UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

v.

MY BIG COIN PAY, INC.; RANDALL CRATER; and MARK GILLESPIE,

Defendants,

KIMBERLY RENEE BENGE; KIMBERLY RENEE BENGE d/b/a GREYSHORE ADVERTISEMENT a/k/a GREYSHORE ADVERTISET; BARBARA CRATER MEEKS; ERICA CRATER; GREYSHORE, LLC; and GREYSHORE TECHNOLOGY, LLC;

Relief Defendants.

Case No.:
1:18-cv-10077-RWZ

DEFENDANTS AND RELIEF DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR JOINT MOTION TO DISMISS

Defendants Randall Crater and My Big Coin Pay, Inc. ("MBCPay")[1] and all Relief Defendants submit this Memorandum of Law in Support of their Joint Motion to Dismiss ("Motion"). The cryptocurrency at issue in the Complaint is not a "commodity" under the Commodity Exchange Act, 7 U.S.C. §§ 1 et seq. (the "CEA") because it is not a service, right, or interest in which contracts for future delivery are presently or in the future dealt in. Accordingly, because the Complaint does not and could not allege that CEA applies, the Plaintiff lacks jurisdiction to bring any claims against the Defendants and the Relief Defendants, there is no subject matter jurisdiction for this Court, and the Complaint does not state any claim for relief because there are no violations of the CEA. This Complaint should be dismissed.

[1] MBCPay's counsel have each filed a motion to withdraw from representation as John Roche, the owner and person in control of MBCPay, has not authorized their representation of MBCPay. This Motion to Dismiss is submitted on behalf of Defendant MBCPay, but the status of MBCPay's representation is unclear.

STATEMENT OF THE CASE

In its Complaint, the Commodity Futures Trading Commission ("CFTC") alleges that Defendants My Big Coin Pay, Inc. ("MBCPay"), and Randall Crater ("Crater") (collectively, "Defendants") operated "a virtual currency scheme in which they fraudulently offered the sale of a fully-functioning virtual currency" called My Big Coin during the period of January 2014 through June 2017. *Complaint*, ¶ 1. The Defendants allegedly misappropriated more than $6 million from at least twenty-eight customers through fraudulent solicitations by making misrepresentations about My Big Coin's "value, usage, trade status, and that My Big Coin was backed by Gold". Id. ¶ 1-2. The CFTC also alleges that the Defendants funneled the misappropriated funds through various accounts in the names of the Relief Defendants, some of whom were family members of Crater and the remainder of which were entities. Notably, there are no allegations that any futures contracts are traded on My Big Coin or on any My Big Coin derivative.

Count I alleges that the Defendants violated Section 6(c)(1) of the CEA and 17 C.F.R. § 180.1(a)(2017) ("CFTC Regulation 180.1") by engaging in Fraud by Deceptive Device. The CFTC claims that the CEA and the CFTC Regulation govern virtual currencies, such as My Big Coin, because virtual currencies are "encompassed in the definition of 'commodity'" under the CEA and CFTC Regulations. Id. ¶ 22. This definition is an essential element to the CFTC's case, as it serves as the sole basis for the CFTC's jurisdiction to bring these claims and it serves as the sole basis for the federal question that provides subject matter jurisdiction for this Court. Id. ¶ 9, 12, 22.

Count II seeks disgorgement of any funds that the Relief Defendants received from the Defendants' fraudulent conduct (or the value of those funds if they have been transferred to

third-parties). Id. ¶ 72. There are no allegations that the Relief Defendants engaged in wrongdoing.

I. STANDARD OF REVIEW

When faced with a motion to dismiss under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6), a district court, absent good reason to do otherwise, should ordinarily decide the jurisdictional issues first. See *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002) ("When a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter.") If the Court must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined by the judge. See e.g., *Miller v. Nichols*, 592 F. Supp. 2d 191 (D. Me. 2009), aff'd 586 F.3d 53 (1st Cir. 2009) (only after the Court has determined it has jurisdiction may it turn to the question of the sufficiency of the complaint).

