UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 21-cv-1317

BURTON W. WIAND, not individually but solely in his capacity as Receiver for OASIS INTERNATIONAL GROUP, LIMITED, *et al.*,

Plaintiff,

v.

ATC BROKERS LTD., DAVID MANOUKIAN, and SPOTEX LLC,

Defendants.
_____/

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT DAVID MANOUKIAN'S MOTION TO DISMISS[1]

[1] This filing is 22 pages in substance, as graciously authorized by the Court [DE 47, 49].

Burton W. Wiand, not individually but solely in his capacity as the Court-appointed receiver (the "Receiver" or "Plaintiff") over Oasis International Group, Limited ("OIG"), Oasis Management, LLC ("OM"), Satellite Holdings Company ("Satellite Holdings"), and their affiliates and subsidiaries, responds in opposition to Defendant David Manoukian's ("Manoukian") Motion to Dismiss [DE 42].[2]

INTRODUCTION

The Receiver has standing to sue in this case, notwithstanding Manoukian's reliance on the Eleventh Circuit's recent decision of *Isaiah v. JP Morgan Chase Bank*, 960 F.3d 1296 (11th Cir. 2020). Contrary to Manoukian's position, *Isaiah* still recognizes long-standing exceptions to the typical affirmative defenses of *in pari delicto* or imputation, including instances where receivership entities have innocent investors, shareholders, or partners during the events at issue. The Receiver has alleged these *Isaiah* exceptions in the Amended Complaint for the Oasis Entities[3] during the underlying events, which the Court must accept as true. (Am. Compl. ¶¶ 2, 14-19, 39, 50, 53-57, fn. 4, 58-59). The Receiver has repeatedly alleged that the CFTC Defendants[4] committed a Ponzi scheme, and the Oasis Entities were their victims. (*Id.*

[2] OIG, OM, Satellite Holdings, Oasis Global FX, Limited ("OGNZ"), and Oasis Global FX, S.A. ("OGBelize") (collectively, OGNZ and OGBelize, the "Oasis Pools"), are the "Oasis Entities."

[3] Manoukian states that these entities were properly licensed (Mot. Dismiss 2), but that implies they were properly registered, which they were not for the reasons alleged in the Amended Complaint. Manoukian also states that his company, co-defendant ATC Brokers Ltd. ("ATC"), is based in London. (*Id.*) That is untrue for the reasons in the Receiver's upcoming Opposition to ATC's Motion to Dismiss (due December 13, 2021).

[4] In April 2019, the Commodity Futures Trade Commission (the "CFTC") sued Michael J. DaCorta

at ¶¶ 50, 53-57, fn. 4, 59, 63-72, 131). By contrast, Manoukian would lead the Court to ignore those allegations and dismiss the Amended Complaint based on the unfounded argument that the Oasis Entities committed a Ponzi scheme.

In addition, for purposes of the aiding and abetting claims (Counts I and II), the Receiver has repeatedly alleged *what* Manoukian knew and *how* he knew it regarding the Ponzi scheme, as well as the CFTC Defendants' misconduct (*i.e.*, their fraud and breaches of fiduciary duties) which was the object of Manoukian's knowledge. (*Id.* at ¶¶ 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131, 134, 145). Similarly, as to the gross negligence and simple negligence claims (Counts VI and VII), the Receiver has repeatedly alleged the duties Manoukian owed and how he breached them. (*Id.* at ¶¶ 73-74, 79-90, 92-95, 110-117, 119-127, 129, 131, 134, 145, 171, 187).

For purposes of the Motion to Dismiss, the Court must accept the Receiver's allegations of knowledge and duty as true. Accordingly, the Court must ignore and reject Manoukian's repeated denials of his knowledge about the Ponzi scheme, his participation or involvement in it, and/or any duties he owed to the Oasis Entities. Manoukian's repeated denials permeate essentially every page of his Motion. The issues involve highly disputed, factual allegations in the well-pled, nearly 60-page Amended Complaint.[5]

("DaCorta"), Joseph S. Anile, II ("Anile"), Francisco ("Frank") L. Duran ("Duran"), John J. Haas ("Haas") and Raymond P. Montie, III ("Montie") (collectively, the "CFTC Defendants"). That case is styled *Commodity Futures Trade Commission v. Oasis International Group, Limited, et al.*, Case No. 8:19-cv-00886-VMC-SPF (Apr. 15, 2019 M.D. Fla.) (the "CTFC Action").

