JUDICIARY OF
ENGLAND AND WALES

IN THE WESTMINTER MAGISTRATES' COURT

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

- V –

NAVINDER SINGH SARAO

Ruling of District Judge Purdy dated 23/3/16. Extradition Act 2003.
Issues: (i) Extradition Offence: S.137. (ii) Forum: S.83A. (iii) Private & family life: S.87 (3) & Article 8 & (iv) abuse of process i.e. an allegedly wilfully materially misleading extradition Request by USA. Background: alleged "spoofing" or improper & dishonest market manipulation of Chicago Mercantile Exchange by adapted computer software as *inter alia* contributed to the so called "flash crash" (6/5/10) & an overall illegal gain of $40 million between 2009-2014.

Advocates: U.S.A.: Mark Summers, Q.C. & Aaron Watkins
Def: James Lewis, Q.C. & Joel Smith

1. Background.

Navinder Sarao is a U.K. born citizen (d.o.b. 14/11/78) now 36 years old and a Requested Person by virtue of a formal fully certified extradition request from the Government of the United States of America (hereafter U.S.A.). In essence this is an accusation Request seeking extradition to face trial for ***"spoofing"*** or electronically manipulating the **Chicago Mercantile Exchange** (C.M.E.) to make very substantial sums as the market either fell or climbed following alleged manipulation to the tune of some **$40 million** (U.S.); although the express period of the charges (as sample counts only) runs from January 2009 – April 2014 and alleges **$8.9m** illegal gains from improper market manipulation or ***"spoofing"***. In short the Defence contend **all** conduct was lawful with every transaction facing the usual market risks which could, and sometimes did, lead to loss not profit. I pause to stress guilt or innocence is **not** for this court, exercising the extradition jurisdiction, to determine. Only a trial court, hearing all the evidence, is equipped to determine guilt or innocence. This court therefore expresses **no** view on guilt/innocence and nothing herein should be taken to suggest a view. Additionally I note this case has attracted much publicity under the banner headlines of involvement in the ***"flash crash"*** which occurred on 6/5/10 and resulted in a significant

crash in the C.M.E.. Complaint of involvement in this emotively named event is but a small part of the conduct alleged here. However, a dispassionate appraisal of the challenges to extradition is the role of this court and no other would be acceptable.

2. Procedural Outline.

The Request covers conduct between January 2009 and April 2014. A formal Request was dated 20/3/15 and led to an arrest warrant from this court being executed on 21/4/15. Following arrest a hearing took place before me on 22/4/5. The procedural requirements were in order and unchallenged. Consent was not forthcoming. The case was opened and adjourned for full hearing. Conditional bail, including an electronically monitored curfew and a £5,50,0000 security, was granted, but the conditions were not met so Navinder Sarao remained in custody. A full hearing dated of 24/25th September 2015 was set. Various case management hearings followed as did an unsuccessful appeal to the High Court seeking to vary the terms of bail on 20/5/15. Alongside this activity the U.S. authorities obtained, on 29/6/15, a worldwide injunction seeking to freeze assets of $40m said to be the proceeds of illegal market manipulation. Navinder Sarao agreed to his numerous assets, much in Switzerland, being frozen and held by his U.S. appointed lawyers who are subject to U.S. jurisdiction. As a consequence I varied bail by reducing the security to £50,000 from family members (and a much greater sum-£2.4 m- once released in Switzerland) which led to eventual release on or about 14.8.15. Bail has been enjoyed without complaint since. On the eve of the full hearing on 24th September the U.S. Prosecutors issued a new and expanded Request bringing the start date of alleged offending back in time to January 2009 from June 2009. On the morning of 24/9/15 I issued a second arrest warrant for the expanded Request. This necessitated re-arrest and a formal restarting of the extradition process. While that may not have been fatal to a successful hearing on that day, the Defence clearly needed time to address the expanded period of complaint and to compound their state of readiness leading counsel, Mr James Lewis Q.C., required urgent hospital treatment preventing his attendance at court for the first time in his long and distinguished career. Accordingly I adjourned and re-fixed the full hearing for 4/5th February 2016. On those dates expert evidence via live link from California and legal argument on both sides was advanced before adjourning for this ruling.

3. Representation.

The U.S.A. is represented by Mr Mark Summers, Q.C. and Mr Aaron Watkins. While the Defence for Navinder Sarao, as indicated, is led by Mr James Lewis, Q.C. with Mr Joel Smith.

4. Issues.

The Defence pursue the following express challenges to the U.S. extradition Request. Firstly extradition offence per Section **137** Extradition Act, the substance of the challenge being ***"spoofing"*** or the market manipulation alleged by adapting computer software is conduct which while illegal in the U.S.A is not illegal in this jurisdiction and thus fails the **dual criminality** test, i.e. not being an offence in both jurisdictions cannot amount to an extradition offence. Secondly **Forum per S.83A** meaning the ***"interest of justice"*** test set out in the amended Section requires trial, if at all, in this jurisdiction. If that is the conclusion of the court extradition is barred even though the U.K. prosecuting authorities, of whom

potentially there are several from the Crown Prosecution Service (CPS) to City regulators, have shown no interest whatsoever in purporting to prosecute here. In any event this court cannot order or require prosecution merely, if the statutory bar is established, discharge this Request. Thirdly a **human rights** challenge per **Section 87(3),** contending any extradition for the instant alleged conduct would be a disproportionate interference with this individual's right to private and family life. Fourth and lastly that the U.S. request is an **abuse of this court's process** because it is founded, to the knowledge of the U.S. Prosecutors, on a materially misleading factual basis. Counsel for the U.S.A. argue the statutory challenges are wrong, there is no abuse of process and extradition should follow to allow a trial on its merits in the U.S.A. where, they argue, the Defence challenges on the facts can and can only properly be heard. To these various points I shall return.

