UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, v. JITESH THAKKAR, Defendant.	Case No. 18-CR-36 Judge Robert W. Gettleman

JITESH THAKKAR'S EMERGENCY MOTION TO EXCLUDE THE GOVERNMENT'S UNTIMELY PROPOSED OSTRICH INSTRUCTION

Jitesh Thakkar moves this Court to bar the government from offering the "ostrich" jury instruction at trial because offering this instruction would deny Jitesh the right to a fair trial. In support thereof, Jitesh states as follow:

INTRODUCTION

On the eve of trial and months after jury instructions were due, the government proposed giving an ostrich instruction at trial in an effort to circumvent its obligation to prove Jitesh's knowledge beyond a reasonable doubt. This untimely proposal was not the result of any newly-discovered evidence. Instead, the government changed its entire theory of the case and notified the defense of its intent to seek this instruction on Friday at 8:05 p.m.—just six days before jury selection was set to begin—based on the government's apparent realization that they don't have sufficient evidence to prove Jitesh's knowledge beyond a reasonable doubt. Allowing the government to present this new theory of the case and instruction would deprive Jitesh his fundamental right to a fair trial.

During his nearly two hours of secretly recorded interviews with the FBI in 2017, Jitesh consistently explained to the government that he did not know how Sarao would use the computer

program Edge Financial created and that traders do not reveal their trading strategies to programmers because those strategies are secret. The government disregarded these statements and presented a theory of the case that Jitesh had *actual knowledge* that Sarao would use the computer program to spoof. In fact, the government went so far as to ask the Court to admit lay opinion testimony that Jitesh *knew* Sarao would use the computer program to engage in spoofing. Now, days before trial, the government seeks to present an entirely different theory in this case—that Jitesh deliberately avoided learning that Sarao would use the program to spoof.

If Jitesh knew the government would pursue this new ostrich theory at trial, Jitesh would have engaged an expert witness to corroborate his statements and provide context to the jury about the propriety and secret nature of trading strategies. Jitesh would also have brought other programmers in to testify that traders did not divulge their trading strategies to programmers and, in fact, would not work with programmers who ask too many questions about their trading strategies. Instead of procuring these witnesses, Jitesh prepared for a trial at which he would disprove the government's allegations that he had *actual knowledge* of how Sarao would use the program, which was the government's theory of the case until Friday at 8:05 p.m. Allowing the government to present this new ostrich theory to the jury even though Jitesh does not have time to retain and prepare witnesses on the proprietary and secret nature of trading strategies would present a misleading picture to the jury and deprive Jitesh of his right to a fair trial.

Even if the government timely notified the defense of its intent to request the ostrich instruction at trial, this instruction is not appropriate in this case because there is no evidence that Jitesh had a strong suspicion that Sarao would use the computer program to spoof or that Jitesh took *deliberate actions* to avoid learning the truth about how Sarao would use the computer program.

Under these circumstances, the government's proposed ostrich instruction must be rejected.

BACKGROUND

I. The Government has not Discovered any New Evidence that Would Warrant Allowing this Untimely Instruction

The government has known that Jitesh did not know that Sarao would use the computer program to spoof since 2017. The FBI interviewed Jitesh on September 12, 2017 and December 21, 2017. During those secretly recorded interviews, Jitesh consistently and truthfully explained to the government that Sarao never told him how he would use the program Edge Financial created and that Jitesh never asked Sarao how he would use the program. Jitesh told the FBI that it is normal for traders to not reveal their trading strategies to programmers because these strategies are secret, and traders do not want to expose their strategies to anyone. Jitesh also informed the government that sometimes traders even have separate developers program smaller pieces of a trading program and then put all of those pieces together to maintain the secrecy of their trading strategy.

Jitesh's statements to the FBI in 2017 about his knowledge are consistent with Sarao's interviews in 2017 and early 2018 in which Sarao told the government that he *never* explained to Jitesh what he was going to do with the computer program, that he did not explicitly tell Jitesh why he did not want to get hit on certain orders or in what context he did not want to get hit on certain orders, and that he definitely did not tell Jitesh what kind of trader he was or the details of his trading strategy. The government has not developed any new or different evidence about Jitesh's lack of knowledge about how Sarao would use the program since the government interviewed Sarao in January 2018.