[5] As further discussed below, the Receiver has also properly alleged that receivership property exists in California. The Court must similarly reject Manoukian's denials of such.

RESPONSE TO MANOUKIAN'S "BACKGROUND" SECTION

Manoukian argues that the services at issue involved "legitimate" forex trading with "licensed" Oasis Entities. (Mot. Dismiss 3 & fn. 2). The Receiver has alleged the opposite : (i) the Oasis Entities were not properly registered (Am. Compl. ¶¶ 73-74, 79-90, 171, 187); (ii) DaCorta, the head trader, was prohibited from forex trading (*id.* at ¶¶ 67, 171, 173, 187-188); and (iii) the trading platform was, in fact, used for illegal or fraudulent purposes (*id.* at ¶¶ 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131, 134, 145, 171, 187).

Manoukian also states that the Oasis Entities "undertook" the Ponzi scheme. (Mot. Dismiss 4). Again, this is *not* what the Receiver has alleged. Similarly, Manoukian states that ATC had no "involvement" or "relationship" with investors. (*Id.*) Not only is this a contested issue, but also cannot overcome the allegations that Manoukian knew: (i) the subject forex trading involved third party/investor money (Am. Compl. ¶¶ 74, 88-90, 93); (ii) the names of investors (*id.* at ¶¶ 116-117); and (iii) material details of their subaccounts, including large trading losses and the corresponding large adjustments to fully conceal the losses (*id.*).

Manoukian also states that the CFTC Defendants "controlled" the doomed forex trading. (Mot. Dismiss 4). Although DaCorta was submitting trades for the account to ATC, this cannot overcome the allegations that Manoukian knew about and participated in critical trading activities, including the automation of substantial adjustments that fully concealed massive trading losses, and led to the continued use of the trading platform fraudulently and illegally. (Am. Compl. ¶¶ 67, 73-74, 79-90,

92-95, 110-117, 119-127, 129, 131, 134, 145, 171, 173, 187-188).

Next, Manoukian asserts that the CFTC did not sue Manoukian or ATC, and thus, concludes that Manoukian and ATC cannot have liability here. (Mot. Dismiss 5). That is patently absurd and, again, these raise disputed issues that are improper for the Court to consider on a motion to dismiss. In addition, the CFTC has specific statutory bases to sue under its enforcement act and rules. The CFTC also has prosecutorial discretion in determining whether to sue a person, and the decision not to sue cannot be understood as the absence of any liability on that person's part. The Receiver has different bases to sue, including common law and equitable claims, as well as certain statutory claims such as fraudulent transfers, which the Receiver has brought in this case. Moreover, Manoukian's discussion about his and ATC's alleged cooperation with the government investigation and the Receiver, which is untrue, is wholly irrelevant for determining whether the Receiver has stated a cause of action against Manoukian and cannot undo the well-pled allegations here. (*Id.* at 5-6).[6]

MEMORANDUM OF LAW

I. Legal Standard

The Court must accept all of the allegations in the Amended Complaint as true. However, Manoukian improperly contests, denies, and "spins" them to his benefit. *See Sallah v. Worldwide Clearing LLC*, 860 F. Supp. 2d 1329, 1336 (S.D. Fla. 2011)

[6] Manoukian also quotes from the Court in the CFTC Action that there were so-called issues regarding jurisdiction over ATC. (*Id.* at 7). That (ATC) issue will also be addressed in the Receiver's upcoming Opposition to ATC's Motion to Dismiss.

(denying motions to dismiss because they denied or contested allegations).

II. The Receiver Has Standing under *Isaiah*

A. Manoukian Is Estopped from Making His *Isaiah*/Standing Arguments

Manoukian has argued that the Receiver lacks standing to sue because all of the CFTC Defendants' misconduct is fully imputed to the Oasis Entities, and the Receiver currently stands in their shoes. (Mot. Dismiss 9-11). In support of this argument, Manoukian has listed some examples of the CFTC Defendants' misconduct that he claims must be imputed to the Oasis Entities (and derivatively, the Receiver). Based on this imputation, Manoukian has relied on the recent *Isaiah* decision for the proposition that a receiver loses standing to sue third parties for torts where a controlling officer's misconduct is fully imputed to the companies in receivership. (*Id.*)