5. Material Considered.

A considerable volume of written material has been provided to the court. Some has been reserved more than once to allow for the expanding of the alleged complaints and a final paginated hearing bundle. I have the original and then final (current) Requests, the supporting affidavits and exhibits, a Prosecution Opening Note and skeleton arguments as the issues focused and finalised. A Defence bundle including a detailed report and oral live link evidence from Professor Lawrence Harris of the University of Southern California's Marshall School of Business. Written submissions from the Defence and able oral submissions by all learned counsel. Navinder Sarao has not personally provided any statement or given evidence, nor is he required to do so. All material has been considered including a substantial bundle of case law and a very recent publication by Prof Harris ***"Trading and Electronic Markets: What Investment Professionals Need to Know"*** (C.F.A. Institute Research Foundation 2015) which, while perhaps not being a best seller on the general publishing market, is a leading work for those concerned in the subject matter of the title.

6. Formalities.

The U.S.A. has submitted a formal supplemental Request dated 23/9/15 being originally certified on 1/4/15 per S.70 Extradition Act 2003. No point is taken that this is a valid and correctly certified Request and I so find. Further that the U.S.A. being designated a category 2 territory by the Secretary of State is required to provide ***"information"-*** not evidence- of conduct which, if notionally committed in this jurisdiction, would be contrary to our domestic criminal law carrying (a potential) 12 months imprisonment or more. There is no dispute, and I so find, that S.72 has been complied with and S.78 (provision of documents). The case was opened and been adjourned, despite the aborted September 2015 hearing, in compliance with the statutory regime. No argument is advanced to the contrary. For the avoidance of doubt I resolve, save for the identified challenges, to which I shall come, all procedural requirements, without more, in favour of the U.S.A..

7. Approach to the Factual Background.

Mr Summers expressed, during oral argument, some concern I might be unable to distinguish between the conduct set out in the formal Request and the Defence *interpretation* of the factual position via the evidence of Prof Harris. I hope neither party has cause to complain. Clearly Mr Summers is correct dual criminality specifically must be assessed on the information in the Request. Any other material is for trial which is beyond my remit. That said the evidence from Prof Harris is relied upon to explain the workings of the financial

market in question (C.M.E.) and- crucially here- to form an evidential basis for arguing the U.S.A. has materially misled this court and thus found a proper basis for a stay of this extradition Request as an abuse of this court's process. To seek to do justice to the involved arguments of both sides I must necessarily set out in some detail the factual assertions of both parties before seeking to determine the legal challenges arising from them.

8. U.S. Complaint.

Background.

The U.S.A. relies on a detailed array of facts to found the conduct it alleges is criminal. This comes from two affidavits of Brent S. Wible, a U.S. Department of Justice Criminal Prosecutor with the title Assistant Chief in the Fraud Section of the Criminal Division (Department of Justice). His affidavits, with supporting exhibits, are dated 18/3/15 and 18/9/15. That of 18/9/15 is described as a ***"supplemental"*** affidavit in support of the expanded Request bringing the **complaint** back from June 2009 to **January 2009 running to April 2014**. Unless otherwise stated references are to paragraphs in that affidavit. He describes the overview as follows (@ para 4) ***"During the relevant time period (January 2009 through April 2014), Navinder Sarao was a futures trader who operated from his residence in the United Kingdom and who traded primarily through his company Navinder Sarao Futures Limited. Navinder Sarao traded futures using commercially available trading software including automated trading software. Such software allowed traders to communicate with markets as quickly as possible and to place, modify and cancel, multiple orders nearly simultaneously".*** Express complaint is made (@ para 5) of ***"…numerous occasions between April 2010 and April 2014 that he spoofed the market and manipulated the intra-day price for near month E-minis on the Chicago Mercantile Exchange (C.M.E.), including on or about May 6, 2010, when the United States Stock Markets plunged dramatically in a matter of minutes in an event that came to be known as the "Flash Crash" Navinder Sarao sought to manipulate the market for E-minis by placing multiple large volume sell orders on the C.M.E. (to create the appearance of substantial supply and thus drive prices down) and modifying and ultimately cancelling the orders before they were executed. Navinder Sarao then exploited his manipulation for his personal profit. Navinder Sarao gained substantial trading profits through this activity. Navinder Sarao also misrepresented and lied about his use of computer automation to effectuate the massive split second modification and cancellation of orders that facilitated his market manipulation."*** E-minis, for those desirous of a definition, are described (@ para (i) thus ***"The Standard & Poor's 500 Index… is an Index of 500 stocks designed to be a leading indicator of United States equities. The E-mini is a stock market index futures contract based on the S & P 500 Index… [it is] … one of the most popular and liquid index futures contracts in the world… the E-mini represents an agreement to buy or sell the cash value of the underlying index at a specific date. The notional value of one contract is 50 times the value of the S & P 500 Index".***

9. U.S. Complaint.

"Layering/Spoofing": Modus Operandi.

