendant's] 35.53%[.]" (Mem. 19.) Yet even this is misleading, pitting defendant's *aggregate* differential against the *commodity-specific* differentials of other traders. As the record shows, defendant's fill-rate differential was higher than 35.53% for ten out of seventeen CME commodities, including British Pound (39.62%), S&P Mid Cap (47.09%), Swiss Franc (47.37%), soybeans (44.86%), soybean meal (39.51%) and oil (60.62%), wheat (36.8%), crude oil (42.46%), natural gas (47.01%), and gold (43.42%). (*See* Tr. 381–95; CME Summary Charts 2 and 3.) And defendant's newly-proffered evidence does not demonstrate that any other trader across the CME markets had an aggregate fill-rate differential higher than 35.53%.

Lastly, as noted previously, defendant's new challenge to ICE 6 (*see* Mem. 5–7, 28–29) conflates *gross* cancellation rates with the figures represented in ICE 6, *i.e.*, rates at which defendant and other traders cancelled large orders after small orders were filled. Accounting for potential changes to ICE 6 and the other summary charts given defendant's post-trial discovery efforts, the Seventh Circuit's opinion affirming defendant's convictions for sufficient evidence would be modified as follows:

> A review of the trial evidence reveals the following. First, Mr. Coscia's cancellation rates represented ~~96~~ 91% of all Brent futures large-order cancellations following small-order fills on the opposite side of the market on the Intercontinental Exchange during the two-month period in which he employed his software. Second, across all 17 commodities on the Chicago Mercantile Exchange, 35.61% of his small orders were filled, whereas only 0.08% of his large orders were filled. Similarly, only 0.5% of his large orders were filled on the Intercontinental Exchange. Third, the designer of the programs, Jeremiah Park, testified that the programs were designed to avoid large orders being filled. Fourth, Park further testified that the "quote orders" were "[u]sed to pump [the] market," suggesting that they were designed to inflate prices through illusory orders.[6] Fifth, according to one study, only 0.57% of Coscia's large orders were on the market for more than one second, whereas 65% of large orders entered by other high-frequency traders were open for more than a second. Finally, Matthew Evans, the senior vice president of NERA Economic Consulting, testified that Coscia's order-to-trade ratio was 1,592% on the Intercontinental Exchange, whereas the order-to-trade ratio for other market participants on the same exchange ranged from 91% to 264%. As explained at trial, these figures "mean[ ] that Michael Coscia's average order [was] much larger than his average trade"—i.e., it further suggests that the large orders were placed, not with the intent to actually consummate the transaction, but rather to shift the market toward the artificial price at which the small orders were ultimately traded.

United States v. Coscia, 866 F.3d 782, 795–96 (7th Cir. 2017) (as interlineated and modified; footnotes in original omitted).

The meager changes noted above do not alter the Seventh Circuit's ultimate

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[6] Defendant speciously claims the government "acknowledges that the testimony of Jeremiah Park . . . does not establish any wrongdoing." (Mem. 19–21.) In support of this assertion, defendant attempts to pit representations made by the government's counsel in *United States v. Jitesh Thakkar*, No. 18-CR-036 (N.D. Ill.), against those made by the government's counsel here. In *Thakkar*, the government's counsel stated there was no evidence that Park was subjectively aware of defendant's fraudulent intent at the time that Park designed defendant's trading software programs in accordance with defendant's instructions. (Mem. 21.) That assertion is consistent with the government's position here, *i.e.*, that defendant's directives to Park—as reported by Park at trial—are probative of defendant's intent to cancel large orders at the time he placed them. (*See* Tr. 1423–26, 1443–46.) Park's *personal* knowledge (or lack thereof) as to defendant's criminal intent is immaterial.

conclusion that, "when evaluated in its totality, the cumulative evidence certainly allow[s] a rational trier of fact to determine that Mr. Coscia entered his orders with the intent to cancel them before their execution." *Id.* at 796. Put another way, even if given the opportunity to present the trading data he obtained post-trial from CME and ICE, defendant cannot prove the outcome of a retrial would be a likely acquittal, as is his burden.

The trial here involved far more than just competing trading data and experts. Defendant took the stand and attempted to present the jury his version of events, as well as his explanation for his own trading patterns and intent. Through its verdict, the jury conclusively rejected defendant's narrative, told in his own words. And none of the new data defendant cites would change the jury's, or this Court's, findings that he *perjured* himself. This Court should therefore reject defendant's motion for a new trial based on belatedly-acquired (yet previously-acquirable) trading data.

