

## Breaking Down The 2nd Criminal Spoofing Trial: Part 2

By **Clifford Histed, Vicente Martinez and Lexi Bond** (June 12, 2018, 1:25 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. In part one of this article, we compared this case to the prosecution of Michael Coscia in Chicago, and we discussed the events leading up to the trial of Andre Flotron. In part two, we discuss the trial itself, and some takeaways for counsel who represent traders in serious enforcement actions.

### The Trial of Andre Flotron

Prior to trial, the parties filed their proposed instructions that would be given to the jury. According to the government's proposed instructions, it believed and accepted that it would be required to prove two things beyond a reasonable doubt:

- That a conspiracy to commit commodities fraud existed. The government's proposed instructions required it to "prove that there was a mutual understanding ... between two or more people to cooperate with each other to accomplish an unlawful act," and also that the unlawful act was commodities fraud; and
- That Flotron knowingly and intentionally became a member of that conspiracy to commit commodities fraud, and that he did so with an awareness of at least some of the basic aims and purposes of the unlawful agreement.[1]

Notably, the word "spoof" did not appear anywhere in either the government's or Flotron's proposed jury instructions. It was not a word the parties requested that the judge explain or define for the jury.

The government went to trial on Monday, April 16, 2018, with a one-count indictment, placing all of its eggs in a single basket. The government did not have to prove that Flotron had spoofed. It did not have to prove that he committed commodities fraud by means of spoofing. It only had to prove that Flotron had



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agreed with another person to commit commodities fraud. Assistant U.S. Attorney Avi Perry delivered the government's opening statement, describing how Flotron and those under his supervision allegedly placed "trick" buy and sell orders to move market prices in favorable directions, rip off other precious metal traders, and make money for themselves and UBS. "They called it a spoof, but call it what you want, it was a fraud," Perry told jurors.[2] Perry described for the jury the now familiar spoofing pattern in which Flotron allegedly would place a small buy or sell order close to the prevailing market price for a particular precious metal futures contract, and then place a much larger order on the opposite side of the market, canceling this larger opposing order seconds later after at least part of his original order was executed. Perry called this process, "order, trick, fill, kill," and said it was designed to take advantage of much faster algorithmic traders.[3]

In his own opening statement, Flotron's attorney, Marc Mukasey, sought to contrast Flotron to the so-called algo-victims, describing Flotron as a conservative, old-school trader who "traded with heart" and made investment decisions by looking at many different sources of incoming information through the lenses of his own experience and intuitions.[4] He asserted that prosecutors were trying to manufacture a case against his client, comparing their supposed "bending, shaping and twisting" of the facts to the malleability of gold, the commodity underlying many of the futures contracts that Flotron traded. "This case is a 24-karat mistake," Mukasey said, arguing that the government had cherry-picked trading data, and was presenting "tarnished" testimony from cooperating witnesses.[5]

But statements of counsel are not evidence, and the actual evidence presented by both sides was familiar to attorneys who have tried complex financial market cases.[6] The government's evidence included testimony of an FBI agent through whom the government introduced a variety of documentary evidence, including chat messages, emails, UBS business records and various presentations of CME trading data.[7] It presented the testimony of a retained witness who prepared and presented trading summary charts.[8] It presented the testimony of Mike Chan and Sergio Soler, both of whom had worked with Flotron at UBS and both of whom received nonprosecution agreements from the government in exchange for their testimony.[9] The government also presented the testimony of Anand Twells, a quantitative researcher for Citadel, who had testified for the government more than two years earlier in the Coscia trial.[10]

Flotron presented the testimony of two experts who, like the government witnesses, had created various charts and demonstrative exhibits for the jury.[11] One of those experts testified that Flotron's and Chan's trading patterns were vastly different. Specifically, Chan's cancellation rate for large orders, a possible indication of spoofing, was twice as high as Flotron's. According to the defense expert, Flotron was also much more successful at filling large orders than Chan.[12] Perry called the defense's trading analysis a "distraction" and characterized defense comparisons of the differences between Flotron's and Chan's trading as, "Those are the days you walk into a bank and don't rob it." [13]

On April 24, the parties presented their closing arguments. U.S. Department of Justice Fraud Section lawyer Robert Zink told the jury that Flotron led a conspiracy of "immense proportions" that "crossed the globe." [14] Pointing to communications between Flotron, Chan and Soler, Zink told the jury that spoofing "was just a regular thing" and "a way of doing business." [15] "Is it really possible that the guy who's the head of the desk just didn't know about this? Is that really possible? It's not," Zink said. [16] Although the government argued that Flotron's culpability was shown in part by the testimony that jurors heard from Chan and Soler, Zink told the jury that Flotron's own trades "are the best evidence of what he did and what he knew." [17] "The pattern speaks for itself," Zink said, referring to the several hundred trade examples that the government claimed represent spoofing based on analysis of Flotron's trading data. [18]

