IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v. Case No. 8:19-cv-00886-VMC-SPF

OASIS INTERNATIONAL GROUP,
LIMITED, ET AL.,

Defendants,

and

MAINSTREAM FUND SERVICES,
INC., ET AL.,

Relief Defendants.
____/

DEFENDANT FRANCISCO "FRANK" DURAN'S MOTION[1] TO SET ASIDE CLERK'S DEFAULT AND MEMORANDUM IN SUPPORT & FOR LEAVE TO RESPOND TO THE AMENDED COMPLAINT

COMES NOW the Defendant Francisco "Frank" Duran ("Duran") Motion to Set Aside the Clerk's Entry of Default [DE 70], pursuant to Rule 55(c) upon good cause shown and without objection from the Plaintiff Commodity Futures Trading Commission ("CFTC"), and for leave to respond to the Amended Complaint and would show in support the following:

Preliminary Statement & Fact Summary

On April 15, 2019, the CFTC filed its Complaint for injunctive and ancillary relief against Duran and six other defendants and a series of Relief Defendants, alleging various and complex violations of the Commodities Exchange Act (7 USC et seq.) (the "Act"), and Regulations

[1] See Declaration of Francisco "Frank" Duran attached as **Exhibit A**

promulgated thereunder [DE 1]. That same day, the CFTC moved separately for an emergency *ex parte* statutory restraining order, a preliminary injunction and other equitable relief. [DE 4]. On or about April 18, 2019 Duran was personally served with the pleadings. His responsive pleading to the Complaint would have been due on or before May 9, 2019. On May 22, 2019, the CFTC filed its motion for a Clerk's Default [DE 62], which was subsequently entered on May 23, 2019 [DE 70].

Subsequent to his being served, and at all times until the undersigned made his appearance on behalf of Duran on June 18, 2019 [DE 122], Duran acted *pro se*. Notwithstanding his failure to respond to the Complaint, Duran has personally engaged in those proceedings which appeared to him to have required his participation, including:

- April 29, 2019 (prior to the Motion for Clerk's Default) Duran consented to the Consent Motion For Preliminary Injunction by Commodity Futures Trading Commission [DE 35, Ex. #5][2];
- June 17, 2019 Duran agreed to the Joint Motion for Miscellaneous Relief, specifically Requesting a Track Three Designation by Commodity Futures Trading Commission and Case Management Report [DE 121].

On June 12, 2019, the CFTC filed an Amended Complaint, the time for responding as of the date of this Motion, has not yet expired.

[2] The Duran Consent is attached as **Exhibit B**

Memorandum of Law

A. Argument.

[T]he court may set aside an entry of default for good cause ....” Fed. R. Civ. Pro. 55(c). “‘Good cause’ is a mutable standard, varying from situation to situation. *Woodbury v. Sears, Roebuck & Company*, 152 F.R.D. 229, 236 (M.D. Fla. 1993). Good cause is also a liberal one — but not so elastic as to be devoid of substance.” *Ligum v. Stephens & Michaels Associates, Inc.*, No. 10-80504-CIV, 2010 WL 3768015, at *1 (S.D. Fla. Sept. 16, 2010) (internal citations omitted). In determining whether the requisite good cause exists, and abiding by the Eleventh Circuit’s edict that the good cause standard is a liberal one, courts balance several factors. These factors may include: “(1) excusable neglect /whether the default is culpable or willful, (2) whether setting aside [the] default would prejudice the adversary, and (3) whether the defaulting party presents a meritorious defense. Additional factors include: (4) whether the public interest was implicated, (5) whether there was significant financial loss to the defaulting party and (6) whether the defaulting party acted promptly to correct the default.”

Regardless of the factors used, they are simply “a means of identifying circumstances which warrant the finding of ‘good cause’ to set aside a default. *Compania Interamericana Export-Import, S.A.*, 88 F.3d at 951-52 (11th Cir. 1996). Moreover, the Eleventh Circuit has held that where a judgment has not been entered, the court may vacate a default upon a showing of *good cause*, which is less burdensome than the standard for setting aside a default judgment under Rule 60(b). See, *Jones v. Harrell*, 858 F.2d 667, 669 (11th Cir. 1988).

In considering the first prong of the test (whether excusable neglect exists for the default), courts generally assess whether the defaulting party's actions were willful or excusable. If the

defaulting party puts forth some reasonable explanation for the default, the Court is justified in setting aside the default. See, e.g., *Zawadski de Bueno v. Bueno Castro*, 822 F.2d 416, 421 (3d Cir. 1987) (default was excusable when it resulted from serious breakdown in communication); *Shepard Claims Serv., Inc. v. William Darrah & Assoc*., 796 F.2d 190, 195 (6th Cir. 1986) (court should grant motion if party offers credible explanation for delay that does not exhibit disregard for the judicial proceedings).

