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.

_____/

PLAINTIFF COMMODITY FUTURES TRADING COMMISSION'S OPPOSITION TO DEFENDANT DACORTA'S MOTION TO DISMISS

On June 12, 2019, the Commodity Futures Trading Commission ("CFTC") filed its First Amended Complaint for Injunctive Relief, Civil Monetary Penalties, Restitution, Disgorgement, and Other Equitable Relief ("Complaint") (Dkt. 110) against Defendant Michael DaCorta, Oasis International Group, Limited ("OIG") and Oasis Management, LLC ("OM"), among others, alleging violations of the Commodity Exchange Act ("Act") and CFTC Regulations ("Regulations"). Specifically, the Complaint alleged that DaCorta and others engaged in a fraudulent scheme to solicit and misappropriate money from over 700 U.S. residents (the "pool participants") for pooled investments in retail foreign currency contracts in two commodity pools—Oasis Global FX, Limited ("OGFXL") and Oasis Global FX, SA ("OGFXS") (collectively, the "Oasis Pools").

This matter has been stayed and administratively closed since July 12, 2019 (*see* Dkt. 179, 215, 282, 353, 417) (initial order granting stay together with subsequent extensions, collectively referred to as the "Stay Order"). Despite the Stay Order currently in effect, on December 16, 2021, Defendant DaCorta filed a Motion to Dismiss (Dkt. 454) based on five grounds: (1) for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(1), (2) for failure to state a claim under Fed. R. Civ. P. 12(b)(6), (3) for involuntary dismissal under Fed. R. Civ. P. 41(b), (4) as frivolous, and (5) for violations of Fed. R. Civ. P. 11(b)(2). The CFTC respectfully submits that Defendant DaCorta's Motion to Dismiss should be denied on all five grounds.

I. This Court Has Subject Matter Jurisdiction Over Violations of the Act and Regulations.

Federal courts have subject matter jurisdiction over matters brought by the CFTC for violations of the Act and Regulations, as alleged in the Complaint:

> - The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 (codifying federal jurisdiction) and 28 U.S.C. § 1345 (providing that district courts have original jurisdiction over civil actions commenced by the United States or by any agency expressly authorized to sue by Act of Congress). In addition, Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a), authorizes the Commission to seek injunctive and other relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act, or any rule, regulation, or order thereunder. Section 2(c)(2)(C) of the Act, 7 U.S.C. § 2(c)(2)(C), subjects the forex solicitations and transactions at issue in this action to, *inter alia*, sections 4b and 4*o* of the Act, 7 U.S.C. §§ 6b, 6*o*, as further described below.

Dkt. 110 ¶ 8. "Rule 12(b)(1) concerns the subject-matter jurisdiction of *this Court*, not an administrative agency bringing suit before it." *CFTC v. Vision Financial Partners*, 190 F.Supp.3d 1126, 1127-28 (S.D. Fla. 2016). Because 28 U.S.C. § 1331 confers upon district courts "all civil actions arising under the Constitution, laws, or treaties of the United States," this Court has subject matter jurisdiction over this case. *See id.* at 1128 (finding court has subject matter jurisdiction over complaint brought by CFTC and alleging violations of the Commodity Exchange Act, a federal statute). "Even though the parties dispute whether the Act ultimately applies, jurisdiction lies unless the claims under the Act 'clearly appear[] to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and

frivolous.'" *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). This court therefore has subject matter jurisdiction over the present claims.

The CFTC also has jurisdiction over its claims against Defendant DaCorta. DaCorta argues that "[b]ecause OIG was an eligible contract participant, [p]er 7 U.S.C. § 2(c)(2)(B)(i)(II) the CFTC lacked jurisdiction over the operations of OIG." Dkt. 454 ¶ 63. But under the section referenced by DaCorta, "the Commission *shall have jurisdiction over*, an agreement, contract, or transaction *in foreign currency* that . . .is offered to, or entered into with, *a person that is not an eligible contract participant*, except under circumstances not relevant here. 7 U.S.C. § 2(c)(2)(B)(i)(II) (emphasis added). In the Complaint, the CFTC sufficiently alleges that the pool participants were not ECPs:

- In soliciting participants for the Oasis Pools, Defendants made no attempt to determine whether these participants were ECPs as defined under 7 U.S.C. § 1a(18), and upon information and belief many, if not all, of the pool participants are not ECPs. *See* Dkt. 110 ¶ 90.