One important requirement for *Isaiah*'s application depends on allegations of the lack of legitimate activities pre-receivership involving the companies placed in receivership. *Isaiah*, 960 F.3d at 1307 ("The complaint itself shows that the Receivership Entities were wholly dominated by persons engaged in wrongdoing and **is devoid of any allegation that the Receivership Entities engaged in any legitimate activities** . . . . ") (emphasis added). However, Manoukian is estopped on relying on *Isaiah* by arguing that the Oasis Entities were engaged in legitimate and authorized activities. For example, in footnote 2 of his Motion to Dismiss, Manoukian argues that the trading was legitimate/authorized: "In this case, the Oasis entities used legitimate software and omnibus trading accounts provided by ATC UK **to conduct**

legitimate FOREX trading . . . ." (Emphasis added). Similarly, on page 10, Manoukian continues this argument: "Even if authorized FOREX trading could be called unauthorized – **which it cannot** – the Receiver still lacks standing to assert a claim against Manoukian." (Emphasis added). This argument, in and of itself, contradicts *Isaiah* and Manoukian's overall standing argument. At the dismissal phase, Manoukian should be estopped from arguing that the Receivership Entities were not engaged in legitimate activities.

B. The Allegations Involved Unauthorized, Ponzi Scheme Misconduct

To the extent that Manoukian is not estopped, Manoukian argues that the Receiver lacks standing because the funds were traded in forex and thus used for an authorized or legitimate purpose. (Mot. Dismiss 9). The Amended Complaint alleges the opposite, highlighting the many unauthorized uses of funds via a Ponzi scheme and admitted criminal activity. (Am. Compl. ¶¶ 2-5, 50-72).

C. Alleging That the CFTC Defendants Owned and Controlled the Entities Is Not Dispositive or Fatal

Next, Manoukian argues that the Receiver lacks standing because the CFTC Defendants owned and controlled the Oasis Entities as their robotic tools. (Mot. Dismiss 11-12). First, it is standard in receivership ancillary cases (such as this case), that the protagonists of the scheme (*i.e.*, the CFTC Defendants) perpetrated the scheme, as opposed to the entities. *See Freeman v. Dean Witter-Reynolds, Inc.*, 865 So. 2d 543, 547, 551 (Fla. 2d DCA 2003); *Wiand v. Lee*, 753 F.3d 1194, 1202-03 (11th Cir. 2014); *Worldwide Clearing LLC*, 860 F. Supp. 2d at 1334-35. Second, as discussed

below, there are legal exceptions to imputation, including in instances where entities in receivership "have at least one honest member of the board of directors or an innocent stockholder." *Isaiah*, 960 F.3d at 1306 (citing *Freeman v. Dean Witter-Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003). The Receiver has pleaded such facts in the Amended Complaint as it relates to the Oasis Entities during the underlying events.

D. The Receiver Sufficiently Alleged Innocent and Honest Investors, Shareholders, and Limited Partners during the Underlying Events

Manoukian argues that the Receiver failed to allege the existence of innocent shareholders of the two Oasis forex pools – Oasis Global FX, Limited ("OGNZ"), and Oasis Global FX, S.A. ("OGBelize") (again, OGNZ and OGBelize are hereinafter referred to as the "Oasis Pools"). (Mot. Dismiss 12-13). That is false. The Receiver alleged that the Oasis Pools consisted of investments from numerous honest and innocent investors, shareholders, and limited partners of OIG and OM, which occurred during the Ponzi's existence. (Am. Compl. ¶¶ 14-15, 50, 53-59, fn. 4). Therefore, these same honest and innocent investors, shareholders, and limited partners of OIG and OM were, by definition, honest and innocent investors, shareholders and limited partners of the Oasis Pools, because they were pool participants. (*Id.*) The allegations, which must be accepted as true, establish this.

E. There Is No Requirement to Allege Any More Specifics

Next, Manoukian suggests that there are requirements to allege: (i) the names of the innocent or honest shareholders, partners, directors, or officers; (ii) their

ownership percentages; and (iii) their existence as of the Receiver's appointment. (Mot. Dismiss 12-13). None of this is required under the case law, although the Receiver will be prepared to produce in discovery the shareholder/partner/investor lists and supporting investment documents that existed during the Ponzi scheme.

