

Breaking Down The 2nd Criminal Spoofing Trial: Part 1

By **Clifford Histed, Vicente Martinez and Lexi Bond** (June 11, 2018, 1:27 PM EDT)

On April 25, 2018, a federal jury in New Haven, Connecticut, found Andre Flotron not guilty of conspiring to commit commodity fraud by means of spoofing (bidding or offering with the intent to cancel the bid or offer before execution) in the futures markets. The acquittal in this case has resulted in comparisons to the trial that resulted in the conviction of Michael Coscia in Chicago in November 2015. In part one of this two-part article, we discuss the significant differences between the two cases that make such comparisons difficult, and discuss the developments in the Flotron case leading up to his trial.

The biggest difference between the Coscia and Flotron cases is that they simply were not tried for the same offenses. Coscia was tried on six counts of spoofing and six counts of commodity fraud based on the same transactions. Flotron, on the other hand, was tried on only one charge — a sole count of conspiracy to commit commodity fraud by means of spoofing. Thus, in Flotron’s case, the government was required to prove two things that in Coscia’s case it was not — namely, the existence of a conspiracy to commit a criminal fraud, and Flotron’s knowing participation in that conspiracy.

Unless one of the Flotron jurors speaks out, we will never know why they acquitted him. Did they believe that he had not spoofed? Did they believe that he had spoofed, but that he did not intend to defraud other traders by spoofing? Did they believe that he spoofed, and that he intended to defraud others, but did not believe that he had conspired with someone else to do those things? Though answers to those questions are inside a black box, there are important lessons to be learned from the Flotron case, particularly given the “futures market spoofing takedown” that the U.S. Department of Justice announced in January 2018.[1] Criminal investigations and prosecutions for spoofing have not let up, and they continue to be relevant to traders and to those vicariously liable for traders’ conduct.

Background

Flotron, a Swiss citizen, worked for UBS, a financial institution based in Switzerland, where he was a precious metals trader for nearly 30 years until he



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left the company in 2013.[2] He lived in the U.S. from 1998 to 2000, and then again from 2006 to 2010, while he worked at the UBS office in Stamford, Connecticut. In 2013, an investigation by U.S. authorities triggered an internal investigation by UBS into its foreign exchange trading practices. Flotron agreed to be interviewed in the internal investigation several times, apparently knowing that the company's reports of his interviews could be turned over to the U.S. government. He also directed his own attorney to provide additional information directly to the government, including his offer to be interviewed by law enforcement. Flotron retired from UBS in December 2013, and since that time he has visited the U.S. several times to visit his girlfriend, a dentist residing in New Jersey. At no time did the government ever tell him that he would be charged with any crimes related to his trading activity at UBS.

A Tale of Two Prosecutions

The Coscia and Flotron criminal prosecutions began very differently. Even though Coscia was a resident of New Jersey, much of his trading took place on CME Group futures exchanges, and CME's computer servers are located in suburban Chicago, in the Northern District of Illinois. The criminal case against Coscia was investigated, charged and tried by the office of the United States attorney in Chicago. A federal grand jury in Chicago indicted Coscia in October 2014 — more than 15 months after the U.S. Commodity Futures Trading Commission, the U.K. Financial Conduct Authority and four CME Group futures exchanges simultaneously had entered into administrative settlements resolving enforcement actions against him for spoofing.[3] Coscia appealed his conviction and sentence of 36 months' imprisonment to the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed Coscia's conviction in August 2017, and on May 14, 2018, the U.S. Supreme Court declined to consider his petition for certiorari.[4]

By comparison, Flotron's alleged spoofing activities came to the attention of federal prosecutors in the DOJ's Fraud Section in Washington, D.C., as a result of its investigation of various banks' conspiracy to manipulate foreign exchange markets, Libor and other benchmark interest rates.[5] As Connecticut Assistant U.S. Attorney Jonathan Francis, and Flotron's attorney, Marc Mukasey, told the court on Nov. 6, 2017, the Flotron investigation and prosecution was generated by prosecutors at the DOJ Fraud Section and not by the office of the U.S. attorney in Connecticut.[6] Francis told the court that he was the "only prosecutor in Connecticut who has worked on this matter" and that he had been "working with the Fraud Section for I believe over a year towards bringing spoofing cases, including this one." [7]

