UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,
v.

Case No. 8:19-CV-886-T-33SPF

OASIS INTERNATIONAL GROUP, LIMITED; OASIS MANAGEMENT, LLC; SATELLITE HOLDINGS COMPANY; MICHAEL J. DACORTA; JOSEPH S. ANILE, II.; RAYMOND P MONTIE III; FRANCISCO "FRANK" L. DURAN; and JOHN J. HAAS,

Defendants,

and
FUND AMDINISTRATION, INC.; BOWLING GREEN CAPITAL MANAGEMENT LLC; LAGOON INVESTMENTS, INC.; ROAR OF THE LION FITNESS, LLC; 444 GULF OF MEXICO DRIVE, LLC; 4064 FOUNDERS CLUB DRIVE, LLC; 6922 LACANTERA CIRCLE, LLC; 13318 LOST KEY PLACE, LLC; and 4 OAKS LLC,

Relief Defendants.

OPPOSITION TO RECEIVER'S VERIFIED MOTION FOR AN ORDER TO SHOW CAUSE

The Undersigned Attorney Is Not The Attorney Of Record Of This Case.

Mr. Wiand has claimed that I am the attorney of record in this case. That is untrue. I appeared in this Court and submitted a *pro hac vice* motion in July 2024 for the sole purpose of contesting Mr. Wiand's motion for contempt of a subpoena. The *pro hac vice* motion was granted in August 2024, and this Court dismissed Mr. Wiand's motion for contempt in December 2024 as it was brought in the incorrect jurisdiction. (Doc. 850). That was the beginning and end of my appearance pursuant to that *pro hac vice* motion.

Mr. Wiand then brought the same motion in the U.S. District Court in the Southern District of New York. After substantive review by that Court, Mr. Wiand's motion for contempt was, again, dismissed in January 2026 and the Southern District of New York, The Honorable Analisa Torres, found that Mr. Wiand's motion was without substance and that he was not entitled to documents that he sought by subpoena because they were either protected by attorney client privilege or were attorney work product. Mr. Wiand's motion for contempt was, again, dismissed. (Exhibit A – Decision for U.S. District Court for the Southern District of New York).

Now, for the third time, Mr. Wiand seeks to hold me in contempt, claiming that my filing of the appeal in the Eleventh Circuit and the Writ of Habeas Corpus in the Middle District of Florida is somehow frustrating the receivership. He is wrong. I have never acted contrary to this Court's order concerning the receivership

or the asset freeze outlined in this Court's 2019 order, and Mr. Wiand provides no evidence to the contrary. Mr. Wiand's request to hold the undersigned attorney, Mr. DaCorta's appellate lawyer, in contempt must be denied in all its aspects.

The Receiver Fails To Show By Clear and Convincing Evidence That An Order Of This Court Was Violated By Mr. DaCorta's Appellate Counsel.

Mr. Wiand alleges, but fails to prove, that the funds used for Mr. DaCorta's legal representation in his appeal to the Eleventh Circuit and in his Writ of *Habeas Corpus* are funds that either belonged to the Defendants in receivership, or are related to Receivership Property or are even remotely derivative of Receivership Property. Because he has failed to prove that the funds used for DaCorta's legal representation are in any way related to Receivership Property, those funds are not subject to this Court's Consolidated Order of July 2019 and not subject to the asset freeze that Mr. Wiand alleges was violated.

The funds used for DaCorta's legal representation came from personal friends of Mr. DaCorta and they were the personal funds of these people. These funds were paid to appellate counsel in February 2024, approximately five years after this Court's Consolidated Order. None of these funds are even remotely connected to Receivership Property or are subject to this Court's Order.

A party seeking civil contempt has the initial burden of proving by clear and convincing evidence that the alleged contemnor has violated an outstanding Court order. *Commodity Futures Trading Com'n v. Wellington Precious Metals, Inc.,* 950

F.2d 1525 (11th Cir. 1992); *Piambino v. Bestline Products, Inc.*, 645 F.Supp. 1210 (S.D. Fla. 1986). The clear and convincing proof standard is more exacting than the preponderance of the evidence standard, but, unlike criminal contempt, does not require proof beyond a reasonable doubt. *S.E.C. v. Greenberg*, 105 F.Supp.3d (S.D. Fla. 2015). In addition to showing by clear and convincing evidence that the court order was violated, the Petitioning party must establish three additional elements: (1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order.

Mr. Wiand has failed to overcome the first hurdle. He has not shown by clear and convincing evidence that the order was violated because the personal funds and future spending of friends or Mr. DaCorta, whether they had been lenders or investors in 2019, were not assets that were subject to this Court's order of an asset freeze. The assets subject to the freeze were assets owned, controlled, managed or held by the Defendants in receivership or in which they have any beneficial interest at the time of the issuance of that order in 2019.

Mr. Wiand emphasizes this in his papers that the Order shall apply to any of Defendants' assets derived from or otherwise related to the activities alleged in the Complaint. (See Receiver's Motion pg. 22 and Doc. 44 para. 4). In order to be subject to this Court's Order, the assets had to be related to, attributable to, or derived

from the assets of the Defendants in Receivership. They were not and there is no clear and convincing evidence to show that they were.

In an attempt to place these funds within the sphere of recoverable assets, Mr. Wiand plays fast and loose with definitions of recoverable assets. He argues that "Recoverable Assets" are any assets of any entity from funds derived from pool participants, lenders, investors, or clients of the Defendants or held in constructive trusts for the defendants. Those assets referenced in this Court's Order are assets that existed at the time that the Defendants were ordered into the Receivership. They are a finite number of assets subject to that order. They do not include the future spending of lenders or investors who happen to be the friends of Mr. DaCorta. This is an attempt to expand the universe of assets subject to that Order by exercising control over the future spending of past lenders or investors who also happen to be friends of Mr. DaCorta.

None of the funds used for Mr. DaCorta's legal representation by appellate counsel were Defendant's assets derived from or otherwise related to the activities alleged in the Complaint. They were not related to or derived from any Receivership Property and are not part of the Receivership Estate. Mr. Wiand has not provided the Court with any clear and convincing evidence that the personal funds of friends of Mr. DaCorta used for Mr. DaCorta's legal representation were assets derived from

or otherwise related to the activities alleged in the Complaint or that they were ever related to or derived from assets of the Defendants in Receivership.

Because Mr. Wiand has failed to provide clear and convincing evidence of this first hurdle, his motion for contempt must be dismissed.

The Receiver's Authority Is Limited To Jurisdiction And Control Over Receivership Property And That Authority Extends Only To Property That Legitimately Belongs To The Receivership Estate.

The monies used to fund Mr. DaCorta's appeal and *Habeas* Petition were personal funds of friends of Mr. DaCorta paid in February 2024. Those funds were not part of the Receivership Estate nor were they Receivership Property. Neither were the funds ever part of, or derivative of, any assets owned or attributed to the Oasis entities in receivership. The receiver is acting outside the scope of his authority as receiver because the funds for Mr. DaCorta's legal representation in the appeal to the Eleventh Circuit in the civil case and for the Writ of Habeas Corpus in the criminal case are not, and were never, part of the Receivership Estate and as such they are not Receivership Property.

The Receivership Estate and the finitely defined Receivership Property were created by this Court's Orders, dated April 15, 2019, April 30, 2019, and July 11, 2019. Mr. DaCorta's appellate counsel, the undersigned, was retained and began representation in February 2024, approximately five years after this Court's consolidated receivership order. The July order superseded all previous orders. Thus,

the Receivership Estate was created by this Court in 2019. Receivership property are the funds that were part of the Oasis Group of entities now in receivership or funds that are derived from the operations of the entities in receivership. The monies used to fund Mr. DaCorta's appeal and the *Habeas* petition are neither funds attributable to the entities in receivership nor are they derivative of anything related to the entities in receivership. They are the personal funds of friends of Mr. DaCorta and, therefore, beyond the scope of authority of the receiver; they are not part of, or related to, this Court's Consolidated Order dated July 11, 2019; and they are not related to or in violation of this Court's asset freeze contained in the Consolidated Order.

In fact, the receiver cites the definition of Receivership assets at pages 18 and 19 of his papers as "all assets (real, personal, intangible or otherwise) of the Defendants." And the Recoverable Assets are assets of any other entities or individuals that (a) are attributable to funds derived from pool participants, lenders, investors, or client of the Defendants…; (b) are held in constructive trust for the Defendants…; (c) were fraudulently transferred by the defendants…; and/or (d) may otherwise be includable as assets of the estates of the Defendants. (See Doc. 904 pages 18-19).

Mr. Wiand attempts to make the argument that the monies paid to Mr. DaCorta's lawyers was money derived from lenders/investors and, he argues, subject to this Court's asset freeze order. (See Doc. 904 page 19). He is wrong because Mr.

Wiand is attempting to control *all future* spending of anyone that was once a lender/investor even though the assets he is talking about were never owned by, attributed to, or derived from assets owned by Defendants in receivership. In making this argument, Mr. Wiand attempts to control all future spending by anyone that was once a lender/investor in Oasis. This was clearly not the intent of this Court's Consolidated Order and would be contrary to the purpose of a receivership. The purpose and scope of a receivership is to consolidate and marshal the assets owned and controlled by the Defendants or Corporations placed into receivership, not to control the future spending of personal assets of anyone that was once a lender/investor.

What Mr. Wiand omitted from his definition of Recoverable Assets is the fact that the definition refers to those assets as they existed at the time of the creation of the Receivership Estate. The Recoverable Assets do not include those personal funds of lenders/investors or how they spend those funds after the creation of the Receivership Estate. In other words, Mr. Wiand has no authority to control how lenders/investors spend their personal funds in the future where those funds are not derived from the Defendants' assets at the time of the creation of the Receivership Estate. To put an even finer point on this: lender/investor funds, not derived from Defendants' assets, are not Receivership Property. As such, Mr. Wiand may not

exercise control over the future spending of friends of Mr. DaCorta whether they were lenders/investors or not.

The funds that paid Mr. DaCorta's legal fees for his appeal and his *Habeas* petition were personal funds spent in February 2024 and they were not part of, or derived from, Defendants' assets. Thus, they are not and were never Receivership Property or subject to the receiver's authority.

The Receiver's Authority Is Limited And He May Not Exercise Authority Over Third Party Assets.

It is a generally recognized rule throughout the Federal Circuits that a receiver acquires no greater rights and powers than the person or entity whose property is in the receivership. Accordingly, when a receiver is appointed over a corporation, the receiver may only assert claims that could have been asserted by the corporation, and the receiver lacks standing to institute actions on behalf of investors in the corporation. Here, Mr. Wiand seeks to assert claims of lenders/investors that they are being defrauded by some other entity, namely the Oasis Helpers. Mr. Wiand has no standing to raise such a claim, and the claim is far beyond the scope of this Court's order appointing him as receiver. All of the claims made in Mr. Wiand's instant motion must be summarily dismissed.

The Eleventh Circuit has firmly established that "a receiver obtains only the rights of action and remedies that were possessed by the person or corporation in receivership." *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296 (2020). A court-

appointed receiver "has no greater rights or powers than the corporation in receivership and 'can only make a claim which the corporation could have made.'" *In re Burton Wiand Receivership Cases Pending in the Tampa Div. of the Middle Dist. of Fla.*, 2008 WL 818504 (2008). This fundamental principle means that "a receiver lacks standing to pursue claims that could only be brought by the investors." *In re Burton Wiand Receivership Cases Pending in the Tampa Div. of the Middle Dist. of Fla.*, 2008 WL 818504 (2008). As one district court within the circuit explained, "an equity receiver may sue only to redress injuries to the entity in receivership." *Hays v. Adam*, 512 F.Supp.2d 1330 (2007), and "the receiver cannot bring claims directly on behalf of third-parties, such as investors." *Hays v. Adam*, 512 F.Supp.2d 1330 (2007).

The receiver's authority is limited to that property over which the entities in receivership would have a claim. A receiver's authority is confined to the property over which the appointing court has jurisdiction and control, limited to the *res* involved in the pending litigation and the court's judgment. Also known as *in rem* jurisdiction. Such authority does not extend to property outside the scope of the receivership or belonging to entities other than the one over which the receiver is appointed. Federal district courts appointing receivers possess in rem jurisdiction over the debtor's property, including assets situated in other districts, contingent upon the receiver's proper notice and bond filing in those districts. The receiver's

control over property is tethered to the scope of the litigation and is divested upon failure to comply with procedural requirements. This delineation affirms that receivers exercise limited in rem authority solely over the property subject to the court's order, precluding authority over unrelated assets or interests.

Another limitation arising from the district court's *in rem* jurisdiction, is that the court may not exercise unbridled authority over assets belonging to third parties to which the receivership estate has no claim. *Sec. and Exch. Commn. v Stanford Intl. Bank, Ltd.*, 927 F3d 830, 841 (5th Cir 2019).

Mr. Wiand attempts to exercise authority over assets that have no relationship to the receivership. Like a photograph or snapshot taken on the date of this Court's order, the assets of the Receivership Estate are finite and fixed in time. They are the assets of the Defendants and Relief Defendants named in this litigation. Those assets are and remain a finite set, and the Receiver may not expand the universe of assets or impose his authority or control over the future spending of lenders, investors, or pool participants, whatever the impetus for that spending may be.

The personal assets/monies of the friends of Mr. DaCorta are not Receivership Property, and they were never part of the Receivership Estate. The funds were never part of the Oasis Group's assets and are not in any way affiliated or derivative of any of the Oasis Group's assets. They are beyond the scope of this Court's Orders issued in 2019 as they were the personal monies spent five years after the creation of the

Receivership Estate. These monies were never part of or derivative of the Oasis Group of corporations' assets. They are, therefore, by definition, beyond the scope of authority of the Receiver as he is confined by this Court's Order and the finite parameters of the Receivership Estate and Receivership Property.

The funds used to pay Mr. DaCorta's legal fees for the appeal and the Writ of Habeas Corpus are in no way related to, or derivative of, this Court's asset freeze in the April 2019 Order appointing the receiver. Mr. Wiand's request for disgorgement is inappropriate and inapplicable to Mr. DaCorta's appeal and to his writ.

The Undersigned Is Not Associated With The Helpers Group Or The Oasis Helpers Group

Mr. Wiand asserts that I am associated with the "Helpers" or "Oasis Helpers." (Doc 904 at 2). This is untrue. I am a private attorney with a practice in New York City. My practice focuses on handling appellate work in New York State Courts of appeal and the Federal Circuit Courts throughout the United States. I have had no affiliation with the Oasis Helpers Group and I do not work with or for the Oasis Helpers. My only knowledge of the Oasis Helpers is from the allegations in the filings by Mr. Wiand.

Furthermore, contrary to the claims of Mr. Wiand, I have not made any attempt to obstruct the receiver or the receivership in any way. I was hired by Mr. Michael DaCorta to file an appeal in the Eleventh Circuit on the civil case decided by this Court, and to file a Writ of Habeas Corpus in the U.S. District Court for the Middle

District of Florida on the criminal case. The work I produced in those cases is attached hereto as Exhibits B, C, D, and E (Respectively, the Appellate Brief, Reply Brief, Writ of *Habeas Corpus*, Reply Brief in *Habeas* Proceedings). The attached briefs and Writ is the total extent of my work and affiliation with Mr. DaCorta. All of the work I have done – the appeal and the writ – was done pursuant to Mr. DaCorta's statutory rights to make these filings and has nothing to do with Mr. Wiand or the Receivership. The assertion of Mr. DaCorta's rights in both his civil and criminal is not the equivalent of obstructing the Receivership, contrary to Mr. Wiand's view.

None Of The Claimed Interference Is Applicable To Me Or My Office

On page 3 of his instant motion, Mr. Wiand makes a series of claims of interference with the receivership. (Doc. 904 pg. 3). I will address each of those claims. For each claim, Mr. Wiand provides no evidence of my involvement at all.

Mr. Wiand claims that I, acting with other Respondents, misrepresented this Court's orders and the Receiver's authority and purpose to claimants. (Doc. 904 page 3 first bullet point). I have never communicated to anyone either the substance of this Court's orders or the Receiver's authority and purpose. In fact, I have not had any communications with the claimants regarding this Court's orders or the Receiver's authority. Mr. Wiand has provided no evidence of my involvement in any of these activities.

Second, Mr. Wiand claims that I discouraged communications with the receiver by requiring victims to sign nondisclosure agreements and made claims that the Receiver will bring criminal charges against victims who contact him. (Doc. 904 page 3 bullet point two). This is false. I never spoke to anyone about communicating with the Receiver and have no knowledge of any nondisclosure agreement.

Third, Mr. Wiand claims that I actively and consistently interfered with the court ordered claims process by disseminating false information to claimants. (Doc. 904 page 3 bullet point 3). Again, this is false. I never disseminated any information to claimants at all and have had no communications with any claimant about the substance of the appeal or the Writ of Habeas corpus that I filed. There is no evidence to the contrary.

Fourth, Mr. Wiand claims that I directly interfered with court ordered distributions by soliciting and coercing claimants into paying monies as contingency fees. (Doc. 904 page 3 bullet point 4). This is false. I have never solicited any money or fees of any kind from any person in this case, or any other case. Soliciting funds is strictly illegal for attorneys in New York. I have never done so and never will.

Fifth, Mr. Wiand claims that I made false representations to victims that Mr. DaCorta did nothing wrong and that Oasis was a bona fide business. (Doc. 904 page 3 bullet point 5). This is again false. I have not communicated with any of the

victims, and Mr. Wiand has not provided any evidence of me or my office making any such representation.

Sixth, Mr. Wiand claims that that I falsely advised victims that the Receiver was acting improperly and that there was no basis for the CFTC's action. (Doc. 904 page 3 bullet point 6). I have never communicated in any way with any of the victims in this case or made any representations, other than those in my briefs submitted to the courts, about the actions of the receiver or the CFTC. Once again, Mr. Wiand has provided no evidence of these allegations.

Seventh, Mr. Wiand claims that I made numerous false accusations to be submitted to the Florida Bar about the receiver. (Doc. 904 page 3 bullet point 7). This is false. I have never communicated with the Florida Bar. Again, no evidence of this has been provided by the receiver of my involvement in any such accusation.

Eighth, Mr. Wiand claims that I made false representations to claimants about receiving money if they funded Mr. DaCorta's legal case. (Doc. 904 page 3 bullet point 8). This is false. I have never communicated to victims or anyone else anything about receiving money, and I have made no promises to anyone about the outcome of Mr. DaCorta's case. Promises about the outcome of an appeal is strictly prohibited under New York Law, and I have never, in any case, made such a promise or even inferred anything about the results of outcome of the appeal. Once again, Mr. Wiand has not provided any evidence of these allegations.

Ninth, Mr. Wiand claims that I made false representations that the Helpers Group were entitled to a percentage of recoveries. (Doc. 904 page 3 bullet point 9). This is false. I have never communicated with anyone about the Helpers Group and have had no such communications with anyone. Once again, Mr. Wiand has provided no evidence of any such occurrence or my involvement.

Tenth, Mr. Wiand claims I falsely represented that claimants will receive no further recovery unless they fund DaCorta's legal defense. (Doc. 904 page 3 bullet point 10). This is false. I have never communicated with any of the claimants or ever made any representation to anyone about recovery or about funding Mr. DaCorta's legal defense. I reiterate, I have never solicited anyone about obtaining funds for Mr. DaCorta's legal defense and I have never made any promises to anyone about the outcome of Mr. DaCorta's case, whether civil or criminal.

Eleventh, Mr. Wiand claims that I was somehow involved in using fabricated judicial imagery, including AI generated depictions of this Court. (Doc. 904 page 3 bullet point 11). This is false. I have never made use of any such imagery or AI depictions of this Court. Once again, Mr. Wiand provides no evidence of this.

In short, I have never communicated with the Oasis Helpers Group and never made any representations about the outcome of the appeal on the civil case or the writ on the criminal case. I have never solicited funds from anyone nor made any

promises about the outcome of the litigation. All of these claims are false, and there is no evidence exists to the contrary.

In fact, when Mr. Wiand subpoenaed, in the Southern District of New York, all my email communications with Mr. Greg Melick, all of those emails and communications were examined in chambers by U.S. District Court Judge Analisa Torres of the Southern District of New York, and those emails were determined to be communications that dealt exclusively with the representation of Mr. DaCorta with regard to his appeal in the Eleventh Circuit. (See Exhibit A).

The U.S. District Court examined the emails and determined that they were protected by the attorney client privilege because they dealt with only legal matters concerning Mr. DaCorta's appeal. The undersigned attorney submitted a privilege log to the U.S. District Court and to Mr. Wiand containing a list of communications with Mr. Melick. Mr. Wiand was ordered by the U.S. District Court to review and contest the privilege log of all those communications. Mr. Wiand did not contest those communications nor did he seek to modify the subpoena. In fact, on April 27, 2026, the U.S. District Court issued an order (Exhibit F) finding that the undersigned attorney was in compliance with the Court's Order concerning all communications with Mr. Melick, those communications having already been found to be privileged, that undersigned's motion to quash was granted and resolved.

Therefore, Mr. Wiand's argument that the undersigned attorney had some knowledge as to what the Oasis Helpers were communicating with investor/lenders is without merit and it is *res judicata* that no such communications ever occurred. The U.S. District Court of the Southern District of New York found that none of the communications encompassed any of the promises that Mr. Wiand now asserts were made to the investors/lenders by the Oasis Helpers.

Mr. Wiand Makes False Statements That The Funds Used To Pay The Retainer Fee Of Appellate Counsel To Represent Mr. DaCorta Was Solicited Or Raised From Victims.

Mr. Wiand claims that the funds used to pay the retainer fee for the appeal to the Eleventh Circuit in the civil case and to file the Writ of Habeas Corpus were solicited from victims in this case. This is false.

First, I have never solicited anyone for funding in this case or any other case in my entire career. As stated previously, it is illegal to solicit clients in New York, and I have scrupulously abided by this rule. The People that contacted me and approached me were self-described friends of Mr. DaCorta who wanted to fund the litigation as Mr. DaCorta was already in custody at the time. They sought me out. They approached me and stated that they were friends of Mr. DaCorta. I confirmed this with Mr. DaCorta that his friends were assisting in the payment of his legal fees. In fact, a number of People called me and came to my office in New York City to offer payment of Mr. DaCorta's legal fees. They all described themselves as friends

of Mr. DaCorta, which I confirmed that they were his friends. Ultimately, only two people paid me in February 2024. One was by personal check and another was by wire transfer. Both parties represented to me that these were personal funds and they were not funds related to, part of, or associated with the receivership estate or receivership property.

There Is No Conflict of Interest

Mr. Wiand claims that my representation constitutes a conflict of interest. He is wrong. I was paid from personal funds of friends of Mr. DaCorta. Of the many people that called me or came to my office to retain me, they all represented that they were Mr. DaCorta's friends, which I confirmed that they were. Additionally, none of the funds that paid my retainer were Receivership Property or in any way derivative of property or assets once owned by, or associated with, the defendants in receivership. Because the funds came from the personal assets that were not part of Receivership Assets or derived from or in any way associated with Receivership Property, there is no conflict of interest with the Receiver or with this Court's Consolidated Order appointing the Receiver.

Mr. Wiand also claims that the Helpers Group is using my representation to claim that they will recover $700 million in damages. An assertion of such a recovery is ludicrous. I am not aware of any representations that the Helpers Group has made, and, more importantly, I have never made any representation about the outcome of

either Mr. DaCorta's appeal in the civil case or the *Habeas* Petition in the criminal case. The representation of the outcome of a case is strictly prohibited by the rules governing lawyers in New York, and I have never made any representation in this case or any other about the outcome or related results of a case.

Since I was retained, the extent of my involvement has been to file an appellate brief and a reply brief in the Eleventh Circuit Court of Appeals on the civil case and a Writ of Habeas Corpus and a reply brief in the Middle District of Florida on the criminal case for Mr. DaCorta. I have had no other involvement or communications with any of the groups that Mr. Wiand mentions in any of his papers addressed to this Court.

Finally, I want to address the amount that was paid to me to represent Mr. DaCorta on the appeal and the *Habeas* Petition. Mr. Wiand is fond of rhythmically and incessantly repeating the number $155,450. While this seems a large amount, I ask this Court to recognize that both the appeal and the *Habeas* Petition represent a tremendous amount of work for me as a sole practitioner. I culled through hundreds of pages in the civil case and more than 4,000 pages of trial transcripts and materials in the criminal case to prepare the Writ of *Habeas Corpus*. I am certain that I have spent well over 400 hours in reading, researching, and writing the appeal and the writ. I am confident that I have represented my client to the best of my ability in a fair and ethical manner.

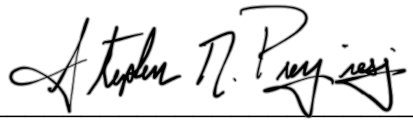
It is both professionally and personally offensive that Mr. Wiand attributes the representations made by others to me. As I have frequently repeated that I have not made any such representations about the outcome of this litigation and I am not aware that anyone is or was making representations about the recovery of money as a result of my representation of Mr. DaCorta.

I have been an appellate lawyer for 26 years in New York City, and I generally represent clients in criminal cases on appeal. I am admitted to all the appellate courts in New York State, as well as all the Federal Circuits Courts of Appeal throughout the United States as well as the United States Supreme Court. I have never had any problems with any clients or ever been accused of violating or circumventing any court order in my entire career.

CONCLUSION

The Receiver has failed to show by clear and convincing evidence that this Court's Order was violated by Appellate Counsel for Mr. DaCorta. The motion and Order to Show Cause must, therefore, be dismissed in its entirety.

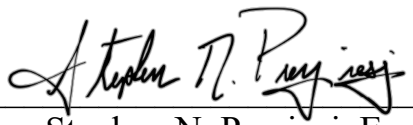
DATED: May 1, 2026
New York, New York



Stephen N. Preziosi, Esq.
Appellate Counsel for
Michael DaCorta
48 Wall Street, 11th Floor
New York, New York 10005

VERIFICATION

I, Stephen N. Preziosi, hereby certify that the information contained in this opposition document is true and correct to the best of my knowledge and belief.



Stephen N. Preziosi, Esq.

EXHIBITS

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In RE SUBPOENA BY A RECEIVER IN COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

-against-

OASIS INTERNATIONAL GROUP, LIMIT ET AL.,

Defendants.

24 Misc. 577 (AT)

ORDER

ANALISA TORRES, District Judge:

In this action, Stephen N. Preziosi, an appellate attorney representing Michael DaCorta in a pending appeal of a civil action in the United States Court of Appeals for the Eleventh Circuit, *Commodity Futures Trading Comm'n v. Oasis Int'l Grp., et al.*, No. 24-10132 (11th Cir. appeal filed Jan. 5, 2024), seeks an order modifying a subpoena issued by the United States District Court for the Middle District of Florida in the underlying civil action for which Preziosi is handling DaCorta's appeal. *See* Mot., ECF No. 1; Subpoena, ECF No 1-2; Summ. J. Order, ECF No. 780, *Commodity Futures Trading Comm'n v. Oasis Int'l Grp., Ltd.*, No. 8:19 Civ. 886 (M.D. Fla. Dec. 6, 2023) (the "civil action"). The subpoena was issued by Burton W. Wiand, the court-appointed Receiver in the civil action. Subpoena at 1. The Receiver cross-moves for indirect civil contempt on the basis of Preziosi's noncompliance with the subpoena. *See* Contempt Mot., ECF No. 7.

BACKGROUND

In 2019, the Commodity Futures Trading Commission (the "CFTC") brought a civil action in the United States District Court for the Middle District of Florida against Michael DaCorta and various other individuals and entities claiming violations of the Commodity

Exchange Act and CFTC regulations. Mot. at 2. The complaint alleged that from April 2014 to April 2019, DaCorta and his co-defendants fraudulently solicited investments in two foreign currency commodity pools, raising approximately $75 million from over 700 U.S. residents. *See* Resp., ECF No. 5, at 2. Around the same time, the federal government initiated criminal proceedings against DaCorta and others. *Id.* at 4. In 2022, a jury found DaCorta guilty on three counts: conspiracy to commit wire and mail fraud, engagement in an illegal monetary transaction, and filing a false income tax return; he was sentenced to 23 years' imprisonment and order to pay over $53 million in restitution. Resp. at 4; Mot. at 3.