In his closing argument, Flotron's counsel called the case "prosecution by statistics," reiterating his criticisms of the government's analysis as cherry-picking a few hundred trades out of hundreds of thousands that Flotron did, and presenting them without context. "We don't convict people with charts and graphs," he told jurors.[19] He also said the government had failed to present any documentary evidence that Flotron had agreed to spoof. Not even the government's two former-traders-turned-cooperating-witnesses testified to having had an agreement with Flotron to commit fraud, he said. "They weren't even asked if they were members of a conspiracy with Andy," he told jurors.[20] To the extent the government built its case with the help of these two cooperating witnesses, Flotron's counsel urged jurors to discount their testimony as flawed and not credible because of their incentives to testify against Flotron. "You can't take their word for anything," he said of the witnesses. "They've got skin in the game and motive to tell the government what it wants." [21] On April 25, after a few hours of deliberation, the jury found Flotron not guilty.

## The Takeaways

It is now beyond any legitimate dispute that spoofing occurs, that it is illegal, that prosecutors are willing and able to charge spoofing as a criminal violation, and that it is possible to prove those charges in court. Traders, their managers, their advisers, and all those vicariously responsible for trader conduct should consider the detection and prevention of spoofing to be a mission-critical priority. In the unfortunate event that traders find themselves charged with spoofing, they and their counsel should consider the following:

- **Location, location, location.** Venue matters because defendants have a constitutional right to be tried in the state and district where the crime was committed.[22] To our knowledge, 11 traders have been criminally charged with spoofing in the futures markets. The first was Michael Coscia, who was investigated, indicted and tried in Chicago by the U.S. Attorney's Office for the Northern District of Illinois. With the exception of Flotron, and Krishna Mohan who was charged in Houston, all of the alleged spoofing traders were charged in Chicago, presumably because that is where the CME computer servers are located. Only one of the 11 traders is alleged to have lived or traded in Chicago; the remaining 10 lived outside of Illinois, and most lived outside of the U.S. With the exception of Coscia, all of the cases were brought by DOJ Fraud Section lawyers out of Washington, D.C. Why were Flotron and Mohan prosecuted outside Chicago? Given the venue issues in the Flotron case in Connecticut, we are watching the Mohan case in Houston.
- **Pressed for time.** Flotron's counsel held the government's feet to the fire and pressed it to try the case earlier than it wanted. The original Connecticut-based assistant U.S. attorney was preparing for two trials to occur back to back, and ultimately had to bow out of the Flotron trial in order for it to take place on the timetable pressed by the court and the defense. A less experienced prosecutor was assigned to the team four months before trial, and his trial partners were from the DOJ Fraud Section in Washington, D.C. Though experienced and capable, those out-of-town lawyers may not have understood the local terrain as well as they would have liked. Defense counsel should consider pressing for a speedy trial.
- **Statistics can work for both sides.** One of Flotron's expert witnesses testified that Flotron's and Chan's trading patterns were vastly different, and appeared to suggest that the trading of Chan — a government witness — was more indicative of spoofing than Flotron's own trading. Despite the government's increased use of data analysis, its close relationships with the regulators and exchanges, and its ability to present evidence of trading patterns in court, the defense also can

make very effective use of data and charts. And it may be highly doubtful that the government can win a trial based only on statistics and trade patterns. The government's arguments that Flotron's own trades that "are the best evidence of what he did and what he knew," and that "[t]he pattern speaks for itself," appear to have fallen on deaf ears. Here, the government believed that this evidence would be fortified by the testimony of two cooperators, but that evidence did not persuade the jury to convict.