Layering (a type of spoofing) is described as ***"…manipulative, high speed activity… a trader places multiple bogus orders that the trader does not intend to have executed … and then quickly modifies at a difference price – and then quickly modifies or cancels those orders***

before they are executed. The purpose of these bogus orders is to trick other market participants and manipulate the products market price. The trader seeks to mislead and deceive investors by communicating false price signals to the market to create a false impression of how market participants value a financial product… a false appearance of market depth (i.e. liquidity) with the intent to create artificial price movements. This is exploited by simultaneously executing other real trades that the trader does intend to have executed, in an attempt to profit from the artificial price movements that the trader had created all done in seconds, in multiple cycles that the trader repeats throughout the trading day."

10. <u>Specific Allegation of Manipulation.</u>

"Beginning in or about January 2009 Navinder Sarao sought to enrich himself through manipulation of the market for E-minis" (@ para 13). Complaint is made of ***"multiple large volume orders… at different price points… (to create) the false impression of substantial supply in order to fraudulently induce other market participants to react to his depressed E-mini prices with the aid of an automated trading program. Navinder Sarao was able to all but eliminate his risk of unintentionally executing those orders by modifying and ultimately canceling them before execution. Meanwhile he exploited his manipulation to reap large trading profits by executing other, real orders".*** An analysis of ***"almost 400 days"*** of trading by Navinder Sarao ***"between April 2010 and April 2014"*** (@ para 18) showed use of this ***"dynamic layering technique on approximately 63% of those days".*** This was said to have ***"affected the market as a whole"*** (@ para 19). Additionally he used another form of spoofing (@ para 20) involving repeated placement of a particular type of order ***"nearly all of which he canceled".*** A ***"third"*** technique (@ para 21) involved ***"flashing"*** a large ***"2000 lot order"*** on ***"one side of the market, executed on an order on the other side… and canceled the 2000 lot order before it was executed"***. These are described as ***"bogus orders"*** whereby the ***"flashing"*** would inflate the market leading to the Prosecution's expert to conclude (@ para 22) ***"… the price of E-minis was artificially depressed (and typically fell) while Navinder Sarao's dynamic layering technique was active and typically rebounded when Navinder Sarao ceased using the technique".*** Thus (@ para 23) was created a ***"substantial imbalance in the E-mini order book".*** Consequently on 11/2/15 a F.B.I. Special Agent ***"filed a criminal complaint"*** (@ para 26) before a judge of the Northern District of Illinois who ***"signed arrest warrant for Navinder Sarao"*** (@ para 27) that day. On 2/9/15 a Grand Jury for the Northern District of Illinois returned the current **indictment alleging 22 charges** being: <u>count 1</u> **"wire fraud"** (maximum penalty 20 years), <u>counts 2-11</u> being ***"commodities fraud counts"*** (maximum penalty 25 years each), <u>counts 12-21</u> being ***"commodities manipulation counts"*** (maximum penalty 10 years each) and <u>count 22</u> ***"spoofing count"*** (which carries a maximum 10 years imprisonment). Provisions of the ***"United States Code"*** are set out. Trading ***"profits"*** (see para 37) covering the 22 counts (sample counts) are described as ***"approximately $8.9 million trading E-minis"*** while for the overall period 2010-2014 ***"approximately $40 million trading E-minis"***.

11. <u>Evidence Relied Upon.</u>

The U.S. authorities speak of reliance on a financial market's expert and 4 specific strands to their case: (i) Records from the C.M.E. of ***"Navinder Sarao's market activity"*** (ii) Navinder Sarao's own commodities brokerage accounts (iii) Navinder Sarao's email correspondence including with software programmers and (iv) witness testimony including the financial market expert and an ***"analyst"*** who has ***"summarised Navinder Sarao's trading and order***

data on selected dates including the date of the flash crash" (see page 35). Reference is made to email correspondence with several (4) software programmers some of which are plainly significant in any prosecution. These include 1/2/09 express reference to ***"If I am short I want to spoof it (i.e. the market) down…".*** 24/2/09 ***"… it is very easy for me to enter orders of varying different amounts. If I keep entering the same clip sizes, people will become aware of what I am doing rendering my spoofing pointless".*** 27/2/09 ***"… I need to know whether you can do what I need, because at the moment I'm getting hit on my spoofs all the time and it's costing me a lot of money".*** 21/4/09 ***"I think you may have to come to England because the functionality needs adjusting…"*** 15/5/09 ***"I really don't know how long I can wait since every day I am getting hit on my spoofs and it is costing me too much money"***. Reference is made (@ para 37) to ***"regulators"*** in both the U.S.A. and U.K. noting ***"suspicious activity"*** and that the U.K.s **Financial Conduct Authority** submitted a ***"questionnaire"*** at the request of U.S. authorities. His responses ***"acknowledged"*** cancelling large volume orders but ***"falsely asserted that he did so manually without the assistance of an automated trading program".*** Significantly he replied all orders ***"were 100% at risk, 100% of the time".*** Further that he only used a ***"basic"*** software not a modified one. The replies to the regulator are described as forming ***"the basis for each count in the indictment including count one, as this evidence tends to show Navinder Sarao's state of mind at the time of the charged conduct".***

12. <u>Prof Hendershott: U.S. Expert.</u>

The response to the Defence expert report of Prof Harris is in a memorandum sworn by Michael O'Neill a Trial Attorney Fraud section of the U.S. Department of Justice dated 29/11/15. Essentially this discloses the previously unnamed Prosecution's financial market expert as being Prof Terrance Hendershott, who holds a chair at the Haas School of Business, University of California. The U.S. response maintains that it ***"accurately reflects the United States' case against Mr Sarao"*** (page 3) and emphasis much of Prof Harris's report is ***"background information"*** and ***"not in dispute".*** The affidavit stresses (page 4***) "… an essential element of each of the charged crimes is Mr Sarao's intent… (****inter alia****)… intent to deceive and defraud participants in the E-mini S & P 500… intent to influence the price of E-minis… intent to cancel E-mini orders before execution (for the spoofing count)".*** The prosecution contend that many of Prof Harris's assertions are either ***"irrelevant"*** or ***"unsupported"*** (see page 9) and ***"fully capable of resolution at a trial in the United States".*** Two **"main"** (page 11) points are made; firstly disputing the orders were ***"true"*** and secondly that the Sarao activity ***"did not move the E-market"-*** both factors being core to the Prosecution's case.