- OIG, OM, and Satellite Holdings solicited and/or accepted funds for a pooled investment vehicle that is not an ECP and that engages in transactions described in 7 U.S.C. § 2(c)(2)(C), other than on or subject to the rules of a designed contract market ("retail forex transactions"). *See* Dkt. 110 ¶ 102.

Further, as it applies to the CFTC's jurisdiction over foreign currency, the definition of an ECP under 7 U.S.C. § 1a(18) *excludes* commodity pools *in which any participant is not otherwise an ECP*. 7 U.S.C. § 1a(18)(A)(iv). As stated above, the Complaint sufficiently alleges that most, if not all, participants in the Oasis Pools were not ECPs. Therefore, in addition to this Court having subject

matter jurisdiction over the Complaint, the CFTC also has jurisdiction for its claims against the Defendants, including DaCorta.

Finally, in support of his motion to dismiss under 12(b)(1) for lack of subject matter jurisdiction, DaCorta also argues that the CFTC failed to identify a "debtor" in its Complaint, that DaCorta has not hindered or defrauded the United States, or evaded service of process, and other arguments also not relevant to subject matter jurisdiction. *See* Dkt. 454 ¶ 67. No such requirements exist to establish subject matter jurisdiction of this Court and DaCorta has identified no such requirements; this court has subject matter jurisdiction over violations of the Act and Regulations, as alleged in the Complaint.

II. The Complaint States a Claim for All Five Counts Alleged Against DaCorta.

In its over fifty page Complaint, the CFTC has alleged numerous, specific, and certainly sufficient factual allegations to support all five of its asserted violations of the Act and Regulations against Defendant DaCorta. "Importantly, a complaint must be liberally construed, assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in the plaintiff's favor." *CFTC v. Vision Financial Partners*, 190 F.Supp.3d 1126, 1127-28 (S.D. Fla. 2016) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A complaint "should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. *Id.* In fact, a well-

pleaded complaint will survive a motion to dismiss "even if it appears that a recovery is very remote and unlikely." *Id.*

While Defendant DaCorta does not clearly argue that the CFTC did not allege sufficient facts to support its various claims—but instead that he disagrees with the facts alleged by the CFTC—this opposition will attempt to address specific arguments, where articulated, in turn. The counts alleged in the Complaint are supported by specific, concrete, allegations of Defendant DaCorta's violations of the Act and Regulations. Defendant DaCorta has made no argument for why these factual allegations—if taken as true as they must be under Rule 12(b)(6)—would not support the causes of action asserted by the CFTC. The CFTC therefore respectfully requests that the Court deny Defendant DaCorta's Motion to Dismiss under Rule 12(b)(6) in its entirety.

A. The Complaint Alleges Sufficient Facts To Establish That DaCorta Engaged in Retail Forex Transactions So As To State a Claim for Violation of 7 U.S.C. § 6b and 17 C.F.R. § 5.2(b).

With respect to Count One of the Complaint, DaCorta's sole argument is that he did not violate 7 U.S.C. §6b "[b]ecause no contract of sale of any commodity for future delivery or swap was ever made" (Dkt. 454 ¶ 76), nor did he violate Regulation 5.2(b) because DaCorta "did not operate, promote, or otherwise engage in retail [f]orex transactions" (*id.* ¶ 78).

As a first matter, 7 U.S.C. § 2(c)(2)(C) grants the CFTC jurisdiction over forex transactions that are entered into (1) with "a person that is not an eligible

contract participant" or one of a list of enumerated persons, (2) are "offered, or entered into, on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis," and (3) do not result in delivery within two days or create an enforceable obligation to make or take delivery.