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. See e.g. *Viqueira v. First Bank*, 140 F.3d 12, 16 (1st Cir. 1998). See also *CFTC v. Zelener*, No. 03 C 4346, 2003 WL 22284295, at *1 (N.D. Ill. Oct. 3, 2003) aff'd, 373 F.3d 861 (7th Cir. 2004) (dismissing case at preliminary injunction stage because "the Court lacked jurisdiction over the case because the trading at issue did not involve futures contracts and thus the Commodity Exchange Act did not apply"). For factual challenges to subject matter jurisdiction, the "plaintiff's jurisdictional averments are entitled to no presumptive weight; the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). See also *Torres-Negron v. J & N Records, Inc*., 504 F.3d 151, 162 n. 8 (1st Cir. 2007) ("[I]f the movant, either in his motion or in any supporting materials, denies or controverts the

pleader's allegations of jurisdiction, the allegations of the complaint are not controlling.") When adjudicating factual attacks on its subject matter jurisdiction, the court may take into account matters that fall outside the pleadings. *Valentin*, 254 F.3d at 363 ("the court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction.")

Should the Court reach the 12(b)(6) arguments herein, the complaint should be dismissed when even the most generous reading of a complaint fails to state a plausible basis for relief. *Wilson v. HSBC Mortg. Servs*., 744 F.3d 1 (1st Cir. 2014). There must be more than mere "labels and conclusions" to find that a claim is plausible on its face. *Charest v. Fannie Mae*, 9 F.Supp. 3d 114, 118 (D. Mass. 2014). That is, the compliant must "possess enough heft" to support a claim. *Hanrahran v. Specialized Loan Servicing, LLC*, 54 F. Supp. 3d 149, 153 (D. Mass. 2014). A complaint satisfies the plausibility requirement only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). But [w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief." *Id*. at 679 (internal punctuation marks omitted).

II. AS MY BIG COIN IS NOT A "COMMODITY" UNDER THE CEA, THE CFTC LACKS JURISDICTION TO BRING THIS ACTION AND THE COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR THIS ACTION.

A. OVERVIEW

The CEA's definition of "commodity" does not include the virtual currency at issue in this case, My Big Coin. The legislative history and intent of the CEA and the plain language of the relevant definitions therein prove that My Big Coin is not a commodity because it is neither a

specifically enumerated agricultural product nor a service, right, or interest upon which futures are traded. 7 U.S.C. § 1(a)(9) (emphasis added). The Complaint pays nothing more than lip service to this fundamental jurisdictional requirement, stating without any support that "virtual currencies are encompassed in the definition of "commodity" under the CEA. *Complaint* ¶ 22. This bald conclusion is not enough to survive a motion to dismiss.

The provisions of the CEA that the CFTC alleges the Defendants violated were added by the Dodd Frank Act.[2] Section 753 of the Dodd Frank Act created a new Section 6(c)(1) which provides:

> **(1) Prohibition against manipulation** It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010 . . . . 7 U.S.C. § 9(1) (*emphasis in original*).

On July 7, 2011, the CFTC promulgated a final rule under the authority granted to it in Section 6(c)(1), CFTC Regulation § 180.1, which states in pertinent part:[3]

> (a) It shall be unlawful for any person, directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:
>
> (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
>
> (2) Make, or attempt to make, any untrue or misleading statement of a material

[2] Pub. Law 111-203

[3] *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 Fed. Reg. 41398 (CFTC July 14, 2011). The rule promulgated essentially mimics the antifraud provisions contained in the Securities Exchange Act of 1934 ("34 Act") and rules thereunder. This is likely no coincidence given the plethora of case law developed under the 34 Act and its implementing regulation that the CFTC would expect courts to rely upon when the CFTC brings an action under its antifraud provisions.

> fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;
>
> (3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person . . . .[4]

Count One of the Complaint alleges that the Defendants violated Section 6(c)(1) of the CEA and Section 180.1 of the Regulations by "in connection with sale [sic] of commodities in interstate commerce, making or attempting to make untrue or misleading statements of material fact . . . ." *Complaint* ¶ 60. The Complaint alleges that the untrue and misleading statements were made in connection with the sale of only one commodity: the virtual currency "My Big Coin." *Id* at ¶¶ 1 & 59.