13. <u>Prof Lawrence Harris.</u>

Prof Harris gave live link evidence to this court from his home in California on 4/2/16 between 1400 hours and 17.18 hours G.M.T.. He adopted his two reports 18/9/15 and 7/1/16. I have a full transcript of his evidence, produced at the request and expense of the U.S. authorities but with the express agreement of the Defence, which runs to 103 pages. He is, as already stated, the author of a 2015 publication on electronic markets (***Trading & Electronic Markets: What Investment Professionals Need to Know***) and is holder of the Fred V. Keenan Chair in Finance at the University of Southern California's Marshall School of Business. I intend him no disrespect by not setting out at great length his two reports and oral evidence. A reasonably concise summary should do his evidence no disservice given a significant measure of common ground on market operation. A key point is to emphasise that

many traders operate, as is alleged, cancelling orders constantly and placing *"multiple"* orders regularly, all done in seconds-or fractions thereof- via electronic means. He refutes that the Sarao orders were not at risk of being taken up, thus costing him money, rather than the bogus operation which, save occasionally, due to highly modified computer software, was never <u>really</u> at risk because of the adapted programme to cancel orders. While the ***"Flash Crash"*** of 6/5/10 was *"the most notable market structure event in recent memory"* (@ para 66 18/9/15 report) he does <u>not</u> accept the Prosecution's view Navinder Sarao's materially contributed as alleged. An array of factors is explained for this event. *"In general when the markets crash there is usually no single cause. Usually there is a sequence of things… but by far and away the primary cause that's been identified with the flash crash… a large market move that was probably in response to concerns about Greek debt crisis, there was a very large trading on behalf of the mutual trust fund who submitted an extremely aggressive larger trading order which was managed by his trading software… an inexperienced trader … submitted a larger order than the market had seen that year, ever before… almost all my colleagues who write on this attribute to the main event this large trader who foolishly submitted too large an order using a software system that demanded liquidity creating a feedback loop that was destructive and exhausted the available liquidity on the buy side of the market"* – see pages 39/40 transcript. More generally his evidence focused on how the market works trading being *"essentially instantaneously… that's how the exchange operates and as a large order is filling size, it essentially happens instantaneously…"* (page 13 transcript). Using one's *"own software system… it's well recognised that this happens and it's completely acceptable"* (page 19 transcript). The software *"provides facilities that allow people to customise its functions"* (page 24 transcript) stressing *"These orders are real representations of opportunities to trade, they're real orders not bogus"* (page 25 transcript). He disagreed with Mr Lewis that 90% of all orders placed are cancelled putting the percentage as <u>*"99%"*</u> (page 30 transcript). Specifically *"Mr Sarao pegged order submissions strategy did not and could not compel traders to do anything. Anything a trader did in response to Mr Sarao's orders would be something that that trader decided to do in and of their own volition"* (page 38 transcript). Further *"… the implied representation by submitting an order is that you are willing and able to honour your contracts… the order itself represents a representation of your willingness to trade"* (transcript page 43). To Mr Summers he agreed (p.49 transcript) -*"that's correct"*- that market manipulation strategies are unlawful in most jurisdictions and the *"spoofing"* is a recognised dishonest market manipulation *"yes I do"* (page 53 transcript). However, he would not yield that orders are genuine *"… there is no question that the order is real and that's real liquidity that's being offered"* (page 55 transcript). He compromised only a little *"the spoofers minimised that risk, but for a spoofing scheme to be effective that risk has to exist. If the order weren't at risk then the spoof presumably would not work"* (page 68 transcript). Mr Summers asked if Prof Harris was suggesting any U.S. Prosecutor or Judge had made any statement or document that did not *"genuinely hold to their stated position"* to which he replied *"of course not"* (page 94 transcript). He also accepted, unlike Prof Hendershot, he had not conducted any analyse of the Sarao market data. To me he stated *"…exchange rules and the proceedings that they effectively incorporate generally don't place restrictions on the type of software that can be used to submit orders. For the purpose of accuracy I would note that the exchanges are very concerned about the potential for software systems submitting orders to the exchange to go out of control, as a consequence attention is paid to that issue but as to why people are submitting orders, exchanges generally don't pay that(much) attention to it"* (page 100 transcript). He did not *"know personally"* if the C.M.E. prohibits spoofing but given there is a specific law in the United States addressing that then *"of course the exchange would subscribe to that rule"* (page 101 transcript).