The Complaint alleges that DaCorta and the other defendants engaged in forex transactions:

- Of the approximate $75 million Defendants received from pool participants during the Relevant Period, Defendants deposited only $21 million into forex trading accounts in the names of the Oasis Pools, all of which has been lost trading forex. Dkt. 110 ¶ 3.

- Pool funds transferred to a forex trading account in the name of OGFXL (Dkt. 110 ¶ 28) and pool funds transferred to a forex trading account in the name of OGFXS (*id.*) both lost money trading forex.

- In or around April 2015, Defendant Joseph Anile opened a forex trading account at a UK forex broker, transferred approximately $1,650,000 to that account, and DaCorta used those funds to engage in forex trading. Dkt. 110 ¶ 38.

- In or around December 2016, Anile opened another forex trading account at the UK forex broker, which received deposits totaling $19,625,000, and DaCorta used those funds to engage in forex trading. Dkt. 110 ¶ 39.

- Through the OGFXL and OGFXS accounts, Defendants engaged in forex transactions on a leveraged or margined basis that did not result in delivery within two days or otherwise create an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business. Dkt. 110 ¶ 40.

- DaCorta explained that the Oasis Pools made money trading forex by capturing the bid/ask spread (Dkt. 110 ¶ 48(d)) and DaCorta said pool funds would only be used for forex trading (*id.* ¶ 48(h)).

The Complaint also alleges that the pool participants were not eligible contract participants, or ECPs:

- In soliciting pool participants for the Oasis Pools, Defendants made no attempt to determine if they were ECPs as defined in Section 1a(18) of the Act, 7 U.S.C. § 1a(18), and upon information and believe many, if not all, of the pool participants are not ECPs. *See* Dkt. 110 ¶ 90.

Finally, the Complaint alleges that DaCorta engaged in forex transactions on a leveraged or margined basis that did not result in delivery within two days:

- Through OGFXS and OGFXL, Defendants engaged in forex transactions on a leveraged or margined basis that did not result in delivery within two days or otherwise create an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business. The trades were leveraged 100:1, which means that the Oasis Pools could trade forex contracts valued at one hundred times the amount of cash in the OGFXL and OGFXS trading accounts. Dkt. 110 ¶ 40.

- The forex trades in the Oasis accounts had a 100:1 leverage ratio and carried a high degree of risk. In fact, the Oasis Pools could rapidly lose all the funds deposited into the forex accounts and lose more than what was initially deposited. Dkt. 110 ¶ 75.

Under 7 U.S.C. § 2(c)(2)(C)(iv), Section 4b of the Act applies to the forex transactions as alleged in the Complaint "as if" they were a contract of sale of a commodity for future delivery. Further, Section 4b is not restricted in its application to instances of fraud or deceit "in" orders to make or the making of contracts. *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-04 (7th Cir. 1977). "Rather, Section 4[b] encompasses conduct 'in or in connection with' futures transactions." *Id.* This includes conduct where, as here, promissory notes are given to secure funds used to trade forex. *CFTC v. Gresham*, No. 3:09-CV-75, 2011WL 8249266, at *3 (N.D. Ga. Sept. 8, 2011) (ruling that Section 4b

encompasses fraudulent misrepresentations "in connection with" promissory notes given to secure funds to trade forex).

Similarly, Defendant DaCorta violated 17 C.F.R. 5.2(b). Regulation 5.2(b) provides, in relevant part, that:

> [i]t shall be unlawful for any person, by use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, in or in connection with any retail forex transaction: (1) [t]o cheat or defraud or attempt to cheat or defraud any person; (2) [w]illfully to make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or (3) [w]illfully to deceive or attempt to deceive any person by any means whatsoever.

17 C.F.R. § 5.2(b) adds only one additional element not found in 7 U.S.C. 6b: that defendant's conduct must involve "use of the mails or by any means or instrumentality of interstate commerce." The Complaint alleges that Defendant DaCorta used the telephone, email, bank wires, and the Internet to cheat or defraud, willfully deceive, and/or make false reports or statements to Oasis pool participants:

- Defendants made material misrepresentations and omissions to pool participants and prospective pool participants via the Oasis website, group conference calls hosted by Oasis, telephone calls, in-person meetings, and in promissory notes they executed with pool participants. Dkt. 110 ¶ 42.