Wiand was appointed as a Receiver in the civil action and was authorized to "marshall[] and preserv[e]" assets related to the civil action. Order Appointing Receiver, ECF No. 1-1, at 2; *see* Mot. at 3; Resp. at 3. The Receiver alleges that, shortly after DaCorta's criminal indictment was issued, Greg Melick, a non-party to the civil action "began soliciting Ponzi Scheme investor victims to raise money" for DaCorta's legal representation and hired an Illinois attorney, Brent Winters, with that money. Resp. at 4. The Receiver claims that, prior to the actions relevant to this motion, Melick worked "in the business of distributing movies." *Id.* at 5. The Receiver also alleges that Melick engaged in a "persistent smear campaign against the Receiver," using false claims concerning available assets in an attempt to encourage potential investors to fund DaCorta's legal representation, and that, with Melick's assistance, DaCorta retained Preziosi for his Eleventh Circuit appeal after the Middle District of Florida granted summary judgment to the CFTC in the civil action. *Id.* at 5–6. The Receiver's papers suggest that Preziosi's representation of DaCorta in the civil appeal results from "[p]ersistently exploiting the same investor victims to benefit the convicted felon that victimized them in the first place." *Id.* at 6.

On June 10, 2024, about the time that Preziosi perfected DaCorta's appeal in the Eleventh Circuit (which remains pending), the Receiver served the instant subpoena on Preziosi. *See* Subpoena; Mot. at 4; Resp. at 8. That subpoena made various requests, generally focusing on documents or correspondence related to the funds used to pay for Preziosi's representation of DaCorta. *See* Subpoena at 8; Mot. at 4–5. Preziosi responded by producing all documents sought in paragraphs 1–4 of the subpoena or denying that such documents existed.[1] *See* Mot. at 5; Resp. at 8.

At issue in this proceeding is paragraph 5 of the subpoena, which sought "[a]ny and all communications with Brent Winters, Greg Melick, Jason McKee, Intermountain Precious Metals, any person affiliated with the Oasis Replevin Group (a/k/a 'Oasis Helpers'), and/or Michelle Utter." Subpoena at 8. With respect to paragraph 5, Preziosi states that he informed the Receiver that he had one phone conversation each with Brent Winters and Jason McKee, that he had no documents reflecting these conversations, and that he had no communications with any other individual listed in the paragraph except for Greg Melick. Mot. at 6. Preziosi claims, however, that Melick was "a paralegal at another law firm that also represents" DaCorta, and that Preziosi had exchanged "a number of emails" with Melick "regarding legal research, legal argument for the appellate brief, legal analysis of facts, case law for the brief," and "statutory and regulatory law." Mot. at 5–6. Preziosi refused to produce these emails on the ground that they are protected as attorney work product. *See id.* at 6–7; Resp. at 8.

On July 31, 2024, counsel for the Receiver requested that Preziosi produce a privilege log of withheld documents. Resp. at 8. According to the Receiver, Preziosi refused to do so, and

[1] Although Wiand characterizes Preziosi's response to the balance of the subpoena as "sparse," he does not claim that Preziosi failed to comply with any request made in paragraphs 1 through 4 of the subpoena. *See* Resp. at 8; *see generally* Contempt Mot.

informed the Receiver that he would file an objection to the subpoena in the civil action. *Id*. Claiming that Preziosi had consistently refused to comply with the subpoena, on August 16, 2024, the Receiver filed a motion for contempt in the Middle District of Florida. *See* Resp. at 8. On December 3, 2024, the Florida district court dismissed the motion after determining that it did not have jurisdiction under Federal Rule of Civil Procedure 45. Resp. at 9; Mot. at 11; Order, ECF No. 1-3. Preziosi filed this motion shortly afterwards, on December 10, 2024. *See generally* Mot. After supporting memoranda were submitted related to Preziosi's motion, the Receiver also filed a motion for indirect civil contempt against Preziosi, *see* Contempt Mot.[2] On December 12, 2024, the Court ordered Preziosi to submit the emails at issue to the Court for *in camera* review, and Preziosi complied with that order. *See* ECF No. 2.

LEGAL STANDARD

I. Privilege

Under the Federal Rules of Civil Procedure, a court where compliance is required for a duly issued subpoena "must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(d)(3)(A)(iii). Federal Rule of Civil Procedure 26(b)(3) defines one such privilege, protecting "documents and tangible things that are prepared in anticipation of litigation or for trial"—known as the attorney work-product privilege. *See United States v. Adlman*, 134 F.3d 1194, 1196–97 (2d Cir. 1998). The attorney work-product privilege "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *Id.* at 1196. If a document is subject to the privilege, then that document is only discoverable where the party

[2] The Receiver also seeks, "in the alternative," an order compelling production of documents subject to paragraph 5 of the subpoena, as well as an award of attorney's fees and costs. Contempt Mot. at 9–10.

seeking discovery shows that the privilege has been waived or that an exception applies. Fed. R. Civ. P. 26(b)(3)(A)(iii); *see Ricoh Co., Ltd. v. Aeroflex Inc.*, 219 F.R.D. 66, 70–71 (S.D.N.Y. 2003) (discussing waiver of the work-product privilege).

Courts construe the attorney work-product privilege to cover a broad range of documents which are prepared in anticipation of litigation. The Second Circuit has held that Rule 26(b)(3) does not only protect materials which are made "primarily" or "exclusively" to aid in litigation but extends its coverage to documents which, for example, analyze potential litigation outcomes, even if the documents' primary purpose is to assist business decisions. *Adlman*, 134 F.3d at 1198, 1199. Courts have also held that the attorney work-product privilege covers documents prepared at the request of an attorney, even when they are not prepared by the attorney herself. *See, e.g.*, *Strougo v. BEA Assocs.*, 199 F.R.D. 515, 522–24 (S.D.N.Y. 2001) (protecting documents prepared by financial advisory firms at the request of attorneys from disclosure).

II. Contempt

To establish contempt, the Receiver must "establish that (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner." *Perez v. Danbury Hosp.*, 347 F.3d 419, 423–24 (2d Cir. 2003) (quoting *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995)).

DISCUSSION

As a preliminary matter, the Receiver argues that the Court must deny Preziosi's motion to modify the subpoena as untimely, because he filed it well after the return date of the subpoena, failed to produce a privilege log at the time he responded to the subpoena, and has not shown good cause for either alleged deficiency. *See* Resp. at 10–11. Although the text of Federal Rule

of Civil Procedure 45 states that "[q]uashing or [m]odifying a subpoena" is "[r]equired . . . on timely motion," *see* Fed. R. Civ. P. 45(d)(3)(A), courts in this circuit have routinely considered motions to quash that were not timely filed. *See, e.g.*, *In re DMCA Section 512(h) Subpoena to YouTube (Google, Inc.)*, 581 F. Supp. 3d 509, 516–17 (S.D.N.Y. 2022) (citing *Nike, Inc. v. Wu*, 349 F. Supp. 3d 310, 320 (S.D.N.Y. 2018) (considering an untimely motion under the Court's "broad discretion" because "good cause exist[ed] to overlook [the] delay in filing it"), *aff'd* 349 F. Supp. 3d 346 (S.D.N.Y. 2018); *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975) (finding that because no prejudice would result from the delay, "failure of [the] movant to comply with the literal requirements of Rule 45(b) does not provide grounds for a reversal of the judgment below"); *Grigsby & Assoc., Inc. v. Rice Derivative Holdings, L.P.*, No. 00 Civ. 5056, 2001 WL 1135620, at *4 (S.D.N.Y. Sept. 26, 2001) (considering an untimely motion to quash where the "subpoenas contain[ed] non-specific, overbroad production requests").

Preziosi filed this motion well after the return date of the original subpoena—which was June 14, 2024—but the Court declines to deny his motion as untimely. Preziosi responded to the subpoena on July 11, 2024, asserted the privilege that is now at issue, and otherwise responded to all requests made in the subpoena. The Receiver then filed a motion for contempt before the Middle District of Florida in August 2024, *see* Resp. at 8–9; Motion for Contempt, ECF No. 834, No. 8:19 Civ. 889 (M.D. Fla. Aug. 16, 2024), and Preziosi filed the instant motion shortly after the Florida district court concluded that this issue should be adjudicated before this Court. *See* ECF No. 1-3.

Although Preziosi could have brought this motion before this Court more promptly, nothing in the record suggests that the delayed filing is due to bad faith or dilatory tactics.

Preziosi communicated his intention to object to the subpoena shortly after the subpoena's original return date, and the Receiver does not argue that that delay (from June 14 to July 11, 2024) reflects a lack of diligence. Nor does the Receiver argue that the untimely filing has caused it undue prejudice; the Receiver does not argue that delayed adjudication of its subpoena has interfered with his duties in any way other than preventing him from viewing the subject documents. As a result, the Court will, in its discretion, consider the motion to modify on the merits. *See, e.g.*, *Langford*, 513 F.2d at 1126.

I. Motion to Modify the Subpoena

Preziosi asks this court to modify the subpoena to exclude the emails exchanged between him and Melick. *See* Mot. at 1–2. Preziosi argues that the documents subject to paragraph 5 of the subpoena—a set of emails exchanged between him and Greg Melick—are covered by the attorney-client privilege, and as such, the subpoena should be modified to prohibit their disclosure. *See* Mot. at 12. He argues that Melick acted as a paralegal while composing his emails and that the substance of all emails concerns "legal research, legal arguments, and legal strategy." *Id.*

Preziosi represents that all of the emails concern the scope of his appellate representation of DaCorta. *Id.* at 1–2; *see also id.* at 19–26. Preziosi produced the emails for the Court's *in camera* review via email on January 2, 2025, and the Court agrees with his characterization. The emails include selected record material from the underlying civil action, and Melick comments on some of that material, all of which would have been relevant to Preziosi's appellate strategy. They were clearly prepared "in anticipation of" Preziosi's pending appeal. *See Adlman*, 134 F.3d at 1197–98. The fact that Melick—and not Preziosi—composed the emails is immaterial to the question of whether they were ultimately produced "in anticipation of," and with the express

goal of aiding, Preziosi's appellate litigation strategy. *See Strougo*, 199 F.R.D. at 522–24.

None of the Receiver's arguments provide a basis to find that the work-product privilege does not apply or was waived. The Receiver claims that the emails are not privileged because Melick was "not a paralegal" and instead was simply using the title to "conceal his years of fraudulent conduct," citing other instances of allegedly fraudulent conduct intended to manipulate investors. Resp. at 11. But Melick's allegedly fraudulent conduct has no bearing on whether the particular emails at issue here were prepared in anticipation of litigation, and thus come within the scope of the work-product privilege.[3] And, regardless of whether Melick is properly considered a "paralegal" or is in fact supervised by a licensed attorney, *see* Resp. at 12, Melick's emails were expressly prepared for an attorney and concern that attorney's legal strategy. As a result, those emails are covered by the work-product privilege.

The Receiver argues that a crime-fraud exception applies to the work-product privilege in this case, citing to *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 A.D.3d 223 (N.Y. App. Div. 2003). Resp. at 12. Under that exception, New York state courts have refused to apply privilege where privileged communications "may have been in furtherance of a fraudulent scheme." *Ulico Casualty Co.*, 1 A.D.3d at 223. Although the Receiver raises allegations that Preziosi's representation of DaCorta was funded with illegitimately obtained funds, the Court holds that after *in camera* review, the emails themselves have no bearing on the allegedly fraudulent conduct. *See* Resp. at 13–14 (acknowledging that *in camera* review would be appropriate); *cf., e.g., Surgical Design Corp. v. Correa*, 284 A.D.2d 528, 528 (N.Y. App. Div. 2001) (finding that an attorney-client communication was not privileged because that

[3] Of course, emails which concerned schemes to defraud investors, or emails which concerned the details of Mr. Preziosi's funding or retention, may very well not fall within the scope of the work-product privilege. But the Court's *in camera* review has determined that the emails subject to dispute in this action do, in fact, contain legal analysis and work product relevant to Preziosi's appeal strategy.

communication "advis[ed]" the client that "its export practices were fraudulent under Brazilian law").

II. Motion for Indirect Civil Contempt

Because the subpoena must be modified to exclude the emails between Preziosi and Melick, the Court denies the Receiver's motion for indirect civil contempt. Under Federal Rule of Civil Procedure 45(e), the Court may find contempt in this matter where it finds "[f]ailure by any person without adequate excuse to obey a subpoena." The Court holds that Preziosi had an "adequate excuse" to refuse full compliance in this case—namely, that the subpoena sought privileged materials and should be modified to exempt those materials from its scope.

The only arguable basis for a finding of contempt, therefore, is Preziosi's untimely filing of the motion before this Court, or his alleged failure to produce an adequate privilege log. For the reasons discussed above, the Court also declines to find that Preziosi's untimely filing to modify or quash the subpoena constitutes noncompliance sufficient to justify an award of attorney's fees and costs. *See also Brentlor, Ltd. v. Schoenbach*, No. 13 Civ. 6697, 2018 WL 5619951, at *3 (S.D.N.Y. Jan. 9, 2018) ("[B]efore contempt sanctions are imposed on a non-party, the violation of a court order is also generally required." (quotation marks omitted)).

However, the Court finds that the privilege log, as produced at pages 19 through 26 of Preziosi's motion, is insufficient. *See* Mot. at 19–26. The privilege log does not include the email addresses of the senders or recipients of any email, and certain emails appear to include recipients beyond solely Preziosi. Accordingly, Preziosi shall produce a privilege log to the Receiver which identifies each email withheld from production, includes the email addresses of the senders and recipients of every email (including recipients included as a "cc"), and states the date and time that each email was sent. *See* Local Civ. R. 26.2(a)(2)(A).

CONCLUSION

For the foregoing reasons, the Court GRANTS Preziosi's motion to modify the subpoena. The subpoena is MODIFIED to exclude the emails exchanged between Preziosi and Melick that Preziosi has identified in his motion at ECF No. 1 and which Preziosi has provided to the Court. The Receiver's motion for indirect civil contempt is DENIED. By **January 23, 2026**, Preziosi shall produce a privilege log consistent with this order to the Receiver, and file a letter on the docket certifying his compliance with this Order.

This order is without prejudice to the Receiver's ability to file a motion to further modify the subpoena and compel the production of specific emails, if Preziosi's privilege log provides grounds for the Court to revisit its decision. Any such motion shall be filed within 30 days of receipt of Preziosi's privilege log.

The Clerk of Court is respectfully directed to terminate the motions at ECF Nos. 1 and 7.

SO ORDERED.

Dated: January 9, 2026
New York, New York

ANALISA TORRES
United States District Judge

EXHIBIT B

No. 24-10132

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellee,

against

OASIS INTERNATIONAL GROUP, LIMITED, et al.,

Defendants,

MICHAEL J. DACORTA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida
Honorable Sean P. Flynn
Case No. 8:19-cv-00886-VMC-SPF

BRIEF FOR DEFENDANT-APPELLANT

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

CFTC DACORTA Appeal No. 24-10132

11th Cir. R. 26.1-1(a) requires the appellant or petitioner to file a Certificate of Interested Persons and Corporate Disclosure Statement (CIP) with this court within 14 days after the date the case or appeal is docketed in this court, and to include a CIP within every motion, petition, brief, answer, response, and reply filed. Also, all appellees, intervenors, respondents, and all other parties to the case or appeal must file a CIP within 28 days after the date the case or appeal is docketed in this court. **You may use this form to fulfill these requirements.** In alphabetical order, with one name per line, please list all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10 or more of the party's stock, and other identifiable legal entities related to a party. ***(Please type or print legibly)***:

J. Alison Auxter, attorney for CFTC in U.S. District Court

Joseph Anile, co defendant last known to be in custody.

Francisco Duran, co defendant, address unknown.

John Haas, co defendant, address unknown.

Honorable William Jung, trial judge U.S. District Court Middle District of Florida

RONALD KURPIERS defense attorney in US District Court 805 W. Azeele St. Tampa, Fl 33606

Jeffery C. Le Riche, attorney for CFTC in U.S. District Court

Raymond Montie, co defendant, address unknown.

Burton Wiand, receiver in lower court. 5505 W.Gray St. Tampa, FL 33609

Submitted by:

Signature:

Name: Stephen N. Preziosi Prisoner # (if applicable):

Address: 48 Wall Street, 11th Floor New York, New York 10005

Telephone #: 212-960-8267

Rev.: 2/23

Statement Regarding Oral Argument

The Appellant, Michael J. DaCorta, requests that oral argument be granted. Because of the complexity of the issues and the detail of the facts of the case, oral argument would be beneficial to the parties and this Court as a full discussion with the attorneys would assist the Court in its decision.

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JURISDICTIONAL STATEMENT

This case involves an appeal after the district court granted summary judgment pursuant to Fed. R. Civ. P. 56. This Court has appellate jurisdiction under 28 U.S.C. §1291. This appeal was taken from the district court's decision to grant summary judgment in favor of Plaintiff on December 6, 2023 by the Honorable Virginia Hernandez Covington. The notice of appeal was timely filed on January 5, 2024.

STATEMENT OF THE ISSUES

The principal issue in this case is whether there exist genuine issues of material fact that preclude summary judgment. The issues, dealt with in one legal point in this brief, can be placed into two sub-categories:

The first legal issue is whether the loan agreements and risk disclosure agreements that existed between the Oasis International Group and each lender created a legally distinct entity that traded in commodities on its own behalf and not on behalf of the lenders, precluding a finding that Mr. DaCorta solicited funds from persons for the purpose of trading in commodities on their behalf.

The second legal issue is whether, under the statutes and related regulations of the Commodity Exchange Act, there existed within Mr. DaCorta's business (the Oasis entities), a commodity pool and whether Oasis was a commodity pool operator or retail forex commodity pool operator, and whether Mr. DaCorta was an associated person of a commodity pool operator.

STATEMENT OF THE CASE

The District Court's Order.

The district court granted summary judgment in favor of the Commodity Futures Trading Commission on five causes of action, holding that: 1) defendants, in connection with retail forex transactions cheated or defrauded pool participants and deceived pool participants; 2) the Oasis entities created a commodity pool and

acted as commodity pool operators and that Mr. DaCorta acted as an associated person of a commodity pool operator; 3) defendants failed to register as commodity pool operators and as associated person of a commodity pool operator; 4) defendants failed to receive pool funds in pools' name and commingled pool funds; and 5) defendants failed to provide pool disclosures. The district court issued an injunction against Mr. DaCorta; ordered restitution in the amount of $53,270,336.08; and ordered a civil penalty in the amount of $2,817,876.16.

Neither DaCorta Nor Oasis Ever Traded Commodities On Behalf Of Other Persons.

Mr. DaCorta and the Oasis entities, Oasis International Group (OIG) and Oasis Management (OM), never traded in commodities on behalf of any of the lenders to Oasis, rather they established a loan program where lenders entered into a Promissory Note Agreement and Agreement with Risk Disclosures. The lenders were promised repayment of principal and interest or transaction fees. No trading of commodities (no forex trading) was ever done on their behalf and Mr. DaCorta and Oasis only traded on their own accounts. The lenders have a contractual agreement with the Oasis entities and Oasis has a continuing legal obligation to repay the lenders principal and interest on those loans.

The Promissory Notes And Risk Disclosure Agreements.

The Promissory Notes and Agreement with Risk Disclosures between the lenders and Oasis are binding legal contracts and have legal force and effect. It was

agreed between the parties and understood that each lender was contributing a loan to the Oasis entities; a loan that was to be repaid including both principal and interest or transaction fees. No commodities were traded on behalf of any other person by Oasis or by Mr. DaCorta. Therefore, no commodity pools existed, and Oasis was not a commodity pool operator or retail forex commodity pool operator, and Mr. DaCorta was not an associated person of a commodity pool operator.

SUMMARY OF THE ARGUMENT

Introduction

The lawsuit is predicated on the assertion that Mr. DaCorta and the Oasis entities were soliciting funds from customers for the purpose of investing those funds in a forex exchange and pooling these funds into commodity pools. The CFTC begins with the assumption that there existed commodity pools; that the Oasis entities were commodity pool operators (CPOs) or retail forex commodity pool operators; and that Mr. DaCorta was an associated person (AP) of a CPO. However, while the entire premise of the CFTC's lawsuit is that there existed commodity pools, commodity pool operators and associated persons, there is no factual basis to support these assertions. The supporting documentation relied on by the CFTC and the district court lacks any genuine analysis and proof that commodity pools existed or that Mr. DaCorta and the Oasis entities solicited funds and then purchased commodities on behalf of other people.

Thus, the CFTC was not authorized to bring the action against Mr. DaCorta or the Oasis entities. Each of the persons providing funds to Mr. DaCorta and the Oasis entities was a lender. They each signed a loan agreement to which was attached three things: 1) a Promissory Note, promising to payback each person in principal, interest, and fees; 2) an Agreement setting forth the terms of the loan, explaining that payments to lenders were not tied or related to profits or losses in any Oasis investments; 3) finally, the documents contained a lengthy Risk Disclosures section, explaining all the risks that their loans were subject to, along with a description of the types of investments that Oasis would be making. Each of the lenders was required to sign both the Promissory Note and the Risk Disclosure Agreement before they were permitted to enter into the loan transaction with Oasis.

RELEVANT FACTS AND CIRCUMSTANCES

Michael DaCorta incorporated Oasis Management, LLC (OM) in November 2011. (Doc. #750 at ¶ 11). From November 11, 2011 to April 15, 2019, he was a General Partner and Chief Executive Officer of OM. (Doc. #750 at ¶ 11). With the assistance and legal direction of attorney Joseph Anile, he formed Oasis International Group (OIG), Limited and served as a member of that entity as well as serving on OIG's board of directors and as CEO. (Doc. # 750 at ¶ 12)

OIG and OM (the "Oasis entities") are diversified corporations engaged in investments designed to produce varied revenue streams from real-estate purchases

and sales; business purchases, operations, and sales; Foreign Exchange (Forex) Trading; precious metal investing, along with other business endeavors. (Doc. # 750 at ¶ 17).

OIG was the sole customer of Broker-Dealers OG Ltd and OGSA. OIG did not trade for any individual resident of the United States or any group of residents in the United States in any capacity. (Doc. #750 at ¶ 19). All of the people referenced by the CFTC were lenders who all signed Promissory Notes and Loan Agreements along with Agreements with Risk Disclosures. (Doc. #750 at ¶¶ 19, 20).

The Legal Distinction: The Promissory Notes And Loan Agreement Are Legally Distinct From Sales Of Commodities On Behalf Of Any Person.

Both the CFTC and the district court fail to recognize the legal distinction between the lenders associated with the Oasis entities and the existence of commodity pools, commodity pool operators, retail forex commodity pool operators, and associated persons and whether OIG was an Eligible Contract Participant (ECP), operating outside the scope of CFTC authority. Most importantly, Oasis did not trade in commodities *on behalf* of the lenders. The lenders were compensated by repayment of principal and interest or transaction fees. Their compensation was never tied to profits and losses from the sale of commodities.

This is a legal distinction that makes a difference. Because DaCorta and Oasis were not trading in commodities *on behalf* of any person, but solely for a corporate ECP, and because the lenders were not compensated based on profits and losses,

they were not investors in commodity pools; Oasis was not a commodity pool operator; DaCorta was not an associated person of a commodity pool operator, and neither Oasis nor DaCorta were required to register as such.

All the people referred to by the CFTC as investors were not investors at all; they were lenders. Each of them signed a promissory note for any and all monies lent to OIG and OM. Each of them also signed an Agreement and Risk Disclosure document, describing the risks associated with lending OIG money. (Doc. #750 at ¶ 22).

The first paragraph of the Promissory Note and Loan Agreement states the following:

PROMISSORY NOTE AND LOAN AGREEMENT

> *FOR VALUE RECEIVED, the undersigned, Oasis International Group, Ltd., a Cayman Island corporation having its registered office at 309 Ugland House, Grand Cayman, KY1- 1104, Cayman Islands (the "Maker"), hereby promises to pay to (the "Payee"): (i) in lawful monies of the United States, in immediately available funds, the principle sum of LOAN AMOUNT ( ) (the "Loan Amount") in one (1) installment or as otherwise directed by Payee pursuant to the terms hereof.*
> (See Doc. 750-1 at 1)

Each of the lenders involved in this case signed the agreement, stating that they were lenders, not investors, and that they would be paid back in a combination of principle and interest or transaction fees. The Promissory Note and Loan

Agreement stated the following repayment terms for each of the lenders in paragraph one of the Agreement:

> ***Interest***. *Any unpaid Loan Amount due hereunder shall receive the greater of (a) interest calculated at the rate of twelve percent (12.00%) per annum, or (b) twenty-five percent (25.00%) of the Transaction Fees (as hereinafter defined), provided, that upon the occurrence of an Event of Default (as hereinafter defined), the unpaid Loan Amount hereof shall bear interest at the maximum rate of interest permitted by the law of the jurisdiction of the Payee from the date of such Event of Default until the default is cured.*
> (See Doc. #750-1 at 1)

The Promissory Note and Loan Agreement makes clear that the Lenders are to be paid back in interest, as is customary in lending agreements. Most importantly, nothing in the agreement states that any Oasis entity or Michael DaCorta is investing on behalf of the Lenders, and it is expressly clear that repayment to each of the lenders is in interest or fees collected. Each of the people referred to in the district court's decision and in the CFTC's amended complaint and motion for summary judgment as investors were not investors; they were lenders.

The Agreement And Risk Disclosures

In addition to signing a Promissory Note and Loan Agreement, the lenders signed an Agreement and Risk Disclosure document, which set forth the terms of the loan that each of them was making, along with all risks. (Doc. 750-1 at 4). The Agreement expressly described the transaction as a loan. It stated in part: ***Short-Term Unsecured Loan.*** *By signing the Promissory Note and Loan Agreement,*

Lender is loaning Oasis money on a short-term unsecured basis. (Doc. #750-1 at 4). These signing documents made clear to every lender that this was a loan that would be paid back with a combination of principal, interest, and fees. It was not money given to any of the Oasis entities and Michael DaCorta for the purpose of investing on their behalf in commodities, and repayment was never associated or tied to profits and losses.

The Agreement and Risk Disclosures document described the transaction as follows in paragraph one, page one:

AGREEMENT AND RISK DISCLOSURES

> *This Agreement sets forth the terms and conditions governing your Loan Account ("Account") at Oasis International Group, Ltd. ("Oasis"), and all agreements and any transactions in this Account with Oasis. In this Agreement, the undersigned lender is referred to as "Lender" or "You".*
> (Doc. #750-1 at 4)

The first sentence of the document on page one defines the transaction between OIG and the lenders as a "Loan Account." The parties giving OIG money are defines as "Lenders." The document defines the transaction as a "Short-Term Unsecured Loan.":

> ***Short-Term Unsecured Loan**. By signing the Promissory Note and Loan Agreement, Lender is loaning Oasis money on a short-term unsecured basis. There is no collateral provided by Oasis to the Lender in connection with any money, including any interest thereon, loaned to Oasis by Lender. if Oasis becomes insolvent and You have a claim for amounts loaned or interest earned on transactions with Oasis, your*

> *claim may not receive a priority. Without a priority, You are a general creditor and your claim will be paid, along with the claims of other general creditors, from any monies still available after priority claims are paid.*
> (Doc. #750-1 at 4)

The Risk Disclosures document stated that any money or payments given to OIG were short-term unsecured loans that would be paid back with interest. Additionally, lenders were informed that in the event that OIG becomes insolvent, the lenders would become general creditors:

> ***Loans and Withdrawals***. *Any loan made by You will require that You complete (or update) the information on the Application so that a Promissory Note and Loan Agreement can be generated for acceptance by Oasis. Payments from an Account require a withdrawal request form signed by all required account holders and submitted in writing to Oasis. A withdrawal of any loan principal amount will be made, in accordance with the terms and conditions of the Promissory Note and Loan Agreement, upon ninety (90) days advance written notice from Lender to Oasis. A withdrawal of any unpaid interest amount may only be made by Lender on or by the last day of a calendar month.*
> (Doc. #750-1 at 4).