Flotron's Arrest

Though Flotron apparently had not traded for UBS in the U.S. since 2010, had traveled to and from the U.S. several times since then without incident, and had no reason to believe that he was under criminal investigation, FBI agents arrested him in New Jersey at the home of his girlfriend on Sept. 12, 2017. Flotron was held in custody in a county jail for approximately 10 days until he was granted bail, subject to home confinement at his girlfriend's home in New Jersey and a \$4 million bond.[8]

The First Indictment

On Sept. 26, 2017, two weeks after Flotron's arrest, a federal grand jury in Connecticut returned an indictment charging him with one crime — conspiracy to commit three separate offenses: (1) commodities fraud, (2) wire fraud and (3) spoofing, all in violation of 18 U.S.C. § 371.[9] Convicting Flotron of this crime would have required the government to prove that Flotron agreed with another person to commit one of these three offenses, and that one or more of the co-conspirators performed an act to further the conspiracy. The government apparently planned to prove Flotron's alleged criminal

agreement through, among other evidence, the testimony of two former UBS traders — Kar-Hoe “Mike” Chan and Sergio Soler — both of whom used to work with Flotron at UBS, and both of whom ultimately testified at trial in exchange for nonprosecution agreements from the DOJ.

The Best-Laid Plans

Assistant U.S. Attorney Francis, who had been planning to try the Flotron case with the DOJ Fraud Section prosecutors who were running the show, had a scheduling issue. He was scheduled to try another case in April 2018, the same month the judge wanted to start the Flotron trial.[10] Francis asked the court to move back the date of the Flotron trial so that he could participate in both trials, but Flotron’s attorney pressed to have the trial take place sooner.[11] The judge ultimately set the trial for April 2018, requiring another assistant U.S. attorney from Connecticut to step in to try the case with the Fraud Section prosecutors.[12] Assistant U.S. Attorney Avi Perry, who had joined the U.S. attorney’s office three years earlier, filed an appearance in the Flotron case on Dec. 1, 2017 — just over four months prior to trial.[13] He and Robert Zink, acting principal deputy chief of the DOJ’s Fraud Section in Washington, D.C., would later be the core of the prosecution team.[14]

January 2018 was a busy month for the Flotron prosecution team. On Jan. 29, 2018, both the DOJ and CFTC announced the filing of several criminal and civil spoofing cases.[15] Acting Assistant Attorney General John P. Cronan announced the filing of criminal spoofing charges against six traders in Chicago and one in Houston, while calling attention to the previously filed charge against Flotron in Connecticut.[16] The CFTC announced the filing and simultaneous settlement of spoofing charges against three banks, including Flotron’s former employer, UBS. The CFTC also announced the filing of a civil complaint against Flotron, and the filing of civil complaints against several of the traders who had just been charged criminally.

The Superseding Indictment

On Jan. 30, 2018, the day after the “futures market spoofing takedown,” a federal grand jury in Connecticut returned a superseding indictment against Flotron.[17] Count one of the superseding indictment charged Flotron with conspiracy to commit commodities fraud. This conspiracy charge was different from the original conspiracy charge in three ways.

First, the new conspiracy charge was brought under 18 U.S.C. § 1349 and not 18 U.S.C. § 371 as in the original indictment. Like Section 371, Section 1349 required the government to prove that Flotron conspired with another person to commit a crime. Unlike Section 371, Section 1349 did not require the government to prove that either Flotron or one of his alleged co-conspirators performed any act to further the conspiracy.[18] Second, a conviction under § 1349 would subject Flotron to a maximum period of imprisonment of 25 years, while a conviction under the original Section 371 charge would subject him to a maximum period of imprisonment of only five years. Finally, the new conspiracy charge alleged that Flotron conspired only to commit commodities fraud, while the original charge alleged that he had conspired to commit commodities fraud, wire fraud and spoofing.