- Defendants DaCorta and Montie led an investor conference call in which DaCorta stated, among other things, that the only risk associated with the Oasis Pools was if all the large banks failed or the dollar collapsed, that the only money at risk was what belonged to Oasis because the pool funds were just collateral, and that pool funds would be used only for forex trading. *See* Dkt. 110 ¶ 48; *see also id.* ¶ 52 (similar representations by DaCorta during call); ¶ 57 (similar confirmations by DaCorta during call).

Accepting the CFTC's allegations as true and drawing all reasonable inferences in the CFTC's favor, the CFTC respectfully requests that the Court

deny Defendant DaCorta's Motion to Dismiss Count One for Failure to State a Claim.

B. The Complaint Alleges Sufficient Facts To Establish That DaCorta Was an AP of a CPO.

With respect to Count Two of the Complaint for fraud and deceit by commodity pool operators and associated persons of commodity pool operators, Defendant DaCorta argues that:

- 7 U.S.C. § 6*o*(1)(A)-(B) pertains exclusively to any "commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator" (Dkt. 454 ¶ 82); and
- 7 U.S.C. § 6*o*(1)(A)-(B) does not pertain to Defendant (*id.* ¶ 83).

Although not specifically articulated, presumably Defendant DaCorta's argument is that 7 U.S.C. § 6*o* does not pertain to him because he was not an associated person of a commodity pool operator, as alleged in the Complaint.

First, a "commodity pool" is defined under 7 U.S.C. § 1a(10)(A) as "any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests," including for the trading of futures or forex. *See* 7 U.S.C. § 1a(10)(A)(ii). The Complaint alleges that OGFXS and OGFXL were both commodity pools:

- Between mid-April 2014 and the present, Defendants have fraudulently solicited hundreds of members of the public to invest approximately $75 million in two commodity pools—OGFXL and OGFXS (collectively the "Oasis Pools")—that purportedly would trade in forex. Dkt. 110 ¶ 1.
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- Defendants have solicited hundreds of U.S. residents, continue to actively solicit U.S. residents to invest in the Oasis Pools, and have accepted funds for the Oasis Pools from at least 700 U.S. residents. *Id.* ¶ 32.

A CPO is defined under 7 U.S.C. § 1a(11)(A)(i) of the Act as any person:

> Engaged in a business that is the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any—
>
> (I) Commodity for future delivery, security futures product, or swap; [or]
> (II) Agreement, contract, or transaction described in section 2(c)(2)(C)(i) of this title or section 2(c)(2)(D)(i) of this title[.]

Under 17 C.F.R. § 5.2(1)(d)(1), subject to certain exceptions not relevant here, any person who operates or solicits funds, securities, or property for a pooled investment vehicle and engages in retail forex transactions is defined as a retail forex CPO. And finally, under 7 U.S.C. § 2(c)(2)(C)(ii)(I), agreements, contracts, or transactions in retail forex and accounts or pooled investment vehicles are subject to 7 U.S.C. § 6*o*, except in circumstances not relevant here.

Second, the Complaint sufficiently alleges that OIG and OM were CPOs:

- OIG and OM acted as commodity pool operators by soliciting, receiving, and accepting funds from pool participants for investment in the Oasis Pools. *See* Dkt. 110 ¶¶ 11-12; 28.

- Defendants have solicited hundreds of U.S. residents, continue to actively solicit U.S. residents to invest in the Oasis Pools, and have accepted funds for the Oasis Pools from at least 700 U.S. residents. Dkt. 110 ¶ 32.

- Defendants OIG and OM, by and through DaCorta and others (and/or their employees and agents), fraudulently solicited and obtained over $75 million from approximately 650 pool participants as investments in the Oasis Pools. Dkt. 110 ¶ 42.

In addition to sufficiently alleging that OIG and OM were CPOs, the Complaint sufficiently alleges that DaCorta was an associated person ("AP") of OIG and OM. 17 C.F.R. § 1.3 defines an associated person of a CPO as a natural person associated with a CPO:

> as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged[.]