In addition to defining the transaction between the lenders and OIG as an unsecured loan, the Risk Disclosure, on page one of the document, describes in detail how OIG intends to use the loaned funds. OIG will use "*any or all of the money loaned by Lender*" at its discretion to invest in a variety of things. It stated:

> ***Use of Funds***. *At any time, in Oasis' sole discretion and without prior demand or notice, Oasis may use any or all money loaned by Lender, including any interest thereon, for any purpose whatsoever including without limitation any investment; the purchase or sale of foreign exchange products, securities or commodities, exchange or off-exchange products; the purchase or sale of any businesses assets or*

> *liabilities, the purchase or sale of any real estate; or for any other purpose, including any general company use or payment, any company payment or loans to any company affiliate, officer, employee, or third party, any company indebtedness or other company obligations. Lender hereby agrees that Oasis may, at any time and from time to time, in the sole discretion of Oasis, apply and transfer from any of Lender's funds with Oasis to any of Oasis' other accounts, whether held at Oasis or other individuals or entities in connection with any Oasis investment. Lender hereby authorizes Oasis to sell, pledge, rehypothecate, assign, invest, commingle and otherwise use any money loaned to it by Lender, including any interest thereon. Where Lender's Loan Account consists of more than one loan, this authorization shall apply to all loans, including any interest thereon.*
> (Doc. # 750-1 at 4-5).

The Use of Funds clause of the document, set out on page one of Risk Disclosures, continued to emphasize that the monies given to OIG were loans and the people entering into these transactions were lenders who would be paid back with interest. The money made by lenders was never tied to profits and losses and OIG was not investing on their behalf.

OIG and Michael DaCorta Were Certain That Each Signer Understood That They Were Lenders Not Investors – Is 216 Times Enough?

The words "loan" and "lender" appear in the Promissory Note And Loan Agreement and Risk Disclosure documents a total of two hundred and sixteen (216) times. The document imposes obligations on the lenders as well. Each of the lenders had to assure OIG and Mr. DaCorta that they had read and understood the documents and that they knew the money they were lending OIG was to be used in a variety of ways. Paragraph four of the Risk Disclosure document states:

> *Lender has read and understands the provisions contained in this Agreement, including, without limitation, Oasis' risk disclosure statements herein contained. Lender will review the Agreement each time it is amended, as provided herein. Lender will not lend Oasis any money unless Lender understands Oasis' revised Agreement, and Lender agrees that in effecting any continuation of a loan or any interest thereunder, Lender is deemed to represent that Lender has read and understands Oasis' revised Agreement as in effect at the time of such loan.*
> (Doc. #750-1 at 5)

The acceptance of the loans was conditioned upon the signed assurance of each lender, promising OIG and Mr. DaCorta that they understood that they were lenders and not investors, and that they were to be repaid in principal, interest, and fees collected. Furthermore, they knew that the types of products being invested in by OIG were high risk in nature. This was expressly stated on page one of the Risk Disclosure document.

The Criminal Case Against Mr. DaCorta

The district court relied heavily on the transcripts in Mr. DaCorta's criminal trial, asserting that he was foreclosed under the principal of collateral estoppel from arguing that he defrauded investors. (Doc. 780 at pgs. 14, 25).

Michael DaCorta was indicted on December 17, 2019 charging him with three counts: 1) conspiracy to commit wire fraud and mail fraud under 18 U.S.C. §§ 1349, 1343, and 1341; 2) money laundering under 18 U.S.C. § 1957; and 3) false and fraudulent statement on income tax return under 26 U.S.C. § 7206(1) and 18 U.S.C. § 2. (Doc. 749-11).

At a jury trial, the government never proved that there existed a commodity pool, a commodity pool operator, a retail forex commodity pool, associated persons, or that OIG was not an eligible contract participant, or that any retail commodity transactions occurred on behalf of any person. This was significant because the CFTC and the district court later assert that these facts were established in the criminal trial.

Because the district court's decision to grant summary judgment in favor of the CFTC relies heavily on the criminal trial transcripts and the declarations of two experts, Ms. Elsie Robinson and Ms. Melissa Davis, as well as the declaration of the receiver, Burton Wiand, it is necessary to discuss the shortcomings of that evidence.

The District Court Relies on Five Factual Sources In Its Motion for Summary Judgment

The district court relies on five factual sources in its decision for summary judgment. The first two sources are the declarations of Burton Wiand (the appointed receiver in the case below) (Doc. #165-1) , and Elsie Robinson (a Futures trading investigator in the division of enforcement of the Commodity Futures Trading Commission) (Doc. #4-1). Although widely cited in the CFTC's motion for summary judgment and adopted by the district court in its decision to grant summary judgment, neither support a finding of the existence of a commodity pool, commodity pool operators or associated persons as defined under the Commodity

Exchange Act. Ms. Robinson was not a witness in the court below and was never cross-examined by defense counsel in the civil case.

The third source in the CFTC's motion is the report of the accountant Ms. Melissa Davis. (Doc. #439-7) Ms. Davis was not a witness at the criminal trial and was not deposed in the civil case. Fourth, the district court indirectly relies on the transcribed phone calls of Mr. DaCorta (as they are cited in both Robinson's and Wiand's declaration) and several other people involved in the criminal case. Some of those transcripts are attached to Mr. Wiand's declaration. No transcripts of phone calls are attached to Ms. Robinson's declaration and are not attached to the CFTC's motion. Finally, the main source of facts in the CFTC's motion were the trial transcripts from Mr. DaCorta's criminal trial.

Source of CFTC Information Relied Upon By The District Court: Ms. Robinson's Written Declaration

Ms. Robinson's declaration is cited extensively in the CFTC's motion and by reference to that motion is widely cited by the district court in its decision. (See Doc. # 749 CFTC Motion for Summary Judgment ¶¶ 4, 9, 10, 11, 20, 21, 22, 26, 27, 28, 35, 38, 40, 48, 49 51, 52, 62, 70). Ms. Robinson's statement relies mainly on recorded phone calls with Mr. DaCorta and other Oasis employees. No recording of the phone calls cited or transcript of the phone calls were attached or provided in conjunction with her declaration.

Ms. Robinson assumes in her declaration that there existed commodity pools and that Mr. DaCorta and the Oasis entities were commodity pool operators. (Doc. 4-1 at 13). Robinson takes great pains to repetitively and heavy-handedly use the terms Oasis pools, pool funds, and pool investors to refer to money deposited in Oasis accounts (she uses these terms 99 times in her declaration). No fact-based explanation or analysis is provided in her declaration as to how she made the determination that these funds were pool funds of commodity pools. Ms. Robinson also, without analysis or explanation, uses the terms "Oasis pool participants" and "pool participants" and "Oasis pools" with gay abandon, providing no fact-based or legal explanation for these conclusions.

In fact, throughout Robinson's declaration there is no legal analysis or fact based explanation for the conclusion that there existed commodity pools, pool funds, or pool participants.

Robinson cites secondhand information from an interview with a financial advisor in Wisconsin who claimed to have participated in a conference call with Mr. Ray Montie, another named defendant. (Doc. # 4-1 at 13). No recording or transcript of the conversation was provided and none of the people who participated in the call are identified.

Robinson also states that she listened to a number of recorded calls in which members of the Oasis entities were speaking with prospective lenders. Robinson

refers to the lenders as prospective pool participants, inferring without explanation or analysis that there existed commodity pools and that DaCorta and Oasis were commodity pool operators. She cites to several such recorded conversations (Doc. # 4-1 at pgs. 14-22); no transcripts of those recordings are attached to her declaration.

While cited extensively by the CFTC and the district court in support of the proposition that there existed commodity pools, commodity pool operators, retail forex commodity pool operators, and associated persons, the Robinson Declaration contains no legal analysis or explanation as to how DaCorta and Oasis meet these legal definitions.

The CFTC claims that Ms. Robinson listened to phone calls with one of the co-defendants of Mr. DaCorta and claims that he used the term "pool participants" in his phone call with lenders. The recordings referenced by Ms. Robinson in her declaration were not provided to the district court and have not been provided to defense counsel. However, in one conversation that Ms. Robinson alleges that she listened to between Mr. DaCorta and one of the lenders, it becomes clear that Ms. Robinson is deliberately altering the language used by DaCorta, changing his words from "lender" to "pool participant". The quoted conversation from Ms. Robinson's declaration is as follows:

> *On April 8, 2019 I listened to a recorded telephone conversation between Person 2 and Defendants Duran and DaCorta that occurred in April 2019 during which DaCorta stated the following:*

> *a. DaCorta is Oasis's principal and signs the loan agreements with Oasis pool participants;*
> *b. new Oasis pool participants are approved by "Deb or Joe Paniagua;"*
> *c. new Oasis pool participants are approved once the pool participant sends the money and Joe Paniagua "will see that and approves your status;"*
> *d. new Oasis pool participants' notes and other documents "will be automatically be uploaded into our system .. .it's called the back office;"*
> *e. accounts can't be activated until Oasis receives funds from pool participants;*
> *f. Joe Anile "gets all of the wires, he checks the bank accounts and lets Joe Paniauga know" that a new Oasis pool participant is approved*
> (Doc. #4-1 at 20)

The transformation of language by Ms. Robinson is significant. In this conversation, Mr. DaCorta is talking to a prospective lender about a loan agreement, yet Ms. Robinson's chooses to use the term "pool participant" repeatedly, a term DaCorta never used in any of the transcribed conversations.

Source of CFTC Information Relied Upon By The District Court: Burton Wiand's Declaration.

On April 15, 2019, Burton Wiand was appointed receiver by the district court. His declaration is cited numerous times in the CFTC motion and by reference adopted by the district court in its decision. (See Doc. 749 at ¶¶ 4, 8, 13, 14, 15, 19, 26, 27, 29, 30, 31, 32, 33, 34, 39, 44, 46).

Mr. Wiand states in his declaration that he listened to several phone calls where Mr. DaCorta and other Oasis members speak with lenders. (Doc. 165-1 at 7). Mr. Wiand attached as exhibits to his declaration transcripts of the phone calls that

he uses as support for his conclusions. Wiand's conclusions were used in the CFTC's motion and in the district court's decision, but are not supported by the transcripts of the phone calls between Mr. DaCorta and the lenders to Oasis.

For example, Mr. Wiand concludes that the people Mr. DaCorta spoke to were potential "investors" and that "profits" are purportedly generated from trading currencies. (Doc. #165-1 at ¶15) The transcripts of the phone calls do not support these conclusions. In fact, in each phone call DaCorta makes clear that the transaction is that of lender-borrower and that the lenders will be paid in interest, not in profits from currency trading. (Doc. 165-5 at 26-29). Mr. Wiand concludes that the phone calls were for the purpose of soliciting "pool participants." (Doc. 165-1 at 8). However, in each transcript of the phone calls it is made clear to the prospective lenders that they would be lending money to Oasis and would be paid in principal, interest or fees. (Doc. 165-5 at 26-29).

Source of CFTC Information Relied Upon By The District Court: Expert Report of Melissa Davis.

The CFTC and the district court relied in part on the expert report of Ms. Melissa Davis, a CPA for the accounting firm of Kapila Mukamal. (Doc. # 439-7).

While Ms. Davis concludes that the Oasis entities acted as a Ponzi scheme based on her analysis of the financials, her conclusions regarding any commodities violations are drawn exclusively from the CFTC's complaint. She states that Oasis operated as a commodity pool operator by soliciting, receiving, and accepting funds

for trading in forex. (Doc. 439-7 at 6) The support for this conclusion in Ms. Davis' report is a citation to the CFTC's complaint. No other independent analysis is offered. Ms. Davis also asserts the following: 1) the Oasis entities offered securities for sale to investors; 2) investors were guaranteed an annual rate of return of 12%; 3) Oasis represented to investors that their money would be used to trade in forex contracts; Oasis pools would earn substantial income. The support for these conclusions in Ms. Davis' report was a reference to the CFTC's complaint. (Doc. 439-7 pg. 7) No other independent source or analysis for these conclusions was offered by Ms. Davis.

Ms. Davis' report is as significant for what it omits as it is for what it includes. Davis refers to the Promissory Note offered by Oasis and makes assertions that are contradicted by the plain language in the Promissory Note and Risk Disclosure documents.[1] For example, she asserts that the lenders were told that Oasis did not lose money in the forex trading activity, referring to the promissory note. (See Doc. 439-7 at 12). However, the Promissory Note and Risk Disclosure both go into great detail about the risks involved in forex trading and state that each lender could lose the entirety of their money. Davis also asserts that lenders were told that their money would be used for forex trading exclusively. (Doc. 439-7 pg. 13). This statement is

[1] Ms. Davis adopts the language used by the CFTC in their complaint and generally refers to the lenders as investors. (See Doc. 439-7 generally).

contradicted directly by the Promissory Note and Risk Disclosure Agreement wherein Oasis described at length the variety of investments for which lenders' money would be used.

Source of CFTC Information Relied Upon By The District Court: The District Court's Reliance On The Criminal Proceedings.

The district court's reliance on the CFTC's assertions and conclusions from the criminal court proceedings is misplaced. At no time during the criminal proceedings was it proven, or even mentioned, that there existed investor pools, commodity pools, retail forex commodity pools, commodity pool operators, associated persons of commodity pool operators, or the investments or solicitation of funds on behalf of another person, as is required under the Commodity Exchange Act for the existence of such entities and for a finding of summary judgment. Asserting that Oasis solicited funds from pool participants, the CFTC directs the district court's attention to Days 10 and 11 of Mr. DaCorta's criminal trial (Doc. # 749-5 at pgs. 248 to 255; Doc. # 749-3 at pgs. 45, 46, 50, 52, and 204).

There are no facts in those transcripts that demonstrate that Mr. DaCorta or Oasis solicited any funds for foreign exchange trading on behalf of any person.

Source of CFTC Information Relied Upon By The District Court: Testimony of Michael DaCorta.

To support the contention that Mr. DaCorta solicited money from "pool participants", the CFTC cites to Mr. DaCorta's testimony at his criminal trial

misrepresenting the actual words that Mr. DaCorta used. (Doc. # 749 at pg. 10). The cited testimony of Mr. DaCorta is as follows:

Q You would at least agree with me, would you not, that all the trading money in the ATC account was lender money, correct?
A It all came through the loan program, yes.

(Doc. # 749 at pg. 10)

The CFTC cited to the preceding testimony and claims in their motion for summary judgment that Mr. DaCorta said that he was receiving money from pool participants. Again, consistent with Ms. Robinson's misrepresentations, the CFTC misquoted Mr. DaCorta to conform to their contention that the actions of Mr. DaCorta fall within the regulatory ambit of the CFTC.

Furthermore, the CFTC contends in their motion for summary judgment at Doc. # 749 at ¶ 25 that Mr. DaCorta was sharing in profits and losses with the people who were lenders. They cite to Mr. DaCorta's testimony at his criminal trial:

> *So, the back office was all Oasis International Group accounts. The subaccounts were all Oasis's accounts, but what we had to do if 100 people loan you money and it's all different amounts and every single person is being allocated spreads on a daily basis, the only way to keep that accurate is to have that ledger in the back office that accounts for each and every transaction every single day. At the end of the month, your loan to me was a hundred thousand dollars. I still owe you a hundred thousand dollars plus whatever that spread was. So, if you withdrew your interest, you now have principal only back there. If we had a profit one month, it had to be reduced. If we had a loss, it had to be put back.*
> *So, in other words, the only way to keep the integrity of how much everybody's loan represented and how much interest they were being allocated on a daily and monthly basis was the end of the month that*

> *number had to be brought back to the principal amount of their loan.* ***The P&L shifted to our side, whether it was profitable or whether it was a loss.*** *That was the company responsibility as we stated many times. But for each person, in order for us to keep track of that loan, we needed the actual amount we owed them, the principal amount, plus any accrued interest, if they left it there, added together to come up with the amount that we now had to put into the PAMM account which then received all the spreads based on the transaction fees.*
> (Doc. # 749-3 at pg. 160) [emphasis added].

"*The P&L shifted to our side, whether it was profitable or whether it was a loss.*" Mr. DaCorta did not testify that lenders were paid according to profits and losses. He stated that they were paid in principal and interest or transaction fees according to the loan agreement. To support the contention that the lenders to OIG were paid in profits and losses, the CFTC also makes a partial citation at Doc. # 749 at ¶ 25 to Mr. Paniagua's testimony at the criminal trial:

> *Q Okay. Let me ask it this way. On a given day if the foreign currency trading resulted in a hundred thousand dollars in profit, would that profit show up in the PAMM subaccounts that belonged to the lenders?*
> *A Yes, it should show up. It should show up in that PAMM account but remember it's a loan program. And the funds are loans to Oasis. So, it's different. The P&L was just Oasis, belonged to Oasis itself.*
> (Doc. # 749-7 at pg. 196).

The P&L, or profits and losses, were attributed to Oasis – *they belonged to Oasis itself*. The lenders money was never impacted by profits and losses. Mr. Paniagua's testimony at the criminal trial does not support the contention made by the CFTC in their motion for summary judgment and relied upon by the district court. He testified that any profits or losses were attributed to Oasis and never

devolved to the lenders. The CFTC chose to omit this part of his testimony in their motion for summary judgment.

The CFTC asserted in their motion for summary judgment at Doc. # 749 at ¶ 26 that Mr. DaCorta routinely participated in conference calls to solicit prospective pool participants to join the Oasis pools. To support this assertion, they cite to Mr. Burton Wiand's declaration (Doc. # 165-1 at ¶ 18) and Ms. Robinson's declaration (Doc. # 4-1 at ¶ 42).

The noticeable distinction between the statements of Wiand and Robinson as compared to Anile (the government cooperator) and Mr. DaCorta is the obsessive use by Wiand and Robinson of the terms "pool" and "pool participant." Anile and DaCorta never use the words "pool," "pool participant," or investor even once, even though Anile is a government cooperator and testifying on behalf of the government.

In Mr. Wiand's declaration, he refers to transcripts of phone calls of Mr. DaCorta speaking to prospective lenders. While Mr. Wiand refers to commodity pools and solicitation of funds to invest in pools quite liberally in his declaration, a review of the transcripts of phone calls attached to his declaration shows that there was no mention of pools, commodity pools, or investments. Instead, in each of those recorded phone calls, Mr. DaCorta explains to the people that they are "lenders" and that they would be lending money to Oasis pursuant to a Loan Agreement and that they would be paid back in principal and interest or transaction fees. In each

transcript, Mr. DaCorta makes clear to the lenders that their money is not impacted by profits and losses. (Doc. # 165-5 and Doc. # 165-6 Exhibits 1-D and 1-E to Wiand declaration).

Source of CFTC Information Relied Upon By The District Court: Mr. Joseph Anile's Testimony.

The CFTC's motion for summary judgment included excerpts from the criminal trial of Mr. DaCorta's former business partner and attorney, Mr. Joseph Anile. Mr. Anile had pleaded guilty to all charges in the indictment and was to receive a lesser sentence for his testimony against Mr. DaCorta and cooperation with the U.S. Attorney's office.

In the CFTC's motion for summary judgment, they assert that there was evidence of "pool participants" sending funds to OIG. They cite to Mr. Anile's testimony at the criminal trial in support of this contention. (Doc. # 749-2 at pgs. 153-157) In the cited pages, there is no testimony regarding pool participants by Mr. Anile and there is no mention of any pool participants. The terms pool, commodity pool, pool participant do not appear anywhere in Mr. Anile's testimony.

At paragraph 17 of the CFTC's motion for summary judgment they assert that payments made to OIG accounts were funds from pool participants (Doc. # 749 at ¶ 17). In Mr. Anile's testimony, he makes the important distinction between lenders and investors. He states that after 2018, the people paying money into OIG accounts were lenders, not investors. He testified as follows:

Q Where did the deposits into the OIG account held by Mainstream Fund Services come from?
A At this point in time in '18 and '19 they were coming from lenders to the company.
Q Were they coming from any other source other than lenders?
A No.
Q What about prior to 2018 and 2019, where did the money that was deposited into -- I guess it would have been the Fund Administration account then; is that right?
A Well, the period which we acted as broker to self-traded accounts or managed accounts, they would have been from investors.
Q Is there any other source of deposits into that account other than investors?
A No.

(Doc. # 749-2 at pgs. 159-160)

This was significant testimony for two reasons: first, there was no mention of pools, commodity pools, or pool investors. Second, it is demonstrative of the changed nature of the business after 2018 where any payments made to OIG were loans and not investments. All those payments were pursuant to a loan agreement where the lenders were paid back and earned according to the agreed upon interest rate; no payments from OIG to lenders were tied to profits or losses.

Source of CFTC Information Relied Upon By The District Court: The Criminal Trial

At no point during the criminal trial was it proven that there existed commodity pools, a commodity pool operator, a retail forex commodity pool operator, or an associated person of any such entity. There was, in fact, significant testimony to the contrary.

During the trial, the government called witness Jennifer Sunu, an employee at the National Futures Association, which is a regulatory organization for U.S. futures and forex trading markets. During Ms. Sunu's testimony, a disagreement about an exhibit led to an argument at side-bar where it was disclosed by the government that no one was going to testify that Mr. DaCorta was a commodity pool operator. Mr. DaCorta's attorney argued as follows:

> *MR. ROSENTHAL: The problem -- I mean, there's multiple problems. Number 1 is -- our objection is she is not going to testify, again, that Mr. DaCorta was operating a commodity pool. So therefore, it's not relevant on that ground and that ground alone. So, it's not relevant whether the National Futures Association, at least through her testimony, regulates commodity pools. She's not going to give further testimony, which we have been assured that she won't, that Mr. DaCorta was operating a commodity pool.*
> (Doc. 749-6 at pg. 97)
> *THE COURT: And why is it relevant? Why is commodity pools relevant? Is someone going to say he's a pool operator?*
> *MR. MURRAY: No, Your Honor. So, the reason it's relevant, again I'll start by saying we disclosed this in our expert disclosure saying she is testifying to exactly this. The reason it's relevant is because Mr. DaCorta structured the Oasis companies to avoid NFA regulation because he couldn't register as an NFA member based on his settlement.*
> (Doc. # 749-6 at pg. 98)

In short, it was never proven at Mr. DaCorta's criminal trial that he was an associated person of a commodity pool operator or that Oasis was a commodity pool operator or that there existed commodity pools at all.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED WHEN IT GRANTED THE MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE COMMODITY FUTURES TRADING COMMISSION ON ALL COUNTS BECAUSE THERE EXIST ON ALL COUNTS GENUINE ISSUES OF MATERIAL FACT.

Introduction

The district court erred when it granted summary judgment in favor of the Commodity Futures Trading Commission because there exist genuine issues of material fact on all counts. The material issues of fact here are: 1) whether Mr. DaCorta and Oasis entered into forex transactions and/or retail forex transactions on behalf of other people; 2) whether the CFTC had authority to bring suit against DaCorta and Oasis; 3) whether, under the Commodity Act ("the Act"), there existed a commodity pool (i.e. whether the funds lent to Oasis through promissory notes can be classified as the existence of a commodity pool); 4) whether, under the Act, Mr. DaCorta and the Oasis entities were commodity pool operators; 5) whether, under the Act, Mr. DaCorta was an associated person of a commodity pool operator; 6) whether, under the Act, Mr. DaCorta was an Eligible Contract Participant; and 7) whether the funds from lenders were given to Mr. DaCorta for the purpose of trading in commodity interests.

None of the sources of information referenced by the district court in its order show that there is no issue of material fact as to whether there existed a commodity

pool, or whether Mr. DaCorta and Oasis were commodity pool operators, or whether Mr. DaCorta was an associated person, or whether there were forex and retail forex transactions. The lack of proof of any of these material facts precludes a finding of summary judgment.

The Standard of Review

The Eleventh Circuit reviews the district court's ruling on a motion for summary judgment *de novo*, applying the same legal standards that bound the district court. *Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 987 (11th Cir. 2016).

Legal Standard For Summary Judgment

Motions for summary judgment should be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c) *Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 987-88). Genuine, triable issues of fact will preclude summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The party seeking summary judgment bears the initial burden of demonstrating to the Court, by reference to the record, that there are no genuine issues of material fact to be determined at trial. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). "When a moving party has discharged its burden,

the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (internal citations and quotation marks omitted). Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, a court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995). *U.S. Commodity Futures Trading Commission v. Allied Markets LLC*, 371 F.Supp.3d 1035, 1043–44 (M.D.Fla., 2019).

If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true, and all reasonable inferences must be drawn in the non-moving party's favor. *Shotz v. City of Plantation*, 344 F.3d 1161, 1164 (11th Cir. 2003). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material facts, the court should not grant summary judgment.

The District Court Erred When It Granted Summary Judgment In Favor Of The CFTC Under Count One Of The Complaint: Forex Fraud By Misrepresentation, Omissions, False Statements, And Misappropriation.

The district court erred in granting summary judgment on count one in favor of the CFTC by using Mr. DaCorta's criminal trial as its main source of factual findings and the principal of collateral estoppel.

In count one it is alleged that Mr. DaCorta violated 7 U.S.C. §6b(a)(2)(A)-(C) and Regulation 17 C.F.R. §5.2. The statute, 7 U.S.C. §6b, is entitled "Contracts designed to defraud or mislead. It states the following:

It shall be unlawful—

> (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or swap, that is made, or **to be made, for or on behalf of**, or with, any other person, other than on or subject to the rules of a designated contract market--
> **(A)** to cheat or defraud or attempt to cheat or defraud the other person;
> **(B)** willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record;
> **(C)** willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person
> [emphasis added]

A violation of this statute requires that there be an order to make a contract of sale of a commodity for future delivery, or swap *be made for or on behalf of any other person* and to cheat, defraud, make false reports or records, and willfully

deceive the other person in regard to any order or contract. Regulation 5.2 pertains to retail forex transactions and is consistent with §6b. It states: § 5.2 Prohibited transactions.

> (a) Scope. The provisions of this section shall be applicable to any retail forex transaction.
>
> (b) Fraudulent conduct prohibited. It 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) To cheat or defraud or attempt to cheat or defraud any person;
>
> (2) Willfully 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) Willfully to deceive or attempt to deceive any person by any means whatsoever.

(See 17 C.F.R. §5.2)

With regard to count one, material issues of fact exist. Neither Mr. DaCorta nor Oasis entered into forex transactions and/or retail forex transactions *on behalf of* the lenders for the purchase of any commodity. (Doc. 750 at pg. 38 and ¶ 44) DaCorta motion). The transaction between the Oasis entities and the lenders was a loan agreement. (Doc. 750 at pg. 38). Neither Oasis nor DaCorta ever entered into a forex or retail forex transaction that was *made for or on behalf of any other person*. There were never any contracts or agreements that either DaCorta or Oasis would purchase commodities or enter into forex or retail forex transactions on behalf of the people that were lenders. (Doc. # 750 at ¶ 38 DaCorta Motion). The loan agreements

were clear. The lenders were to be paid back with principal and interest based on a variety of investments that Oasis would make independently, not investments on behalf of anyone. (Doc. # 750 at pgs. 30-31 DaCorta Motion).

The District Court's Decision To Grant Summary Judgment

The district court erroneously held that, under count one, the CFTC was required to prove three elements to show liability for fraud under 7 U.S.C. §6b(a)(2)(A)-(C). The district court stated that the CFTC must prove 1) the making of a misrepresentation, misleading statement, or a deceptive omission; 2) scienter; and 3) materiality. (Doc. # 780 at pg. 24).

However, the district court truncated drastically that which was required to prove count one in the CFTC's complaint. The CFTC must also prove that DaCorta and Oasis entered into forex transactions and retail forex transactions *on behalf* of other persons and that Oasis was not an Eligible Contract Participant. In other words, the CFTC was required to show that there was a contract between DaCorta/Oasis and the lenders specifically for the purpose of a sale of a commodity, in this case the forex transactions and retail forex transactions. Furthermore, the CFTC was required to prove in this case that there existed commodity pools, commodity pool operators, and that DaCorta was an associated person of a commodity pool operator. No such proof exists in this case and these points are all genuine issues of material fact, precluding a finding of summary judgment.