F. Manoukian Mischaracterizes *Isaiah* and Related Cases

Despite the absence of any allegations in the Amended Complaint, Manoukian argues that the investors, shareholders or partners who sold their interest must have benefitted from the Ponzi scheme and therefore cannot be honest or innocent. (Mot. Dismiss 13). Again, Manoukian is wrong. Under *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543 (Fla. 2d DCA 2003) and its progeny, including, *Isaiah*, innocent or honest means that the person did not know about or did not participate in the Ponzi scheme. An honest or innocent shareholder does not lose his, her or its honesty or innocence by selling an interest in the entity. All that is required to prevent imputation is one honest or innocent investor, shareholder, partner, director, or agent who did not know about the Ponzi scheme or did not participate in the scheme and existed during the events of the Ponzi scheme (*i.e.*, any time before April 2019, not as of April 2019). *See Isaiah*, 960 F.3d at 1307; *Freeman*, 865 So. 2d at 547, 551. As stated above, the Receiver has alleged not merely one honest or innocent shareholder, but the existence of scores of these shareholders and partners during the underlying events of the Ponzi scheme for years, which satisfies *Isaiah*.

Critically, Manoukian's reliance on the *Wiand v. Arduini* case for supposed proof that the shareholders are not innocent because they sold their shares and benefitted

from the Ponzi scheme is grossly misplaced. (Mot. Dismiss 13). Even if the Court judicially notices the Receiver's filing in the *Arduini* case, the Receiver never alleged that the defendants there were shareholders or partners or had knowledge of the Ponzi scheme. Case No. 8:20-cv-00862-VMC-TGW, DE 1 (M.D. Fla. Apr. 14, 2020).

Similarly, Manoukian argues that the innocent shareholder allegations contradict and cannot overcome the allegations that the CFTC Defendants controlled and operated the Ponzi scheme. (Mot. Dismiss 13-14). Manoukian, again, is wrong under the law, including *Isaiah* and *Freeman*, which provide that even if the protagonists operated a fraud or Ponzi through receivership entities, a receiver still has standing if innocent or honest shareholders exist. *See Isaiah*, 960 F.3d at 1307; *Freeman*, 865 So. 2d at 547, 551.

Indeed, last year's *Isaiah* decision, which incorporated the reasoning of *Freeman* and similar case law, did not fundamentally alter the means by which a receiver can gain standing. *Isaiah* still provides for the receivership exception of innocent/honest (or less culpable) shareholders, officers, directors, and employees. *Isaiah,* therefore, does not eliminate the long-recognized exceptions to *in pari delicto* or imputation.

G. The Receiver Sufficiently Alleged a Duty to Disclose or Notify Others, Including Innocent Shareholders and/or Regulators

Manoukian argues that he had no duty of disclosure or notification to others because no honest person existed within the Oasis Entities. (Mot. Dismiss 14-15). Again, this is a highly contested issue and mischaracterizes the Receiver's above-cited, well-pleaded allegations, including alleging various types of people Manoukian could

and should have contacted, from at least 60-plus innocent shareholders and limited partners to regulators such as the CFTC, SEC or NFA. (Am. Compl. ¶¶ 53-56). There were also several employees, representatives or agents within Oasis who have not been indicted or sued, whom Manoukian could have contacted and who have less culpability, and thus more honesty, than the CFTC Defendants. Ultimately, Manoukian could and should have contacted anyone, but never did, choosing, instead, to continue conducting business as usual because Oasis was ATC's largest client, which generated millions of dollars in commissions for ATC.

H. The Issues Are Factual and Thus Premature

The defenses involving *in pari delicto* or imputation are typically fact-intensive inquiries, as they are typically framed as affirmative defenses requiring factual proof. Therefore, unless the facts appear on the four corners of the complaint, these issues are typically inappropriate for Rule 12(b)(6) dismissal. *Perlman v. Alexis*, No. 09-20865-CIV, 2009 WL 3161830, at *3 (S.D. Fla. Sept. 25, 2009); *see also Wiand v. EFG Bank*, No. 8:10-CV-241-T-17MAP, 2012 WL 750447, at *9 (M.D. Fla. Feb. 8, 2012) (recommending denial of motion to dismiss because *in pari delicto* was "inappropriate for consideration . . . at the motion to dismiss stage").

Notwithstanding the above, *in pari delicto* (or imputation) is only appropriate on a motion to dismiss where the facts establishing the defense are: (i) definitively ascertainable from the complaint; and (ii) clearly establish the defense. *Id.* Clearly, those requirements are not present here. Although the Amended Complaint includes an overview of the scheme, which the CFTC Defendants accomplished, the Receiver's

allegations are directed at the Defendants in *this* case, including Manoukian. Although the Amended Complaint alleges wrongdoing by the CFTC Defendants, an essentially equitable, fact-bound apportionment of responsibility between them and Manoukian would be inappropriate on the Motion to Dismiss.