With regard to the existence of any prejudice, courts require that any claimed prejudice be greater than would be experienced by an ordinary litigant required to litigate the case on the merits. See, e.g., *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) (merely being required to litigate on merits not considered prejudicial); *Johnson v. Dayton Elec. Mfg. Co*., 140 F.3d 781, 785 (8th Cir. 1998) (prejudice may not be found from delay alone or from fact that defaulting party will be permitted to defend on merits). In short, the normal delay or expense of litigating a case is not the type of prejudice that will justify denial of a request to set aside a default. *Id*.

Moreover, the defaulting party need not prove its defense or defenses before the Court can set aside a default. The test is not whether there is a likelihood that the defaulting party will prevail on its defenses, but rather whether a defense is asserted that is legally cognizable and, if proven at trial, would constitute a complete defense to the plaintiff's claims. See, e.g., *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 98 (2d Cir. 1993) (the test is not whether there is a likelihood of prevailing, but whether the evidence submitted, if proven at trial, would constitute a complete defense); *Johnson,* 140 F.3d at 785 (issue is whether proffered evidence would permit finding for defaulting party, not whether it is undisputed). When a meritorious defense is presented, any doubts should

be resolved in favor of setting aside the default so that the case can be decided on the merits. See, e.g., *Mendoza v. Wright Vineyard Mgmt.*, 783 F.2d 941, 945-6 (9th Cir. 1986).

The standard imposed on the defaulting party for setting aside a default is different from, and less burdensome than, the standard for setting aside a default judgment. *EEOC v. Mike Smith Pontiac GMC, Inc.,* 896 F.2d 524, 527-28 (11th Cir. 1996); *Theiss v. Giove Law Office, P.C. 2008 WL 2323911 (M.D. Fla. 2008).* As noted, no default judgment has been entered to date. When it is uncertain whether good cause exists, courts generally find it appropriate to exercise their discretion in favor of setting aside defaults so that cases can be decided on the merits. See, e.g., Theiss, 2008 WL 2323911, at *3. In fact, courts in the Middle District of Florida have expressed a very strong preference for deciding cases on their merits whenever possible, rather than have cases decided through the technicality of a default. See, e.g., *Theiss*, 2008 WL 2323911, at *3; *Leaderstat, LLC v. Abisellan,* 2007 WL 5433486 (M.D. Fla. January 24, 2007); *Crowley Liner Services, Inc. v. Owens-Illinois De Puerto Rico, LLC*, 2008 WL 1990664 (M.D. Fla. May 5, 2008).

B. Ground for Good Cause

There are various grounds incorporating the forgoing factors upon which "good cause" is found to exist entitling Duran to relief from the Clerk's default:

a. First, he actually participated in the litigation by engaging with the CFTC in connection with, *inter alia*, the entry of the preliminary injunction and the freezing of all of his assets [DE 35]. That Consent Order resulted in Duran having no access to resources necessary to hire counsel specialized in the field of commodities regulation. Moreover, he was completely overwhelmed by the Complaint which consisted of forty-five pages, five (5) separate claims arising under multiple provisions of the very complex Commodity

Exchange Act, and no funds to defend. Under Florida state and federal law, a clerk's default may be entered against a defendant who has failed to file or serve any paper in the action. Once a party has filed or served any paper, however, he must be served with notice of the application for default, and the default must be entered by the court. Florida and federal courts liberally construe what constitutes the term "paper." The invalid entry of a default by the court clerk after a paper has been filed renders the judgment void. *Gulf Maintenance v. Barnett Bank,* 543 So. 2d 813 (Fla. 1st DCA 1989); *Ziff v. Stuber*, 596 So. 2d 754 (Fla. 4th DCA 1992). As noted, Duran's consent to the Motion for Preliminary Injunction [DE 35, Ex. #5], stands as a "paper" filed in this cause.

Fed. R. Civ. P. 55 is similar to Florida's rule regarding defaults. Pursuant to subsection (a), the clerk shall enter the moving party's default when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend." In all other cases, the party must apply to the *court* for a default judgment. Fed. R. Civ. P. 55(b)(2). Like Florida courts, federal courts define the term "appearance" broadly, and do not limit it to a formal court appearance. *Segars v. Hagerman*, 99 F.R.D. 274 (N.D. Miss. 1983). In other words, a defendant need not "respond directly to the complaint in order for its conduct to constitute an appearance." *Heleasco Seventeen, Inc. v. Drake.* 102 F.R.D. 909, 912 (D. Del. 1984) (telephone exchanges between parties' counsel constituted an appearance); *Charlton L. Davis & Co., P. C. v. Fedder Data Center, Inc.* 556 F.2d 308 (5th Cir., 1977). In this cause, Duran had "appeared" within the meaning of the federal rules.