The District Court Erroneously Relied Exclusively On The Principal Of Collateral Estoppel

The district court, relying on the principal of collateral estoppel, held that the jury in the criminal proceeding found that Mr. DaCorta committed wire fraud and mail fraud and is, therefore, precluded from arguing the elements of scienter and materiality and that the criminal trial proved that he made misrepresentations. (Doc. # 780 at pgs. 14, 25). However, in no part of the criminal trial was there proof that either DaCorta or the entity Oasis entered into contracts with other people for the purpose of the sale of a commodity or for making forex transactions or retail forex transactions on behalf of others. The district court omitted the requirement that any fraud or misrepresentation must have been in relation to a contract for the sale of a commodity. This was a material fact that was never demonstrated by the CFTC.

This legal distinction was never recognized by the district court: no agreement or contract or transaction to trade in currency was ever offered by DaCorta or Oasis or entered into with any person by DaCorta or Oasis. The Promissory Note and Risk Disclosures Agreement were legally distinct and materially different than offering a forex transaction or retail forex transaction to another person or entering into a foreign currency transaction with another person. The district court ignored the legal distinction between a loan program with a Promissory Note and offering or entering into a foreign currency transaction.

In fact, the district court's decision begins with the assumption that *"OIG 'solicited, received, and accepted funds' for foreign exchange ("forex") trading."* (Doc. 780 at pg. 3). As support for this proposition the district court cites to CFTC's motion for summary judgment (Doc. 749 ¶ 9) and to Mr. DaCorta's testimony at his criminal trial (Doc. 749-3 at 50:5-10). The cited materials do not support the district court's conclusion that either DaCorta or Oasis solicited funds for foreign exchange trading.

The district court cites to the CFTC's motion for summary judgment (Doc. 749 ¶ 9), which in turn cites to Ms. Robinson's declaration Exhibits H and I (Doc. 4-1; Doc. # 4-11; Doc. #4-12). Those exhibits to Robinson's declaration merely list expenses incurred by the Oasis entities; they do not assert or prove that DaCorta or Oasis solicited funds for forex transactions. Additionally, the trial court cites to Mr. DaCorta's trial testimony to support the contention that he solicited funds for forex trading. The excerpted testimony is as follows:

> *Q. What were the funds that would be loaned to OIG be used for?*
> *A. A percentage would be used for collateral deposit for foreign exchange trading, and the balance of it could be used for pretty much any investment decision we decided we would like to make.*
> (Doc. 749-3 at 50: 5-10)

The limited excerpt from DaCorta's testimony makes clear that the funds were borrowed. However, what both the district court and the CFTC omitted was the testimony that showed that the funds were borrowed pursuant to a loan program

and that Oasis never entered into forex transactions on behalf of the lenders. The entirety of the testimony was as follows:

> *Q Either way, were there documents that those investors had to agree to move forward with the 2017 loan program?*
> *A Yes, absolutely.*
> *Q What were the funds that would be loaned to OIG be used for?*
> *A A percentage would be used for collateral deposit for foreign exchange trading, and the balance of it could be used for pretty much any investment decision we decided we would like to make.*
> (Doc. 749-3 at 50: 2-10)

The documents referred to were the Promissory Note and the Risk Disclosure Agreement, which explained to the lenders that Oasis was not offering or entering into forex transactions on the lenders' behalf. (Doc. 750-1 Promissory Note, Loan Agreement and Risk Disclosures).

Whether the loaned money was a forex transaction and whether DaCorta and Oasis offered to or entered into foreign currency transactions with other persons is a genuine issue of material fact that was not proven by the cited materials in the district court's decision. Forex transaction and a retail forex transaction have very specific statutory definitions under 7 U.S.C. § 2(c)(2)(B) and 7 U.S.C. §2(c)(2)(C) that were never proven and no evidence supports the district court's decision.

The Promissory Note and Risk Disclosure Agreement Renders The Transaction Legally Distinct and Beyond the Reach of the CFTC Regulation.

The agreements between DaCorta, Oasis and the lenders are legally distinct from contracts to enter into sales of commodities or for forex transactions or retail

forex transactions. This is a material fact in issue. The district court's reliance on the principal of collateral estoppel is misplaced because nowhere in the criminal proceedings was it ever proven that DaCorta or Oasis entered into contracts with other persons for the purpose of retail forex transactions.

The District Court Erred When It Granted Summary Judgment In Favor Of The CFTC Under Count Two Of The Complaint As There Existed Genuine Issues Of Material Fact As To The Terms Commodity Pool Operator, Associated Person, Retail Forex Commodity Pool Operator, And Retail Forex Transactions.

The CFTC alleged under count two of the complaint that Mr. DaCorta and the Oasis entities violated 7 U.S.C. §6o(1)(A)-(B), where they assert that Mr. DaCorta and the Oasis entities, acting as commodity pool operators and associated persons of commodity pool operators, solicited funds for the purpose of trading in commodities and that they pooled these investments while acting as associated persons of a retail forex commodity pool.

The district court decision in support of the holding that the Oasis entities solicited, received, and accepted funds for foreign exchange trading as commodity pool operators and associated persons of commodity pool operators cites to the sources listed in the statement of facts: the declaration of Ms. Robinson; declaration of Mr. Wiand; the criminal trial. None of those sources prove that DaCorta or Oasis acted as either commodity pool operators, associated persons, or that they engaged in forex trading on behalf of anyone.

The district court's analysis begins on page 3 (Doc. # 780 at 3) of its opinion where it states that OIG solicited, received, and accepted funds for foreign exchange. To support this finding, the district court cites to the CFTC motion for summary judgment (Doc #749 at ¶ 9) and Mr. DaCorta's testimony at his trial (Doc. #749-3 at 50:5-10). (Doc. 780 pg. 3). Neither of these sources support the contention that OIG or DaCorta or the Oasis entities solicited, received, and accepted funds for foreign exchange.

Paragraph nine of the CFTC's motion asserts that they did solicit funds for foreign exchange, citing to Ms. Robinson's declaration (Doc. #4-1 ¶¶ 56-64) and trial transcripts from Mr. DaCorta's criminal trial. Ms. Robinson's declaration at paragraphs 56 to 64 and Exhibits H and I (Doc. # 4-11; Doc. #4-12) are merely a list of deposits and withdrawals. The actual source of those deposits and withdrawals is not listed and how the funds were obtained is not stated. While Ms. Robinson has an extreme penchant for using the term "pool funds" and "Ponzi payments" to describe those funds, she does no analysis and cites no authority as to why she believes that these were pool funds and Ponzi payments. She merely adopts this language as a presumption without supporting evidence that there existed a commodity pool.

The district court also cites transcript from Mr. DaCorta's criminal trial to support the contention that funds were solicited for foreign exchange. (Doc. 749-3 at 50:5-10). That excerpt from the transcript says nothing about Mr. DaCorta

soliciting funds for foreign exchange and the district court's decision is based on faulty information.

Additionally, the CFTC at paragraph nine of its motion cites transcripts from day 10 of Mr. DaCorta's criminal trial. (Doc. #749-5 pgs. 248-255). The transcript at pgs. 248 to 255 says nothing about soliciting funds for foreign exchange. The CFTC's assertion (cited to by the district court) is wrong. The CFTC also cites to day 11 transcripts of the DaCorta criminal trial. (Doc. #749-3) The CFTC in paragraph nine cites to Doc. #749-3 pgs. 45-46, 50, 52, and 204 to support their assertion that DaCorta solicited funds for foreign exchange trading.

None of the transcripts cited supports the contention that Mr. DaCorta solicited funds for forex transactions. DaCorta's testimony is a description of the loan program that he instituted.

The Loan Programs Are Legally Distinct From The Sale Of A Commodity On Behalf Of Another Person.

Both the CFTC and the district court consistently skip over this essential legal distinction and fail to recognize that the loans made to Oasis are not the same as an investment in a commodity. The Promissory Notes and Risk Assessment Agreement were the basis for the loans made to Oasis. The lenders were promised repayment with interest. This loan transaction is legally distinct from a contract of sale for the purchase of a commodity on behalf of an investor. In the case of the loan agreement, the principle of the investor is protected by the promissory note and the legal

obligation to repay the principle with interest, despite the fluctuations of the market. The contract of sale for the purchase of a commodity on behalf of an investor is quite different in that the investor fully absorbs the risk of the fluctuations and instability of the market. (See Doc. # 750 at pg. 38 DaCorta Motion).

Both the CFTC's motion and the district court's decision fail to show any evidence that DaCorta or Oasis ever solicited funds from anyone for the purpose of entering into commodity sale agreements on behalf of other people, as is required under the statute (See 7 U.S.C. §6b(a)(2)).

Commodity Pool And Count Two: There Is A Genuine Issue Of Material Fact Regarding The Existence Of A Commodity Pool.

As part of the district court's decision under count one, the CFTC is obligated to prove that the Oasis entities constituted a commodity pool and that they were commodity pool operators. The CFTC failed to provide such evidence and the district court erred when it granted summary judgment.

In support of its decision to find that there existed commodity pools in this case, the district court makes four assertions: 1) investor's funds were aggregated into a single account; 2) funds were invested for the purpose of trading in commodity interests; 3) the lenders participation based on a promissory note system as opposed to direct investing does not effect whether Oasis should be classified as a commodity pool; 4) the Oasis entities are not qualified as Eligible Contract Participants (ECPs)

– meaning they are exempt from CFTC regulation – because the lenders, which the district court calls investors, are not ECPs. (Doc. 780 at pgs. 18-19).

Count Two: The District Court Erred In Finding The Existence of a Commodity Pool Asserting That Investor Funds Were Aggregated Into A Single Account

The district court asserts that the aggregation of investors' funds into a single account is an aspect of a commodity pool, citing to *Commodity Futures Trading Comm'n v. Amerman*, 645 F. App'x 938, 941-42 (11th Cir 2016). However, the facts of the *Amerman* case are distinguishable from this case because in *Amerman* the investors shared the profits and losses from commodity trading on a pro rata basis. In the case *sub judice*, the lenders did not share profits and losses but were promised repayment of a loan with interest.

The *Amerman* court held that while the aggregation of investors' funds into a single account is certainly one of the criteria for a commodity pool; however, the relevant feature of the pooling of such funds is to limit the liability of individual investors such that each investor shares the profits and losses on a pro rata basis. Conversely, Oasis did not pool funds to limit the liability of investors; Oasis issued promissory notes to repay the investors.

The district court's superficial recognition of the pooling of funds, once again, fails to perceive the distinction. The pooling of funds in a commodity pool is for the purpose of spreading risk and sharing in pro rata profits and losses. The Oasis lenders did not enter into a pool for the purpose of spreading risk and they did not share in

the pro rata distribution of profits and losses. The district court's reliance on the *Amerman* case is misplaced and it should not have granted summary judgment on count two.

Count Two: The District Court Erred In Holding That A Commodity Pool Existed Asserting That Funds Were Invested For The Purpose Of Trading In Commodity Interests.

The district court erred when it held that the "investor" funds were invested for the purpose of trading in commodities and, therefore, there existed a commodity pool. First, there were no investors; there were only lenders, each having signed a promissory note. Second, the lenders did not invest in commodities but were promised repayment of their principal plus interest or transaction fees. Principal and interest are two components of a loan repayment, not an investment in the sale of a commodity.

To support the holding that funds were invested for the purpose of trading in commodity interests, the district court cites to the CFTC motion for summary judgment (Doc. 749 at ¶¶ 9, 11); the trial testimony of Joseph Anile, the attorney for Oasis (Doc. 749-2 at 94:1-8); and DaCorta's trial testimony (Doc. 749-3 at 50:5-10). None of these sources supports the contention that funds were invested for the purpose of trading in commodity interests.

Paragraphs nine and eleven of the CFTC's motion, already discussed above, contain no relevant evidence that Oasis traded in commodities (forex exchange or retail forex exchange) on behalf of any of the lenders – again See 7 U.S.C. §6b(a)(2).

The district court also cites to the testimony of Joseph Anile at the criminal trial. This citation is deliberately deceptive because in that excerpt, Mr. Anile is discussing the state of Mr. DaCorta's company, Oasis, prior to 2012, which is prior to the time frame being discussed in this lawsuit and prior to any of the lenders or "investors" in question being involved with Oasis. Finally, the district court again cites to the same testimony of Mr. DaCorta, in which he never states that he was accepting funds for the purpose of trading in commodity interests on behalf of others. The district court's holding that *the record is clear that such funds were invested for trading in commodity interests* (Doc. #780 at 18) is false and summary judgment should not have been granted.

Count Two: The District Court Erred When It Asserted That Lenders Participation Based On A Promissory Note System As Opposed To Direct Investing Does Not Effect Whether Oasis Should Be Classified As A Commodity Pool.

The district court erred when it held that the promissory note system does not effect the classification of Oasis as a commodity pool. To support this assertion, the district court cites to *Commodity Futures Trading Comm'n v. Collins*, No. 94 C 4375, 1997 WL 106135, at *2 (N.D. Ill. Feb. 10, 1997). (See Doc. 780 at 18).

However, the district court's reasoning is faulty as the Northern District never held that.

In *Collins*, the Northern District of Illinois found that the investors believed that they were investing in commodities but were told that the transactions were loans and that borrowers would share in the profits from the commodities transactions. See *Collins*, 1997 WL 106135 at 1. The facts of *Collins* are distinguishable in that the investors believed they were investing in commodities and sharing in profits from the trade in commodities. However, here, the lenders were loaning money with a contractual promise to receive re-payment.

Count Two: The District Court Erred When It Held That The Oasis Entities Are Not Qualified As Eligible Contract Participants (ECPs) – Meaning They Are Exempt From CFTC Regulation – Because The Lenders, Which The District Court Calls Investors, Are Not ECPs Because That Holding Is Based Purely On The Fictionalized Existence Of Commodity Pools.

The district court erroneously held that the Oasis entities and Mr. DaCorta are not Eligible Contract Participants under 7 U.S.C. §1a(18)(A)(iv)(II), which states that a *The term eligible contract participant means—(A) acting for its own account—(iv) a commodity pool that—(II) is formed and operated by a person subject to regulation under this chapter or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the commodity pool or the foreign person is itself an eligible contract participant) provided, however, that for purposes of section 2(c)(2)(B)(vi) of this title and section*

2(c)(2)(C)(vii) of this title, the term "eligible contract participant" shall not include a commodity pool in which an participant is not otherwise an eligible contract participant.

The district court's analysis assumes incorrectly two things: 1) that the Oasis entities and Mr. DaCorta were commodity pools; and 2) that the Oasis entities were not ECPs under 7 U.S.C. §1a(18)(A)(v)(III)(aa) and (bb), which states *The term eligible contract participant means—(A) acting for its own account—(v) a corporation, partnership, proprietorship, organization, trust, or other entity—(III) that – (aa) has a net worth exceeding $1,000,000; and (bb) enters into a an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonable likely to be owned or incurred by the entity in the conduct of the entity's business.*

As has been previously discussed, neither the Oasis entities nor Mr. DaCorta acted as a commodity pool or a commodity pool operator. The lack of any evidence to the contrary means that there is a genuine issue of material fact with regard to the existence of a commodity pool. Additionally, the district court's limited analysis tortures the definition of Eligible Contract Participant by constricting it to one of the many possible definitions of Eligible Contract Participant. In this case, the district court's faulty assumption under §1a(18)(A)(iv) is that Oasis is a commodity pool

and that Mr. DaCorta is a commodity pool operator and that both are subject to regulation. Additionally, the district court does no analysis of any of the other means of becoming an Eligible Contract Participant under 7 U.S.C. §1a.

Mr. DaCorta asserted in his motions that OIG was an Eligible Contract Participant under the subsection cited above. (See Doc. #750 at ¶¶ 30-36). Thus, whether Oasis and Mr. DaCorta were Eligible Contract Participants and, therefore, exempt from regulation under a separate sub-section as they asserted was never addressed by the district court and there remains an undecided genuine issue of material fact, precluding the granting of summary judgment.

Under Count Two, The District Court Erred When It Held That The Oasis Entities Were Commodity Pool Operators, Retail Forex Commodity Pool Operators, And That DaCorta Was An Associated Person Thereof.

The district court erred when it held, under count two, that *there is no genuine dispute of material fact that both OIG and OM* (the Oasis entities) *were both CPOs and retail forex CPOs* (Doc. 780 at 30) and that *there is no genuine dispute of material fact that DaCorta was both an AP* (associated person) *of a CPO and an AP of a retail forex CPO*. (Doc. 780 at 30). The district court's reasoning, once again, was based on the unproven assertion that the Oasis entities operated commodity pools and that DaCorta solicited investment for the purpose of investing in commodities on behalf of others. Mr. DaCorta negated the assertion that there existed commodity pool operators or associated persons (Doc. #750 at ¶ 40 and pgs.

37-38 DaCorta motion) and it remains an outstanding issue of material fact precluding a finding of summary judgment.

In support of this contention, the district court cites to the CFTC's motion for summary judgment (Doc. #749 at ¶ 68), which merely states that DaCorta was responsible for all investment decisions, as well as managing a relationship with an outside broker, citing to the testimony of Joseph Anile at the criminal trial. Additionally, the district court cites Mr. DaCorta's trial testimony (Doc. 749-3 at 205:4-11, 206:8-15), which merely states that DaCorta managed a relationship with an outside broker and at one point changed brokers. The excerpts cited by the district court were a very limited window of information concerning one fraction of the activities of Mr. DaCorta. The information in no way proves that Mr. DaCorta ran a commodity pool, was a commodity pool operator or a retail forex commodity pool operator or an associated person of either such entity.

While the district court cites the statutory definition of commodity pool operator under 7 U.S.C. §1a(11)(A), which states that "*the term "commodity pool operator" means any person ---(i) engaged in a business that is of the nature of a commodity pool…*" and the regulatory definition of a retail forex commodity pool operator under 17 C.F.R. §5.1(d)(1), which states "*Commodity pool operator, for purposes of this part, means any person who operates or solicits funds, securities, or property for a pooled investment vehicle that is not an eligible contract*

participant as defined in section 1a(18) of the Act, and that engages in retail forex transactions," the district court's analysis is, once again, faulty and there remain issues of material fact that remain outstanding.

The district court merely states that DaCorta solicited funds on behalf of the Oasis entities as the definitive support for both of these contentions. (Doc.# 780 at 30-31). This does not prove that such pools existed as defined by statute or that Oasis was a commodity pool operator or retail forex commodity pool operator and that remains a genuine issue of material fact, precluding a finding of summary judgment.

The District Court Erred When It Granted Summary Judgment On Count Three Because The Oasis Entities Were Not Commodity Pool Operators And Mr. DaCorta Was Not An Associated Person Of A Commodity Pool Operator.

Under count three of the amendment complaint, the CFTC alleged violations of 7 U.S.C. §§ 2(c)(2)(C)(iii)(1)(cc), 6k(2), 6m(1), and 17 C.F.R. §5.3(a)(2), by failing to register as a CPO and retail forex CPO and Associated Person of a CPO and Associated Person of a retail forex CPO.

Each of the allegations require the existence of a commodity pool, that the Oasis entities were commodity pool operators and retail forex commodity pool operators, and that Mr. DaCorta was an associated person of a commodity pool operator or retail forex commodity pool operator, and that none were Eligible Contract Participants. The existence of any type of commodity pool or commodity pool operator remains an outstanding issue of material fact because the CFTC has

failed to put forth any evidence that Oasis and Mr. DaCorta offered to, or entered into any agreement contract or transaction in foreign currency with any of the lenders in this case. Thus, the requirement to register as such cannot be imposed.

Title 7 U.S.C. §2(c)(2)(C)(iii)(1)(cc) states: A person, unless registered in such capacity as the Commission by rule, regulation, or order shall determine and a member of a futures association registered under section 21 of this title, shall not-- **(cc)** operate or solicit funds, securities, or property for any pooled investment vehicle that is not an eligible contract participant in connection with agreements, contracts, or transactions described in clause (i) of this subparagraph entered into with or to be entered into with a person who is not described in item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II). Relevant to this section is 7 U.S.C. §2(c)(2)(C)(i)(I), which states that §2 (c)(2)(C)(iii)(1)(cc) is applicable to any agreement, contract, or transaction in foreign currency that is—(aa) offered to, or entered into with, a person that is not an eligible contract participant.

Neither DaCorta nor the Oasis entities ever *entered into* a contract or transaction in foreign currency with any of the lenders in this case and neither was such a contract for the sale in foreign currency *offered to* them. None of the lenders ever entered into any contract for the sale or the purchase of a commodity and DaCorta and Oasis never contracted to purchase commodities on their behalf.

Each of the statutes and regulations cited by the district court require that in order to violate said statute, one must be acting as a commodity pool operator and soliciting funds for participation in a commodity pool. No such evidence was offered by the CFTC or cited to by the district court. Whether the Oasis entities were commodity pool operators and whether DaCorta was an associated person both remain outstanding issues of material fact.

The district court erroneously held that there was no genuine dispute of material fact that the Oasis entities were CPOs and retail forex CPOs or that DaCorta was an associated person of those CPOs. (Doc. #780 at 32). The district court makes no citations to any additional factual support for this conclusion. As previously stated, the district court's flawed assessment of the existence of commodity pools and commodity pool operators is based on the unsound opinions of Ms. Robinson, Ms. Davis, and Mr. Wiand. None of these declarations/statements relied upon by the CFTC and the district court contain a sound analysis of the statutes involved here or of the facts of this case. The declarations begin with the assumption that there exist commodity pools and commodity pool operators without explanation or analysis. Those faulty assertions were relied upon by the district court.

The District Court Erred When It Granted Summary Under Counts Four And Five Of The Amended Complaint As Oasis And DaCorta Never Received Pool Funds And Never Commingled Funds Regarding Pools That Never Existed.

Under count four, the CFTC alleged that Mr. DaCorta and the Oasis entities violated regulation 17 C.F.R. §4.20(b)-(c) (2018) in that Mr. DaCorta and the Oasis entities, acting as commodity pool operators and associated persons of commodity pool operators received funds from pool participants, did not receive the funds in the name of the pool, and commingled the Oasis pool property with the property of other persons.

The district court granted summary judgment (Doc. #780 at 33), citing to Ms. Robinson's declaration (Doc. #4-1 at ¶ 30, 44, 45); the CFTC's motion (Doc. 749 at ¶ 50); Mr. Anile's testimony (Doc. #749-2 at 153:5-157:13); and Mr. DaCorta's motion (Doc. 757 at ¶50).

Ms. Robinson's declaration (Doc. #4-1 at ¶ 30, 44, 45) is, again, an accounting of funds going in and out of accounts without any analysis as to whether the accounts were "pooled funds" and whether the activity by Oasis subjected them to regulation by the CFTC. The district court's reliance on that declaration is faulty in that it does not prove the existence of pooled funds.

The district court also cited to the CFTC's motion (Doc. 749 at ¶ 50) where the CFTC asserted that Mr. DaCorta paid for a personal residence with Oasis funds. This was a misrepresentation to the court because DaCorta did not own the home but purchased it as an investment for Oasis and intended to flip the house for the company's profit. Thus, the CFTC's representation that DaCorta paid for two

personal residences is false. The investments in real estate were consistent with the loan agreement signed with each of the lenders. They were made aware, *ab initio*, that Oasis would invest in real estate. (Doc. # 750-1 at pg. 4). The Agreement and Risk Disclosures statement signed by each of the lenders permitted Oasis to use funds for various investments, including real estate. (Doc. #750-1 at pg. 4).

Furthermore, the CFTC citing to Mr. DaCorta's testimony mentions that he took a trip on a private plane; however, the CFTC leaves out the fact that Mr. DaCorta testified that the majority of the time he flew coach; the district court fails to mention that Mr. DaCorta testified that he rarely went on vacation (about 2.5 days per year over the last ten years See Doc. 749-3 at 125). The CFTC makes grandi60-8267ose representations of a luxurious lifestyle that are untrue and inexistent. The district court's reliance on these assertions is a failure to look at all the facts.

Count Five

Under count five, the CFTC alleged a violation of 17 C.F.R. §4.21 (2018), stating that Mr. DaCorta and the Oasis entities, acting as commodity pool operators and associated persons of commodity pool operators failed to provide pool disclosures. It was again alleged that Mr. DaCorta and the Oasis entities operated as commodity pool operators relating to forex transactions and that they were required to register as commodity pool operators and failed to deliver to pool participants a disclosure document.

Here again, the requirement to deliver such disclosures is dependent upon the finding that there existed commodity pools, that Oasis acted as a commodity pool operator, and that DaCorta was an associated person thereof, and that trades were not executed by an Eligible Contract Participant. No such evidence exists, precluding a finding of summary judgment.

CONCLUSION

The district court's decision granting summary judgment must be vacated and the consequent remedies imposed by the district court must be reversed and vacated as well, including the injunctive relief, restitution, and civil penalty.

Dated: June 25, 2024

/s/ Stephen N. Preziosi
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contained 12,938 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman typeface and 14-point font size.

/s/ Stephen N. Preziosi

Stephen N. Preziosi, Esq.
Attorney for Appellant

Dated: June 25, 2024

EXHIBIT C

No. 24-10132

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellee,

against

OASIS INTERNATIONAL GROUP, LIMITED, et al.,

Defendants,

MICHAEL J. DACORTA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida
Honorable Sean P. Flynn
Case No. 8:19-cv-00886-VMC-SPF

REPLY BRIEF FOR DEFENDANT-APPELLANT

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

CFTC DACORTA Appeal No. 24-10132

11th Cir. R. 26.1-1(a) requires the appellant or petitioner to file a Certificate of Interested Persons and Corporate Disclosure Statement (CIP) with this court within 14 days after the date the case or appeal is docketed in this court, and to include a CIP within every motion, petition, brief, answer, response, and reply filed. Also, all appellees, intervenors, respondents, and all other parties to the case or appeal must file a CIP within 28 days after the date the case or appeal is docketed in this court. **You may use this form to fulfill these requirements.** In alphabetical order, with one name per line, please list all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10 or more of the party's stock, and other identifiable legal entities related to a party. ***(Please type or print legibly)***:

J. Alison Auxter, attorney for CFTC in U.S. District Court

Joseph Anile, co defendant last known to be in custody.

Francisco Duran, co defendant, address unknown.

John Haas, co defendant, address unknown.

Honorable William Jung, trial judge U.S. District Court Middle District of Florida

RONALD KURPIERS defense attorney in US District Court 805 W. Azeele St. Tampa, Fl 33606

Jeffery C. Le Riche, attorney for CFTC in U.S. District Court

Raymond Montie, co defendant, address unknown.

Burton Wiand, receiver in lower court. 5505 W.Gray St. Tampa, FL 33609

Submitted by:

Signature:

Name: Stephen N. Preziosi Prisoner # (if applicable):

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Rev.: 2/23

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POINT I

NEITHER MR. DACORTA NOR THE OASIS ENTITIES TRADED FOR OR ON BEHALF OF ANY INDIVIDUAL AND THIS ISSUE WAS ARGUED IN THE COURT BELOW AND PRESERVED FOR APPELLATE REVIEW.

IN RESPONSE TO THE CFTC'S ARGUMENT IN POINT I(A)

The Issue Raised Under 7 U.S.C. §6b Was Preserved For Appellate Review In Mr. DaCorta's Motion To Dismiss.

The Commodity Futures Trading Commission (hereinafter "CFTC") argues in Point I of their answering brief (Doc. 39 pg. 28-29) that Mr. DaCorta failed to argue in the district court that he did not trade commodities for or on behalf of others and, they argue, that the issue is unpreserved and waived. The CFTC is wrong. Mr. DaCorta made extensive argument on this issue in both his motion to dismiss and in his response in opposition to the CFTC's motion for summary judgment.

Mr. DaCorta argued in his motion for summary judgement that he never solicited individuals to trade in commodities and that he did not trade for individuals. Appendix IX (ECF No. 750). For example, Mr. DaCorta states that *OIG did not trade for any individual resident of the United States or any group of residents in the United States in any capacity*. Appendix IX pg. 104 (ECF No. 750 pg. 7).