Aside from the thirty specifically enumerated agricultural products irrelevant to this case, Section 1(a)(9) of the CEA defines the term "commodity" to mean: all other goods and articles, . . . and **all services, rights, and interests** (except motion picture box office receipts, or any index, measure, value or data related to such receipts) **in which contracts for future delivery are presently or in the future dealt in**. 7 U.S.C. § 1(a)(9) (*emphasis added*). The definition of the term "commodity" in the CFTC's Regulations[5] is identical to the CEA's definition.

As a virtual currency, with no physical or tangible existence (see *Complaint*, ¶ 22), My Big Coin (and other virtual currencies) is not a "good" or an "article." Instead, virtual currencies represent a set of "services, rights or interests." **Per the plain language of the CEA, intangible "services, rights and interests" are only included in the CEA's definition of the term "commodity" if there are futures contracts traded on them.** The only virtual currency on which futures contracts are traded is Bitcoin.[6] Because there are no futures contracts traded on

[4] 17 C.F.R. § 180.1(a).
[5] 17 C.F.R. § 1.3.
[6] CFTC supervised bitcoin derivatives have been listed and traded since 2014. TeraExchange, a swap execution facility ("SEF"), listed bitcoin swaps on September 11, 2014. The North American Derivatives Exchange

My Big Coin, it is not a "commodity" as that term is defined in the CEA, the CFTC has no jurisdiction to bring this action, and there is no subject matter jurisdiction for this Court.

B. The Legislative History of the CEA's Definition of "Commodity" Confirms that My Big Coin is Not a Commodity.

a. Congress Initiates Regulation of Intangible Commodities

The definition of the term "commodity" in the CEA stems from the Commodity Futures Trading Commission Act of 1974 (the "1974 Act"),[7] which worked "a sweeping overhaul" of the CEA.[8] It created the CFTC and granted it extensive authority over commodity futures markets not then regulated by the CFTC's predecessor, the Commodity Exchange Authority, a division of the Department of Agriculture.

Prior to 1974, the CEA and its predecessor statutes, the Futures Trading Act of 1921[9] and Grain Futures Act of 1922,[10] specifically enumerated commodities subject regulation. As the number of commodities with futures contracts trading on them increased, Congress repeatedly amended the statute to have the new markets regulated. When Congress amended the Grain Futures Act in 1936, renaming it the Commodity Exchange Act, it extended the law's regulatory authority to cover cotton and other specified commodities. Amendments to the CEA in 1968 added more specifically enumerated commodities under the regulatory purview of the law such as livestock, livestock products, and frozen concentrated orange juice.

By 1974, it had become clear that the strategy of naming specific commodities in the CEA's definition could not keep up with the growth of the futures markets, which was expanding

[7] Pub. L. No. 93-463, 88 Stat. 1389 (1974).
[8] T. Snider & R. Bartlett, Chapter 10: United States Jurisdiction published in *The Regulation of the Commodities Futures and Options Markets* 2d ed. (McGraw-Hill Cos. 1995) § 10.01.
[9] Pub. Law No. 67-66, 42 Stat. 187 (1921). The ill-fated Futures Trading Act of 1921 was Congress's first attempt to regulate futures trading. It was meant to address speculative excesses on the grain exchanges following World War I. It based its regulatory authority on the taxing power under the Federal Constitution and was declared unconstitutional for that reason in *Hill v. Wallace*, 259 U.S. 44 (1922).
[10] Pub. Law No. 67-331, 42 Stat. 998 (1922).

to cover additional goods and services:

> While the futures markets in a number of agricultural commodities had been regulated to varying degrees since 1922, many large and important futures markets were completely unregulated by the federal government prior to 1974. These included such agricultural and forestry commodities as coffee, sugar, cocoa, lumber and plywood plus various metals including the highly sensitive silver market and markets in a number of foreign currencies.
>
> A person trading in one of the then unregulated futures markets needed the same protection afforded to those trading in the regulated markets. . . . S. Rep. 850, 95th Cong., 2d Sess. 1978; 1978 U.S.C.C.A.N. 2087, 2097 ("1978 Senate Report").