- **Think hard about whether the defendant should testify at trial.** Most defendants in federal criminal trials do not testify in their own defense, for good reason. It is a rare defendant who can stay calm and collected on the stand, and appear likeable and earnest, while being subject to a barrage of leading questions by an aggressive and determined prosecutor. Also, federal juries are specifically instructed not to hold a defendant's decision not to testify against the defendant, and so defendants should not fear that they will be convicted solely because they did not take the witness stand to "tell their side of the story." There usually is not sufficient reward for a defendant to take the stand to be worth the risk. Though we do not have a large enough sample size to make statistically reliable predictions, we observe that Coscia, who exercised his constitutional right to testify on his own behalf to try to explain away the government's evidence, was convicted while Flotron, who did not try to give such explanations, was acquitted.
- **Get the transcripts.** Defense counsel would do well to learn from those who have gone before them. Several of the same witnesses have shown up on the government's witness lists in both the Coscia and Flotron trials, and one witness actually did testify in both trials. The transcripts from the Coscia trial, the preliminary injunction hearing in *U.S. Commodity Futures Trading Commission v. 3Red et al.*,<sup>[23]</sup> and the Flotron trial will contain many valuable lessons, and perhaps some rich material for use on direct or cross-examination in other cases.
- **Focus on the elements of the offense.** This seems like common sense, but it bears repeating. Defense counsel should build the defense around the crime that is charged. Flotron was not charged with spoofing; he was charged with agreeing to commit commodities fraud. It appears that the government may have focused more on spoofing than on proving the existence of a criminal agreement. It appears that Flotron's team did a better job of keeping its eye on the ball, and they won.
- **The markets are watching.** Traders watch the futures markets, but the futures markets — the exchanges that essentially are the markets — also watch traders. The exchanges have sophisticated surveillance and data analysis systems. These systems are vigilant. They do not sleep. Data from CME systems was used by both sides in both the Coscia and Flotron trials. Counterparties also are watching, and are ready to become government informers, witnesses and/or whistleblowers, or to file their own private lawsuits against traders whose conduct they believe harms them.<sup>[24]</sup> Regulators and exchanges around the world share information with one another and with criminal prosecutors.<sup>[25]</sup>

## Conclusion

The criminal prosecution of Andre Flotron was ill-fated, and suffered from a series of missteps and miscalculations by the government, and probably some bad luck as well. Though the prosecution team had the benefit of a successful blueprint in the form of the Coscia case, it decided to go back to the drawing board and approach the Flotron case very differently. Also, the friction between the government and the judge was palpable, even to readers of the cold record. That friction appeared to

put the government on its back foot well ahead of trial. It appears that the DOJ's Fraud Section lawyers bit off more than they could chew in Connecticut. We will see how they do in Chicago with the new wave of spoofing cases they brought in January. Market participants and their advisers are watching.

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[1] See U.S. v. Flotron, 17 CR 220 (D. Conn.), Dkt. No. 166 at 18-26, 30-33.

[2] See Jon Hill, Ex-UBS Trader's Alleged Spoofing Was Fraud, Jury Hears, Apr. 16, 2018. Found at <https://www.law360.com/articles/1033633/ex-ubs-trader-s-alleged-spoofing-was-fraud-jury-hears>.

[3] Id.

[4] Id.

[5] Id.

[6] See U.S. v. Flotron, 17 CR 220 (D. Conn.), Dkt. No. 215 (official exhibit list and admission chronology).

[7] Id. at 1-2.

[8] Id. at 2-3.

[9] Id. at 3-4.

[10] Id. at 4. The Flotron prosecution team also listed traders Hovannes Dermenchyan and Alexander Gerko on its witness list, id., Dkt. No. 94, though it appears that they were not called at trial. Both of these witnesses testified at the Coscia trial.

[11] Id., Dkt. No. 215 at 5-7.

[12] See Christie Smythe, Ex-UBS Metals Trader Beats Spoofing Conspiracy Charge, Bloomberg, Apr. 25, 2018. Found at <https://www.bloomberg.com/news/articles/2018-04-25/ex-ubs-metals-trader-flotron-beats-spoofing-conspiracy-charge>.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Jon Hill, Case Against Ex-UBS Trader In Spoofing Trial Heads To Jury, Apr. 24, 2018. Found at <https://www.law360.com/articles/1036533/case-against-ex-ubs-trader-in-spoofing-trial-heads-to-jury>.

[18] Id.

[19] Id.

[20] Id.

[21] Id.

[22] See U.S. Const. Art. III. § 2, cl. 3; U.S. Const. Amend. VI.

[23] This hearing was held in April and May, 2016, in the case styled CFTC v. Igor B. Osytacher and 3Red Trading LLC, Case No. 15 CV 9196 (N.D. Ill.).

[24] See Choi v. Tower Research Capital LLC, 890 F.3d 60 (2nd Cir. 2018) for just one example of a private lawsuit brought by traders against other traders for alleged spoofing.

[25] In the press release by Acting Assistant Attorney General John P. Cronan announcing the “futures market spoofing takedown,” he stated: “The alleged conduct in the cases announced today was identified and investigated through a variety of methods, including traditional law enforcement techniques, cooperation by relevant corporate actors, and, importantly, data analysis. Let me say a word about that data analysis. The Department and its law enforcement partners have developed the ability to identify spoofing patterns through sophisticated analysis of market-level data. Going forward, we expect to use data analysis to an even greater degree in order to identify fraudulent and manipulative conduct in our financial markets. The Criminal Division’s message is clear. We are watching. We are closely monitoring the markets. And we will leave no stone unturned in our efforts to combat and eradicate illegal, fraudulent, and manipulative market conduct.” 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>.