b. Second, Duran's intention was to engage counsel from the inception but, despite efforts, could not do so due to the Asset Freeze and lack of funds. Eventually, through the

assistance of friends and family, he was been able to finally engage the undersigned on the evening of June 18, 2019. Once Duran was able to certify to the undersigned that the funds were not subject to the Asset Freeze Order, the undersigned filed his Notice of Appearance [DE 122]. Duran's failure to respond to the Complaint was not willful; Duran has acted responsibly and promptly once he was able to engage counsel. *Fiske v. Publix Super Market Inc.* 2006 WL 2533743 (M.D. Fla. 2006).

c. Third, the setting aside of the Clerk's Default will not prejudice the CFTC. The CFTC has been notified of this Motion and has stated that it has no objection. Indeed, a default judgment against Duran was never entered or even sought by the CFTC. Moreover, the case is in its infancy, and Duran has done nothing to obstruct or slow the progress of the litigation. *United States v. Varmado,* 342 Fed. App'x. 437, 441 (11th Cir. 2009). As noted, he has consented to the preliminary relief (which resulted in his inability to obtain counsel) and agreed to the Case Management Report filed by the parties. Moreover, the CFTC has now filed an Amended Complaint, mooting pending dispositive motions filed by other defendants, and has procedurally provided all defendants an opportunity to revisit their responsive pleadings.

d. Fourth, a default will result in a judgement of millions of dollars being adjudicated against him without the ability to defend, a factor which the Court should take into consideration prior to entering a judgment. *Compania Interamericana Export-Import, S.A.* 88 F.3d at 951.

e. Lastly, Duran has meritorious defenses to the CFTC action. *Parker v. U.S. Bank Nat. Ass'n,* 580 Fed. App'x. 776, 777 (11th Cir. 2014). By way of example, and not limitation, he will defend this cause by denying that:

a. he knowingly or recklessly was engaged in any fraudulent conduct;
b. he knowingly or recklessly made intentional misrepresentations or false statement to any investor;
c. he knowingly or recklessly cheated, deceived, or defrauded or attempt to cheat or defraud any investor;
d. he knowingly or recklessly employed devices, schemes or artifices to defraud pool participants and prospective pool participants, or engaged in transactions, practices, or courses of business which operated as a fraud or deceit upon pool participants or prospective pool participants;
e. he was required to register as a commodity pool operator

In addition, Duran will contest the allegations on grounds that;

a. he was not an officer, director or partner or principal of any of the defendant organizations;
b. he had no managerial positions or responsibilities;
c. he did not handle the operations of Oasis;
d. he did not knowingly divert any of the funds to himself for personal use; and
e. he did not prepare or make any of the marketing materials

Consequently, judgments by default are generally disfavored. See *Woodbury v. Sears, Roebuck & Co.,* 152 F.R.D. 229, 236 (M.D. Fla. 1993); *Turner v. Salvatierra,* 580 F. 2d 199, 201 (5th Cir. 1978) (holding that default judgment is appropriate only “where there has been a clear record of delay or contumacious conduct”). Any doubts regarding setting aside a default should be resolved in favor of deciding the case on the merits.

Because the response to the Amended complaint is not yet due, Duran requests that he be permitted to respond in the normal counsel required by Rule 15 of the Fed. R. Civ. Pro.

Conclusion

Based upon the foregoing points and authorities, the Defendant Francisco "Frank" Duran respectfully request that:

a. the Clerks Entry of Default [DE 70] be set aside; and

b. Duran be permitted to respond or otherwise move with respect to the Amended Complaint in accordance with rule 15 Fed. R. Civ. Pro.

LOCAL RULE 3.01(g) CERTIFICATE OF GOOD FAITH CONFERENCE

Allan M. Lerner, counsel for Defendant Duran, contacted attorneys for the Plaintiff Commodity Futures Trading Commission, by telephone on June 17, 2019 and email on June 18, 2019, to request that Plaintiff agree to the entry of an order setting aside the clerk's entry of default in this matter. To which the Plaintiff's counsel advised it would have no opposition.

Law Offices of Allan M. Lerner, P.A.
Attorneys for Francisco Duran
2888 East Oakland Park Boulevard
Fort Lauderdale, FL 33306
Tel: (954)563-8111
Fax: (954)563-8522

By: *Allan M. Lerner*
FBN 196681

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2019, I filed a copy of the foregoing with the Clerk of the Court via the CM/ECF system, which served all parties of record who are equipped to receive service of documents via the CM/ECF system.

Law Offices of Allan M. Lerner, P.A
Attorneys for Francisco L. Duran
2888 East Oakland Park Boulevard
Fort Lauderdale, FL 33306
Tel: (954)563-8111
Fax: (954)563-8522
E-Mail: Allan@lernerpa.com

By: */s/ Allan M. Lerner*
Allan M. Lerner
FBN 196681