As further evidence that Mr. DaCorta argued that he did not trade for or on behalf of individuals, he states in his motion for summary judgment that *OIG traded exclusively for its own corporate account as an Eligible Contract Participant ("ECP")*. Appendix IX pg. 136 (ECF No. 750 pg. 39). In that same paragraph

DaCorta argues that *OM traded under a rule exemption for a few limited partners as well as ECP and Accredited Investors ("AI). But OIG never traded for individuals…* Appendix IX pg. 136 (ECF Doc. 750 pg. 39). It is also relevant that through all of his motions, Mr. DaCorta asserts that he never engaged in retail forex transactions, i.e. transactions with individuals or on behalf of individuals. Appendix IX pg. 136 (ECF Doc. 750 pg. 39). Again, just a few pages later, he argues *Neither OGLtd, OGSA or OIG traded for any individual resident of the United States in any capacity.* Appendix IX pg. 138 (ECF Doc. 750 pg. 41).

In addition to using the language that he never traded in commodities on behalf of individuals, Mr. DaCorta asserted that he never operated any retail foreign transactions or agreements, nor did he have any retail forex customers. He asserts that *Mr. DaCorta did not operate, manage, or engage in any retail foreign transactions*. Appendix IX pg. 140 (ECF Doc. 750 pg. 43) *and neither did OM nor OIG ever offer any retail forex account agreements (17 CFR §5.1(j)). OM or OIG had no retail forex customers.* Appendix IX pg. 140 (ECF Doc. 750 pg. 43). *Finally, neither OM nor OIG transacted any retail forex business*. Appendix IX pg. 140 (ECF Doc. 750 pg. 43).

Stating that he did not operate "retail" is the same as stating that he did not engage individuals in commodities trading and did not trade on or behalf of any

individuals, as is required under 7 U.S.C. §6b(a)(1) (CEA §4b) in order to find that he was liable for any unlawful acts under the CEA.

The Issue Raised Under 7 U.S.C. §6b Was Preserved For Appellate Review In Mr. DaCorta's Answer To The CFTC's Motion For Summary Judgment.

In Mr. DaCorta's answer to the CFTC's motion for summary judgment he argues that *OIG did not trade for any individual resident of the United States or any group of residents in the United States in any capacity. (DaCorta Second Motion to Dismiss Doc. 663 pg. 6 ¶ 25)* and *OGLtd or OGSA did no retail forex transactions*. Appendix X pg. 200 (ECF Doc. 757 pg. 4).

Mr. DaCorta consistently argued that he was not trading commodities for or on behalf of individuals, debunking the CFTC's assertion that this argument was not made in the lower court. In his answer to the CFTC's motion for summary judgement he again argues *Neither OGLtd, OGSA or IIG traded for any individual resident of the United States in Any capacity.* Appendix X pg. 202 (ECF Doc. 757 pg. 6).

The CFTC's assertion under §4b (7 U.S.C. §6b) that Mr. DaCorta never argued this in the court below is perfectly debunked as Mr. DaCort argued that he never traded commodities for or on behalf of individuals no less than nine times. The CFTC's argument has no merit and Mr. DaCorta preserved for appellate review the argument that he never traded commodities for or on behalf of individuals as is required for the CFTC's case under 7 U.S.C. §6b (CEA 4b).

POINT II

THERE WAS NO AGENCY LIKE RELATIONSHIP AND THE LENDERS DID NOT HAVE AN OWNERSHIP INTEREST IN THE FUNDS IN QUESTION.

IN RESPONSE TO CFTC ARGUMENT I(B)(2)

The CFTC argues that there existed an agency like relationship and therefore, they argue, Mr. DaCorta was trading *for or on behalf* of other individuals. (See Appellee Brief pg. 25 Doc. 39 pg. 36). The Appellee's argument is premised on the supposition that the lenders still owned the funds that Oasis had borrowed, and that Oasis merely had custodial authority over the funds and those funds still belonged to the alleged victims. (See Appellee Brief pg. 26 Doc. 39 pg. 37). The CFTC is wrong because the lenders no longer owned those funds pursuant to their signing the promissory note and loan agreement.

The Promissory Notes and Loan Arrangement Severed The Ownership Rights Of The Lenders.

The promissory note and loan agreement legally severed the ownership rights of the lenders. Those people no longer owned those funds. What they owned were accounts receivable, i.e. the right to be repaid according to the terms of the loan agreement and risk disclosure agreement.

This is a significant point that has two consequences: First, it precludes any agency relationship as argued for the first time on appeal by the CFTC, and second, it precludes the CFTC's assertion that there existed the pooling of any funds.

This Court Must Find That There Was No Agency Relationship Or Remand For Further Fact-Finding.

An agency relationship requires that the actor act for or on behalf of the victim. The Seventh Circuit has held that the antifraud provisions of the Commodity Exchange Act §4b only apply where there is an agency relationship between the actors, i.e. one is acting for or on behalf of the victim. *Commodity Trend Service, Inc. v. CFTC*, 233 F.3d 981, 991-992 (7th Cir. 2000).

The Eleventh Circuit, when interpreting whether an agency relationship exists, has cited to the treatise Restatement Second of Agency §1. *Commodity Futures Trading Commission v. Gibraltar Monetary Corp., Inc.*, 575 F.3d 1180, 1189 (11th Cir. 2009). The Restatement of Agency states the following: The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. Restatement (Second) of Agency § 1 (1958)

The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. It is the element of continuous subjection to the will of the principal which distinguishes the

agent from other fiduciaries and the agency agreement from other agreements. Restatement (Second) of Agency § 1 (1958)

Oasis, according to the terms of the loan agreement were never subject to the directions of the lenders in this case. The contractual agreement is clear that Oasis was free to invest the money lent to them in a variety of places and they were not subject to direction of the lenders. Whether the Oasis entities were acting as the agents of the lenders is a question of fact that was never decided by the district court. Whether there was any agency like relationship at all is determinative of whether §4b and the antifraud provisions of the Commodity Exchange Act are even applicable here.

This Court must find that there was not agency relationship or remand this case for further fact finding to the district court.

There Can Be No Pooling Of Funds Where The Lenders No Longer Owned The Monies Lent To The Oasis Entities.

Where the ownership rights of the lenders were severed from the funds, it precludes the notion that the Oasis entities were pooling the funds of the lenders. The issue of ownership of the funds in the Oasis accounts was never directly addressed by the district court. Pooling cannot take place unless the lenders retained an ownership interest in those funds. *CFTC v. Amerman*, 645 F.App'x 938, 941-42 (11th Cir. 2016) holding that the *sine qua non* of a commodity pool is the aggregation of *investor's funds* into a single account [emphasis added]; see also *CFTC v. Equity*

Financial Group LLC, 572 F.3d 150, 158 (3rd Cir. 2009) holding defendant was a commodity pool when he combined *investor funds* into a single, commingled account [emphasis added]; *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880, 884 (9th Cir. 1986) holding that factors to be present to find that a commodity pool existed are that an investment organization combines *investor funds* into a single account for the purpose of investing in commodity futures contracts [emphasis added]; *CFTC v. Heritage Capital Advisory Services, Ltd.*, 823 F.2d 171, 173 (7th Cir. 1987) holding that a commodity pool operator is one who solicits and pools the *funds of others* for the purpose of trading on the commodities market [emphasis added]. It is universally held that the investors must maintain an ownership interest in the funds invested in commodities in order for a commodity pool to exist.

According to the loan agreements and risk disclosure agreements, signed by all the lenders, the ownership rights of the lenders were severed. They did not have an ownership interest in those funds when they were placed in the Oasis accounts and, therefore, there could not have been a pooling of investor funds.

If the promissory notes and the risk disclosure agreements severed the ownership rights of the lenders, and Oasis was not investing the money of the lenders then the CFTC's arguments must fail, i.e. there did not exist a commodity pool, and Oasis did not trade for or on behalf of the lenders. This issue must be remanded to the district court for further fact-finding and argument.

POINT III

THE METHOD OF REMUNERATION IS A MATERIAL ISSUE OF FACT AND THIS COURT MUST REVERSE THE GRANT OF SUMMARY JUDGMENT AND REMAND THE CASE TO THE DISTRICT COURT.

IN RESPONSE TO CFTC ARGUMENTS I(A) AND II(A)

The CFTC argues that the payment of spread fees or the transaction fees bring the forex transactions within the ambit of §4b of the CEA. (See Appellee Brief pgs. 19 and 29, Doc. 39 pgs. 30 and 40). The CFTC argues that the method of remuneration is relevant in determining whether there existed commodity pools, commodity pool operators, associated persons, etc.

However, while the CFTC finds the payment of transaction fees as a method of remuneration relevant, they argue precisely the opposite with regard to the sharing of profits or losses as a method of remuneration. The CFTC takes the contradictory position that the distribution of profits and losses is not relevant to the finding of a commodity pool or commodity pool operators, but the sharing of transaction fees, they argue, is determinative. The CFTC's position regarding the two methods of repayment is not only contradictory, but it is also contrary to the majority of Circuit and District Court case law.

Mr. DaCorta argued throughout his initial brief that the lenders did not absorb profits and losses according to the loan agreement. Therefore, he did not trade for or on behalf of the lenders, precluding the application of CEA §4b. A number of

Circuits hold that the sharing of profits or losses is an essential element to finding that a commodity pool existed. *Lopez v. Dean Witter Reynolds, Inc.,* 805 F.2d 880, 884 (9th Cir. 1986); *CFTC v. Amerman*, 645 Fed.Appx. 938, 942 (11th Cir. 2016); *CFTC v. Equity Financial Group LLC*, 572 F.3d 150, 158 (3rd Cir. 2009); *CFTC v. Vision Capital Corp.*, 2007 WL 4246302, at *2 (D Utah Nov. 28, 2007); *Commodity Futures Trading Com'n v Perkins*, 2009 WL 806576, at *4 [DNJ Mar. 25, 2009], affd, 385 Fed Appx 251 [3d Cir 2010]; *Commodity Futures Trading Com'n v Equity Fin. Group, LLC*, 2006 WL 3359418, at *2 [DNJ Nov. 16, 2006]; *Nilsen v Prudential-Bache Sec.*, 761 F Supp 279, 292 [SDNY 1991].

With near unanimity, both Circuit Courts and District Courts throughout the nation require the existence of sharing profits and losses in order to find the existence of a commodity pool. The CFTC's argument under Point II(A) (Doc. 39 pg. 40) has no support in case law. A Westlaw search of relevant case law revealed that there is no case law that supports the notion that paying transaction fees brings any type of transaction into the ambit of the CEA. In fact, the CFTC does not cite any case law to support the proposition that pro rata distribution of profit and losses is not essential to the existence of a commodity pool or that payment of transaction fees is relevant.

The CFTC attempts to make the argument that the profits and losses do not have to be shared pro rata in order for there to exist a commodity pool. In a footnote to their argument they assert that commodity pools may have special allocations or

distributions that are not pro rata. (Doc. 39 pg. 42 fn. 10). To be clear, Mr. DaCorta has never argued that profits and losses must be distributed pro rata in order for there to be a commodity pool. That is a characterization that appears exclusively in the CFTC's brief. Whatever the form of the distribution, what is being distributed is a form of profits and losses. And that did not happen in this case.

The Oasis entities did not share profits and losses with the lenders. They were repaid with either interest or transaction fees, whichever was greater. The fact that lenders were never subject to the risk of profits or losses is determinative in this case that no commodity pool existed and that Oasis and Mr. DaCorta were not subject to the antifraud provisions of CEA §4b.

POINT IV

THE CFTC ARGUES THAT THE COMMODITIES EXCHANGE ACT SHOULD BE INTERPRETED BROADLY AND THEY INCORRECLTY CONCLUDE THAT IT ENCOMPASSES THE FACTS OF THIS CASE.

IN RESPONSE TO POINT I(B)

The CFTC argues under Point I(B) of their brief (Doc. 39 pg. 31) that this Court must be guided by the principle that the CEA is a remedial statute that protects the investor and must be construed liberally. The CEA, they argue, is intended to deter and prevent disruptions to the market and protect all market participants. (Doc. 39 pg. 32.

The remedial nature of the statute is to protect those who are trading in commodities. The lenders in this case were not trading in commodities; they were lending money, and they received a promissory note in exchange. The statute is not so broad as to encompass the regulation of loans and promissory notes.

In conjunction with this argument, the CFTC argues that the solicitations gave the impression that the Oasis entities were trading in commodities on behalf of others. This is simply untrue and has no factual basis.

Each of the lenders signed a Promissory Note (Appendix IX Doc. 27 pg. 149), which explained the method of repayment and an Agreement and Risk Disclosures document (Appendix IX Doc. 27 pg. 152). The documents explain clearly that the lenders were making unsecured loans and that they would be repaid in either interest or fees. Furthermore, the lenders were expressly told in those agreements that there was a substantial amount of risk involved in all the investments made by Oasis.

The CFTC argues that the transcripts of the phone calls between Mr. DaCorta and the lenders gave the impression that he was trading in commodities on their behalf. This is untrue. In each of the transcripts of phone calls it is made clear that the lenders are loaning money to Oasis and that they will not be paid in profits or losses, but in interest or fees. The prospective customers on the phone calls are, at all times, referred to as lenders, not investors. The following is an excerpt from those transcripts where Mr. DaCorta explains that they are lenders:

> *You're not an account with us, you're a lender to us, so we have an obligation to pay you. We pay you a minimum of the 12 percent or the fees. You pay us nothing.*
> *The only thing you may incur is a wire fee from your bank. Obviously, we're wiring money back and forth, if you're taking withdrawals or you're sending deposits, but that's from the bank charging, we don't charge anything.*
> *So there are no fees. The only thing that you're going to get – you're going to get from us is interest and special interest. The interest is the minimum of 12percent. The special interest is anything above the 12 percent.*
> *And again, you're a lender to us, you're not a – you're not a customer, so we don't charge you any fees of any kind, so that's –that's – that's any easy one to answer.*
> (Appendix II Doc. 20 pg. 25 Transcript page 22)

Mr. DaCorta makes it clear that the prospective clients are lending money to Oasis. He repeatedly states that they are not accounts, i.e. they are not investors and he is not trading on their behalf. He is borrowing money from them and paying them back in interest. The phone calls and transcripts of calls are consistent with this excerpt. There is never any talk of trading in commodities on behalf of the lenders.

The CFTC's argument that either the Loan Agreement, Risk Disclosure or the transcripts of the phone calls gave the impression that either Oasis or Mr. DaCorta would be trading in commodities on behalf of anyone has no basis in fact.

POINT V

THE CFTC INCORRECTLY ASSERTS THAT THE DISTRICT COURT PROPERLY FOUND THAT THE FUNDS WERE FOR THE PURPOSE OF TRADING IN COMMODITIES.

The CFTC argues that the district court's holding that the funds were for the purpose of trading in commodities. The CFTC cites two reasons: first, Mr. DaCorta's trial testimony from his criminal trial; second, the bank analysis of the CFTC investigators. Neither of these support a finding that funds were solicited for the purpose of trading commodities for or on behalf of others.

First, the citation to Mr. DaCorta's testimony by the CFTC at Doc. 39 pg. 43 referring to Appendix IV pg. 15 is a excerpt taken out of context. The testimony states that the funds were "loaned" to OIG, and they were then used for a variety of purposes. When the funds were loaned to the Oasis entities, the lenders no longer had an ownership interest in them. Oasis was not trading in commodities for or on behalf of those lenders.

The excerpt of that testimony taken together with both the transcripts of phone conversations previously cited (Appendix II Doc. 20 pg. 25 Transcript page 22) of Mr. DaCorta telling lenders that Oasis was not trading on their behalf and they were lending money to Oasis, and the Promissory Note, Loan Agreement, and Risk Disclosure Agreement is conclusive evidence that the Oasis entities and Mr. DaCorta were not trading commodities for or on behalf of the lenders.

The CFTC also asserts that because the funds loaned to Oasis were put into a bank account there must have existed a commodity pool. (CFTC brief Doc. 39 pg. 45). However, no such fact exists in the statutory definition of commodity pool. Under 7 U.S.C. §1a(10), defining commodity pool, no part of the statute states that placing the funds in a bank account is determinative of the existence of a commodity pool. Nor does the CFTC cite to any CFTC regulation that would support such an assertion. Both the CFTC and the district court rely exclusively on *CFTC v. Amerman*, 645 F.Appx 938 (11th Cir. 2016). However, in that case, the investors retained an ownership interest in the funds invested and they shared in the profits and losses of their investment. The *Amerman* Court specifically held that the relevant feature of the pooling of funds is to limit the liability of individual investors so that each investor shares the profits and losses on a pro rata basis.

This is an important distinguishing fact compared to this case. When Oasis took in the funds from the lenders and put them into a bank account, the lenders no longer had an ownership interest in those funds. Their liability and ownership interest was severed by the promissory note and loan agreement, and they did not share in profits and losses whether on a pro rata basis or any other basis. There can be no commodity pool where the lenders retained no ownership interest.

POINT VI

THE OASIS ENTITIES AND MR. DACORTA WERE ELIGIBLE CONTRACT PARTICIPANTS AND THE DISTRICT COURT ERRED IN ITS DECISION FOR SUMMARY JUDGMENT.

ADDRESSING POINT III OF THE CFTC'S BRIEF.

The CFTC argues incorrectly that the district court's analysis of the Oasis Entities' status as Eligible Contract Participants was sound. However, the district court held that Oasis did not qualify as an ECP under "one" of the subsections, i.e. 7 U.S.C. § 1a(18)(A)(iv)(II), but ignored arguments under 1a(18)(A)(v)(III).

Mr. DaCorta argued that he was an ECP under §1a(18)(A)(v)(III), defined as follows: *The term eligible contract participant means (A) acting for its own account – (v) a corporation, partnership, proprietorship, organization, trust, or other entity (III) that (aa) has a net worth exceeding $1,000,000; and (bb) enters into an agreement, contract, or transaction connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonable likely to be owned or incurred by the entity in the conduct of the entity's business.*

He put forth facts to support this argument, stating that he was an ECP because they operated no commodity pools and he asserted that the average transaction fee income for the company was $1,468,565.88 (Appendix IX pg. 135) and OIG traded

exclusively for its own corporate account as an Eligible Contract Participant with funds derived from lenders (Appendix IX pg. 136).

The assertion by the district court, and now the CFTC on appeal, is that Oasis did not qualify under one of the many subsections defining an Eligible Contract Participant. However, DaCorta and Oasis did qualify and asserted facts as to that qualification under §1a(18)(A)(v)(III). While the CFTC argues that the organization of Mr. DaCorta's motion for summary judgment was not compliant with the district court's rules, it cannot deny that the facts to support Mr. DaCorta's and Oasis' qualifications were argued in the court below.

This Court must find that Mr. DaCorta and Oasis were ECPs and the CFTC did not have jurisdiction to bring the instant law suit against him as he was exempt under their rules.

Dated: October 8, 2024

/s/ Stephen N. Preziosi
Stephen N. Preziosi, Esq.
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contained 3,964 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman typeface and 14-point font size.

/s/ Stephen N. Preziosi

Stephen N. Preziosi, Esq.
Attorney for Appellant

Dated: October 8, 2024

EXHIBIT D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
----------X

MICHAEL DACORTA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

----------X

AMENDED NOTICE OF MOTION, AFFIRMATION, AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE CONVICTION PURSUANT TO 28 U.S.C. §2255

Docket No.: 8:25-cv-1992-WFJ-CPT

PLEASE TAKE NOTICE that upon the attached declaration of Stephen N. Preziosi , Esq., attorney for Michael DaCorta, dated September 2, 2025, the attached exhibits, and upon all of the prior pleadings and proceedings, the defendant Michael DaCorta will move this Court at the United States Courthouse for the Middle District of Florida, located at 801 North Florida Avenue, Tampa Florida at a date and time to be set by the Court for an order pursuant to 28 U.S.C. §2255, requesting that this Court set aside the conviction and sentence of Michael DaCorta and grant such other and further relief as the Court deems just and proper.

Dated: September 2, 2025
New York, New York

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TO: United States Attorney for the Middle District of Florida

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
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MICHAEL DACORTA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

----------X

AMENDED MOTION, AFFIRMATION, AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE CONVICTION PURSUANT TO 28 U.S.C. §2255

Docket No.: 8:25-cv-1992-WFJ-CPT

PRELIMINARY STATEMENT

By Amended Motion dated September 2, 2025 Michael DaCorta seeks relief, pursuant to 28 U.S.C. §2255, on the grounds that his conviction was unconstitutionally obtained and his sentence was not compliant with Due Process. Mr. DaCorta is in the custody of the Bureau of Prisons in Sumterville, Florida at the Coleman Correctional Facility.

STATEMENT OF TIMELINESS

Mr. DaCorta was convicted on three counts after trial before the Honorable William Jung upon a jury verdict on May 4, 2022 (Crim. Case No. 8:19-cr-605-WFJ-CPT): Count One conspiracy to commit wire fraud and mail fraud under 18 U.S.C. §1349, Count Two illegal monetary transactions under 18 U.S.C. §1957, and Count Three false and fraudulent statement on income tax return under 26 U.S.C. §7206(1) and 18 U.S.C. §2. On October 20, 2022, Mr. DaCorta was sentenced as follows: on Count One, he was sentenced to twenty years; on Count Two, he was sentenced to twenty years to run concurrently to Count One; and on Count Three, he was sentenced to 36 months to run consecutive to Counts One and Two.

Mr. DaCorta appealed to the Eleventh Circuit Court of Appeals (Case No. 22-13564). He argued four points on appeal: 1) The District Court erred in overruling the defense objection to a non-pattern jury instruction that instructed the jury that "and" means "or"; 2) The District Court erred in denying the motion to suppress statements taken at DaCorta's home; 3) The District Court erred in denying DaCorta's request for a jury instruction; 4) The District Court erred when it denied a motion for mistrial when a witness expressed an opinion about Mr. DaCorta's guilt.

In an unpublished opinion, the Eleventh Circuit affirmed the conviction on May 1, 2024. (See *United States v. DaCorta*, 22-13564, 2024 WL 1905330 (11th Cir. 2024). Although Mr. DaCorta had ninety days to seek review by the United States Supreme Court, he did not do so, and his appeal became final on July 30, 2024. Mr. DaCorta has one year from the date that his appeal became final to file a motion pursuant to 28 U.S.C. §2255. (See 28 U.S.C. §2255 (f)(1)).

Mr. DaCorta timely filed the 2255 motion with this Court on July 28, 2025. This Court ordered that the motion be stricken without prejudice and refiled as an amended motion by September 4, 2025 (See 8:25-cv-1992-WFJ-CPT Doc. #2). In a later order, this Court granted Mr. DaCorta permission to file an expanded motion of 40 pages, excluding tables and exhibits.

ISSUES PRESENTED

Mr. DaCorta was deprived of effective assistance of both trial counsel and appellate counsel under the Sixth Amendment of the U.S. Const. and *Strickland v. Washington*, 466 U.S. 668 (1984). The issue of ineffective assistance of counsel was not raised on appeal. Mr. DaCorta was deprived of effective assistance of trial counsel and appellate counsel in the following instances:

1. When his attorneys failed to raise the issue of whether, under the District Court's order, a receiver could waive attorney-client privilege in a criminal case when the consent order, acquiesced to by Mr. DaCorta in a civil proceeding, was done solely for the purpose of enabling the receiver to retrieve assets of the corporation.

2. When his attorneys failed to raise the issue of the conflict of interest that existed for the receiver in waiving the attorney client privilege where 1) Mr. Anile, as argued by the Government, was not the attorney for the corporation; and 2) where the interests of the receiver were at odds with the interests of the corporation as the receiver is aligned most closely with the Government as prosecutor, and as the receiver readily admitted, a conviction in the criminal case would benefit the receivership.

3. When his attorneys failed to raise the issue of the scope of the waiver of attorney-client privilege consented to by Mr. DaCorta in the civil case and whether that waiver extended to the criminal case, which did not exist at the time Mr. DaCorta consented to the waiver.

4. When his attorneys failed to raise the issue of whether Mr. Anile was the attorney to Mr. DaCorta personally and whether the communications between them, which were admitted through the testimony of Mr. Anile at trial, were covered by personal attorney-client privilege between DaCorta and Anile.

5. When his attorneys failed to object at trial or raise the issue of the legal conclusions testified to by Joseph Anile at page 81 when he testified that DaCorta had committed felonies with him.

6. When his attorneys failed to object at trial or raise on appeal the opinion testimony of the receiver, Burton Wiand, who testified that Mr. DaCorta was running a fraudulent scheme,

that this was a Ponzi scheme, that another U.S. District Court Judge found that this was a Ponzi scheme, and that DaCorta had made fraudulent conveyances;

7. When his attorneys failed to object at trial or raise on appeal the testimony of the receiver, when he testified that he had confiscated assets of Oasis pursuant to an order of another U.S. District Court, which found there was fraud, usurping the fact finding authority of the jury.

8. When his attorneys failed to object at trial or raise on appeal the Confrontation Clause violation regarding the testimony of the receiver, who testified as to analysis, opinions and conclusions of an outside accounting firm regarding the books and records of Oasis, depriving DaCorta the right to confront the witnesses against him;

9. When his attorneys failed to object at trial or raise on appeal trial counsel's failure to call an expert witness in Forex trading to counter the government's expert witnesses.

10. When his trial attorney failed to object to the 404(b) testimony by 1) Ms. Oremland on 4/19/22 page 74 when the government introduced past allegations of fraud against Mr. DaCorta; 2) Ms. Sunu on 4/19/22 page 117-118 past allegations of disciplinary actions; 3) by Joseph Anile on 4/25/22 at page 126 where he alleged that Mr. DaCorta falsified accounts.

11. When his trial attorney failed to move, under the Fourth Amendment, to suppress the illegally obtained video statements and images of Mr. DaCorta recorded at an office Christmas party, which were illegally and covertly recorded by an FBI agent while trespassing at an invitation only private event.

STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

12. The following standard for ineffective assistance of both trial counsel and appellate counsel under the Sixth Amendment of the U.S. Constitution and under the Supreme Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984) is applicable to all the arguments presented below.

13. The Sixth Amendment of the U.S. Constitution enshrines the right to effective counsel. U.S. Const. amend. VI. An attorney provides ineffective assistance of counsel when his or her representation does not meet reasonable professional standards. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* outlines a two-prong test to determine an attorney's ineffectiveness. *Strickland*, 466 U.S. at 687. First, counsel's representation must fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687. Second, this ineffective performance must have prejudiced the defense. *Strickland*, 466 U.S. at 687.

14. This requires establishing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Osley v United States*, 751 F3d 1214, 1222 (11th Cir 2014).

15. The well-known standard for ineffective assistance of counsel articulated in *Strickland* applies to appellate proceedings as well as trial proceedings. *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001). The *Strickland* standard as outlined here is applicable to all the arguments that follow.

ARGUMENT AND MEMORANDUM OF LAW

POINT I

MR. DACORTA WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL WHEN HIS ATTORNEYS FAILED TO ARGUE THAT THE ATTORNEY-CLIENT PRIVILEGE COULD NOT BE WAIVED BY THE RECEIVER AND WHEN THEY FAILED TO ASSERT THE PERSONAL PRIVILEGE OF MR. DACORTA.

Defense Counsel Failed To Object To The Transfer Of The Receiver's Waiver Of Attorney-Client Privilege From The Civil Case To The Criminal Case.

16. A civil proceeding had been commenced against Mr. DaCorta on April 15, 2019. (*See Commodities Futures Trading Comm. v. Oasis Int'l Grp., Ltd. et al*., Case No. 8:19-cv-886-VMC-SPR, Doc. # 1, hereinafter "the "CFTC Action." DaCorta signed a consent (CFTC Action

Doc. # 35-3) to entry of the order of the District Court in the civil proceeding, which bestowed upon the receiver the right to waive attorney-client privilege on behalf of the corporation for limited purposes. (CFTC Action Doc. #44).

17. At the pre-trial hearing and at trial, defense counsel failed to argue that relinquishing the right to waive attorney-client privilege in a civil proceeding for the purpose of pursuing claims should not transfer to and be applicable in a criminal proceeding.