Any person associated, as defined above, with a retail forex CPO is similarly an associated person of a retail forex CPO. 17 C.F.R. § 5.1(d)(2).

DaCorta was a partner, officer, employee, consultant, and/or agent of OIG and OM. The Complaint alleges that Defendant DaCorta co-founded and is a principal shareholder and director of OIG; was the chief executive officer and chief investment officer; was responsible for all of OIG's investment decisions, trading execution, services, sales, clearly, and operations; and also signed OIG promissory notes. Dkt. 110 ¶ 14. The Complaint alleges that DaCorta was the sole signatory on Oasis Management bank accounts, and that during the Relevant Period DaCorta acted as an AP for CPOs OIG and OM by soliciting pool participants for investments in the Oasis Pools. *Id.* The Complaint also specifically alleges DaCorta's personal role in the solicitation of funds for investment in the OIG and OM commodity pools:

- Based on Montie's and DaCorta's representations about the Oasis Pools, K.M. invested $20,000 in Oasis in 2017 and $37,500 in 2018, some of which was from her Roth IRA. Dkt. 110 ¶ 45.

- G.M. invested $500,000 in the Oasis Pools beginning in November 2017, based on Montie's and DaCorta's representations about Oasis, approximately $180,000 of which was from his IRA. Dkt. 110 ¶ 51.

- Based on Montie's, Haas's, and DaCorta's representations about Oasis, M.B. invested $100,000 in Oasis in 2018, including money from IRAs. Dkt. 110 ¶ 55.

- D.J.C. invested a total of $750,000 in the Oasis Pools in October 2018, based on Montie's, Haas's, and DaCorta's representations. Dkt. 110 ¶ 58.

- C.M. invested $66,000 in the Oasis Pools in 2018 based on representations by Montie, Haas, and DaCorta . Dkt. 110 ¶¶ 59-62.

The Complaint sufficiently alleges that Defendant DaCorta was an associated person of a CPO, and therefore the CFTC respectfully requests that the Court deny Defendant DaCorta's Motion to Dismiss Count Two for failure to state a claim.

C. The Complaint Sufficiently Alleges That DaCorta Was an AP Engaged in Forex Transactions.

With respect to Count Three DaCorta argues, as in his argument against Count One, that he was not engaged in retail forex transactions. Dkt. 454 ¶ 90. For the same reasons enumerated in Part II.A., *supra*, the Complaint sufficiently alleges that DaCorta was engaged in retail forex transactions. DaCorta also argues, as in his argument against Count Two, that he was not a CPO as defined by statute or regulation, nor was he an associated person of a CPO. Dkt. 454 ¶ 92. For the same reasons enumerated in Part II.B., *supra*, the Complaint sufficiently alleges that DaCorta was an associated person of a CPO. The CFTC therefore respectfully requests that the Court deny Defendant DaCorta's Motion to Dismiss Count Three for failure to state a claim.

D. The Complaint States a Claim Against DaCorta as a Controlling Person.

With respect to Count Four, DaCorta states simply that he did not violate 17 C.F.R. § 4.20(b)-(c). Dkt. 454 ¶ 97. Based on prior arguments made by Defendant DaCorta, the CFTC assumes that DaCorta's basis for not violating Count Four is that he is not a CPO. The Complaint alleges that DaCorta is liable for OIG's and OM's violations of 17 C.F.R. § 4.20(b)-(c) as a control person of these entities and commodity pools:

> - By virtue of this conduct and the conduct further described herein, Defendants—either directly or as controlling persons—have engaged, are engaging, or are about to engage in acts and practices in violation of 7 U.S.C. §§ 6b(a)(2)(A)-(C), 6k(2), 6m(1), 6*o*(1)(A)-(B), 2(c)(2)(iii)(I)(cc), and 17 C.F.R. § 4.20(b)-(c), 4.21, 5.2(b)(1)-(3), 5.3(a)(2). Dkt. 110 ¶ 5.