II. The Government Notifies Jitesh that it Intends to Offer the Ostrich Instruction After Hours Just Six Days before Jury Selection is Set to Begin

Despite knowing about Jitesh's lack of knowledge since 2017, the government did not notify the defense of its intent to seek an ostrich instruction at trial until after hours on a Friday, less than a week before jury selection is set to begin, and long past the Court's deadline for the parties to submit jury instructions.[1] The Court ordered the parties to submit proposed jury instructions to the Court on December 7, 2018. The jury instructions the government submitted to the Court on December 7th did not include the ostrich instruction. *See* Government's Jury Instruction No. 20, ECF Dkt. No. 49, pg. 20. On December 18, 2018, the Court ordered the parties to submit a combined set of jury instructions to the Court. December 18, 2018 Order, ECF Dkt. No. 57. The government and Jitesh's attorneys communicated for nearly two weeks to produce a combined set of jury instructions for the Court. Not once during this process did the government *ever* suggest that it would seek the ostrich instruction at trial. The combined set of jury instructions that the parties submitted to the Court did not include the ostrich instruction. *See* Joint Proposed Instruction No. 25, ECF Dkt. No. 62, pg. 27. Nor did the government raise the idea that an ostrich instruction may be appropriate in this case in either their jury instruction objection brief or their brief responding to Jitesh's jury instruction objection brief. *See* ECF Dkt. Nos. 64, 78. Nor did the government raise the possibility that they would request the ostrich instruction at either of the pretrial conferences with the Court at which the parties discussed jury instructions. Nor did the government notify Judge Gettleman that it intended to request this untimely instruction when Judge Gettleman informed the parties at the last pretrial conference that he would put together a

[1] Due to the government's untimely notification, the defense has not had sufficient time to fully brief this issue. This motion is meant to bring this issue to the Court's attention in a timely manner, but Jitesh reserves the right to raise additional arguments against this instruction at a later date.

draft set of jury instructions so that the parties knew what the draft instructions would look like before jury selection.

Simply put, the government *never* informed the defense or the Court during the course of this case that its theory of the case was that Jitesh deliberately avoided knowledge of what Sarao would do with the program or that it would seek an ostrich instruction in this case. This was not surprising because the government's theory in this case has always been that Jitesh had actual knowledge that Sarao would use the computer program to spoof, not that Jitesh deliberately avoided knowledge of what Sarao planned to do. In fact, the government planned to introduce lay opinion testimony from Sarao that Jitesh knew and understood that Sarao would use the program to spoof until the Court granted Jitesh's motion *in limine* to bar that improper testimony.

Apparently realizing what Jitesh's counsel has told the government for months—that Jitesh did not know Sarao would use the computer program to spoof, and thus could not have conspired with or aided and abetted Sarao's spoofing—on Friday, March 22, 2019 at 8:05 p.m., government sent an email to Jitesh's counsel informing them ***for the first time*** that the government intends to request that the Court provide following ostrich instruction to the jury:

> You may also find that the defendant acted knowingly if you find beyond a reasonable doubt that he believed it was highly probable that the NavTrader program would be used to engage in spoofing, and that he deliberately avoided learning that fact. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discover the truth.

See 3/22/19 Email from M. Cipolletti, attached hereto as Exhibit A. The government identified no new evidence that has emerged since jury instructions were due that makes this instruction necessary. Nor could they, given that they interviewed Jitesh for hours before the charges were brought in this case, interviewed Sarao at least seven different days, and have every email and document from Jitesh's business that is relevant to this case. The government apparently realized

only a week before trial that despite all of these documents and testimony, they do not have sufficient evidence to prove Jitesh knowingly entered into a conspiracy with Sarao or knowingly aided and abetted Sarao's spoofing and is now scrambling to salvage a case that should be dismissed. Jitesh's counsel notified the government of Jitesh's strong objection to this untimely proposal the next day. However, as of the filing of this motion, the government has not withdrawn their proposed request for the ostrich instruction at trial.

ARGUMENT

I. Giving the Ostrich Instruction would Deprive Jitesh of his Right to a Fair Trial

Giving the ostrich instruction in this case would deprive Jitesh of his right to a fair trial because Jitesh spent the past five months preparing for a trial at which he will disprove the government's allegations that he had *actual knowledge* that Sarao would use the program to spoof. Jitesh and his counsel prepared witnesses, selected exhibits, and deliberately decided not to engage expert witnesses in the trading industry based on the government's allegations that Jitesh had actual knowledge that Sarao would use the program to spoof. The government's introduction of the ostrich theory six days before jury selection does not give Jitesh sufficient time to prepare a defense to adequately rebut the government's new theory that Jitesh deliberately avoided learning that Sarao would use the computer program Edge Financial created to spoof.