14. Prof Harris: Published View.

Given reliance has been placed on the expert view of Prof Harris, having summarised his written and oral testimony expressly for these proceedings, I include something of his wider 2015 published view ensuring balance away from the cut and thrust of the adversarial process. His 2015 publication ***"Trading & Electronic Markets: What Investment Professionals Need to Know"*** deals *inter alia* with *"Market Manipulators"* (page 12). Such persons are *"… parasitic traders who speculate on future price changes that they attempt to control. They profit from trades that they fool or force other traders into doing… many market manipulation strategies exist. In most jurisdictions, market manipulation strategies are illegal. Enforcement is often difficult, however, because the exact infractions are hard to define and because prosecutors generally must prove criminal intent which can be difficult when defendants suggest alternative explanations for their behaviour."* He deals with various manipulating techniques and describes *"spoofing, also known as layering"* and placing *"one or more exposed sell limit orders in the market to convey the impression that prices may soon fall… spoofing is risky because the spoofing orders that spoofers submit might execute before their intended orders execute. Spoofers can manage this risk by keeping track of the orders in the limit order book ahead of their spoofing orders… spoofers need to use electronic systems to monitor trading and to ensure that they can quickly cancel their orders as soon as they no longer want them to stand"* (page 13). He accepts the **U.S. Securities and Exchange Commission** and the **U.S. Commodity Futures Trading Commission** *"consider it illegal"* (page 13). Accordingly *"market manipulators often use these improper market activities singly or in combination when they try to fool or force other traders into trades that will ultimately prove to be disadvantageous to them"* (page 14). The conclusion to that chapter (page 21) says *"whether traders win or lose depends on how well informed they are about the future"*. Appendix "A" is entitled *"The Flash Crash"* and is a view of the causes. The Crash is described as an *"extraordinary event"* (page 76) albeit it lasted *"about 20 minutes"* (page 78) albeit remaining *"quite volatile during the remainder of the day"* (page 78). Consequently *"regulators adopted new rules to prevent a similar crash from happening again"* including mechanisms that *"halt trades in a stock for five minutes if prices move up or down by more than 10% for large stocks"* and *"20% for smaller stocks"* (page 79).

15. Factual Findings.

Once again I emphasise my factual findings have nothing to do with guilt/innocence which can only be determined at a trial. However, I am required to assess the case adduced when considering the (legal) challenges advanced to this extradition Request.

(i) Navinder Sarao set up and adapted, with the active assistance of 4 separate programmes, altered software system very different from the basic programme.

(ii) Navinder Sarao actively traded on the C.M.E. during the alleged illegal activity 2009 – 2014, all from his base in London.

(iii) Altering software is not *per se* illegal either against C.M.E. rules or U.S. Federal law and is not uncommon.

(iv) A very high percentage of contracts on the C.M.E. are routinely cancelled by traders large and small, perhaps 99%. Altering contracts is commonplace and legitimate.

(v) Navinder Sarao for instant purposes traded, albeit with some losses, making a very substantial profit of approximately $40 m and on the sample counts $8.1 m.

(vi) Emails sent by Navinder Sarao to his various programmers provide a powerful basis for concluding, absent any contradiction, that active market manipulation, including that known as spoofing, was expressly intended and was clearly known by him to be illegal.

(vii) While all of Navinder Sarao's contracts may have been at potential risk of execution, to his fiscal detriment, which is how the market operates, Navinder Sarao had adapted his software to minimise the risk way beyond ordinary market custom and practice.

(viii) Navinder Sarao was seemingly untruthful to Regulators in answering formal enquiries as to how he was operating on the C.M.E.

(ix) The Defence expert, Prof Harris, has not undertaken any examination of Navinder Sarao's market activity from any of the data potentially available to him. The Prosecutor's expert, Prof Hendershot, has formed a view based on an analysis of all that data.

(x) The causes of the Flash Crash (on 6/5/10) are not a single action and cannot on any view be laid wholly or mostly at Navinder Sarao's door, although he was active on the day. In any event this is only a single trading day in over 400 relied upon by the prosecution.

(xi) Prof Harris accepts, while he disagrees with the conclusions of the U.S. Prosecutors, he is not saying the complaint of illegal market manipulation is not a genuine belief of both the U.S. Prosecution authorities and the U.S. Judge who issued the warrant or the grand jury and it's 22 count indictment.

16. <u>Submissions.</u>

I have already headlined the four challenges pursued. These I now take in order as per the oral submissions of learned counsel.

17. <u>Dual Criminality: S.137.</u>

An ***"extradition offence"*** must be ***"conduct"*** per **S.137(3)(b)** ***"… would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or other form of detention for a term of 12 months or greater punishment if it occurred in that part of the United Kingdom"***. The parties agree this requires a transposition exercise of notionally placing the complaint of conduct in this jurisdiction and asking what, if any, offence(s) which carry ***"12 months or greater"*** punishment can be alleged as if they had occurred at the self-same time as alleged. If such an exercise, as the Defence contend, results in no such notional criminality, whatever the crime(s) in the U.S.A., discharge must follow as dual criminality will not have been established. Mr Summers

accepts that is for the U.S.A. to establish so that I am sure. Accordingly three U.K. offences are relied upon. **S.2 Fraud Act** 2005 for Count 1 of the U.S. indictment and **S.397 Financial Services Markets Act 2000** and the replacing provision (in force 1/4/13) **S.89 Financial Services Act 2012**. The overlap is necessary and relevant to embrace the time span of the conduct in the Request but is not otherwise of material significance. I pause to acknowledge a point that excites the Defence namely that there is no known U.K. prosecution under either S.397 of the 2000 Act or its replacement S.89 in 2012. The U.S.A. argue that is irrelevant to the dual criminality exercise, a view with which I agree, and is at best indicative of how difficult prosecuting financial market offences can be but not that such conduct cannot be prosecuted, indeed Parliament has enacted express powers (these among others) for that very purpose.