Discussions were underway concerning futures markets in such things as home mortgages and ocean freight. Accordingly, Congress considered using generic categories to define the commodities subject to the jurisdiction of the CEA. These included the phrases "all other goods and articles" to cover tangible commodities in addition to the specifically enumerated agricultural commodities, and "all services, rights, and interests" to cover the intangible commodities such as home mortgages which seemed just over the horizon to Congress in 1974.

b. Congress Limits the CFTC's Jurisdiction in Response to Concerns of the Treasury and SEC

The generic approach, however, generated concerns at the Treasury Department, SEC and other regulators. During the drafting process leading up to the enactment of the 1974 Act, for instance, Treasury wrote to Congress to express its concerns that the proposed legislation gave unnecessary jurisdiction to the CFTC over intangible commodities such as foreign currencies, and "a wide variety of transactions involving financial instruments,"[11] given the regulation of these markets by the Office of the Comptroller of the Currency and the Federal Reserve. The

[11] Letter to Herman E. Talmadge, Chairman of the Senate Committee on Agriculture and Forestry from Donald L.E. Ritger, Acting General Counsel, Department of the Treasury dated July 30, 1974 reprinted in Commodity Futures Trading Commission Act, S. Rep. 1131, 93rd Cong., 2d Sess. 1974; 1974 U.S.C.C.A.N. 5843,5885-86.

letter concluded, "[W]e strongly urge the Committee to amend the proposed legislation to make clear that its provisions would not be applicable to futures trading in foreign currencies or other financial transactions . . . other than on organized exchanges."[12]

Congress ultimately addressed the Treasury Department's concerns, in part, by including a qualifier to its jurisdictional language: "all services, rights and interests in which contracts for future delivery are presently or in the future dealt in." In other words, Congress gave the CFTC exclusive jurisdiction only of futures exchange trading of intangible commodities in recognition of the jurisdiction of other regulators over trading in the cash markets for such financial instruments.

In the Congressional proceedings leading up to the 1978 reauthorization of the CFTC, the Treasury Department again expressed concerns regarding the CFTC's jurisdiction over futures on Treasury securities and mortgage-backed securities.[13] The SEC advocated that the "services, rights and interests" be narrowed to exclude those that are securities or any security index.[14] The Senate Committee rejected the proposals. "[T]he basic conclusion reached in 1974 that there should be a single regulatory agency responsible for futures trading is as valid now as it was then."[15]

The federal courts that have addressed the meaning of the definition of a "commodity" under the CEA confirm that for a service, right, or interest to be a commodity there must be a futures contract traded on that service, right, or interest. In *Board of Trade of the City of Chicago v. SEC*,[16] the Seventh Circuit ruled that the CFTC had exclusive jurisdiction over options on GNMA mortgage-backed securities, explaining:

[12] Id. at 5886.
[13] 1978 Senate Report at 2107.
[14] Id
[15] Id. at 2110 (emphasis added)
[16] 677 F.2d 1137, 1142 (7th Cir. 1982), judgment vacated as moot, 459 U.S. 1026 (1982).

> In 1974, Congress enacted the Commodity Futures Trading Commission Act, which amended the CEA's definition of "commodity" to include "all other goods and articles, except onions * * *, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in * * *." CEA s 2(a)(1), 7 U.S.C. s 2. By this amendment, literally anything other than onions could become a "commodity" and thereby subject to CFTC regulation simply by its futures being traded on some exchange.

Further clarifying that the CEA governs the futures contracts but not the underlying securities, the District Court in *Abrams v. Oppenheimer Government Securities, Inc*., 589 F. Supp. 4, 6-7 (N.D. Ill. 1983), aff'd, 737 F.2d 582 (7th Cir. 1983) ruled that cash transactions in GNMA mortgage-backed securities were not subject to the CEA.