18. The parties relied on *Commodity Futures trading Com'n v. Weintraub*, 471 U.S. 343 (1985) to assert that the receiver had the right to waive the attorney-client privilege in a criminal case. In that case, the Supreme Court held that where the CFTC filed a petition against a corporation and on that same day the sole director of the corporation consented to the appointment of a receiver and consented to the receiver filing a petition for bankruptcy.

The Facts Of This Case Are Distinguishable From Weintraub.

19. When DaCorta signed the consent to the entry of the order appointing the receiver in CFTC action (See CFTC Action Doc. 44), the criminal action against DaCorta had not yet been commenced. That action commenced in December of 2019. Conversely, in *Weintraub*, both the consent signed by the defendant encompassed both the appointment of the receiver and the filing of the bankruptcy petition.

20. The waiver of attorney-client privilege must be intentional, and the scope of the waiver is limited to certain subject matter. See FRE Rule 502(a)(1) and (a)(2).

21. Under FRE Rule 502(a) it states *When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed*

communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.

22. DaCorta's consent to the entry of the order in the CFTC Action was intentional only within the scope of the language of that Order. (CFTC Action Doc. 44). The waiver applies only to the proceedings that the receiver might pursue for the purpose of regaining assets for the receivership. It did not apply to a criminal proceeding.

23. It is impossible to interpret DaCorta's consent as an intentional waiving of the privilege as is required under FRE Rule 502(a) in the criminal context because there was no criminal case at the time.

The Language Of The Order Appointing The Receiver Limits The Authority To Waive The Attorney Client Privilege To The Pursuit Of Assets For The Receivership.

24. The order appointing the receiver limits the power to waive the attorney-client privilege to the context of his pursuit of claims for the receivership.

25. In *United States v. Sanmina Corp.*, 968 F.3d 1107, 1117 (9th Cir. 2020), the Court addressed the concept of subject matter waiver of the attorney-client privilege. It was held that under the subject matter waiver, disclosure of information resulting in the waiver of the attorney-client privilege constitutes waiver only as to communications about the matter actually disclosed. See also *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) holding that voluntary disclosure of the content of a privileged attorney communication constitutes waiver as to communications on the same subject.

26. Here, the language in the order authorizing the receiver to waive the privilege is contained in a section of the order entitled "Investigate and Prosecute Claims." (CFTC Action Doc. 44 pages 16-17).

27. Even if DaCorta were aware that he was signing away the authority to waive attorney-client privilege, which is unlikely given the complexity of the 22 page document, he would have believed that the authority to waive the privilege was applicable only in situations where the receiver was pursuing assets to be taken into the receivership.

28. In fact, there is no language within the order appointing the receiver, express or implied, that authorizes the receiver to waive attorney-client privilege in a criminal proceeding.

Defense Counsel Failed To Object To The Conflict Of Interest That Existed For The Receiver Whereby The Receiver Was The Alter Ego Of The Prosecuting Authority.

29. Defense counsel failed to argue that the receiver was too closely associated and was a parallel legal identity to the Government. The authority to waive attorney-client privilege in the context of a criminal case violated the Due Process right to a fair trial.

30. The actions and testimony of the receiver demonstrated that he was the alter ego of the prosecuting authority. He accompanied the FBI and CFTC to DaCorta's house and took possession of DaCorta's assets. (TT.194 at 4/27/22)[1]; he testified against DaCorta in the pre-trial criminal proceedings (See transcripts of Evidentiary Hearing on June 15, 2021); he testified against DaCorta at the criminal trial (See transcripts of Criminal Trial on April 27, 2022); he provided affidavits to the CFTC in their motions for summary judgment in the civil action (See CFTC Action Doc. 165-1); he brought legal actions against each and every one of DaCorta's attorneys, thwarting DaCorta's ability to retain adequate representation.

31. Not only was the receiver the alter ego of the prosecution of DaCorta, but the prosecution and conviction of DaCorta also benefits the receiver personally. He has billed millions of dollars to the receivership in exchange for his testimony and actions against DaCorta. (TT.237)

[1] TT numbers refer to trial transcripts followed by page number.

As of the date of trial, the receiver had billed $2.4 million to the receivership. It is believed that as of the writing of this motion, the receiver has billed in excess of $3 million in attorney and expert fees, all for services provided to the prosecuting authority.

32. Permitting the receiver to possess the authority to waive attorney-client privilege in the context of a criminal case recasts the waiver into a cudgel for the Government to thrash DaCorta's Due Process right to a fair trial.

Defense Counsel Failed To Object Or Assert That Mr. Anile Was Personal Counsel To Mr. DaCorta And The Receiver Had No Right To Waive The Attorney-Client Privilege That Existed Between DaCorta As An Individual And Mr. Anile As His Counsel.

33. Mr. DaCorta and Mr. Anile had a long history as attorney and client before Oasis.

34. Anile and DaCorta met in the mid 1990s and there was an extensive history of DaCorta seeking the legal counsel from Mr. Anile.

35. In the mid 1990s DaCorta sought out Anile to do a securities offering:

> Q Before we get into that, prior to this time, had you been acquainted with Mr. DaCorta?
> A A mutual friend, I don't know who, introduced us in the mid '90s. I was a lawyer, and Michael was introduced to me to help him. He had a company and he was trying to raise capital for the company, corporate finance. And he hired me as an attorney to do a securities offering which would be exempt from registration pursuant to the Securities and Exchange Commission rules.
> Q And so you had done some legal work for Mr. DaCorta previously?
> A Yes.
> (T.89 at 4/25/22)

36. Sometime in the early 1990s, Mr. DaCorta again consulted Mr. Anile as attorney to assist in raising funds for a brewing company called Empire State Brewing:

> Q Who did you call to seek legal advice?
> A That would be Joseph Anile.
> Q How did you come to learn about Joseph Anile?
> A I was with an investment firm who was interested in taking a look at the beer brand. And they had recommended that I call him because I told them, you know, what I was planning on doing, and they told me that he would be the type of attorney I would need.

(T.210 at 4/29/22)

37. In 2008, DaCorta hired Mr. Anile to file for bankruptcy:

> Q Did you hire an attorney to assist you in that bankruptcy?
> A I did.
> Q And who did you hire?
> A Well, at first I called Mr. Anile again and I asked him his advice.
> Q Let me stop you right there. You mentioned that you called Mr. Anile. There had been some time since you had spoken to him, had it not?
> A No. He actually sets up -- yeah. He sets up -- he set up ICT and the DaCorta Group in 2002 for me.
> Q Did Mr. Anile represent you in the bankruptcy?
> A No.
> (T.225-226 at 4/29/22).

38. Again, in the early 2000s, DaCorta hired Anile to set up a company named ICT:

> Q Before we get to the agreement, why Joe Anile?
> A Joe Anile had set up ICT. And Joe was probably at that time someone that I knew of that was one of the best corporate and financial attorneys that I knew.
> (T.239-240 at 4/29/22).

39. In 2012, DaCorta hired Anile as his attorney to assist in creating a hedge fund:

> Q Did Mr. DaCorta ask you to do any other work for him?
> A We were anticipating that answer, the answer that you see here, the denial of the claim. So Michael suggested that I help set up a hedge fund.
> (T.93 at 4/25/22)

40. In 2015 DaCorta consulted with Anile to set up Oasis. DaCorta testified about his relationship with Anile:

> Q Was he someone that you trusted?
> A Oh, absolutely.
> Q Did you rely on his counsel, his advice that he was giving you regarding the NFA informal agreement?
> A Absolutely, 100 percent.

41. DaCorta trusted Anile as his counsel. He asked him to be partner in the new business venture and counsel for DaCorta and the corporation.:

> Q In brainstorming the company that you wanted to form, how did you envision your role in this new company?

> A Well, I envisioned that I would take care of the investment end of it, Joe would take care of the legal end of it, and Ray would take care of the marketing end of it.
> (T.244 at 4/29/22)

42. Mr. Anile had been Mr. DaCorta's go-to attorney for at least 20 years before Oasis was formed. DaCorta went to Anile with every legal issue even when DaCorta's daughter had some personal problem in school and needed legal advice and counsel, DaCorta went to Mr. Anile.

43. While Anile testified that he was not the attorney for the corporation and the Government insisted the same, Mr. Anile was collecting an annual salary at Oasis of over $200,000 plus a rent-free house. His total compensation package was close to $250,000.00 per year.

44. Anile worked his entire career as an attorney at law firms in New York City. See transcripts pgs. 76-78 on April 25, 2022 Anile testified his singular skill was as an attorney.

45. At Oasis, Anile didn't participate in trading for Oasis; he didn't do sales; he didn't do marketing; he didn't do bookkeeping or accounting; he did not interview or recruit employees.

46. Why was Joseph Anile being compensated in the range of $250,000 per year to work at Oasis?

47. While Anile vociferously denied being the attorney for Oasis, it is more than curious that Anile never testified as to precisely what he did at Oasis. There was no testimony as to what his daily tasks were or what his responsibilities were.

48. Anile was asked to be part of Oasis, and he worked at Oasis providing legal counsel of all types. Much like an in-house counsel, Anile sought out and hired other attorneys for Oasis. (See TT.89 at 4/25/22; T. 97 at 4/25/22; TT.103 at 4/25/22; T.104 at 4/25/22); he handled the attorney's trust account for OIG (TT.144 at 4/25/22); he handled contracts for Oasis (TT.113 at 4/25/22; TT.213 at 4/25/22; TT.261 at 4/25/22).

49. Most importantly, DaCorta went to Anile with any and all legal issues whether personal or corporate. During a pre-trial hearing, the fact that DaCorta went to Anile seeking advice regarding an issue that his daughter was having in college is highly indicative that DaCorta viewed Anile as his personal counselor.

Defense Counsel Failed to Object To Anile's Testimony That Violated The Personal Attorney-Client Privilege That Existed Between DaCorta And Anile.

50. At trial, Anile testified about two private conversations he had with Mr. DaCorta. Both of the conversations fell within DaCorta's personal attorney-client privilege and were not covered by any waiver of the privilege by the receiver. The nature of the communications and the circumstances under which DaCorta communicated with Anile indicate that this was a privileged communication where DaCorta was seeking confidential legal counsel.

51. The attorney-client privilege protects certain communications between a client and their attorney and is designed to encourage open and honest communication.

52. The party invoking the attorney client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential. *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991). To show that a communication is privileged, it must be made confidentially, in a professional capacity, for the purpose of securing legal advice. The key question is whether the client reasonably understood the conference to be confidential. See *Schaltenbrand*, *supra*.

53. The Eleventh Circuit has consistently held that the incriminating nature of the communication may create in the client a reasonable expectation of confidentiality. *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992). Referred to as the "last link" doctrine, it extends the attorney-client privilege to non-privileged information when the incriminating nature is

indicative of the professional relationship. *In re Grand Jury matter No. 91-01386*, 969 F.2d 995, 998 (11th Cir. 1992); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992).

54. In both encounters, DaCorta met with Anile covertly, one on one – a powerful indicator of an attorney-client communication:

> Q During this same trip in or about February 2017, did you meet with the defendant?
> A Yes.
> Q What happened?
> A The morning following my arrival, he rang the bell and he asked if I would go for a walk and I did. Ostensibly it was to show me the block and the neighborhood. We were just chatting. And as we were walking, he informed me that he had suffered a trading loss.
> Q He had suffered what?
> A A trading loss.
> Q Did he say how much?
> A Yes.
> Q How much?
> A He said he lost $4 million.
> Q How did you respond?
> A There had been red flags as to the possibility of losses. So his saying it to me was a little bit of a relief because I realized there would be losses and I thought they were far less than I would have thought. And I said, well, okay, we can get the partners together, meaning myself, Mike, and Ray and we can perhaps borrow the money from our own families and friends and then just shut down that aspect of the business, and we had other things going on that were very good that we could have continued with.
> Q Did the defendant agree with that proposal?
> A No.
> Q What did he say?
> A He said that would not be necessary, that we didn't have to tell Ray or anything about it, that he had it covered.
> Q Did he say what he meant by "he had it covered"?
> A Yes.
> Q What did he say?
> A He had a very specific plan of trading, and it wouldn't happen quickly. It would happen over a period of months, but he would be able to go in and out of the market and basically make up the deficit which he then referred to as a gap, a trading gap.
> Q Did you two discuss disclosing this gap to the investors?
> A No. We agreed not to discuss it with anyone.
> (T.171-173 at 4/25/22)

55. DaCorta went to see Anile at Anile's home. They went for a walk to maintain privacy. DaCorta confessed that there had been losses, that he didn't want the other partner, Ray Montie, to know. They kept the facts and the conversation outside the office, and they did not convey this information to anyone else at the direction of DaCorta.

56. The setting of the conversation, the nature of the information that DaCorta conveyed to Anile, and DaCorta's direction that the information should not be shared with anyone, even their own partner, are all factors that are indicative of the personal attorney-client relationship.

57. Anile testified as to another private conversation he had with DaCorta. In late 2018, DaCorta went to Anile's home and confessed to him, while they sat by the pool alone, that there had been more trading losses.

> Q At some point in later 2018, did you have a discussion with the defendant about the trading?
> A Yes.
> Q When?
> A Around August of '18.
> Q What did the defendant tell you?
> A Michael came to my home and we sat out by the pool and he said he had significant losses, between seven and a half and $15 million. He didn't know the amount.
> Q How much money did he say he had lost?
> A Seven and a half to $15 million.
> Q From the FX trading, the forex trading?
> A It wasn't clear to me what the total losses were an aggregate of.
> Q How did you respond to that statement?
> A I was overwhelmed. I said, this is clearly a Ponzi scheme. He said, yes, I know. And I said, well, we need to get our arms around this. And we agreed to hire an accountant who would come in and audit everything and look at all the books and records. And we wouldn't tell anyone until we had real information what we would say.
> Q You wouldn't tell anyone you didn't have real information. What do you mean?
> A Right. We didn't know -- we didn't know what the losses were, if they were accurate. That's correct. It was too much of a variable to say that number. And the company had assets that maybe had to be recalculated for fair market value. It was just we did not have a handle on the losses. Seven and a half to $15 million is not

> an accurate statement. And we agreed not to say anything and have an accountant calculate them.
> (TT.198-199 4/25/22)

58. This conversation was held outside the corporate setting; at Anile's home, one on one, by the pool as DaCorta confessed trading losses. The setting is indicative of the confidential nature of the communication. The incriminating content is indicative of the personal attorney-client relationship. See *United States v. Leventhal*, 961 F.2d at 940.

59. If Anile's testimony is to be taken as truthful, DaCorta confessed to running a Ponzi scheme, i.e. he confessed to a criminal act. This is not the statement of a corporate officer seeking the advice of in-house counsel or a discussion of business strategy.

60. DaCorta went to Anile seeking legal advice on the alleged crime. The location and setting of the communication and the incriminating nature of the information DaCorta shared is indicative of the confidential nature that was intended. The overall context of the communication established a personal attorney-client relationship between DaCorta and Anile.

61. Moreover, DaCorta seeking out Anile for legal advice is consistent with their shared histories. DaCorta had been seeking legal advice from Anile as his personal attorney for more than two decades.

62. Most importantly, the privilege established in these conversations was a personal privilege between DaCorta and Anile. It was not part of or encompassed by the waiver possessed by the receiver. The privilege in these communications could only be waived by DaCorta himself.

63. Defense counsel failed to make any objection to preserve the right to the privileged communications between Mr. DaCorta and his attorney. That failure falls below an objectively reasonable standard. There can be no doubt that Anile's testimony regarding these two conversations was fatal to the defense at trial.

Defense Counsel Failed To Object To The Legal Conclusion/Opinion Testified To By Mr. Anile

64. Defense counsel failed to object to the testimony of Mr. Anile constituting a legal conclusion. The Government asked Mr. Anile on direct whether he had ever committed a federal felony offense. Anile admitted that had already pleaded guilty to several counts and was awaiting sentence.

65. However, the Government then asked Anile to make a legal conclusion:

> Q Now, Mr. Anile, have you ever committed a federal felony offense?
> A Yes.
> Q What federal felonies have you committed?
> A Conspiracy, money laundering, and filing a false tax return.
> Q Do you see anyone in this courtroom who participated in that conduct with you?
> A Yes.
> Q Could you please identify the person to whom you are referring by pointing him or her out and describing what they are wearing?
> A Of course. Mr. DaCorta seated here wearing a brownish blazer, blue shirt, and blue silver tie.
> (T.81 at 4/25/22)

66. Defense counsel should have objected to this legal conclusion and Anile's opinion. Anile was not an expert and should not have been permitted to testify to a legal conclusion and offer his opinion to the jury. (See FRE Rules 701 and 702).

The Failure To Object To All The Arguments Raised Under Point I Constitute Ineffective Assistance of Both Trial Counsel And Appellate Counsel Under The Sixth Amendment And Strickland v. Washington.

67. The failure to object to the grounds raised under this point were a departure from professional norms and resulted in prejudice to Mr. DaCorta, depriving him of effective assistance of counsel.

68. Defense counsel's failure to object can constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), when such failure meets the two-pronged

test established by the Supreme Court: (1) the performance prong, requiring that counsel's performance fell below an objective standard of reasonableness, and (2) the prejudice prong, requiring that the deficient performance prejudiced the defense.

69. At the pre-trial hearing concerning Anile's testimony, it was decided that the receiver had the authority to waive the attorney-client privilege on behalf of the corporation only, and that DaCorta retained the right to the personal attorney-client privilege and that right was his alone to waive. In its order, the Court stated that it would decide at a time closer to trial whether there were any protectible attorney-client communications between DaCorta and Anile. (See Doc. 103).

70. Defense counsel never revisited the issue, and no objection was ever made.

71. In *Stermer v. Warren*, 959 F.2d 704, 736-737 (6th Cir. 2020), the court found that the admission of certain statements by the prosecution in closing arguments were so highly prejudicial that there was no way that the attorney's failure to object might be considered sound trial strategy. *Stermer* at 737. There, trial counsel stood by while the prosecutor repeatedly branded Stermer a liar, misrepresented her statements, bolstered the credibility of other witnesses, and called her a "diabolical, scheming, manipulative liar and a murderer." While "any single failure to object usually cannot be said to have been error," defense counsel "so consistently failed to use objections that counsel's failure cannot reasonably have been said to have been part of a trial strategy." *Lundgren v. Mitchell*, 440 F.3d 754, 774 (6th Cir. 2006) (applying the *Strickland* test for ineffective assistance); *Stermer v Warren*, 959 F3d 704, 737 [6th Cir 2020].

72. The holding and rationale in *Stermer* are applicable here. The prejudice that inured to Mr. DaCorta that stems from waiver in the civil case permitted the testimony of Anile, including the incriminating conversations between DaCorta and Anile and an alleged admission to running

a Ponzi scheme. This testimony was direct proof of one of the elements of the crimes in the indictment, and it could not have been more prejudicial to Mr. DaCorta to have his personal counsel testify to their confidential conversations.

73. Second, there is no case law that permits a receiver who was authorized in a civil proceeding to then waive attorney-client privilege in a criminal proceeding. The scope of the receiver's authority is immediately apparent within the context of the order appointing the receiver in the CFTC Action. There is no logical strategy to permit the receiver to exercise this unsanctioned power for the admission of evidence at Mr. DaCorta's criminal trial.

74. More importantly, the Government asserted that Mr. Anile was not the attorney for Oasis, and Anile denied being the attorney for Oasis. It was never asked who the "attorney" was in the receiver's waiver of attorney-client privilege. To which attorney is the receiver's waiver applicable? And what is the scope of information that the receiver's waiver would allow? These objections were never made, and questions were never asked by defense counsel.

75. Third, the issue of the personal attorney-client privilege had been raised at a pre-trial hearing where the trial court stated that it would entertain argument on this subject closer to trial. Defense counsel had an obligation to either find out what statements Anile would testify to or make the appropriate objection at trial. The two highly incriminating conversations were admitted at trial without objection or assertion of DaCorta's personal attorney-client privilege.

POINT II

MR. DACORTA WAS DEPRIVED OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL WHEN HIS ATTORNEYS FAILED TO OBJECT AT TRIAL AND RAISE ON APPEAL THE TESTIMONY OF RECEIVER BURTON WIAND.

76. Mr. DaCorta's trial attorney failed to object to the testimony of the receiver at his criminal trial on the following grounds: 1) he failed to object to the opinion testimony of the

receiver regarding the nature of Oasis; 2) he failed to object when the receiver testified to the fact that another U.S. District Court found that Mr. DaCorta and Oasis had committed fraud; 3) he failed to object when the receiver testified that he confiscated all the assets of Oasis and Mr. DaCorta pursuant to a finding of fraud by another U.S. District Court; 4) he failed to object when the receiver committed a Confrontation Clause violation and testified to the expert findings and opinions of an accounting firm that were not his own findings and conclusions; 5) Most importantly, there was no objection to the relevance of the receiver's testimony because it did not touch upon any proof of the elements of the crimes alleged against Mr. DaCorta.

Mr. DaCorta Was Deprived Of Effective Assistance Of Counsel When His Trial Attorney Failed To Object To The Opinion Testimony Of The Receiver.

77. The receiver offered his opinion about the activities of Mr. DaCorta and Oasis that went directly to the ultimate issue to be decided. He stated that the financial activities of Oasis were fraudulent conveyances, that Mr. DaCorta was running a Ponzi scheme, and that DaCorta had committed acts of fraud. Defense counsel made no objection.

78. Under FRE Rule 702, an expert witness may give testimony in the form of an opinion. However, the receiver was not an expert. Even the testimony of expert witnesses is confined by Rule 704(b), which states in a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone. *United States v. Goodman*, 633 F.3d 963, 968-969 (10th Cir. 2011).

79. The receiver's testimony was not admissible as lay-opinion testimony under FRE Rule 701. In order for it to be admissible under Rule 701 it must not be based on scientific, technical, or other specialized knowledge under Rule 702. Wiand testified he relied on numerous experts.

80. He hired the Kapila accounting firm to go through all the financial records of Oasis to verify the money that came in and out of the company (TT.217 at 4/27/22); he hired retail marketing agents to market the real estate (TT.223 at 4/27/22); he hired an IT consulting firm called E-Hounds, experts in forensics (TT.211 at 4/27/22). He was not an expert and under 701 he may not offer opinion testimony by merely regurgitating the opinion of the experts he hired.

81. Courts have repeatedly warned against lay opinion testimony that risks usurping the jury's role as the ultimate fact-finder. In *United States v. Fulton*, the Third Circuit noted that while Rule 704(a) permits ultimate issue testimony, such testimony is inadmissible if its primary value is to dictate a conclusion to the jury. *United States v. Fulton*, 837 F.3d 281 (2016). Similarly, in *United States v. Diaz-Arias*, the First Circuit highlighted that lay opinions on ultimate issues rarely meet Rule 701(b)'s helpfulness requirement because the jury is equally capable of drawing conclusions. *U.S. v. Diaz-Arias*, 717 F.3d 1 (1st Cir. 2013).

82. Under *Strickland*, defense counsel's failure to object to improper lay opinion testimony can constitute deficient performance if the testimony violates evidentiary rules and prejudices the defendant. In *United States v. Glover*, the D.C. Circuit found that defense counsel performed below constitutional standards by failing to challenge lay opinion testimony interpreting recorded statements. The court emphasized that Rule 701 requires lay opinions to be rationally based on the witness's perception and helpful to the jury. Counsel's failure to object to this testimony at trial and on appeal was deficient. *United States v. Glover*, 872 F.3d 625 (2017).

83. The receiver testified as to his opinion that went directly to the ultimate issue.

> Q Mr. Wiand, were you also charged with evaluating the Oasis entities themselves?
> A I was, absolutely.
> Q For what purpose?
> A Well, when a receiver is appointed in this kind of case, you might think that should be the case, but the receiver's job is not to go in and say, okay, I'm a

liquidator. The receiver's job is to go in and look at the business and see should this thing be liquidated or is this thing something that can live. And so I need to, as part of my task, do an evaluation based upon the records of the business and the information I gathered to determine whether or not it was a viable business. And I did that with respect to the Oasis entities.
Q And what was your determination?
A My determination was that the Oasis entities was not a viable business, and indeed it was a Ponzi scheme.
(TT.232-233 at 4/27/22)

84. Whether there was a Ponzi scheme was Wiand's opinion, which usurped the jury's fact finding authority. FRE Rule 704(b).

85. Mr. Wiand offered other opinions:

Q Did you institute any legal action, civil legal actions in connection with your duties as receiver?
A Yeah. I instituted a number of legal actions. As part of being a receiver, you look for assets of the receivership. And claims against third parties are assets of the receivership. So I bring claims in order to get more money into the receivership. Examples in this case are I have instituted a claim against Mr. Montie who was one of the three partners in Oasis because we had claimed that he had breached his fiduciary duties to the company. I have instituted a claim against Fund Administration or Mainstream that was the -- they did – as Fund Administration, they issued the checks, they received the money in. And based upon what they saw with respect to money coming in and going out, knowing that this was an investment company and never receiving any money from any investments, we charged that they had knowledge that this was a scheme, an investment scheme…
(TT.233-234 at 4/27/22)

86. The testimony that this was an investment scheme was Mr. Wiand's opinion as to the ultimate issue. Defense counsel objected on grounds of foundation and relevance but never to the lay opinion that was directed at the ultimate issue.

87. The receiver offered further opinion:

MR. WIAND: We also instituted lawsuits that involved -- I don't have the exact number -- but a hundred people who are – what is known as claw back lawsuits. And in a receivership, I'm obligated to go out and seek the return of any monies that are owed to the receivership. If an individual invests in one of these schemes and --
MR. ALLEN: Objection. 403.
THE COURT: Well, overruled.

A -- they receive back more money than they invested, the law says that that additional money that they received is what's called a fraudulent conveyance, and I am entitled to seek the return of that money.
(TT.235 at 4/27/22)

88. The testimony that this was a fraudulent conveyance and what the law says is opinion.

89. The receiver continued to offer opinion testimony:

Q Because you don't know what the future is going to hold regarding the market?
A That is not my job.
Q Correct.
A And this was not -- this was a Ponzi -- I mean, this was a forex scheme. It was not involved with -- it wasn't a REIT. It wasn't a real estate investment trust.
Q Well, there has been no finding in either the criminal matter or the civil matter that this was a forex scheme; isn't that correct? Judicial finding by a jury in either matter, correct?
A I don't think a jury has found that, but I think you might find in some of Judge Covington's orders that the evidence presented to her, she made the determination that it was a Ponzi scheme.
Q Preliminary matters, correct?
A They were -- as the motions went forward in the proceeding, I think she has made that determination but, you know, it is not a final end judgment against Mr. DaCorta, no.
(TT.269 at 4/27/22)

Q Okay. There has been no finding of guilt or innocence as to the allegations that are lodged against Mr. DaCorta as to whether or not he was involved in a scheme to defraud, correct? You don't get to decide whether or not Mr. DaCorta is guilty of a scheme to defraud, do you?
A It's incumbent upon me in making my decisions as a receiver to determine whether or not this was a Ponzi scheme and whether or not he directed it. And I made that determination, and it is yes.
(TT.270. at 4/27/22)

90. The testimony that this was a Ponzi scheme, a Forex scheme, and that another U.S. District Court judge opined on the fraudulent nature of Oasis was improper under Rules 701, 702, and 704.

Defense Counsel Failed To Object To The Receiver's Testimony That Introduced The Findings Of Another U.S. District Court That There Had Been Fraudulent Activity, Once Again, Usurping The Fact Finding Authority Of The Jury And Depriving Mr. DaCorta Of Effective Assistance Of Counsel.

91. The receiver testified as to the alleged findings of the U.S. District Court in the civil proceedings with the CFTC, i.e. the CFTC Action, again, usurping the fact finding authority of the jury without objection from defense counsel.

92. The receiver testified that Judge Covington found that there was a Ponzi scheme or that there was fraud and that he was confiscating assets of Mr. DaCorta and Oasis based on the findings in the CFTC Action.