7 U.S.C. § 13c(b) states that a controlling person of an entity is liable for the violations of that entity if the controlling person knowingly induced the violations, directly or indirectly, or did not act in good faith. "A fundamental purpose of Section 13[(b)] is to allow the Commission to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals as well as the corporation itself." *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1334 (11th Cir. 2002) (quoting *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567 (11th Cir. 1995)). The defendant in *R.J. Fitzgerald* was the company's principal and "exercised the ultimate choice-making power with the firm regarding its business decisions," "reviewed and approved the activities that [violated the Act]," and "was ultimately responsible for compliance with all applicable rules on commodities

solicitations." *Id.* The Complaint sufficiently alleges that Defendant DaCorta was a controlling person of OIG and OM:

- DaCorta co-founded and is a principal shareholder and director of OIG. He is also the chief executive officer and the chief investment officer of OIG and opened and was the sole signatory on OM bank accounts. Dkt. 110 ¶ 14.
- DaCorta was responsible for all of OIG's investment decisions, trading execution, services, sales, clearing and operations, and signed OIG promissory notes. *Id.*
- OIG is owned and directed by DaCorta, Anile, and Montie. Dkt. 110 ¶ 28.
- OM bank accounts received pool participant funds and are controlled by DaCorta. *Id.*
- OIG, OM, and Satellite Holdings share the same office and employees, commingle funds, and operate under one overarching name "Oasis." DaCorta and/or Anile own and control OIG, OM, OGFXL, and OGFXS. Dkt. 110 ¶ 29.
- During the Relevant Period, DaCorta was a controlling person of OIG. He co-founded and was a principal shareholder, director, president, chief executive officer, and chief investment officer of OIG. According to OIG's website, DaCorta is responsible for all investment decisions, trading execution, services, sales, clearing, and operations of OIG. DaCorta did not act in good faith or knowingly induced OIG's fraudulent acts. Dkt. 110 ¶ 113.
- During the Relevant Period, DaCorta was also a controlling person for OM. He opened bank accounts for OM in November 2011 and is the sole signatory on these accounts. DaCorta did not act in good faith or knowingly induced OM's fraudulent acts. Dkt. 110 ¶ 114.

The Complaint also sufficiently alleges that OIG and OM commingled pool funds and failed to receive pool funds in the name of the Oasis Pools:

- Defendants OIG, OM, and Satellite Holdings, while acting as CPOs of the Oasis Pools, received pool funds that were not in the name of the Oasis Pools and commingled pool funds with non-pool property by depositing pool funds into the bank accounts of OM, Satellite Holdings, Fundadministration, and Mainstream, rather than separate bank accounts specifically designated for the Oasis Pools. Dkt. 110 ¶ 107.

- While acting as CPOs of the Oasis Pools, Defendants OIG, OM, and Satellite Holdings commingled pool funds with non-pool property by transferring pool funds from the OM, Satellite Holdings, Fundadministration, and Mainstream bank accounts into other accounts holding non-pool funds. *Id.* ¶ 108.

Because the Complaint sufficiently alleges facts to support its claim against Defendant DaCorta as a controlling person of the Oasis Pools, the CFTC respectfully requests that the Court deny DaCorta's Motion to Dismiss Count Four for failure to state a claim.

E. The Complaint States a Claim for Failure To Provide Pool Disclosures.

Finally, with respect to Count Five, DaCorta argues that he was not a commodity pool operator registered or required to be registered under the Act (Dkt. 454 ¶ 101) and that he did not violate 17 C.F.R. 4.21 (*id.* ¶ 102). As discussed more fully in the CFTC's argument in Part II.D., *supra*, the Complaint alleges that DaCorta is liable for OIG's and OM's violations of 17 C.F.R. § 4.21 as a control person of these entities and commodity pools. The Complaint also sufficiently alleges that OIG and OM failed to provide pool disclosures and other relevant documents as required under 17 C.F.R. § 4.21:

- At or near the time of investment, Defendants provided potential pool participants with a document titled "Agreement and Risk Disclosures," along with a "Promissory Note and Loan Agreement" (Dkt. 110 ¶ 109), which purported to alert investors to risks associated with investing in forex, but also guaranteed pool participants a 12% annual return (*id.* ¶ 110).