18. <u>S.2. Fraud Act 2005.</u>

This requires proof of a person ***"dishonestly"*** making ***"a false representation"*** which he/she ***"intends… to make a gain for himself… or to cause loss to another or to expose another to a risk of loss".*** The ***"representation is false if it is untrue and misleading and the person making it knows that it is, or might be untrue or misleading"*** with ***"representation"*** defined (S.2(1)(c) as ***"… any representation as to fact or law, including a representation as to the state of mind of the person making (it) …"*** which ***"…may be express or implied … in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention)"***. The U.S.A. argue, on the conduct in the Request, they establish dishonest representations where made by electronic means because they were bogus and intending to cause a gain for himself or loss or deliberately cause loss to others. The essence for this comes from the modified software and the email instructions disclosing dishonest market manipulation as his intention to the four software programmers.

19. <u>S.397 Financial Services & Markets Act 2000.</u>

This provision (in force 2005 – 31/3/13) is headed ***"misleading statements and practices"*** and requires proof of ***"… a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular"*** which ***"dishonestly conceals any material facts… which creates false or misleading impression as to the market in or the price of any relevant investments is guilty of any offence if he does so for the purpose of creating that impression and of thereby inducing another person to acquire, dispose of … those investments".*** Here the U.S.A. contend the conduct details doing an act creating a false or misleading impression as to a market price and that was his dishonest purpose.

20. <u>S.90 Financial Service Act 2012.</u>

As indicated in force from 1/4/13. This is headed ***"misleading impressions"*** and requires proof of ***"any act"*** or ***"… course of conduct which creates a misleading impression as to the market in or the price or value of any relevant investments"*** and he ***"intends"*** to create such an impression and ***"… to induce another person to acquire, dispose of or refrain from doing so".*** The offence is established if wilfully or recklessly where ***"a gain"*** for himself or ***"loss to another person or the exposing of another person to the risk of loss"***. The U.S.A. rely on the same reasoning and conduct as for S.397 F.M.S.A. 2000 which is summarised (@ para 49 U.S.A.'s skeleton argument of 23/9/15 as *"without doubt that is what the government alleges occurred in this case. The purpose of the criminal offence is to support the need for, and punish the failure to deliver, openness and integrity in markets"*.

21. <u>Defence Position.</u>

(i) **S.2 Fraud Offence**.

Mr Lewis submits the S.2 Fraud Act offence fails because the nature of the ***"representation"*** is unclear. He argues it is *"not enough"* to *"simply assert"* the modified software is creating *"representations"* bogus or otherwise. The implied representation orders/contracts will not be cancelled as a foundation to the prosecution case is *"fatally flawed"* because, looking at Prof Harris' evidence (unchallenged on the point), something like 99% of orders <u>are</u> cancelled as routine market activity. This is *"common place"* making, says Mr Lewis, a S.2 Fraud Act Offence *"impossible"*. Use of one's own software is equally common. A major plank of his submission is that *"all orders are capable of execution at the time of being placed"*. Without diminishing the range of case law relied upon particular reliance was put on ***U.A.E. v Allen*** [2012] EWHC 1712 (Admin) (@ para 27 & 42) per Toulson, LJ, referring to other case law like ***Dudko v Russia*** [2010] EWHC 1125, Admin @ para 42 his Lordship said this ***"As a matter of common law, a representation must be capable of being expressed as a statement of the past or present. A statement which amounts only to a statement as to the future may have effect as a contractual promise, but it will not come within the legal classification of a representation. A promise may carry with it an implied statement as to the promisor's present intention and circumstances, but that is a representation of present fact"***.

(ii) **S.397 FSMA 2000** Offence.

Here Mr Lewis focuses on the imperative of a ***"false or misleading"*** impression arguing this is simply *"not made out"*. Reliance is placed *inter alia* on the civil – not criminal – case of ***Da Vinci Investments Ltd*** [2015] EWHC 2401 (ch) per Snowden, J. looking at S.118 of the FSMA 2000 which requires deliberately acting in a way to ***"give or are likely to give a false or misleading impression"*** of the ***"supply of, or demand"*** of ***"qualifying investments".*** These criteria are, he submits, *"much wider"* than the alleged conduct. I note the force of those submissions but cannot ignore (@ para 133) his Lordship repeating the **"code"** in place per S.119 called the **Code of Market Conduct** Rule 1.6.2(4) says ***"entering orders into an electronic trading system, at prices which are higher than the previous offer, and withdrawing them before they are executed, in order to give a misleading impression that there is demand for or supply the qualifying investment at this price"***. The provision relates to this jurisdiction and is clearly illegal conduct. Undaunted Mr Lewis argues the conduct as explained by Prof Harris amounts to any orders being *"genuine i.e. true orders while on the market and can be taken up, so no false impression as to supply and demand"*. Mr Lewis accepts the Defence challenge is in identical terms in respect of **S.90** FSA 2012.

22. <u>Dual Criminality: Conclusion.</u>

I repeat this exercise can only be based on the conduct set out in the Request. Essentially has the U.S.A. established that the same actions in this jurisdiction at the same time would be capable of being prosecuted for one or more offences known to the criminal law? This is not the forum for testing the evidence as in a trial. To my mind when all is said and done the U.S.A. are correct in arguing they have shown dual criminality. I have already set out factual findings. In my judgement *"**representations"*** are made by making orders/contracts, the

prosecution can show the motivation for this fact given the heavily modified software and the reasons for that (see the email exchanges with the four software programmes) which is intended to dishonestly create a gain for Navinder Sarao (and loss for other market users). This if proven here would be a S.2 Fraud Act 2005 offence. The S.397/S.90 specific financial market offences are, to my mind, also made out for dual criminality purposes. A ***"false"*** impression as to price is clearly intended and created by the conduct alleged and that is dishonest, again by reference to the conduct outlined in clear and unambiguous terms by this U.S.A. Request. Accordingly I reject the dual criminality challenge.