Similarly, the Receiver and Manoukian dispute key facts, including whether there were innocent or less culpable shareholders/partners and whether there were other less culpable managers/employees/agents of Oasis (including the Paniaguas and others, who have not been sued by the CFTC or indicted) who could have prevented the CFTC Defendants' misconduct from being directed at the Oasis Entities.

As the Court is aware, considering contrary factual allegations is improper on a motion to dismiss. *See In re Wiand*, 8:05-cv-1856-T-27MSS, 2007 WL 963165, at *7 (M.D. Fla. Mar. 27, 2007) ("Confining its analysis to the allegations of the complaints, this Court is unable to determine the relative fault of the parties. Therefore, this Court . . . finds that the defense of in pari delicto is not apparent from the face of the complaint" (alteration added)). Manoukian's ultimate argument, that the Oasis Entities did not have one single shareholder, partner, officer, employee, director, or agent that could have been notified, is incorrect, highly disputed and premature.

III. 28 U.S.C. § 754 Extends Jurisdiction over Manoukian

A. The Receiver Sufficiently Alleged Property in California

Manoukian argues that the Receiver has not alleged receivership property in the Central District of California. (Mot. Dismiss 15-16). This, too, is false. The Receiver

has alleged that receivership property exists with Manoukian in California. (Am. Compl. ¶¶ 32, 36).

For example, ATC transferred millions of dollars each year for several years to a "related entity" in California and other ATC personnel, including Manoukian in California, for purported services provided to ATC. A portion of these transferred funds derived from the Oasis relationship.[7] The "related entity" that received the transferred funds is California-based ATC U.S. These facts are corroborated by ATC's publicly-filed and publicly-available online annual reports (see "Related party transactions" section, usually section 17, 19 or 20, on ATC's Notes to Financial Statements) filed with the Companies House[8] via the following link https://find-and-update.company-information.service.gov.uk/company/08036570/filing-history (under "Full accounts" links), and are subject to judicial notice on a motion to dismiss. *See Rosetto v. Murphy*, No. 16-81342-CIV-MARRA/MATTHEWMAN, 2017 WL 2833453, at *7, n.1 (S.D. Fla. June 30, 2017) ("This Court may take judicial notice of public records without converting a motion to dismiss into a motion for summary judgment.")

In addition, as stated above and demonstrated by these ATC annual reports, ATC transferred funds to its directors, and Manoukian, an undisputed California resident and ATC director, received and deposited such funds in California for his

[7] Discovery will prove the amount of money transferred by ATC that was derived from Oasis.

[8] Companies House is the official U.K government entity which incorporates companies in the U.K., registers company information, and makes it available to the public. (Am. Compl. ¶ 21).

ATC ownership interests and/or work as an ATC director. Again, a portion of these funds derived from the Oasis relationship.[9] Copies of representative ATC annual reports are attached as Composite Exhibit A. Therefore, such transferred funds, which include funds derived from the Oasis-ATC relationship, are in the Central District of California, where Manoukian is. (Am. Compl. ¶¶ 32, 36).

Finally, receivership property can be characterized as a "chose in action." "Chose" is "a thing; an article of personal property." Black's Law Dictionary 219 (5th ed. 1979). "Chose in action" is also "a thing in action and is a right of bringing an action or right to recover a debt or money. A right to personal things of which the owner has not the possession, but merely a right of action for their possession." *Id.* Accordingly, a receiver's "chose in action" constitutes personal property. Section 754 expressly includes personal property. Therefore, the instant lawsuit against Manoukian constitutes personal property in satisfaction of 28 U.S.C. § 754. *See Haile v. Henderson Nat. Bank*, 657 F.2d 816, 820, 826 (6th Cir. 1981) (property was the right to receive payment from out-of-state defendants).

B. Whether Property Exists in California Is Also Factual and Thus Premature

Manoukian denies the existence of receivership property in California and argues any property exists in the U.K., including the money currently frozen in an

[9] The Receiver will also determine in discovery the amount of money received by Manoukian that was derived from the Oasis relationship, including the monies he received directly from ATC and/or indirectly received from ATC through ATC U.S.

account in the U.K. (Mot. Dismiss 15-16). First, the Receiver is not suing based on this money; he is suing based on the location of receivership property in California for the reasons stated above. Second, Manoukian's arguments on the location of receivership property involve factual disputes and contested allegations that are premature for a motion to dismiss.