- Defendants' Agreement and Risk Disclosures did not include the required cautionary statement to investors or a full and complete risk disclosure, including the risks involved in foreign futures contracts and retail forex trading. *Id.* ¶ 111.

- Defendants also failed to provide pool participants with additional required information, including but not limited to, the fees and expenses incurred by the Oasis Pools, past performance disclosures, and a statement that the CPO is required to provide to all pool participants with monthly or quarterly account statements, as well as an annual report containing financial statements certified by an independent public account. *Id.* ¶ 112.

Because the Complaint sufficiently alleges facts to support its claim for DaCorta's violation of Regulation 4.21 as a controlling person as previously discussed, the CFTC respectfully requests that the Court deny DaCorta's Motion to Dismiss Count Five for failure to state a claim.

F. Defendant DaCorta's Alleged Reliance on Counsel Does Not Support a Motion To Dismiss for Failure To State a Claim.

In his arguments under each count in support of his Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), Defendant DaCorta asserts that he "trusted and relied solely on counsel, attorney Joseph S. Anile II, regarding all legal matters." Dkt. 454 ¶¶ 8, 19, 22-25, 51, 54, 76, 79, 84, 90, 93, 97, 102. Defendant makes no argument—and the CFTC is unaware of same—that a defendant's reliance on counsel, if any, provides independent grounds for a complaint's dismissal for failure to state a claim. For this and all of the reasons above, the CFTC respectfully requests that the Court deny Defendant DaCorta's Motion to Dismiss for failure to state a claim.

III. The CFTC Has Prosecuted Its Claim to the Extent Allowable Under the Stay.

On July 12, 2019, the Court ordered that this matter be administratively closed and deadlines stayed until the expiration of the stay (with limited

exceptions for the appointed receiver to fulfill his mandate). Dkt. 179. "A district court may stay civil proceedings when related criminal proceedings are imminent or pending, and it will sometimes be prudential to do so." *SEC v. LaGuardia*, 435 F.Supp.3d 616, 621 (S.D.N.Y. 2020) (granting motion to stay SEC action during pendency of criminal proceedings); *see also SEC v. Palleschi*, No. 2:21-cv-530, 2021 WL 4710773, at *1-2 (M.D. Fla. Sept. 24, 2021) (same).

In its Motion for Temporary Stay of All Proceedings, Including Staying Entry of a Case Management and Scheduling Order, to Prevent Harm to Federal Criminal Investigation ("Motion for Stay") (Dkt. 149), Intervenor United States sought a stay of these proceedings due, in part, to its pending criminal investigation of DaCorta. *Id.*, p. 11. In this Motion for Stay, Intervenor United States represented that Defendant DaCorta had no objection to the requested stay (Dkt. 149, p. 25). On four subsequent occasions since the initial Stay Order, Intervenor United States has sought extensions of the Stay Order (Dkt. 215, 282, 353, 417), and Defendant DaCorta has similarly not objected to any of these requests for extension, all of which have been entered by this Court. Yet Defendant DaCorta argues that the CFTC's failure to object to the requests supports a claim for involuntary dismissal. *See* Dkt. 454 ¶¶ 115-116 ("Plaintiff has unreasonably failed to object to any motion for a stay of the proceedings . . . [and its] failure to prosecute prompts Defendant to move this Court to dismiss the instant case under FRCP [] 41(b)").

If the CFTC prosecuted the case against Defendant DaCorta, as suggested by DaCorta himself, the CFTC would be in direct violation of the Court's Stay Order. Failure to prosecute Defendant DaCorta therefore cannot be the basis for a Rule 41(b) motion for involuntary dismissal. The CFTC has, however, expressed its willingness for modifications to the Stay Order to advance the case in a manner not detrimental to the interests of Intervenor United States. *See* Dkt. 225 (requesting that any grant of extension of the stay be accompanied by an order granting Mainstream leave to move the Court for further relief including a motion to partially lift the stay); Dkt. 391 (requesting limited relief from stay to conduct third-party discovery). The CFTC therefore respectfully requests that the Court deny Defendant DaCorta's Motion to Dismiss the Complaint under Rule 41(b).