In other words, the new conspiracy charge gave the government the ability to seek a much longer sentence while also reducing the number of elements it would be required to prove. Nonetheless, a conviction under count one of the superseding indictment would require the government to prove, in the words of the indictment itself, that, “Flotron, and others known and unknown to the grand jury, did unlawfully, knowingly, and intentionally conspire, combine, confederate, and agree with each other and others ... to knowingly and with the intent to defraud, execute and willfully participate in a material

scheme and artifice to defraud any person in connection with [precious metals futures contracts].”[19]

The superseding indictment also added six new criminal charges — three counts of commodities fraud and three counts of spoofing. The six new counts were odd in that they charged Flotron with crimes that allegedly occurred on three days in 2012 and 2013, after he had left the U.S. in 2010. Moreover, the superseding indictment alleged that these offenses had occurred in the Northern District of Illinois, and not in Connecticut where the case would be tried.[20]

On Feb. 5, 2018 — four business days after the filing of the superseding indictment — Flotron filed a motion to dismiss the six new counts with prejudice for lack of venue.[21] He argued that the government had engaged in “improper conduct” by asking a federal grand jury in Connecticut to return an indictment where venue was alleged to be in Chicago.[22] Flotron characterized the government’s actions as “an abuse of the grand jury process, a stark violation of the U.S. Attorney’s Manual, and an affront to traditional notions of fair play.”[23] Flotron accused the government of engaging in this conduct “in order to gain unfair leverage and compromise Mr. Flotron’s rights.”[24] According to Flotron, the government’s actions presented him with the following choices: “(1) waive venue on Counts Two through Seven so that they may be tried in Connecticut, (2) face the daunting prospect of two trials — the trial of Count One in Connecticut and the trial of Counts Two through Seven in the Northern District of Illinois, or (3) consent to moving the entire case to the Northern District of Illinois.”[25]

In its Feb. 12 response, the government acknowledged that venue for counts two through seven did not lie in Connecticut, and that those counts would have to be dismissed if Flotron did not waive the venue defect.[26] But the government asked the court to dismiss the counts without prejudice, and also stated that if Flotron did not waive defective venue, it would file a motion to dismiss count one (to which there had been no venue challenge) without prejudice so the entire case could be prosecuted in the Northern District of Illinois.[27]

On Feb. 19, 2018, the court issued its written order on the motion to dismiss the six new counts.[28] In the opening paragraph of a 14-page order, the court signaled its view of the government’s handling of the case: “Having detained and confined defendant away from his home country of Switzerland, the Government would like to break its agreement to proceed with a speedy trial in Connecticut so that it may pursue more charges and an eventual trial someday in Illinois. I conclude that a speedy trial should proceed here in Connecticut on the schedule previously agreed to by the Government.”[29]

Observing that it was “highly unusual” for a grand jury in Connecticut to return an indictment in a case where trial venue would not be proper in Connecticut, the court stated: “Federal grand juries in Connecticut don’t ordinarily indict bank robberies in Boston, kidnappings in Kansas, or drug dealing in Dallas. At no time prior to the return of the superseding indictment did the Government advise defendant or the Court that it had launched a novel plan to put defendant on trial in Connecticut for felony crimes of commodities fraud and spoofing that had nothing to do with Connecticut.”[30] The court stated that it would be “clearly contrary to the manifest public interest to allow the Government to break its agreement to proceed to trial in April so that it may start the prosecution all over again on a blank slate with new charges in the Northern District of Illinois.”[31]

Regarding the superseding indictment, the court stated: “While the defendant has languished in jail and now in highly restrictive conditions of ‘home’ confinement far from his real home in Switzerland, the Government had months upon months to decide how it would frame a superseding indictment.”[32] The court concluded that, “the Government has acted in bad faith by moving to dismiss the remainder of its indictment. Its request for me to dismiss the conspiracy charge so that it may re-file broader

charges elsewhere is an intentional breach of its assurances and agreement to proceed to trial against defendant in this Court in April.”[33]

“All this smacks of manipulation, harassment, and an unfair effort to move the goalposts for the Government’s evolving strategic convenience. The Government committed to the Court and defendant that it would be prepared to proceed to trial in April in Connecticut. Rather than seeking to dismiss for re-prosecution some day in Illinois, the Government should keep its word.”[34]

Conclusion

Leading up to the trial, the friction between the government and the judge was palpable, even to readers of the cold record. In part two, we will discuss the trial and some takeaways for counsel who represent traders in serious enforcement actions.

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[1] See U.S. Department of Justice, Acting Assistant Attorney General John P. Cronan Announces Futures Markets Spoofing Takedown, Jan. 29, 2018. Found at <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-john-p-cronan-announces-futures-markets-spoofing>.