C. Defendant Is Not Entitled To A New Trial Based On Inadmissible Evidence of Subsequent, Unrelated Prosecutions That Would Only Further Establish His Criminal Conduct For A Jury

Defendant also argues that evidence of subsequent prosecutions could not have been discovered through his exercise of pre-trial due diligence, since the indictments he now cites were not returned until after defendant was convicted. (Mem. 34.) But defendant's bid for a new trial on this basis still fails for: (1) a lack of materiality; and (2) the unlikelihood of his acquittal, assuming that evidence of later, unrelated prosecutions were admissible at a second trial (which they are not).

1. Inadmissible evidence of unrelated prosecutions cannot—by definition—be material

Newly-discovered "evidence must be admissible to be material[.]" *United States v. Westmoreland*, 712 F.3d 1066, 1075 (7th Cir. 2013); *see also United States v. Salem*, 578 F.3d 682, 686 (7th Cir. 2009) ("[O]nly admissible evidence can be material, for only admissible evidence could possibly lead to a different verdict."). Evidence must, at minimum, "be relevant to be admissible[.]" *United States v. Schmitt*, 770 F.3d 524, 532 (7th Cir. 2014).

Here, defendant's proffered evidence of subsequent prosecutions does not meet the bare threshold of relevance. Simply put, "comparisons between other criminal cases being prosecuted across the nation" are "plainly irrelevant and inadmissible." *United States v. Andreas*, 23 F. Supp. 2d 855, 861 (N.D. Ill. 1998), *aff'd*, 216 F.3d 645, 673 (7th Cir. 2000) (approving of district court's instruction that "references to other cases are totally irrelevant," and that the jury "should absolutely disregard any statements or references comparing this case to any other case"); *see also United States v. Alfred L. Wolff GmbH*, No. 08 CR 417-14, 2012 WL 90119, at *3 (N.D. Ill. Jan. 11, 2012) ("Defendant cannot manufacture relevance by showing a similarity of legal strategy, or charged offenses, between two completely unrelated criminal prosecutions."). Given its inadmissibility, evidence of later indictments—whether newly discovered or not—is not material by definition, and therefore cannot provide defendant an avenue for securing a new trial.

2. That similarly-situated traders were charged with the same federal crimes only further inculpates defendant

Assuming *arguendo* that it were admissible, evidence of subsequent unrelated prosecutions would hardly, let alone "probably," lead to an acquittal.

Defendant takes apparent umbrage at the government's arguments—in various motion, trial, and appellate proceedings—that defendant's trading patterns were unique, where later-filed criminal cases show that other individuals exhibited similar trading patterns over similar time periods and markets. (*See* Mem. 8–9, 21–22.) Two responses defuse defendant's sensationalist allegation that "the government knew, or, at a minimum, should have known that its representations to the jury were false." (Mem. 22.)

First, the government never claimed that defendant was the *only* trader in the nation engaged in spoofing or commodities fraud. Notwithstanding the government's assertion at closing that defendant's trading patterns were uncommon, which the jury was free to ignore as "statements and arguments" of counsel that "are not evidence" (ECF 85, Jury Instr. No. 4), the evidence of defendant's order-to-trade-size ratios, his infinitesimal large-order fill rate across the CME and ICE markets, and defendant's directives to Jeremiah Park, among other evidence, supported the jury's conclusion—affirmed by the Seventh Circuit—that defendant "entered his orders with the intent to cancel them before their execution." *Coscia*, 866 F.3d at 796.

Second, defendant's trading patterns were inarguably unusual compared to *legitimate* (*i.e.*, non-indicted) traders. If put before the jury, evidence of subsequent

prosecutions would simply confirm that individuals sharing defendant's "one-of-a-kind" trading profile met the same fate: they were charged with the same crimes as defendant. Rational litigants typically deem such evidence overwhelmingly—indeed, prejudicially—inculpatory. *See Andreas*, 23 F. Supp. 2d at 861. If allowed to present such evidence to the jury, defendant might score a rhetorical victory, somewhat rebutting the assertion that his trading patterns were unique. But he would do so at the expense of yet another guilty verdict by yet another jury, which now would see a slew of other indictments categorizing defendant's trading patterns as criminal. This, alone, should demonstrate that defendant is not entitled to a new trial based on newly-discovered evidence of later prosecutions against similarly-situated fraudsters.

III. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court deny defendant's second motion for a new trial, without an evidentiary hearing.

Respectfully submitted,
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