23. <u>Abuse of Process.</u>

I deal with this here. Counsel agree the jurisdiction exists to stay a Request pursued on a wilfully misleading basis. Extensive recital of case law is unnecessary. ***Zakrzewski v Poland*** [2013] U.K.S.C. 2 from the Supreme court per Lord Sumption, S.C.J. is regarded as the leading case on point (@ para 13). His Lordship made clear the abuse jurisdiction is ***"exceptional".*** I ***"must have regard… to the scheme and purpose of the legislation. It is not therefore to be used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant this being a matter for the requesting state".*** The crux is the ***"materiality of the error in the warrant".*** Here the Defence allege manipulation of this court's process by failing to outline general market operation on the C.M.E. giving the deliberately false impression *only* Navinder Sarao was engaged in multiple order and multiple – 99% - cancellations, when that is the norm. Further implying altered software is *per se* wrong when it is of itself permissible and common. Mr Summers describes Prof Harris as *"unimpressive"* as a witness to this court. Much is placed on the fact he, unlike the Prosecutor's market expert, has not undertaken any analysis of Navinder Sarao's actual market usage on the C.M.E. Further that Prof Harris conceded, if reluctantly *"spoofing"*- even as described by him in print- <u>is</u> illegal. Lastly, as also accepted by Prof Harris under cross examination, he is not suggesting anything other than genuine belief in the U.S.A.'s case from their expert witness, the Prosecutor and the Judge and Grand Jury. True Prof Harris, with equal integrity, disagrees with the Prosecutor's contentions and is plainly qualified so to do. None of this is, in my view, anywhere near an abuse of process scenario. The differing expert views are classic trial issues and cannot on any basis, on the material before me, amount to an abuse of process of this court by the U.S.A. The challenge is, with respect, a bad one and must factually and legally be rejected.

25. <u>S.83/Article 8 ECHR.</u>

Mr Lewis relied on written submissions for this challenge and chose not to amplify them in oral argument. There is no dispute **Article 8** is engaged because extradition to the U.S.A. for trial is undeniably a life defining prospect of a most unwelcome kind for Navinder Sarao. He is a British born and lifelong domiciled UK citizen who, the only information I have comes from the U.S.A. (there is no information as to personal circumstances from the Defence), but seems to have lived and worked in London, more specifically Hounslow. The U.S.A. do not suggest any visit to their shores and contact with that jurisdiction appears to be solely via completed computer systems and no other. **Article 8 ECHR** enshrines ***"respect for his private and family life"*** any ***"interference by a public authority"*** being permitted ***"as in accordance with law and is necessary in a democratic society"***. I have in mind the Supreme Court decisions in ***Norris v U.S.A.*** [2010] 2 A.C. 572 and ***H.H. v Italy*** [2012] 1 A.C. 338 as authoritatively revisited in ***Celinski v Poland*** [2015] EWHC 1274 (Admin) per Thomas, LCJ.. The law is clear, there is a powerful public interest in honouring extradition treaty

agreements with friendly states and thereby seeking to enforce cross border criminal justice and deny safe havens. There is no suggestion the allegations are not of serious fiscal crime. Prosecuting authorities have pursued their complaint, given the complexities, promptly with a September 2015 Grand Jury indictment containing 22 counts (as samples) comprising over $8m compared to total alleged illegal conduct of $40m. While I note (@ para 23 of the Defence skeleton 18/1/16) Article 8 is *"only"* pursued if I uphold the dual criminality challenge to the S.2 Fraud Act 2005 conduct and reject the other financial service charges. Although I have not upheld that submission I deal, as I must, with Article 8. On the instant material there is nothing disproportionate, although obviously most unwelcome, in extradition given the gravity of the allegation faced against the (limited) information on Navinder Sarao's life in the U.K.

26. <u>Forum S.83A.</u>

The amendment to the originally enacted Extradition Act 2003 requires this court to consider if the ***"interests of justice"*** (applying set statutory criteria and no other) requires trial in this jurisdiction. Even if I so conclude the statute gives **no** power to direct or compel the U.K. prosecuting authorities, potentially a number exist given the financial market nature of alleged offending, to even consider, never mind actually embark on, a trial. However, S.83A does require me, if I conclude the ***"interests of justice"*** test applying the statutory criteria, to ***"bar"*** extradition and discharge this Request. As a fact U.K. prosecuting authorities have shown no known inclination to seek to prosecute Navinder Sarao. Indeed should they so wish any charge against Navinder Sarao here automatically stops the extradition process until such process is concluded (see S.76). The only known involvement of U.K. authorities, save for those involved in these extradition proceedings, has been to serve statutory questionnaires on Navinder Sarao, expressly referred to in the Request, on international mutual legal assistance grounds at the instigation of the U.S. prosecuting authorities- see **Crime (International Cooperation) Act 2003**. From the case law on point the position is clear I must, as the legislation states, consider the criteria alone and cannot speculate as to, for example, the attitude of a U.K. prosecutor who has not expressly involved themselves in the Forum Bar process. In ***Dibden v France*** [2014] EWHC 3074 (Admin) per Simon, J (@ para 18***) "The court will be engaged in a fact specific exercise in order to determine whether the particular extradition would be in the interests of justice"***. ***Shaw v U.S.A.*** [2014] EWHC 4654 (Admin) reviewing S.83A held ***"… the judge has to bear in mind each of the specified matters (and not any others). However, it may be that in the particular case being considered, one factor is irrelevant or not present, or of little weight, or alternatively of great importance"*** @ para 40 and @ para 41 ***"The question is whether, in the interests of justice, there should not be an extradition to the requesting state".*** Aikens, LJ. in ***Atraskevic v Lithuania*** [2015] EWHC 131 (Admin) on the mirror provision in EAW cases- S.19B – on the role of a U.K. prosecutor held ***"If the prosecutor does not decide to apply to the court, neither the court nor the defendant can make the prosecutor do so. Moreover, there is no provision… for the appellant court to force any further investigations to be made"***.