[2] See U.S. v. Flotron, Case No. 17 CR 220 (D. Conn.), Dkt. No. 6 at 2-3.

[3] See Commodity Futures Trading Commission, Press Release No. 6649-13, CFTC Orders Panther Energy Trading LLC and its Principal Michael J. Coscia to Pay \$2.8 Million and Bans Them from Trading for One Year, for Spoofing in Numerous Commodity Futures Contracts, Jun. 22, 2013. Found at <https://cftc.gov/PressRoom/PressReleases/pr6649-13>.

[4] See U.S. v. Coscia, 866 F.3d 782 (7th Cir. 2017). Coscia’s petition for a writ of certiorari to the U.S. Supreme Court was denied on May 14, 2018. Coscia v. U.S., No. 17-1099, 2018 WL 747023, at *1 (U.S. May 14, 2018).

[5] See U.S. v. Flotron, 17 CR 220 (D. Conn.), Dkt. No. 6 at 2-3. See also U.S. Department of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas, May 20, 2015. Found at <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

[6] See U.S. v. Flotron, 17 CR 220 (D. Conn.), Dkt. No. 38 at 14-15.

[7] Id. at 15.

[8] Id., Dkt. Nos. 11-13; 38 at 18.

[9] Id., Dkt. No. 14.

[10] Id., Dkt. No. 38 at 11-13.

[11] Id. at 14-15.

[12] Id. at 18-19.

[13] See Isaac Avilucea, New Hires Boost Ranks at Conn. U.S. Attorney's Office, Nov. 17, 2014. Found at <https://www.law.com/ctlawtribune/almID/1202676646934>; Id., Dkt. No. 41.

[14] DOJ Fraud Section attorney Matthew Sullivan, who joined the DOJ in Washington, D.C., in September 2016, also was part of the team. Sullivan also has filed appearances in several of the criminal spoofing cases that the Fraud Section brought in Chicago.

[15] See U.S. Department of Justice, Acting Assistant Attorney General John P. Cronan Announces Futures Markets Spoofing Takedown, Jan. 29, 2018. Found at <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-john-p-cronan-announces-futures-markets-spoofing>; Commodity Futures Trading Commission, Press Release No. 7681-18, Jan. 29, 2018. Found at <https://cftc.gov/PressRoom/PressReleases/pr7681-18>.

[16] Only one of the six traders who were charged in Chicago was a resident of the Northern District of Illinois. Presumably, the rest were charged in that district due to the presence of CME's computer servers there.

[17] U.S. v. Flotron, 17 CR 220 (D. Conn.), Dkt. No. 58.

[18] See U.S. v. Roy, 783 F.3d 418, 420 (2nd Cir. 2015) (conspiracy conviction under § 1349 does not require proof of an overt act).

[19] U.S. v. Flotron, 17 CR 220 (D. Conn.), Dkt. No. 58 at 4.

[20] The superseding indictment also differed from the original one in that it characterized the orders that Flotron allegedly intended to cancel as "trick orders" while the original indictment called them "spoofer orders." The superseding indictment characterized the orders that Flotron wanted to have filled as "genuine orders" while the original indictment called them "primary orders."

[21] U.S. v. Flotron, 17 CR 220 (D. Conn.), Dkt. No. 64. Flotron's memorandum of law in support of the motion was Dkt. No. 65.

[22] Id., Dkt. No. 65 at 1.

[23] Id.

[24] Id.

[25] Id. at 2.

[26] Id., Dkt. No. 71 at 1.

[27] Id.

[28] Id., Dkt. No. 81.

[29] Id. at 1.

[30] Id. at 5.

[31] Id. at 8-9.

[32] Id. at 9.

[33] Id. at 14.

[34] Id. After the jury acquitted Flotron, the court reissued this same order but vacated its finding of bad faith on the part of the government. Id., Dkt. No. 216, n. 1. The court stated: "Any finding of bad faith is no longer necessary in light of the Government's determination not to seek mandamus or other expedited interlocutory appellate review of my initial ruling. A jury trial on the conspiracy charge proceeded before me as scheduled, and the jury acquitted defendant of the charge. The government stated at trial that it does not intend to pursue further charges against defendant."