In sum, Congress expressly limited the CFTC's jurisdiction over financial instruments as commodities to solely where such financial instruments are traded on futures exchanges in recognition of the jurisdiction of numerous other regulators over the trading of such products in the cash markets. This limited jurisdiction has remained unchanged through the numerous amendments to the CEA, up to and including the Dodd-Frank Act.[17]

C. The Public Policy Behind Limiting to the CFTC's Jurisdiction Applies to the Intangible Commodity of Virtual Currency

Cash market transactions in virtual currency have been subject to regulation by the same federal regulators that voiced concerns regarding the CFTC's jurisdiction in 1974. As early as 2013, the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued Guidance that persons engaged as a business in administering or exchanging virtual currencies

[17] Since 1974, Congress has amended the CEA numerous times (including in the Futures Trading Acts of 1978 and 1986, the Futures Trading Practices Act of 1992, the Telemarketing and Consumer Fraud and Abuse Prevention Act, the CFTC Reauthorization Act of 1995, the Commodity Futures Modernization Act of 2000, the CFTC Reauthorization Act of 2008, and finally, the Dodd-Frank Wall Street Reform and Consumer Protection Act – Title VII – Wall Street Transparency and Accountability Act of 2010 (the "Dodd Frank Act")) Throughout each of these amendments, the definition of "commodities" as applied to intangible commodities has never been altered; intangible commodities only fall under the CEA if they are traded on a futures exchange.

were subject to its money services businesses regulations.[18] The Office of the Comptroller of the Currency launched a "FinTech Banking License."[19] In July 2017, the SEC issued a report concluding that a token sold to investors who were to share in investment profits were securities subject to the SEC's jurisdiction.[20] The SEC followed up with an administrative ruling concluding a token sale where the company issuing the tokens planned on using the proceeds raised from the sale of the token to improve its software's functionality involved the sale of a security.[21]

Congress's restriction of the CFTC's jurisdiction over intangible commodities by the futures trading requirement is as applicable today as it was in 1974 to avoid inconsistent and redundant regulation of the cash markets by the CFTC in addition to the Treasury Department, OCC and SEC.

D. Prior CFTC "Speaking Orders" Provide No Basis for the Proposition that All Virtual Currencies Are "Commodities"

The CFTC has issued three "speaking orders" in which it has declared, broadly, that virtual currencies are commodities under the CEA, but the reasoning in these orders applies solely to Bitcoin, the only virtual currency upon which futures are traded.[22] In In re *Coinflip Inc.,*

[18] FIN-2013-G001, Application of FinCEN's Regulations to Persons Administering, Exchanging or Using Virtual Currencies (March 18, 2013). FinCEN has continued to issue ever more detailed guidance and administrative rulings concluding that certain persons engaged in virtual currency business activity must be registered as money transmitters. See, e.g., FIN-2015-R001 Application of FinCEN's Regulations to Persons Issuing Physical or Digital Negotiable Certificates of Ownership or Precious Metals (Aug. 14, 2015); FIN-2014-R011, Request for Administrative Ruling on the Application of FinCEN's Regulations to a Virtual Currency Trading Platform (Oct. 27, 2014)

[19] *OCC Issues Draft Licensing Manual Supplement for Evaluating Charter Applications From Financial Technology Companies, Will Accept Comments Through April 14*, NR 2017-31 (OCC March 15, 2017) available at: https://www.occ.treas.gov/news-issuances/news-releases/2017/nr-occ-2017-31.html

[20] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Release No. 81297* (SEC July 25, 2017) Available at: https://www.sec.gov/litigation/investreport/34-81207.pdf

[21] *In re Munchee Inc.*, Docket No. 3-18304 (SEC Dec 11, 2017).Available at: https://www.sec.gov/litigation/admin/2017/33-10445.pdf

[22] Virtual Currency Backgrounder.

d/b/a Derivabit, and Francisco Riordan, CFTC Docket No. 15-29 (Sept. 17, 2015),[23] the CFTC found that the respondents had violated various sections of the CEA and CFTC regulations by providing a trading platform through which users could buy and sell options on Bitcoin without the trading platform being registered as required with the CFTC. Pertinent here, the CFTC wrote:

> Section 1a(9) of the Act defines "commodity" to include, among other things, "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7U.S.C. §1a(9). The definition of a "commodity" is broad. See, e.g., Board of Trade of City of Chicago v. SEC, 677 F.2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities. *Id*. at 3.