Presumably, the government will argue that the ostrich instruction is appropriate in this case because Jitesh did not ask Sarao about his trading strategy or ask how Sarao intended to use the computer program—facts the government has been aware of since 2017. Had the government properly notified Jitesh of their intent to request this instruction when jury instructions were due in this case—or at any other point before the eve of trial—Jitesh would have prepared his witnesses and selected exhibits to rebut this theory at trial. More importantly, Jitesh would have retained

trading industry experts who could testify to the proprietary nature of trading strategies and that it is a universal practice in the trading industry for trading firms and traders to never reveal their trading strategies to anyone. Trading strategies are proprietary information. Traders and trading firms spend years and in some cases upwards of hundreds of thousands of dollars developing trading strategies. Sharing these strategies with anyone makes the strategy less effective. The proprietary nature of trading strategies can be seen in recent criminal cases brought in this District. For example, in *United State v. Yihao Pu*, the government charged Pu with theft of trade secrets for, among other things, downloading files containing a company's trading strategies and copying them onto his personal hard drive. *United States v. Pu*, 11-CR-699 (N.D. Ill.), Indictment, Dkt. No. 44. The indictment asserts that materials relating to the trading strategies of Pu's company constituted trade secrets, the materials were a significant source of value for the company, and that the company did not disclose materials related to its trading strategy to the public, or even to investors or customers. The *Pu* indictment describes the lengths the company went to in order to protect its trading strategies from being disclosed to third parties. *Id.* Similarly, in *United States v. David Newman*, the government charged Newman with theft of trade secrets for copying computer files from his trading firm employer that contained trading algorithms and trading strategies. *Newman*, 14-CR-704 (N.D. Ill.), Indictment, ECF Dkt. No. 1. The indictment sets forth numerous steps the trading firm took to keep its trading strategies secret. *Id.*

If Jitesh knew the government planned to pursue this new theory that he deliberately avoided knowledge of Sarao's intention to use the program to engage in spoofing, presumably because he did not ask questions about Sarao's trading strategy, Jitesh would have retained expert witnesses to provide the jury with this context that trading strategies are proprietary, highly

valuable, and highly confidential, in order to give the jury the proper context for why a trader would not reveal his trading strategies to a computer programmer.

Jitesh also would have brought in other programmers who work with traders to testify that it is common for traders to not divulge their trading strategies, even to the people developing their trading software. These witnesses would testify that in some cases, traders give separate programmers smaller pieces of a larger trading program to develop and then combine those elements so that no other person knows the trader's entire strategy. These programmers would also testify that traders would not use firms that ask too many questions about a trading strategy because traders are concerned programmers could sell these strategies to other people. This testimony from other programmers would have corroborated Jitesh's testimony that traders don't tell him their strategies when he's creating programs because that information is the trader's "secret sauce" that they do not share with anyone.

Without this context on the proprietary and secret nature of trading strategies and traders' unwillingness to share these strategies even with programmers, the government will try to distort a universal industry practice (and Jitesh's personal experience) of traders not revealing their trading strategies to computer programmers or anyone else into evidence that Jitesh deliberately avoided learning that Sarao would use the computer program to spoof. If the government is permitted to present an ostrich theory to the jury even though Jitesh has not had sufficient time or notice to engage an industry expert on the proprietary nature of trading strategies, it is highly likely that the jury could reach an improper conclusion based on a distorted view of the trading industry. To give Jitesh a fair trial in the face of this instruction, the parties would need to present what would amount to a mini-trial on the proprietary nature of trading strategies. Merely allowing the

government to present and argue the ostrich instruction at trial without this context would violate Jitesh's right to a fair trial and must not be permitted.

II. The Ostrich Instruction is not Appropriate in this Case even if the Government Timely Notified the Defense

Even if the government timely notified the defense of its intent to offer the ostrich instruction, this instruction is not appropriate in this case because there is no evidence that Jitesh believed or suspected that there was a high probability that Sarao would use the computer program to engage in illegal trading and no evidence that Jitesh took affirmative steps to avoid confirming that fact. "The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings." *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (holding the ostrich instruction was improperly given to the jury). The ostrich instruction "should not be given lightly, lest it lead the jury to believe that it may convict the defendant solely on the basis of his negligence." *United States v. Pierotti*, 777 F.3d 917, 920-21 (7th Cir. 2015).

First, this instruction is inappropriate in this case because there is *no evidence* that Jitesh had any suspicion, much less a strong suspicion, that Sarao would use the program to engage in spoofing. As Jitesh explained to the FBI in 2017, it is common for traders to not reveal their trading strategies, or how they will use Edge Financial's programs, to Jitesh. Thus, it was not surprising or suspicious to Jitesh that Sarao did not explain to Jitesh what kind of trader he was or how he would use the program Edge Financial created.