> Q What does it mean to serve as a receiver?
> A Well, a receiver can be many things. In mortgage foreclosures and things of that nature on a big building oftentimes when the parties are in dispute, the Court will appoint a receiver to manage the property until that is resolved. In this type of receiver, it's called a federal equity receivership. And in civil enforcement actions by regulatory agencies where they show to the Court that there is a business that is involved in fraudulent activities, oftentimes the relief, part of the relief they will seek is the appointment of a receiver.
> (TT.195 at 4/27/22)

93. This was a direct message to the jury that another court already found the conduct of DaCorta and Oasis to be fraudulent and ordered that Wiand confiscate their assets:

> Q And without getting into the details, what was your purpose in having this conversation with Mr. DaCorta?
> A My purpose was twofold or threefold maybe. It was, Number 1, to explain to him who I was and what my position was and to explain to him what my job was as receiver and what my authorities were. And I provided him a copy of the receivership order and went through that and talked to him about what it meant and that kind of thing, explained to him that with respect to the house and other assets that I now control those.
> (TT. 204)

94. The receiver testified that pursuant to a federal court order he confiscated all the real estate owned by Oasis:

> Q Mr. Wiand, did you go to any other locations on April 18 of 2019 in connection with your receivership duties?

A I did not. I went -- after we left Mr. Duran's house, we went downtown. There were some other people from the CFTC who were there going to other houses and residences and an office. And we had lunch and a meeting there to talk about what we had seen and found.
Q Were the other CFTC individuals in the area who went to the other residences, were they doing effectively the same thing you had done at Mr. DaCorta's residence and the house
where Mr. Duran was living?
A It's my understanding that's what they were doing, yes.
(TT.207-208 at 4/27/22)

95. The receiver testified that a federal court ordered that all Oasis records be turned over to him.

MR. WIAND: And the Court's order directs that all records be turned over to me. And any financial institution that has dealt with Oasis or related companies, that they were obligated to turn all of their records over to me also. So we bring in all of those records.
(TT.211 AT 4/27/22)

96. The receiver testified that he sold off all the assets of Oasis with the approval of Judge Covington in the civil action:

MR. WIAND: When I presented the price to the Court, then I present an average of the opinions of the real estate professionals, the sales price has to be within 30 percent of that. It can't be lower than 30 percent of that average opinion price. In this situation, everyone was over that price. And so then the Court evaluates that and approves it and then we close the transaction.
Q Did you have to get three separate valuations from real estate professionals for every one of these properties?
A Every one of them, yes, ma'am.
Q And did you present all of that information to the Court?
A It was all approved by Judge Covington.
(TT. 224 AT 4/27/22)

97. The receiver further testified that he instituted legal actions against numerous entities to claw back money to the receivership. He obtained judgements and legal findings of fraud that settled for millions of dollars. (T.234-236 at 4/27/22). This was a direct message to the

jury that not only did a federal judge make a finding of fraud, but numerous other courts also made findings of fraud, usurping the fact finding authority of the jury.

98. The receiver testified as to the findings of Judge Covington:

> Q Well, there has been no finding in either the criminal matter or the civil matter that this was a forex scheme; isn't that correct? Judicial finding by a jury in either matter, correct?
> A I don't think a jury has found that, but I think you might find in some of Judge Covington's orders that the evidence presented to her, she made the determination that it was a Ponzi scheme.
> (TT.269 at 4/27/22)
>
> ---
>
> Q Okay. There has been no finding of guilt or innocence as to the allegations that are lodged against Mr. DaCorta as to whether or not he was involved in a scheme to defraud, correct? You don't get to decide whether or not Mr. DaCorta is guilty of a scheme to defraud, do you?
> A It's incumbent upon me in making my decisions as a receiver to determine whether or not this was a Ponzi scheme and whether or not he directed it. And I made that determination, and it is yes.
> (TT.270 at 4/27/22)

99. This testimony effectively precluded the jury from making any factual determination. The jury was presented with a finding of fraud by a federal court and numerous other courts according to the testimony of the receiver.

100. Mr. DaCorta was deprived of the right to effective assistance of counsel when his attorney failed to object to the opinion testimony and various court findings that there was a Ponzi scheme and that fraud had been committed.

Mr. DaCorta Was Deprived Of Effective Assistance Of Counsel When His Trial Attorney Failed To Object To A Confrontation Clause Violation In The Receiver's Testimony.

101. The receiver testified that he hired and relied on the findings of numerous experts during his tenure as receiver. For financial matters, he relied on the Kapila Accounting Firm, which tracked deposits, withdrawals, and the overall activity in Oasis accounts. He testified that

Kapila provided him with a report summarizing all of Oasis's financial operations. His testimony was that the Kapila Firm prepared a report for him with specific findings regarding the financial workings of Oasis.

102. The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause protects a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom. The Clause bars the admission at trial of an absent witness's statements unless the witness is unavailable, and the defendant had a prior chance to subject the witness to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177.

103. The Supreme Court has clarified that when an expert witness conveys the statements of an absent analyst as the basis for their opinion and those statements are relied upon for their truth, the Confrontation Clause is implicated. In *Smith v. Arizona*, the Court held that testimonial statements from an absent analyst, even if presented as the basis for an expert's opinion, are admitted for their truth and therefore require the opportunity for cross-examination. The Court emphasized that the Confrontation Clause bars the admission of such statements unless the defendant has had a prior opportunity to cross-examine the original analyst. *Smith v. Arizona*, 602 U.S. 779 (2024).

104. Just as in *Smith v. Arizona*, the testimonial nature of the report prepared by the Kapila Accounting Firm formed the basis for the opinion and factual assertions made by the receiver in his testimony. In fact, the report was prepared at the direction of Mr. Wiand where he asked the Kapila Firm to make certain analyses and conclusions. (See Exhibit A – the Kapila Report). The receiver's testimony was merely a regurgitation of the conclusions in the Kapila report.

105. The Kapila Report contains the same numbers testified to by Mr. Wiand, the same conclusions regarding beginning bank account balances, total credits/receipts, total debits and disbursements, and ending bank account balances.

106. Most importantly, the Kapila Report makes conclusions about the finances of Oasis. The Report does a Ponzi analysis and concludes that Oasis was a Ponzi scheme; the Report does an analysis of the Oasis trading accounts, a reconstruction of Oasis bank accounts, cash flow charts and makes conclusions and opinions. The conclusions and opinions contained in the Kapila Report are the same conclusions and opinions testified to by the receiver, except one, which the receiver left out of his testimony.

107. In footnote 27 of the Kapila Report at page 17, the forensic experts conclude that some lenders made more money than they put in. The Kapila Accounting Firm, preparer of the Report and consistent beneficiary of the Wiand receivership[2], does not state how many lenders made more money than they invested.

108. The receiver relied entirely on the information in the Kapila Report, and he testified as to the opinions of the expert forensic accountants. The report was prepared for litigation purposes, and it is testimonial evidence under a Confrontation Clause analysis. Mr. DaCorta had the right to Confront the author of the Kapila report – the person who made those findings, opinions, and conclusions – at trial and cross-examine them as is his right under the Confrontation Clause of the Sixth Amendment.

109. The receiver testified that he consistently hires the Kapila Accounting Firm:

> Q Did you, in carrying out your duties as a receiver, rely exclusively on Mr. Paniagua's accounting of the lender accounts?
> A No.
> Q What did you do?

[2] Mr. Wiand testified that he consistently hires the Kapila Accounting Firm to do forensic work in his receiverships. See pgs 217-218 at trial transcripts on 4/27/22.

A Well, in order to determine with this kind of particular entity, relying on the records of this, you have to verify what you are seeing. I had the Kapila firm go through the bank account records and take all checks in, checks out to verify what money came in and what money went out in order to determine if these representations that you see here appeared reasonable.
(TT.217 at 4/27/22)

Q And you mentioned the Kapila firm; is that right? Who is that?
A It is one of the premiere forensic accounting firms in the state and has a national reputation. The primary partner I deal with is a fellow named Soneet Kapila, and his staff.
Q Were you able to determine how much money came into Oasis through the investors and lenders?
A I believe it was something like $88 million.
(TT.218 at 4/27/22)

110. The receiver relied on the Kapila Accounting Firm for all the numbers and forensic financial data in his testimony:

Q Were the records that were collected by you and your team in this case, the civil case, voluminous?
A Very much so.
Q Did you hire any other individuals to provide any specific services?
A Yes. In collecting this, the people I have spoken about so far were lawyers. A lot of this is collecting and analyzing the numerical and financial data with respect to this. And I have a couple of different companies that I use who are forensic accountants who are adept at helping me examine these schemes and pull together the information. In conjunction with me and under my supervision doing what I want to do, they go out and go through all of the bank accounts and all of this information and prepare information with reports that they collect. And I review them with them, and we put them together so that we have a picture of the financial activity and what took place relating to the Oasis International Group and all of its related entities.
(TT.211-212 at 4/27/22)

111. The receiver's testimony concerning account analysis and funds present drew the same conclusions contained in the Kapila Report.

112. At page 3 of the Kapila Report it states: "The Receiver has asked KM to opine on: (a) Whether or not the scheme operated by the Oasis Entities had attributes of a Ponzi scheme; (b) The amount of funds invested into the scheme; (c) the amount of funds lost by investors in the

scheme; (d) Whether or not the revenue generated from forex trading was sufficient for the Oasis Entitles to pay investors the promised returns; (e) The False Profits paid by the Oasis Entities paid to the following individuals: Betsy Doolin, Bradly and Carrie Kantor, David Wilderson, Elizbeth McMahon, Joseph Martini Jr., Joseph Martini Sr., Offer Attia, and Timothy Hunte. (See Exhibit A – Kapila Report pages 3-4)

113. The Kapila Report, at page 4 goes on to give a stated opinion: OPINIONS: KM's opinions are as follows: (a) From November 2011 to approximately April 2019, the scheme operated by the Oasis Entities had the attributes of a Ponzi scheme; (b) The total funds the Oasis Entities raised from the investors was approximately $83.8 Million; (c) The amount of funds lost be investors was at least $53.4 million; (d) The revenue generated from forex trading was insufficient for the Oasis Entitles to pay the promised return to investors; (e) False Profits were paid to several individuals. (Exhibit A pg. 4).

114. The receiver's testimony repeated the findings in the Kapila Report: that this was a Ponzi scheme (TT.233, T.269, T.270 at 4/27/22); the receiver testified that the total funds raised from investors was approximately $80 million dollar range (TT.218, TT.245, TT.246); the receiver testified that the amount of losses was about $56 million (TT.246, T.249); the receiver testified that the revenue generated from forex trading was insufficient, i.e. a scheme (TT.269); the only thing that the receiver did not testify to that is contained in the Kapila Report was that there were profits paid to certain investors, described as false profits.

115. While the numbers that Mr. Wiand testified to at trial were slightly (very slightly) different than the numbers in the Kapila report that is because the report (Exhibit A) was issued six months before Mr. Wiand testified at trial and the numbers changed slightly as more claims came in and as money was clawed back.

116. Mr. DaCorta should have had the opportunity to cross-examine the forensic accountants that created that report on which the receiver relied to make opinions and conclusions.

POINT III

MR. DACORTA WAS DEPRIVED OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CALL AN EXPERT WITNESS TO COUNTER THE TESTIMONY OF THE GOVERNMENT'S FOREX EXPERT.

117. Mr. DaCorta was deprived of effective assistance of counsel when his attorney failed to call an expert witness regarding Forex trading to counter the testimony of the Government's Forex expert.

118. The crux of the Government's case was that DaCorta had recklessly traded in the Forex area and lost large sums of money. According to the Government, the trading was so unprofitable that DaCorta was forced to pay the interest from the incoming loans, rendering Oasis a Ponzi scheme. The only expert witness regarding Forex trading was Mr. Childers. The failure to call an expert to counter his opinions deprived Mr. DaCorta of the right to effective assistance of counsel.

119. The opinion of the Forex expert that DaCorta hired, and who was available and waiting to testify at trial, is attached hereto as Exhibit C. The testimony that the jury would have heard counters all of the significant points made by Childers at trial. See Exhibit C – Sworn Affidavit of Abe Cofnas.

120. Courts have held that trial counsel's failure to call an expert may constitute ineffective assistance of counsel if the expert's testimony is critical to the defense and its absence prejudices the defendant. In *Ferensic v. Birkett*, the Sixth Circuit affirmed the district court's grant of habeas relief where the trial court excluded the defendant's eyewitness identification expert due to a discovery violation. The court emphasized that the entirety of the evidence against the

defendant was based on eyewitness identifications, and the expert's testimony would have provided critical evidence regarding the inherent unreliability of such identifications. The exclusion of the expert's testimony deprived the defendant of a substantial defense, undermining confidence in the trial's outcome. *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007).

121. In *United States v. Nolan*, the Second Circuit found trial counsel ineffective for failing to consult or call an expert to testify about the unreliability of eyewitness identifications under egregious circumstances. The court noted that the eyewitness identification was virtually the only evidence against the defendant, and an expert could have explained the unreliability of the identification due to medical trauma experienced by the eyewitness, which was beyond the understanding of typical jurors. *United States v. Nolan*, 956 F.3d 71 (2nd Cir. 2020).

122. The United States Supreme Court found that an attorney's performance fell below an objectively reasonable standard and was constitutionally deficient under *Strickland* when the defense attorney failed to seek additional funds to hire an expert witness. The Supreme Court saw this as unreasonable under professional norms. *Hinton v. Alabama*, 571 U.S. 263, 273 (2014).

123. The jury should have heard another expert's opinion to the investment and trading strategies of Oasis, especially where the company was profitable for 21 months of the time period in question. The assertion that the trading strategy of DaCorta was an illusion that took money from one pocket and put it in the other was a false assertion. The strategy, known as a straddle, has the potential for profitability, and was profitable for almost half the time.

124. The Government's Forex expert opinion was without question the most important and devastating testimony at DaCorta's trial. His opinions went uncontested.

125. Childers only testified about a couple of trades made at Oasis to support his opinion that the straddling was an accounting sleight of hand. The jury should have heard about

the straddling strategy and how it was profitable in many of the other trades made by DaCorta. (Exhibit C – Cofnas Affidavit).

126. Instead, DaCorta's Forex expert sat idly by his silent phone, prepared, but never called to testify.

POINT IV

MR. DACORTA WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT AND MOVE TO PRECLUDE RULE 404(b) MATERIAL ADMITTED INTO EVIDENCE BY THE GOVERNMENT.

127. On three separate occasions during the trial, the Government called witnesses to testify as to other crimes, wrongs, or uncharged criminal acts alleged to have been committed by Mr. DaCorta. The Government did not provide reasonable notice of this testimony as is required under FRE Rule 404(b), and Defense counsel did not object. In each instance, the Government alleged that DaCorta committed some act, wrong, or uncharged crime that was similar to the charges in the indictment. The testimony had no probative value as to the crimes charged and was highly prejudicial.

Rule 404(b) And The Rule Against Admission of Other, Crimes, Wrongs, Acts.

128. The Eleventh Circuit has developed a consistent framework for analyzing the admissibility of evidence under Federal Rule of Evidence 404(b).

129. The Eleventh Circuit's Three-Part Test for Rule 404(b) Evidence: (1) The evidence must be relevant to an issue other than defendant's character; (2) There must be sufficient proof to allow a jury to find by a preponderance of the evidence that the defendant committed the extrinsic act; (3)The probative value of the evidence must not be substantially outweighed by the risk of unfair prejudice, and must satisfy the requirements of Rule 403. *United States v. Smirnoff*, 382 F.Supp.3d 1278 (2019).

130. Defense counsel failed to object and failed to request that a curative instruction be given to the jury.

The 404(b) Testimony.

131. There were three instances of 404(b) testimony that were not objected to by defense counsel. First, was the testimony of Deborah Oremland, an attorney for FINRA. The Government introduced a CRD report of Mr. DaCorta through this witness (Exhibit 100A and 100B at trial). (T.69 at 4/19/22). The testimony was as follows:

> Q Are there any customer complaints listed in Exhibit 100A?
> A Yes.
> Q I would like to turn your attention to page 22 and focus on, it says "SRO Arbitration." Would this be a complaint lodged against Mr. DaCorta?
> A Yes.
> Q Generally, ma'am, what were the allegations?
> A Allegations were of fraud, breach of fiduciary duty, breach of contract, and negligence.
> (T. 74 at 4/19/22)

132. The document referred to in this testimony was from 2001 (T.72 at 4/19/22). It was so remote in time that it had no relevance to this case and no probative value; yet the allegations were identical to the allegations against Mr. DaCorta: fraud, breach of fiduciary duty, breach of contract, negligence. It was introduced as character evidence to show that DaCorta was accused of fraud in 2001, therefore, he must also be guilty of committing fraud in 2022.

133. Significantly, Ms. Oremland was not called to offer any other testimony.

134. Next, the Government called expert witness Jennifer Sunu. She testified that the NFA was considering disciplinary action against DaCorta based on deficiencies found in a 2009 audit of DaCorta's old company, ICT.

135. Sunu testified that the NFA entered into an agreement with DaCorta to forego disciplinary charges against him if he agreed to withdraw from NFA membership.

136. The Government had the witness read from Exhibit 111:

> Q Ms. Sunu, just taking this -- let's take the top half of this. And can you just please read that to the jury?
> A "Whereas, in 2009, NFA conducted an audit of International Currency Traders Limited, ICT, a Forex Commodity Trader Advisor, CTA, NFA member. Whereas, NFA is considering recommending formal disciplinary action against ICT and DaCorta based on the deficiencies found in the 2009 audit of ICT. Whereas, NFA would be willing to forego recommending formal disciplinary action against ICT and DaCorta if ICT would agree to withdraw from NFA membership and not reapply for registration as an NFA member, or act as a principal of an NFA member, at any time in the future; and DaCorta would agree to withdraw from NFA associate membership and as a principal of ICT and not reapply for registration as an NFA member or associate, or act as a principal of an NFA member, at any time in the future.
>
> Now therefore, NFA does hereby agree to forego recommending formal disciplinary action against ICT and DaCorta, based on NFA's 2009 audit, and settle all issues arising therefrom."
> (T.117-118 at 4/19/22)

137. Again, the allegations against DaCorta dated back to 2009 before DaCorta started Oasis. The allegations had no probative value to any of the elements of the crimes in this case.

138. Finally, the Government put forth testimony by Mr. Anile that DaCorta had falsified a customer statement, identical to the allegations in this case:

> Q I'm not going to ask you what your brother told you, all right? Did you have a discussion with him about his concerns?
> A Yes.
> Q What, if any, action did you take based upon that discussion with your brother, Frank Anile?
> A I called Michael, and I told him that he had apparently falsified a customer.
> MS. IRVIN: Objection, Your Honor. Hearsay. This is based on the conversation that he says he had with his brother.
> THE COURT: Well, he can relate his conversation with the defendant. So to that extent it's overruled.
> BY MS. BEDKE:
> Q So Mr. Anile, what did you tell the defendant?
> A I told him that he had falsified a customer statement and that he wasn't allowed to do that. That's typically not done. He basically grossed it up or he added money back to the account that was not there. And he acknowledged that he knew that, and he told me he wouldn't do it again.
> (T.125-126 at 4/25/22)

139. Anile's 404(b) testimony contained the exact same factual allegation that the Government was making against DaCorta in the indictment, i.e. that he was falsifying customer accounts. There was no probative value to this testimony because it was a completely separate incident that had nothing to do with the allegations in the indictment. There was no reason to bring this testimony from Anile other than to show propensity to commit the crimes alleged.

140. In all three instances, the 404(b) testimony was admitted without objection from defense counsel and without a request for a limiting instruction to the jury on these other crimes, wrongs, uncharged crimes, or bad acts.

POINT V

MR. DACORTA WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT OR MOVE TO SUPPRESS THE VIDEO EVIDENCE ILLEGALLY OBTAINED BY THE FBI DEPICTING A PRIVATE CHRISTMAS PARTY THAT TOOK PLACE ON PRIVATE PREMISES.

141. Mr. DaCorta was deprived of effective assistance of counsel because his attorney neither raised in pre-trial motions nor objected at trial to the illegally obtained video and audio taken by an FBI agent at a Christmas party hosted by Mr. DaCorta. The FBI agent illegally and surreptitiously entered private property and recorded a speech made by DaCorta. That video was introduced into evidence, and no Fourth Amendment argument was made by defense counsel either prior to trial or during trial. Mr. DaCorta was denied the right to effective assistance of counsel when his attorney failed to move to suppress the illegally obtained video evidence.

The Video Recording of DaCorta At The Christmas Party Constituted A Warrantless Search.

142. In *Katz v. United States*, the Supreme Court established that the Fourth Amendment protects people, not places, and that what an individual seeks to preserve as private—even in a public or accessible area—may be constitutionally protected. *Katz v. U.S.*, 389 U.S. 347 (1967). The Court held that warrantless electronic surveillance of a public telephone booth

violated the Fourth Amendment because the petitioner had a reasonable expectation of privacy in his conversations, even though the surveillance involved no physical trespass (*Katz v. U.S.*, 389 U.S. 347 (1967)) [3]. Similarly, in *Carpenter v. United States*, the Court reaffirmed that official intrusion into a private sphere generally qualifies as a search and requires a warrant supported by probable cause when the expectation of privacy is reasonable. *Carpenter v. United States*, 585 U.S. 296 (2018).

143. In *United States v. Jones*, the Court emphasized that the reasonable-expectation of-privacy test supplements, rather than replaces, the common-law trespassory test. A search occurs when the government physically occupies private property to obtain information, as this would have been considered a "search" under the Fourth Amendment at its adoption. *U.S. v. Figueroa-Cruz*, 914 F.Supp.2d 1250 (N.D. Ala. 2012).

144. In *Gennusa v. Canova*, the Eleventh Circuit held that warrantless electronic surveillance of attorney-client privileged communications violated the Fourth Amendment, emphasizing that the proper inquiry is whether the government's activities violated privacy upon which the participants justifiably relied. *Gennusa v. Canova*, 748 F.3d 1103 (11th Cir. 2014). This principle applies broadly to situations where individuals have a reasonable expectation of privacy in their communications or activities. See also *Berger v. New York*, 388 U.S. 41 (1967) holding that a trespassory intrusion into a constitutionally protected area violates the Fourth Amendment; *Silverman v. United States*, 365b U.S. 505 (1961) sticking a microphone into a constitutionally protected area to record conversations violated the Fourth Amendment.

145. Even in a public area, the Supreme Court has held that there is a reasonable expectation of privacy where attachment of a global positioning system to a vehicle constituted a search under the Fourth Amendment, and such a warrantless search violates the Fourth

Amendment. *United States v. Jones*, 565 U.S. 400 (2012). Even in the absence of a trespass, a Fourth Amendment search occurs when the Government violates the subjective expectation of privacy that society recognizes as reasonable. *United States v. Jones*, at 414.

146. Mr. DaCorta had a reasonable expectation of privacy at a private, invitation-only event that took place in a banquet hall where the doors were closed to outsiders, and only invited guests were present – it was a private party, and DaCorta had a reasonable expectation of privacy.

147. FBI Agent Stone trespassed on private property and crashed the party.

> Q And did you do any undercover work in that investigation?
> A Yes, I did.
> Q What type of undercover work did you do?
> A Initially I tried to submit an online request for information, found no success. That was with OIG. And then I transitioned to eventually attending a Christmas party at the Ritz-Carlton in Sarasota followed by in-person meetings or telephone calls or text messages.
> Q And what year was that Christmas party in?
> A That was December 1 of 2018.
> (T.16 at 4/21/22)
> ---
> Q And could you tell the jury about how you ended up attending that party?
> A Yes. So originally I wasn't sure if the party was on a Friday or a Saturday. So myself and another undercover agent went to the Ritz-Carlton in Sarasota, Florida, on a Friday night. We learned after being in the lobby area and asking different people at the front desk, there was no party planned for OIG on Friday night but rather it was on Saturday night.
> (T.17 at 4/21/22)
> ---
> So, on Saturday night I returned with another FBI agent in a covert capacity. And upon arriving at the Ritz-Carlton, we could see that in fact there was a party planned.
> Q What were you wearing?
> A I was wearing a suit, dressed with a shirt and a necktie. This was what you would expect at the Ritz-Carlton. Everyone was dressed in attire that would be certainly suitable for what I would deem a high-end Christmas party.
> (T. 17 at 4/21/22)
> ---
> Q And did you have an invitation to that party?
> A No, I did not.
> (T.18 at 4/21/22)
> ---

Q And were you eventually able to get into that party?
A Yes.
Q And once you got into that party, did you speak to anybody?
A Yes, I did.
Q What was your cover story?
A So initially knowing that this was an event where you were invited, I originally just went up and talked to the photographer, believe it or not. And so I established a rapport with the photographer. And then once we were in and amongst others at the party, we just talked to the folks that were eating or drinking and exchanged pleasantries…
(T.18-19 at 4/21/22)

Q And as the night drew on, what happened next?
A As the guests went in to be seated at the table, clearly I did not have a seat at any of the tables. So during the formal dinner obviously they made their selections, their grouper or steak or whatever they were going to have just like you would think at a wedding reception, and folks were all seated at a table. So clearly I didn't have a seat. I didn't go inside the ballroom, but I overheard Mr. DaCorta speaking on a microphone. So I opened the door to hear what Mr. DaCorta was telling the mass of people, and I would estimate probably about 200 people roughly. And Mr. DaCorta was in front of where the band would be. They had a string band there. And Mr. DaCorta had a microphone, and at that time I started to record what Mr. DaCorta was saying.
(T.20 at 4/21/22)

Q And what have I handed you in 210A?
A There is a DVD. It's marked obviously Trial Exhibit 210A. It is initialed by me, J.R.S., and it is dated by me 4/20/22. And this represents the video recording that I took on the night of December 1 of 2018.
Q And so prior to coming in here and testifying today, did you initial that DVD?
A Yes, sir, I did.
Q And is the video recording on there a fair and accurate representation of what you observed and what you recorded at that Christmas party?
A Yes, sir.
(T.21 at 4/21/22)

148. Stone was on private property at a private event; it was invitation only; he wasn't invited. He was outside the dinner hall and opened the door to record what DaCorta was saying.

149. Stone was physically excluded, and he was trespassing into a private event without a warrant, violating a constitutionally protected space.

150. The opening of that door was a break and a search. When Stone opened that door into a private, invitation-only area and recorded video and audio, he violated the Fourth Amendment.

151. Invitations were handed out to include the desired guests, and to exclude others – others, like Agent Stone.

152. Defense counsel should have moved to suppress this video and any testimony by Agent Stone regarding the Christmas party, which the Government used over and over again at trial to demonstrate to the jury DaCorta's allegedly excessive lifestyle.

CONCLUSION

Mr. DaCorta was deprived of the right to effective assistance of counsel under the Sixth Amendment and under *Strickland v. Washington*. In each instance, defense counsel's conduct fell below the professional norms required of defense counsel, and the outcome of the trial would have been different but for the sub-standard performance of defense counsel.

Dated: September 2, 2025
New York, New York

Stephen N. Preziosi, Esq.
48 Wall Street, 11th Floor
New York, New York 10005
212-960-8267

EXHIBIT E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

----------X

MICHAEL DACORTA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

----------X

REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO MR. DACORTA'S 28 U.S.C. §2255 MOTION TO VACATE

Docket No.: 8:25-cv-1992-WFJ-CPT

PLEASE TAKE NOTICE, that upon the annexed affirmation of Stephen N. Preziosi, Esq. dated March_____, 2026 the undersigned Replies to the Government's Opposition papers and moves this Court for an Order to vacate the conviction and sentence imposed on Michael DaCorta pursuant to the Writ of Habeas Corpus pursuant to 28 USC § 2255 in that the conviction and sentence contained fundamental Constitutional error due to ineffective assistance of counsel under the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

Date: March 2, 2026

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DEFENSE COUNSEL FAILED TO ARGUE THAT THE RECEIVER DID NOT HAVE THE RIGHT TO WAIVE ATTORNEY-CLIENT PRIVILEGE IN A CRIMINAL CASE AND FAILED TO RAISE THE ISSUE OF PERSONAL ATTORNEY-CLIENT PRIVILEGE.