The CFTC was correct to claim Bitcoin was a "commodity" because at the time, Bitcoin swaps were offered for trading on TeraExchange and Bitcoin binary options were traded on NADEX.[24] In contrast, the CFTC had no basis for asserting that "other virtual currencies are encompassed in the definition and properly defined as commodities." The CFTC did not (and could not) provide support for this claim, as there have never been futures exchange trading on "other virtual currencies.".

In the very case on which the CFTC relied in Coinflip, the *Board of Trade v. SEC*, the Seventh Circuit expressly notes the futures exchange trading requirement for a service, right, or interest to become a "commodity" subject to the CFTC's jurisdiction.[25] Indeed, it is unclear why CFTC was opining about "other virtual currencies" in its Coinflip decision, as Coinflip traded only Bitcoin options. CFTC's statement about "other virtual currencies" is at best unsupported dictum in a speaking order where the respondents had no apparent reason to challenge or negotiate with the CFTC over that conclusion. Coinflip offers this Court no basis for concluding

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[23] Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf

[24] *CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets*

[25] 677 F.2d at 1142.

that My Big Coin is a "commodity" under Section 1(a)(9) of the CEA.

Even more dubious is the support offered for the proposition that My Big Coin is a "commodity" by the CFTC's In re TeraExchange LLC (CFTC Docket No. 15-33 (2015) speaking order.[26] TeraExchange involved a CFTC-registered swap execution facility that arranged for an illegal wash trade in Bitcoin swaps to occur on its trading platform. In a footnote, CFTC stated "Bitcoin is a commodity under Section 1a of the Act . . . and is therefore subject as a commodity to applicable provisions of the Act and Regulations." Bitcoin was a commodity because swaps on Bitcoin were traded on TeraExchange, a registered swap execution facility. TeraExchange offers no support whatsoever for the claim that My Big Coin is a "commodity" when there are no derivatives trading on My Big Coin.

Finally, in the third speaking order, In re BFXNA Inc., d/b/a Bitfinex CFTC Docket No. 16-19 (2016),[27] the CFTC fined Bitfinex for a margin lending program it provided to retail investors which enabled them to trade Bitcoin on margin in violation of another section of the CEA.[28] In its legal discussion, the Bitfinex order makes the same claim that the CFTC made in Coinflip: that Bitcoin and "other virtual currencies" meet the definition of a "commodity" under the CEA.[29] Other than citing its own Coinflip speaking order, however, the CFTC again offered no basis for asserting that virtual currencies other than Bitcoin are "commodities" under the CEA. Moreover, like in Coinflip, the CFTC's discussion of other virtual currencies being "commodities" is dictum. Bitfinex's margin program which violated the CEA only financed retail investors' purchase or sale of Bitcoin, not other virtual currencies.

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[26] Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfteraexchangeorder92415.pdf

[27] Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbfxnaorder060216.pdf

[28] 7 U.S.C. § 2(c)(

[29] Id. at 5-6.

These three speaking orders boil down to one undisputed conclusion: Bitcoin, the only virtual currency on which futures contracts are traded, is a "commodity." But they do not provide any support for the CFTC's claim of jurisdiction over My Big Coin.

E. CFTC v. McDonnell Is Inapposite

On March 8, 2018, the CFTC filed a Notice of Supplemental Authorities. The notice called the Court's attention to a March 6, 2018 decision of the United States District Court for the Eastern District of New York, CFTC v. McDonnell, Docket No. 18-CV-00361.[30] In the McDonnell Complaint,[31] the CFTC alleged that McDonnell had "operated a deceptive and fraudulent virtual currency scheme to induce customers . . . to send money and virtual currencies to Defendants in exchange for purported virtual currency trading advice concerning the trading of virtual currencies, **including Bitcoin** and Litecoin . . . ."Complaint ¶ 1 (*emphasis added*). Judge Weinstein granted the CFTC's motion for a preliminary injunction over the opposition of McDonnell who was representing himself *pro se*.