IV. The Receiver Sufficiently Alleged That Manoukian Committed Torts

A. The Receiver Did Not Allege Vicarious Liability; He Alleged Personal Participation by Manoukian

Manoukian argues that the Receiver attempts to impute ATC's conduct to Manoukian via a vicarious liability theory. (Mot. Dismiss 17). Similarly, Manoukian argues that the Receiver does not allege that Manoukian acted tortiously in his individual capacity. (*Id.*) Again, this is false. A clear reading of the Amended Complaint shows sufficient, and objectively voluminous, allegations that Manoukian personally participated and thus acted in his individual capacity. (Am. Compl. ¶¶ 26, 40, 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131).

B. Manoukian's Cases Are Distinguishable

Manoukian has cited several cases for the proposition that "[a] corporate officer or agent must be alleged to have acted tortiously in his individual capacity in order to be individually liable" and that liability in unavailable against an officer simply due to his or her position with the company. (Mot. Dismiss at 17 (quoting *McElveen By and Through McElveen v. Peeler*, 544 So. 2d 270 (Fla. 1st DCA 1989)). However, the Receiver has repeatedly alleged that Manoukian engaged in the requisite tortious acts in his

individual capacity and has not claimed liability against him simply based on his position as an officer or agent. Specifically, the Amended Complaint is replete with allegations that Manoukian *personally participated* in the wrongdoing and provides many specific examples of how he did so, including from the onboarding of the accounts to registration violations to the automation of substantial adjustments that fully concealed the massive trading losses from investors. (Am. Compl. ¶¶ 26, 40, 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131).

C. The Issue of Manoukian's Personal Participation Is, Again, Factual and Thus Premature

Manoukian denies any personal involvement or any tortious activities in his individual capacity. (Mot. Dismiss 17). These denials represent arguments contesting the above-cited, well-pled allegations, which is improper on a motion to dismiss. Manoukian's arguments on his individual involvement naturally involve factual disputes which are premature for deciding on a motion to dismiss.

V. The Receiver Sufficiently Alleged That Manoukian Had Knowledge

A. The Receiver Sufficiently Alleged That Manoukian Knew about the Ponzi Scheme and the CFTC Defendants' Misconduct

Manoukian argues that the Receiver fails to allege that he had any knowledge other than of purported red flags. (Mot. Dismiss 18-21). Similarly, Manoukian argues that the Receiver has merely alleged that Manoukian should have known certain things. (*Id.*) Again, Manoukian misrepresents the Receiver's allegations.

The Receiver has alleged numerous examples of Manoukian's actual

knowledge of the CFTC Defendants' wrongdoing, including knowledge of the accounts' onboarding failures to registration violations to the automation of substantial adjustments that fully concealed the massive trading losses from investors. (Am. Compl. ¶¶ 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131, 134, 145). The supporting non-exhaustive emails and reports regarding, among other things, the adjustment issue that are summarized in the Amended Complaint (see ¶¶ 113-117, 119, 122-127, 129, 131), prove Manoukian's knowledge.

In addition, it is wholly improper on a motion to dismiss for a defendant to recast the allegations (which must be accepted as true) for his own benefit. For example, Manoukian argues that the allegations of "evidence of a crystal-clear Ponzi scheme" (¶¶ 119, 121, 127) are not allegations that Manoukian had knowledge of a Ponzi scheme. (Mot. Dismiss 19). However, they are objective allegations of knowledge of a Ponzi scheme, and the Court should reject Manoukian's spin and mischaracterizations. Notwithstanding the above, the Receiver did, indeed, allege in the aiding and abetting claims (Counts I and II) that Manoukian knew that a Ponzi scheme was occurring. (Am. Compl. ¶¶ 137, 148).

In addition, Manoukian denies any knowledge of the Ponzi scheme or the CFTC Defendants' misconduct (*i.e.*, their fraud and breaches of fiduciary duties). (Mot. Dismiss 18-21). Among other things, Manoukian questions how he could have known that the online portal showed profitable (fictitious) trading, questions how he could have known that the adjustments (fraudulently) hid the trading losses and denies how he could have known the amount of liabilities owed to investors. (Mot. Dismiss

19-20). The Receiver has alleged how Manoukian knew these items, including alleging the emails which were sent to Manoukian with the information. (Am. Compl. ¶¶ 110-117, 119-127). Manoukian's disputing the veracity of the allegations is, again, improper on a motion to dismiss.