IV. The CFTC's Complaint Is Not Frivolous.

The CFTC's Complaint is not frivolous. The entirety of Defendant DaCorta's argument that the CFTC's Complaint should be dismissed as frivolous is stated in one sentence:

> The Complaint, being wholly without any arguable basis in law or fact, presents no realistic chance of success and is therefore dismissible as frivolous.

Dkt. 454 ¶ 106. In support of the dismissal as frivolous, DaCorta cites *Moreland v. Wharton*, 899 F.2d 1168 (11th Cir. 1990). Dkt. 454 ¶ 105. But *Moreland* was decided in the context of a prisoner proceeding *in forma pauperis*, and was decided under 28 U.S.C. § 1915, a statute granting "a broad grant of discretion to

the courts regarding management of IFP actions." *Id.* at 1169. Ultimately, the court of appeals vacated and remanded the district court's dismissal of the prisoner's complaint, finding that the district court should have conducted an inquiry because "the complaint presents an arguable basis in law and contains unfanciful facts." *Id.* at 1171.

Because Defendant DaCorta seeks dismissal of the CFTC's Complaint as frivolous under *Moreland* (Dkt. 454 ¶ 5), and *Moreland* addresses a very specific statute applicable only to prisoners filing cases *in forma pauperis*, the CFTC respectfully requests that this Court deny Defendant DaCorta's motion to dismiss the Complaint as frivolous.

V. The CFTC's Claims and Legal Contentions in the Complaint Are Warranted by Existing Law.

DaCorta argues that the CFTC violated Rule 11(b)(2) by submitting claims and legal contentions in a Complaint that were unwarranted by existing law (Dkt. 454 ¶¶ 58-59), but merely makes the same argument as in the rest of his Motion to Dismiss—factual arguments not proper under Rule 11(b)(2).

First, to the extent that DaCorta is requesting sanctions under Rule 11 (*see* Dkt. 454 ¶ 124), a motion for sanctions "must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." *Hooker v. Wilkie*, No. 8:18-cv-2000-T-36JSS, 2020 WL 4428760, at *3 (M.D. Fla. July 31, 2020). In addition to failing to file as a separate motion, DaCorta fails to offer any explanation for why the CFTC's Complaint runs afoul of Rule

11(b)(2), and merely lists the factual allegations that he disagrees with, stating summarily that they are unwarranted by existing law and unsupported by evidence. Dkt. 454 ¶ 59. DaCorta similarly fails to provide any case law or legal authority in support of his argument under Rule 11(b)(2). *See Hooker*, 2020 WL 4428760, at *6 (denying Rule 11 motion where movant provided no case law or legal authority that response contained sanctionable conduct).

Second, DaCorta did not comply with the safe harbor provision of Rule 11. *See* F.R.C.P. 11(c)(2) ("[t]he motion must be served, . . . but it must not be filed or presented to the Court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets")

Regardless, the assertions that DaCorta cites in favor of a violation of Rule 11(b)(2) are inherently questions of fact, and questions of fact cannot be determined to be "objectively frivolous" as required for a violation of Rule 11. *See Etkin & Co., Inc. v. SBD LLC*, No. 11-21321, 2013 WL 12092534, at * 5 (S.D. Fla. Jan. 9, 2013) (report and recommendation adopted in No. 11-21321, Dkt. 478 (S.D. Fla. Jan. 29, 2013)). The CFTC therefore respectfully requests that the Court deny Defendant DaCorta's Motion to Dismiss under Rule 11(b)(2).

CONCLUSION

For all of the foregoing reasons, the CFTC requests that the Court deny Defendant DaCorta's Motion to Dismiss in its entirety.

Dated: January 13, 2022

Respectfully submitted,

COMMODITY FUTURES TRADING COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2022, 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.

I hereby certify that on January 13, 2022, I provided service of the foregoing via electronic mail to:

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I hereby certify that on January 13, 2022, I provided service of the foregoing via electronic mail to the following unrepresented party:

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PRO SE DEFENDANT