27. <u>Applying Forum Criteria.</u>

(i) Whether a ***"substantial measure of D's activity was performed in the United Kingdom"*** per S.83A (1) (a). To my mind that must be so in that Navinder Sarao was directing his conduct from the U.K. alone. However, given the electronic means used an exact measure of activity in the U.K., as compared to the U.S.A., is impossible.

(ii) ***"The place where most of the loss or harm resulting from the extradition occurred or was intended to occur"*** per S.83A (3)(a). The Defence argue this is global i.e. to traders on C.M.E. who come from all parts of the world. While that is correct, to an extent, the better view, in my judgement, is the U.S.A. where most traders operate and where ***"harm"*** can include damage to the integrity of that particulars trading market.

(iii) ***"… Interests of any victims"*** per S.83A (3) (b): The Defence contend there are no *"individual"* victims therefore *"the interests of victims are of no relevance"* (see Defence skeleton 28/9/15 @ para 118). The point has some force but corporate entities can still be ***"victims"*** in law. I construe this provision as having regard to the need for witnesses to travel to court etc. Clearly live link facilities can be used for a case like this and (as matters seem) evidentially the really significant contested evidence is that of the respective experts and, if he elects to give evidence, Navinder Sarao himself. Two of those three are in the U.S.A. but live link evidence is certainly possible so, to that extent, the balance is neutral or slightly in favour of the U.S.A.

(iv) ***"Any belief of a prosecutor that the United Kingdom… is not the most appropriate jurisdiction".*** S.83A (3) (c): there is no U.K. prosecutor's view tendered and the case law cited confirms neither the court or Defence can require such.

(v) If a U.K. prosecution should occur over the extradition conduct ***"whether evidence necessary to prove the offence is or could be made available in the United Kingdom"*** per S.83A (3) (d). I agree with the Defence all evidence could be made available much is documentary in English already and the key witnesses are U.S. based academics one of whom has already given live link evidence to this court from California.

(vi) ***"Any delay that might result from proceeding in one jurisdiction rather than another"*** per S.83A (3) (e): The Defence argue *"minimal"*. Clearly given no U.K. prosecutor's interest there will be no action to bring about a U.K. prosecution. However, the provision seems to require an assessment of the notional position. Looked at here given the nature of the case the U.S. authorities are ready to try the matter so a trial here will amount to a delay but not such as to be an issue offending the ***"interests of justice"*** test. Arguably the only party suffering anxiety from the delay of this type of trial is Navinder Sarao himself.

(vii) ***"…Desirability and practicability of all prosecutions"*** for the alleged conduct in one jurisdiction having regard to co-defendants, none are alleged,- S.83A (3) (f) are for Navinder Sarao himself, all other actions are in the U.S.A. While a trial could utilise live link and mutual legal assistance provisions the ***"practicability"*** element seems, to my mind, to favour the U.S.A.. Further, a factor the parties seem not to have considered, is that the U.S.A.'s worldwide freezing order (injunction) which has effectively frozen $40 million of Navinder Sarao's assets, *inter alia* in Switzerland, is an order from a U.S. court already in place which, should confiscation or similar process follow any successful prosecution, is in U.S. not U.K. control. That may not be insurmountable but when addressing a ***"desirability and practicability"*** test must come down firmly in favour of the U.S.A.

(viii) Navinder Sarao's ***"connections with the United Kingdom"*** per S.83A (3) (g). There is no dispute Navinder Sarao is a U.K. born and raised citizen with no evidence of ever personally going to the U.S.A. All his family connections are U.K. (London) based.

I have all the required factors in mind and the existing case law on point. Navinder Sarao self-evidently and understandably does not wish or desire to be extradited, few do, or face trial in any jurisdiction, this one included. That is not the test in law. To my mind the ***"interests of justice"*** make trial in the U.S.A. both the desirable and practicable venue and I reject the challenge advanced of the forum bar, although I accept, as with all fraud cases of broadly similar types, any decision is not as definitively possible as in many other types of case.

28. <u>Conclusion.</u>

Time, a good deal of it, has necessarily been taken to identify the Prosecution's case and the various rigorously pursued Defence challenges. Each point has been carefully considered and such factual and legal issues as necessary to resolve the challenges is/are dealt with herein. As always I am indebted to all learned counsel for their comprehensive written and most able oral submissions. No points are argued or arguable beyond those expressly advanced. For the reasons given I reject the challenges pursued by the Defence and find the Request a valid one. Accordingly I send this case per **S.87(3) of the Extradition Act 2003 to the Secretary of State** for her decision whether to order surrender applying, as she must, the set statutory criteria. Navinder Sarao may seek to leave from the High Court to challenge my decision and such leave must be in proper form and lodged within 14 days of any decision by the Secretary of State (she has two months) to order extradition.