Manoukian also argues that the Receiver's allegations are conclusory because there are no allegations regarding (i) Manoukian's knowledge of the investors' relationship with Oasis or (ii) Manoukian's access to investor accounts. (Mot. Dismiss 20). The Receiver has alleged that Manoukian knew that Oasis was trading third party investor money through the onboarding and application process (Am. Compl. ¶¶ 74, 88-90, 93); the automation of the adjustments (*id.* at ¶¶ 121-126); and various reports regarding investor subaccounts that identified investor names. According to Manoukian, the most he knew was that Oasis lost money and had adjustments to the accounts of the Oasis investors, including that the adjustments could be credits of charged fees or sharing spread pay typically kept by the broker. (Mot. Dismiss 19). However, he is alleged to have known the trading losses for each subaccount/investor account; the commissions for each; and the large adjudgments used to ultimately fully mask, alter, cover-up, disguise, and conceal the trading losses (*id.* at ¶¶ 116-117). These allegations, which are specific examples of how Manoukian had knowledge, are not conclusory and show full access to, and knowledge of, fraudulent activities.[10] *See Allied*

[10] The Receiver is not alleging that Manoukian did the fraudulent trading, so his reliance on various Declarations is misplaced. In addition, his reliance is further misplaced because the Declarations do not state that Manoukian did not have any type of access whatsoever to investor subaccounts, the investor information within, or investor information overall.

Irish Banks, P.L.C. v. Bank of America, N.A., No. 03 Civ. 3748 (DAB), 2006 WL 278138, at *11 (S.D.N.Y. Feb. 2, 2006) (actual knowledge pleaded where primary violator trading forex told defendant prime bank to omit information "from daily trade confirmations, monthly reports and communications because he sought to conceal such information from his employer"); *Perlman v. Bank of America, N.A.*, No. 11-cv-80331, 2011 WL 13108060, at * 9 (S.D. Fla. Dec. 22, 2011); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1075).

B. Manoukian's Cases Are Distinguishable

Manoukian's reliance on cases based on "red flags" and on cases lacking allegations of what and how the defendant knew things, is misplaced, and those cases are distinguishable. The Receiver has not alleged knowledge of "red flags"; the Receiver has alleged Manoukian's actual knowledge of (i) a Ponzi scheme; (ii) the CFTC Defendants' breaches of fiduciary duties; and (iii) how he knew such. (Am. Compl. ¶¶ 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131, 134, 145).

C. The Issues, Once Again, Are Factual and Premature

These knowledge arguments naturally involve factual disputes and contested allegations that are premature for a motion to dismiss. Therefore, like every other issue herein, this Court should reject Manoukian's knowledge arguments.

VI. The Receiver Sufficiently Alleged Gross and Simple Negligence

A. The Receiver Sufficiently Alleged a Duty Owed by Manoukian

Manoukian argues that he had no opportunity or means to stop the Oasis fraud

and had no duty to do so. (Mot. Dismiss 21-25). Manoukian further argues that the Amended Complaint does not contain allegations supporting a duty. (*Id.*)

In Florida, a duty may arise when one undertakes to provide a service to others and, thus, assumes a duty to act carefully and not create an undue risk of harm to others. *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003) (reversing summary judgment because duty existed under specific circumstances of that case); *see also* Restatement (Second) of Torts § 324A (1965). Specifically, "[v]oluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others or might result in harm to others due to their reliance upon the undertaking confers a duty of reasonable care, because it thereby 'creates a foreseeable zone of risk.'" *Union Park Mem'l Chapel v. Hutt*, 670 So. 2d 64, 67 (Fla. 1996) (quoting *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992)).

The Receiver has alleged clear duties owed by Manoukian and the basis for them, including duties to ensure: (i) the onboarding and application process of opening the subject accounts was proper and conformed to industry standards (Am. Compl. ¶¶ ¶¶ 73-74, 79-90, 93-95, 171, 187); (ii) the Oasis Entities were properly registered for purposes of forex trading and conformed to industry standards (*id.* at ¶¶ 73-74, 79-90, 171, 187); (iii) the forex trading was conducted by someone registered, was legally authorized to do such, and conformed to industry standards (*id.* at ¶¶ 67, 171, 173, 187-188); and (iv) the trading platform would not be used for any illegal or fraudulent trading, and conformed to industry standards (*id.* at ¶¶ 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131, 134, 145, 171, 187). These allegations are not conclusory and

are consistent with the duties recognized in *Clay Electric*, *Union Park*, and *McCain*. As established by the above-cited case law, these duties are distinct from the myopic duties Manoukian claims are the only duties that exist, such as his duty to his company ATC.