Although Jitesh may be able to see how Sarao planned to use the program looking back on it in hindsight after Sarao's arrest, "[e]vidence that a defendant *reasonably should have had strong suspicions* about the operative illegality is not sufficient to support the ostrich instruction."

United States v. L.E. Myers Co., 562 F.3d 845, 854 (7th Cir. 2009). "[E]vidence merely supporting a finding of negligence—that a reasonable person would have been strongly suspicious, or that a defendant should have been aware of criminal knowledge—does not support an inference that a particular defendant was deliberately ignorant." *United States v. Salinas*, 763 F.3d 869, 880 (7th Cir. 2014) (internal citations and quotation marks omitted). The Seventh Circuit has specifically cautioned that the ostrich instruction is "inappropriate in situations where the evidence only supports a finding that the defendant *should have* known or strongly suspected that criminal dealings were afoot." *United States v. Pabey*, 664 F.3d 1084, 1092 (7th Cir. 2011) (emphasis original). The Seventh Circuit has also emphasized that "the danger of giving the instruction where there is evidence of direct knowledge but no evidence of avoidance of knowledge is that the jury could still convict a defendant who merely should have known about the criminal venture." *United States v. Caliendo,* 910 F.2d 429, 435 (7th Cir. 1990). Because there is no evidence in this case that Jitesh *actually suspected* that Sarao would use the program to engage in spoofing, giving the ostrich instruction in this case could lead the jury to improperly find Jitesh guilty merely because they believe he *should have suspected* Sarao would use the computer program for illegal trading. Due to the risk of this improper result, the ostrich instruction should not be given in this case.

Further, there is no evidence in this case that Jitesh took affirmative actions to avoid learning the truth about how Sarao would use the program. "Failing to display curiosity is not enough; the defendant must *affirmatively act* to avoid learning the truth." *L.E. Myers Co.*, 562 F.3d at 854 (emphasis added) (internal quotation marks omitted) (holding that it was erroneous to give ostrich instruction where "the government can point to no evidence that any L.E. Myers employee took deliberate steps to avoid learning the truth."). "The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is

involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings." *Giovannetti*, 919 F.2d at 1228. In fact, the evidence in this case shows the opposite—that Sarao took steps to deliberately mislead Jitesh about his trading. Sarao admitted in his interviews with the FBI that he "definitely did not tell Thakkar the type of trader he was" and that he deliberately mislead Jitesh about how big of a trader he was because he did not want Edge Financial to charge him more. Thus, not only is there no evidence that Jitesh took actions to deliberately avoid the truth, Sarao actually mislead Jitesh about his trading and what type of trader he was, masking his true intentions for how he would use the program.

The government procured no evidence in this case that Jitesh strongly suspected Sarao would use the program to spoof or that Jitesh took deliberate actions to avoid discovering the truth. Under these facts, the ostrich instruction must not be given because it could improperly lead the jury to convict Jitesh on what the jury may believe Jitesh *should* have known.

CONCLUSION

WHEREFORE, Jitesh Thakkar respectfully requests that this Court enter an order excluding the government's proposed "ostrich" jury instruction and granting such other and further relief as the Court deems proper.

Dated: March 24, 2019

Respectfully submitted,

By: /s/ *Renato Mariotti*

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 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

EXHIBIT A

From: Cipolletti, Mark (CRM) <Mark.Cipolletti@usdoj.gov>
Sent: Friday, March 22, 2019 8:05 PM
To: Campbell, Holly H.; Mariotti, Renato
Cc: O'Neill, Michael (CRM); Sullivan, Matthew (CRM)
Subject: U.S. v. Thakkar, No. 18 CR 36

Good evening, Counsel.

Based on the pretrial conference last week, we write regarding the following two topics:

Stipulations

Per our discussion at the pretrial conference earlier this week, please let us know if you will stipulate to the authenticity and admissibility of the government's exhibits as reflected on the government's Second Amended Exhibit List—provided that the exhibits are offered through an appropriate witness. If there are particular exhibits to which you would object, please let us know.

Supplemental Potential Instruction re Knowledge

In addition, and subject to how the evidence comes in at trial, the government intends to request the following supplement to the pattern instruction on knowledge.

"You may also find that the defendant acted knowingly if you find beyond a reasonable doubt that he believed it was highly probable that the NavTrader program would be used to engage in spoofing, and that he deliberately avoided learning that fact. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discover the truth."

This is based on the language of the pattern instruction (No. 4.10) in the Seventh Circuit. Please let us know if you have any objection.

Thank you and enjoy your weekend, to the extent possible.

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