The government claims that the receiver may waive attorney-client privilege. The government fails to make the distinction of waiving such privilege in the civil setting versus the criminal trial. While *CFTC v. Weintraub*, 471 U.S. 343 (1985) makes it clear that a trustee in a Bankruptcy case may waive the corporate attorney client privilege, that case never spoke of waiving that same privilege at a criminal trial and it never spoke of waiving the personal attorney client privilege in a criminal trial setting.

The government's overly expansive interpretation of the waiver of that privilege paints with too broad a brush and is inapplicable in this case for several reasons: 1) there is no case law that supports the receiver's right to waive the corporate attorney client privilege in a criminal case; 2) there is no case law that supports the receiver's right to waive the personal attorney client privilege; 3) the receiver's authority is confined to those rights contained in the order that appointed him and that order does not contain any authority for him to waive either the corporate attorney client privilege or the personal attorney client privilege in a criminal case; 4) the government is now attempting an about face and claiming that Mr. Anile was the attorney for either Mr. DaCorta or for Oasis; 5) Mr. DaCorta's attorney failed to argue these points and never defined the role of Mr. Anile and failed to properly raise the issue of personal attorney client privilege.

There Is No Case Law That Supports A Trustee/Receiver's Waiver Of Either Corporate Attorney Client Privilege Or Personal Attorney Client Privilege In A Criminal Case.

The *Weintraub* case does not support the receiver's right to waive corporate attorney client privilege in a criminal case. The rationale applied by the Supreme

Court in *Weintraub* was that the trustee, in order to fulfill his obligations under the bankruptcy laws, needed to step into the shoes of corporate management in order to maximize the value of the bankruptcy estate and pursue claims on behalf of the estate. *Weintraub* at 353-354. The *Weintraub* Court held that the absence of authority to waive attorney client privilege in *Weintraub* would frustrate the bankruptcy laws. In short, the Supreme Court held that, for policy reasons, the trustee in *Weintraub* could waive the corporate attorney-client privilege so that assets could be obtained for the bankruptcy estate and so as not to frustrate the bankruptcy laws.

The objectives of the Court in *Weintraub* in permitting the waiver of the corporate attorney client privilege and the objectives of the government here in seeking the waiver of the corporate attorney-client privilege are clearly distinct. The government sought the waiver of the corporate attorney client privilege in order to obtain evidence that would lead to a criminal conviction. That is not consistent with the holding in *Weintraub*.

As previously argued in Mr. DaCorta's Amended Petition, the waiver of the attorney client privilege must be intentional under FRE Rule 502(a). Mr. DaCorta's waiver pertained to the receiver having the capacity to regain assets for the receivership estate, not with regard to a criminal proceeding where the objective was to obtain a criminal conviction.

Defense counsel failed to make this argument and failed to assert an important right to exclude evidence at Mr. DaCorta's pretrial hearings and at the criminal trial. Because the receiver's testimony at trial was particularly damaging, Mr. DaCorta suffered extreme prejudice by the inclusion of his testimony.

Under the *Strickland* analysis, defense counsel's performance fell below an objectively reasonable standard and as a result Mr. DaCorta suffered extreme

prejudice in that the outcome of his criminal trial would have been different had the testimony of Mr. Wiand been limited or excluded.

The Receiver's Powers Are Limited To The Those Contained In The Order Appointing Him.

The order that appointed the receiver gave him limited powers in waiving attorney client privilege. That authority was limited to investigating and prosecuting civil claims with regard to receivership property on behalf of the receivership estate. (See Civil Docket 8:19-cv-00886 Doc 44 paras. 41-44, heading entitled "Investigate and Prosecute Claims").

A receiver's powers in the Eleventh Circuit are strictly limited by the terms of the court order that appoints him, and the receiver cannot exercise authority beyond what is expressly granted in that appointment order. The scope of a receiver's authority must be determined by examining the specific language and provisions contained within the appointing court's order. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1186 (11th Cir. 1991).

The order appointing the receiver in this case, dated April 30, 2019, contains no authority for him to waive the attorney client privilege in a criminal case. The receiver went beyond the scope of this authority. Intervening and providing testimony against Mr. DaCorta was far beyond the scope of his authority as receiver.

Once again, defense counsel failed to argue that the receiver's authority is limited by the order appointing him. Under the *Strickland* analysis, defense counsel's performance fell below an objectively reasonable standard and as a result Mr. DaCorta suffered extreme prejudice in that the outcome of his criminal trial would have been different had the testimony of Mr. Wiand been limited or excluded.

Defense Counsel Never Narrowed The Scope Of The Privilege: What Was The Subject Testimony That Would Be Produced As A Product Of The Receiver's Waiver.

On November 29, 2021, this Court held a hearing as to whether the attorney client privilege would be waived by the receiver. Defense counsel wrongly conceded this point. It was defense counsel's obligation to point out that the receiver's authority to waive the corporation attorney client privilege is limited by the April 30, 2019 order that appointed him as receiver. The pertinent part of that order is as follows:

X. Investigate and Prosecute Claims

41. Subject to the requirement, in Section VIII above, that leave of this Court is required to resume or commence certain litigation, the Receiver is authorized, empowered and directed to investigate, prosecute, defend, intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in his discretion, and in consultation with Plaintiffs' counsel, be advisable or proper to recover and/or conserve Receivership Property.

42. Subject to his obligation to expend receivership funds in a reasonable and cost effective manner, the Receiver is authorized, empowered and directed to investigate the manner in which the financial and business affairs of the Receivership Defendants were conducted and (after obtaining leave of this Court) to institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate; the Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order. Where appropriate, the Receiver should provide prior notice to counsel for the CFTC before commencing investigations and/or actions.

43. The Receiver hereby holds, and is therefore empowered to waive, all privileges, including the attorney-client privilege, held by all entity Receivership Defendants.

44. The receiver has a continuing duty to ensure that there are no conflicts of interest between the Receiver, his Retained Personnel (as that term is defined below), and the Receivership Estate.
(See Doc 44 on Docket 8:19-cv-00886)

Defense counsel failed to raise this very fundamental concept. *Citronelle-Mobile Gatherin, Inc. v. Watkins*, 934 F.2d 1180, 1186 (11th Cir. 1991). Defense counsel's failure to argue this point and bring it to this Court's attention constituted

an error and performance that fell below an objectively reasonable standard, causing extreme prejudice to Mr. DaCorta.

Defense Counsel's Performance Fell Below An Objectively Reasonable Standard and Created Extreme Prejudice to Mr. DaCorta.

Because of defense counsel's sub-standard performance, the government was permitted to introduce Mr. Anile's testimony as to conversations that he had with Mr. DaCorta where, according to Anile, DaCorta admitted to him that Oasis was losing millions of dollars and that DaCorta knew it was a Ponzi scheme. (See Trial Transcripts April 25, 2022 pages 171-175, 198-201 Anile's testimony).

Defense counsel failed to make any inquiry as to what testimony by Anile would be permitted. This was performance that fell below an objectively reasonable standard that created extreme prejudice to Mr. DaCorta because these were admissions of criminal acts by DaCorta.

Furthermore, defense counsel failed to assert the personal attorney client privilege. As argued in the Amended Petition at paragraphs 50 to 63, these conversations were held between DaCorta and Anile one on one, in private, and had all the hallmarks of the personal attorney client privilege, i.e. the substance of the conversations, the private setting of the two conversations, the incriminating nature of the communications, the past attorney client history between DaCorta and Anile, and the reasonable expectation that such communications created a personal attorney client privilege.

The Government's Argument That DaCorta and Anile Were Merely Friends

The government argues that DaCorta and Anile were merely friends and that the conversations alleged by Anile (See Trial Transcripts April 25, 2022 pages 171-175, 198-201) was just between two friends and, therefore, not privileged. This argument has no merit. (See page 20, 22 Government's Response) DaCorta and

Anile had an attorney client relationship for decades prior to Oasis (not just back in the 1990s as the government suggests), and all the surrounding facts of their conversations testified to by Anile indicate that DaCorta was seeking his advice as an attorney. The conversation, therefore, fell into the personal attorney client privilege and, but for defense counsel's sub-standard performance and failure to argue the personal attorney client privilege, the conversations would not have been admitted and the outcome of the case would have been different.

The government's argument that DaCorta and Anile were "merely friends" requires a great transformation of Mr. Anile from personal attorney to merely a friend. That is not how personal relationships work between people. Anile was not miraculously transformed from attorney to DaCorta for several decades to a mere friend. Part of the analysis must be what DaCorta reasonably expected when he twice went to Anile's house and, according to Anile, confessed to a criminal act.

The Conversations That Demonstrate The Attorney Client Relationship

Anile's testimony was that DaCorta, on two occasions, came to his house and confessed that Oasis had suffered losses. The first time in February of 2017 where Anile alleged DaCorta came to Anile's house and confessed that there had been a $4 million loss. It bears mentioning that the government asserted at page 21 of their Response that it was DaCorta that testified that he confessed these losses to Anile. That is incorrect. DaCorta never gave any testimony about meeting with Anile and confessing losses. It was Anile's testimony that these two conversations took place. Anile testified, that in August of 2018 DaCorta came to Anile's home and confessed that there had been even greater losses. Anile testified that he believed this was a Ponzi scheme that they needed to hire an accountant.

As argued in the Amended Petition, the Eleventh Circuit has consistently held that the incriminating nature of the communication may create in the client a

reasonable expectation of confidentiality and extends the attorney client privilege to the conversations through the "last link" doctrine. *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 998 (11th Cir. 1992).

The facts of this case carry all the hallmarks of a privileged attorney client communication. The government argues that there must be actual consultation between attorney and client seeking legal advice. (See Gov. Response pgs. 20, 21). Both the February 2017 and August 2018 conversations were consultations that took place at Anile's house. Anile testified that, at Anile's suggestion, they agreed to hire an accountant to review the books and records of Oasis to perform a full audit and they agreed to keep the conversation confidential.

Anile Gives DaCorta Legal Advice After Hearing His Alleged Confession

Anile, after hearing DaCorta's alleged confession of losses, advised him to hire an auditor. While Anile's advice to hire an auditor is significant in that it constitutes the giving of legal advice under the circumstances, the most important part of Anile's testimony is what Anile did not tell DaCorta to do. After hearing that DaCorta was running a Ponzi scheme, Anile did not tell DaCorta to hire an attorney.

The significance of this cannot be underestimated. If Anile, with a lifetime of legal experience, truly believed that DaCorta had done something illegal, and if Anile was not acting as DaCorta's attorney, then he would have advised DaCorta to hire an attorney to protect himself. After all, Anile and DaCorta had known each other for decades; they were friends and business partners. Anile had moved from New York to Florida at DaCorta's invitation. He changed his entire life to become partners with DaCorta. There was a high level of trust, friendship, and partnership between Anile and DaCorta. Given the nature of this relationship, why wouldn't Anile advise DaCorta to get legal counsel?

Anile never advised DaCorta to hire an attorney because DaCorta already had an attorney, the same attorney he had been using for decades, the attorney who advised him on every business and personal decision he had made for the past 20 years. Joseph Salvatore Anile was DaCorta's personal attorney and confidant. The conversations fell neatly within the personal attorney client privilege, and defense counsel failed to argue that they fell within the personal attorney client privilege.

No Retainer Agreement Is Necessary To Establish An Attorney Client Relationship

The government argues that there could not have been an attorney-client relationship because Anile was not retained. (See Gov. Response page 21-22). The government goes on to assert that legal advice can only be explanations of statutes and case law. The government is wrong as no retainer is necessary and the view that a lawyer's role is nothing more than to explain statutes and case law is myopic at best.

Under Florida law and Eleventh Circuit precedent, an attorney-client relationship can be established without a signed retainer agreement, and evidence of such a relationship includes consultation between the parties, the client's reasonable belief they are seeking legal advice, and the attorney's provision of legal services. A formal retainer agreement is not essential to finding an attorney-client relationship, and a client need not pay a fee to form such a relationship. *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250 (2004); *Pagidipati v. Vyas*, 353 So.3d 1204 (2022); *Eggers v. Eggers*, 776 So.2d 1096 (2001).

Furthermore, the Eleventh Circuit has consistently found that communications that fall within the attorney client privilege go far beyond the interpretation of statutes and case law. The attorney-client privilege protects confidential communications made for the purpose of securing legal advice,

extending well beyond mere interpretation of statutes and case law. *U.S. v. Davita, Inc.*, Civil Case 1:07-cv-2509 (N.D. Georgia 2014). The Supreme Court in *Upjohn* emphasized that the privilege "exists to protect not only giving of professional advice to those who can act on it but also the giving of information to lawyer to enable him to give sound and informed advice." *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). This foundational principle recognizes that effective legal representation requires attorneys to gather information, analyze facts, and provide comprehensive counsel that goes far beyond simply explaining what the law says.

Clients rarely, if ever, come to an attorney and ask about the interpretation of a particular statute or case law. When clients consult with attorneys, they impart some factual scenario and the lawyer, applying his/her legal knowledge, recommends a course of action and, most of the time, never discusses a statute or case law in a consultation with a client. The government's view of client consultations lacks understanding of the attorney client consultation process.

The Crime Fraud Exception Is Not Applicable To The Conversations Between Anile And DaCorta

The government asserts that the crime fraud exception applies to the conversations to which Anile testified and, therefore, the government asserts, the attorney client privilege does not apply, and defense counsel cannot be found ineffective for failure to object to this testimony. However, the government leaps over significant parts of the legal analysis in making this argument.

The United States Supreme Court suggests that whether certain testimony or evidence comes within the crime fraud exception to attorney client privilege can first be reviewed *in camera* by the district court to determine whether the two step analysis has been fulfilled by the proponent of the evidence. *United States v. Zolin*, 491 U.S. 554, 568 (1989); see also *Cox v. Administrator U.S. Steel & Carnegie*, 17

F.3d 1386, 1418 (11th Cir. 1994). In this case, Defense counsel never asked the court to review the proposed testimony of Anile outside the presence of the jury and never made any objection to their admission. (See Trial Transcripts April 25, 2022 pages 171-175 and 198-201).

The government's analysis fails to mention this deficiency in defense counsel's actions. Defense counsel should have first asked the Court to review the proposed testimony outside the presence of the jury and then objected to the admission of this testimony, arguing that the crime fraud exception was not applicable because Anile's testimony showed that the conversations were not in furtherance of criminal acts. His advice was to hire an auditor, and that is not seeking advice in furtherance of a criminal act.

The Eleventh Circuit's Two Part Test

The Eleventh Circuit employs a well-established two-part test to determine whether the crime-fraud exception applies. First, the party seeking disclosure must make "a prima facie case showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice." *In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987).

Second, the party must demonstrate that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it. This requires showing that the communication is related to the criminal or fraudulent activity established under the first prong. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1416 (11th Cir. 1994).

Standard of Proof and Burden Allocation of the Crime Fraud Exception

The party invoking the crime-fraud exception bears the initial burden of presenting prima facie evidence that the exception exists. *In re Holdsworth*, 495 B.R. 544, 550 (2013). Once this initial showing is made, the burden of persuasion then shifts to the party asserting the privilege to give a reasonable explanation of its conduct.

Defense counsel never requested that the court perform this analysis whether *in camera* or outside the presence of the jury. While this Court suggested that Anile may have to take the stand outside the presence of the jury to determine the application of the crime fraud exception (See Hearing November 29, 2021 page 17, Doc. 112 page 17), defense counsel dropped the ball and never sought further clarification. The absence of the two-part analysis from the proceedings not only constituted ineffective assistance of counsel but was also a denial of Due Process.

THE TESTIMONY OF THE RECEIVER CONTAINED CONCLUSIONS THAT HAD NOTHING TO DO WITH ESTABLISHING MR. DACORTA'S KNOWLEDGE, INTENT, OR PARTICIPATION IN A FRAUDULENT SCHEME.

The government argues that defense counsel had no basis to object to the testimony of the receiver because it went directly to the knowledge, intent, and participation of Mr. DaCorta. However, the receiver never testified or made references to Mr. DaCorta's knowledge or intent either directly or inferentially.

As documented at pages 19 to 31 of the Amended Petition, the receiver's testimony contained opinion (as a lay witness), findings of fraud by another district court judge, and confrontation clause violations, which had nothing to do with knowledge and intent of Mr. DaCorta. No connection between the receiver's opinions or the decision in the civil case and Mr. DaCorta's mental state was established. The government presented all this testimony as conclusions for the

jury to consider. None of the receiver's testimony ever touched upon knowledge or intent of Mr. DaCorta but presented the conclusions of Mr. Wiand's accountants.

Defense counsel's failure to object to the opinions of the receiver or the admission of the fact that a civil court had concluded fraud was attorney performance that fell below and objectively reasonable standard and permitted the opinions to usurp the fact finding authority of the jury because the jury was presented with the conclusions that the issue of fraud had already been adjudicated.

Defense Counsel's Failure To Object To The Confrontation Clause Violation During The Receiver's Testimony Was Performance That Fell Below An Objectively Reasonable Standard.

Mr. Wiand testified as to the conclusions of another expert, the Kapila accounting firm. The report from the Kapila accounting firm proves conclusively that the opinions were not those of Wiand, but it was the accounting firm that came to these conclusions and Wiand was merely regurgitating them. Even a cursory inspection of the Kapila report (Exhibit A Amended Petition) shows that Mr. Wiand's testimony was virtually identical to that report. In fact, Mr. Wiand requested the production of that report with a request for specific findings.

The failure of defense counsel to object to the Confrontation Clause violation constituted performance that fell below objectively reasonable attorney performance. Mr. DaCorta did not have the opportunity to cross examine the expert witnesses that provided the conclusions of fraud that were presented to the jury. There can be no debate that such conclusions, which were never tested through the crucible of cross examination, were highly prejudicial.

Defense Counsel Was Ineffective When He Failed To Call An Expert Witness To Contest The Government's Forex Expert, Even Though A Forex Expert For Mr. DaCorta Was Standing By Waiting For The Call To Testify.

The government argues that the failure of Defense Counsel to call a Forex expert was a reasonable strategic choice. The government arguments are wrong and contain no analysis of the evidence. The testimony of the expert witness, Mr. Abe Cofnas, who was ready and waiting to testify, would have offered a different opinion of the trades and financial position of Oasis. (See Exhibit C to Amended Petition).

The government's principal argument was that the testimony would have been cumulative. This argument has no merit as his views clearly differed from the government expert. Cofnas provided an affidavit in which the distinctions between what would have been his testimony and the government's Forex expert were vastly different. Based on the dramatic differences in the Forex experts opinions, the choice not to call an expert was not reasonable by any standard.

The Promise To Call An Expert In Opening Statement Coupled With The Failure To Call The Expert Is Strong Evidence Of Ineffective Assistance Of Counsel

In *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1988), the court held that where defense counsel had promised in opening statements that an expert witness would give opinion testimony and then failed to call that witness at trial constituted ineffective assistance of counsel. This case is consistent with *Anderson*. Defense counsel made a promise in his opening statement to call an expert witness to show that DaCorta's company would be profitable and then failed to call that expert.

At page 177 of the trial transcript dated 4/18/22 defense counsel promised an expert witness to show that silver holdings of Oasis would have offset the losses:

> *You are going to hear expert testimony that when the regulatory agencies took over Mr. DaCorta's company and seized its assets, including its silver position, that in April of 2019 that 3.8 million ounces of silver was worth over $1.5 million and that in just a few months silver started to skyrocket and it went up to over 6.6 million. And in September of that same year, it continued to go up and it was worth nearly $20 million. And again by January 31 of the next year, it took a little bit of a dip, but it was still worth over $13 million. And then by August 6 of 2020, its high water mark, it*

> *would have been worth $56,506,000. How much spread revenue were they generating from their broker-dealer? Of that 22 million deposited, the total spread revenue generated over that period of time was over $51 million, more than sufficient to satisfy any 90-day demand for return of principal on the loans. The total P&L was over 62 million. And if one subtracted those two from each other, they're still $11 million, right, in the hole. Yet the spread revenue was sufficient to cover the lenders' interest every month because revenue and profit are not the same thing. And we also know, as Mr. DaCorta predicted, that that 3.8 million ounces of silver would have reversed any of the trading losses.*
> (Exhibit A PGS. 177-178 APRIL 18, 2022)

This is precisely what was in the affidavit of Abe Cofnas. The Cofnas affidavit (Exhibit C to Amendment Petition) stated:

> *Silver Bullion Purchase: Mr. Childers testified that the Oasis purchase of Silver Bullion, was somehow illegal and not part of an overall healthy risk profile. To the contrary, Oasis activity in purchasing bullion was part of its asset allocation diversification and reduced overall risk as it was not correlated with trading. The testimony that this was reckless and not conducive to risk aversion is simply not true. The silver trades were presented as being extremely large positions. Once again, the testimony cited the Silver trades as being not possible in the US. But the Oasis silver trades of 3.6 million ounces of silver, were legal as they were NOT a US based trading operation. The Oasis position in silver was vindicated because had the position been held a few months longer and not sold off by the receiver, Oasis would have turned a handsome profit.*
> (Exhibit C Amendment Petition)

However, defense counsel never called Mr. Cofnas as a witness as he had promised. The failure to call this witness, just as in the *Anderson* case, constituted ineffective assistance of counsel. see also *Ouber v. Guarino*, 293 FF.3d 19 (1st Cir. 2002); *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003).

Furthermore, defense counsel made promises of showing that the spread strategy of Oasis would be shown as a legitimate strategy. The only way he could have shown this was through the expert Mr. Cofnas because that is precisely what is in Mr. Cofnas' affidavit (Exhibit C to Amended Petition).

THE GOVERNMENT VIOLATED THE FOURTH AMENDMENT WHEN AN FBI AGENT TRESPASSED ONTO PRIVATE PROPERTY AND USED HIS CELL PHONE TO VIDEO TAPE A PRIVATE, INVITATION ONLY EVENT.

During the investigation of Mr. DaCorta, FBI Agent Stone entered a private, invitation only event hosted by Mr. DaCorta. Stone testified that he was not invited to the event and mingled in a crowded space until it was time to be seated. (Trial transcript pages 18-19 April 21, 2022). He further testified that he could not go into the room where DaCorta was speaking so he opened to door to hear and record DaCorta. (Trial transcript page 20 April 21, 2022). The illegal recording violated the Fourth Amendment and Defense counsel failed to move to suppress this evidence and failed to object at trial when it was admitted into evidence.

The failure to move to suppress the recording constituted performance that fell below an objectively reasonable standard, and Mr. DaCorta suffered extreme prejudice. The illegally obtained video was an incessant theme for the Government throughout the trial. The Government rang the "Christmas Party Bell" for the jury a dozen times every day of the trial: (T.16 at 4/19/22; T.18 at 4/19/22; T.37 at 4/19/22; T.43 at 4/19/22; T.49 at 4/19/22; T.155 at 4/19/22; T.197 at 4/19/22; T.25 at 4/20/22; T.73 at 4/20/22; T.74 at 4/20/22; T.75 at 4/20/22; T.165 at 4/20/22; T.16 at 4/21/22; T.17 at 4/21/22; T.21 at 4/21/22; T.23 at 4/21/22; T.24 at 4/21/22; T.25 at 4/21/22; T.64 at 4/21/22; T.67 at 4/21/22; T.83 at 4/21/22; T.140 at 4/22/22; T.136 at 4/25/22; T.162 at 4/25/22; T.214 at 4/25/22; T.146 at 4/28/22; T.147 at 4/28/22; T.48 at 4/29/22; T.49 at 4/29/22; T.105 at 4/29/22; T.106 at 4/29/22; T.59 at 5/2/22; T.60 at 4/2/22; T.225 at 4/29/22; T.101 at 5/3/22; T.102 at 5/3/22; T.153 at 5/3/22; T.171 at 5/3/22).

There can be no doubt that the Christmas party video was an important piece of evidence, and the failure to move to suppress caused extreme prejudice.

The Government Argues That Federal Agents Can Violate The Fourth Amendment Whenever They Want As Long As They Are Undercover.

The government argues that Agent Stone's trespass into a private area and covert recording of a private conversation did not violate the Fourth Amendment. The government is wrong. In support of their argument the government cites *Lewis v. United States*, 385 U.S. 206, 208-09 (1966) and *Hoffa v. United States*, 385 U.S. 293, 302 (1966). Neither of these cases is applicable here.

In *Lewis*, the question was whether a federal agent violated the Fourth Amendment by misrepresenting his identity. In *Lewis*, the undercover agent was invited into the defendant's home where he purchased narcotics. In this case, Agent Stone was never invited into the space where the Christmas dinner was being held. This is an important and powerful distinction in Fourth Amendment analysis.

Stone was trespassing. His testimony was that he could not enter the ballroom and he pushed open the door to record DaCorta. (See Trial transcript page 20 April 21, 2022 –*So, I opened the door to hear what Mr. DaCorta was telling the mass of people….and at that time I started to record what Mr. DaCorta was saying*). The opening of that door was an invasion into a constitutionally protected area, violating the Fourth Amendment.

The government also cites *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa*, a confidential informant gave information to federal agents. That informant, Mr. Partin, was part of Hoffa's inner group. Partin attended meetings with Hoffa inside a hotel room and relayed that information to federal agents. The Supreme Court's holding in that case has direct application here: *Partin did not enter the site by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either direct to him or knowingly carried on in his presence. Hoffa v. United*

States, 385 U.S. 293, 302 (1966). The holding in *Hoffa* supports our argument that Stone was a "surreptitious eavesdropper," who was recording the Christmas party secretly, illegally, and in violation of the Fourth Amendment.

The government argues that the Christmas party was neither closed nor confidential. (Gov. Response page 33). This is contradicted by Stone's testimony that he could not enter the ballroom because he did not have a seat; he had to push open the door because it was an invitation only event. Finally, the government asserts that Stone was in an adjacent open area connected by open doors and that he recorded what was plainly audible. (Gov. Response page 33). Again, this was contradicted by Stone's testimony where he stated that *So, I opened the door to hear what Mr. DaCorta was telling the mass of people….and at that time I started to record…* Stone could not hear what DaCorta was saying from outside the ballroom. He had to push open the door. That was a Fourth Amendment search.

The illegal Christmas party video and DaCorta speech was illegally obtained and introduced into evidence. Defense counsel's failure to move to suppress this video and to object at trial was performance that fell below an objectively reasonable standard, and DaCorta suffered severe prejudice at trial by the government's repeated references to the Christmas party as representative of the allegation that he was living a luxurious lifestyle with fraudulently obtained funds.

Dated: March 2, 2026
New York, New York

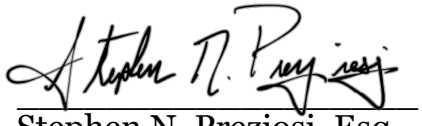

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EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In RE SUBPOENA BY A RECEIVER IN COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

-against-

OASIS INTERNATIONAL GROUP, LIMITED ET AL.,

Defendants.

24 Misc. 577 (AT)

ORDER

ANALISA TORRES, District Judge:

On January 9, 2026, the Court granted Stephen Preziosi's motion to quash a subpoena issued by the United States District Court for the Middle District of Florida, and denied a cross-motion for indirect civil contempt filed by Burton W. Wiand. *See* ECF No. 21 at 1. The Court ordered that Preziosi provide an amended privilege log to Wiand by January 23, 2026. *Id.* at 10. On January 21, 2026, Preziosi filed a letter certifying compliance with the terms of this Court's order. ECF No. 22.

The Court directed the Wiand to file any motion to further modify the subpoena and compel production of specific emails, if any dispute concerning the adequacy of Preziosi's privilege log arose, within "30 days of [Wiand's] receipt of Preziosi's privilege log." ECF No 21 at 10. Thirty days since Preziosi certified compliance with the terms of this Court's January 9 order have passed, and the Court has not received any further submission from the parties in over three months. Accordingly, the Court considers the issues raised by Plaintiff's motion to quash to be resolved.

The Clerk of Court is respectfully directed to close the case.

SO ORDERED.

Dated: April 27, 2026
New York, New York

ANALISA TORRES
United States District Judge