B. Manoukian's Cases Are Distinguishable

The cases cited by Manoukian are distinguishable. For example, the case of *Curry v. TD Ameritrade, Inc.*, 662 F. App'x 769 (11th Cir. 2016), is distinguishable because *Curry* did not involve allegations – like the ones in this case – to ensure: (i) the onboarding and application process of opening the subject accounts was proper and conformed to industry standards (Am. Compl. ¶¶ ¶¶ 73-74, 79-90, 93-95, 171, 187); (ii) the entities doing the trading were properly registered and conformed to industry standards (*id.* at ¶¶ 73-74, 79-90, 171, 187); (iii) the trading was conducted by someone registered, was legally authorized to do such, and conformed to industry standards (*id.* at ¶¶ 67, 171, 173, 187-188); and (iv) the trading platform would not be used for any illegal or fraudulent trading, and conformed to industry standards (*id.* at ¶¶ 73-74, 79-90, 92-93, 95, 110-117, 119-127, 129, 131, 134, 145, 171, 187). As alleged throughout the Amended Complaint, and unlike *Curry*, Manoukian undertook responsibilities regarding the application process; registration issues; and trading activities, including margin warnings, trading losses and the automation of substantial adjustments that fully concealed the massive trading losses. Unlike this case, *Curry* involved the role of TD Ameritrade as a custodian without any factual allegations that TD Ameritrade

contributed to the fraudulent transactions.[11]

In addition, Manoukian conflates the issue of CFTC violations by the CFTC Defendants with Manoukian's duties. (Mot. Dismiss 23-25). The Receiver is not suing Manoukian for statutory CFTC violations, and it is a red herring whether or not the CFTC could regulate or sue ATC.[12] Therefore, this is not a suit to enforce federal law through a private right of action.[13]

Finally, Manoukian argues that any duty to police would be owed to investors, not any Oasis Entities. (Mot. Dismiss 25). This is incorrect. It is legally proper for a court-appointed fiduciary to file claims owned by the entity for the benefit of creditors, including duped investors.[14] At least one of the cases cited by Manoukian supports this. *See Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. 2d DCA 2003) ("[T]he receiver can bring actions previously **owned by the party in receivership for the benefit of creditors**, but he or she cannot pursue claims owned directly by the creditors.") (emphasis added); *see also Lee*, 753 F.3d at 1199-1204 (affirming summary judgment in favor of receiver where receiver sued investor for fraudulent transfer "on behalf of the receivership entities in order to partially compensate those investors who

[11] In addition, the cases cited by Manoukian in the shareholder/director context for the proposition that the only duty Manoukian owed was to ATC (and not the Oasis Entities) are irrelevant.

[12] In the CFTC Action, the CFTC obtained leave from the Court earlier this year to continue its investigation of ATC for claims and potential defenses regarding ATC and its related entities.

[13] As such, the case law that Manoukian cites does not apply.

[14] Assuming the Receiver recovers from Manoukian, those funds will be deposited in the receivership account for purposes of a future distribution to investors with allowed claims.

suffered a net loss on their investments"); *Worldwide Clearing LLC*, 860 F. Supp. 2d at 1335 ("[T]he Receiver is not pursuing claims owned [] by [] creditors. Rather, the Receiver is pursuing claims that are owned by MRT LLC.").

C. The Issues, Once Again, Are Factual and Thus Premature

Manoukian's arguments on duties he owed or undertook naturally involve factual disputes and contested allegations that are premature for a motion to dismiss. In addition, the duty issue will be subject to expert opinions and testimony, and the Receiver has retained for this purpose, via Court approval in the underlying CFTC Action, Thomas Bakas of the firm RPM Financial Markets Group, LLC.

VII. Worst Case Scenario, the Receiver Can Re-Plead

For the above-discussed reasons, the Receiver has sufficiently alleged his claims against Manoukian. However, if this Court disagrees, the Receiver has the right to re-plead to correct and/or add relevant allegations.

CONCLUSION

On literally every page, the Motion to Dismiss disputes, spins and distorts the well-pleaded allegations of the Amended Complaint. The Motion to Dismiss raises factual issues and affirmative defenses that require discovery and further development. The Motion to Dismiss reads more like a motion for summary judgment. The Receiver has sufficiently alleged his claims against Manoukian, which should be viewed in the light most favorable to the Receiver. This Court should fully deny Manoukian's Motion to Dismiss and provide the Receiver the opportunity to prove the allegations at trial.

Dated: December 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 13, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/Patrick J. Rengstl
Patrick J. Rengstl, Esq.