Although the CFTC's purpose in flagging *McDonnell* to this Court is not clear, to the extent that the CFTC intended to use *McDonnell* to advance its claim that "My Big Coin" is a commodity under the CEA, that is a misreading of the facts and of Judge Weinstein's decision. At the time the McDonnell complaint was filed, there were futures contracts trading on Bitcoin on the CBOE Futures Exchange and the Chicago Mercantile Exchange, and Bitcoin binary options listed on the Cantor Fitzgerald Futures Exchange. Moreover, Bitcoin swaps and Bitcoin binary options had been available for trading on TeraExchange and NADEX, respectively, since 2014.

[30] Available at 2018 WL 1175156.
[31] Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcdmcomplaint011818.pdf

It is undisputed that the *McDonnell* case involved Bitcoin which is a "service, right, or interest, in which contracts for future delivery presently are or in the future dealt in." Importantly, Judge Weinstein expressly acknowledges the futures trading requirement in the definition of the term "commodity": "Where a futures market exists for a good, service, right, or interest, it may be regulated by CFTC as a commodity, without regard to whether the dispute involves futures contracts."[32]

The McDonnell case does not, however, offer any support for the CFTC's assertion that My Big Coin is a "commodity" under the CEA when there are no futures contracts trading on My Big Coin.

III. Regulation Section 180.1 Was Not Intended to be Used In this Context

The legislative history of Section 753 of the Dodd Frank Act which amended Section 6(c)(1) of the CEA indicates that Congress's primary intent for giving the CFTC the additional authority provided under the new provision was to combat manipulations. The Chair of the Senate Agriculture and Forestry Committee, Senator Blanche Lincoln, explained in comments on the Senate Floor that:

> Section 753 adds a new anti-manipulation provision to the Commodity Exchange Act (CEA) addressing fraud-based manipulation, including manipulation by false reporting. Importantly, this new enforcement authority being provided to the CFTC supplements, and does not supplant, its existing anti-manipulation authority for other types of manipulative conduct. Nor does it negate or undermine any of the case law that has developed construing the CEA's existing anti-manipulation provisions.
>
> The good faith mistake provision in Section 753 is an affirmative defense. The burden of proof is on the person asserting the good faith mistake defense to show that he or she did not know or act in reckless disregard of the fact that the report was false, misleading, or inaccurate. 156 Cong. Rec., 111th Cong., No. 105 S5924 (July 15, 2010).

There is nothing in Senator Lincoln's remarks regarding fraud unrelated to manipulation.

[32] 2018 WL 1175156 at *11.

The senator's reference to the false reporting conduct further demonstrates that the thrust of Congress's intent in amending the CEA was to combat manipulation.

The CFTC's narrative explanation of its adoption of the final text of Regulation Section 180.1 is consistent with the thrust of the legislative history of Section 6(c)(1) of the CEA.

> [T]he Commission expects to exercise its authority under 6(c)(1) to cover transactions related to the futures or swaps markets, or prices of commodities in interstate commerce, or where the fraud or manipulation has the potential to affect cash commodity, futures, or swaps markets or participants in these markets. 76 Fed. Reg. at 41401.

The CFTC brushed aside fears that commenters had expressed in response to the Notice of Proposed Rulemaking that "the word 'commodity' in proposed Rule 180.1 'indicates that the rule will apply to virtually every commercial transaction in the economy'." The CFTC pointed to the limitation provided by the "in connection with" requirement in the regulation. The CFTC reasoned that the limitations put on the application of SEC Rule 10b-5's "in connection with" requirement by the Supreme Court in *SEC v. Zandford* would apply to Section 180.1: "If * * * a broker embezzles cash from a client's account or takes advantage of the fiduciary relationship to induce his client into a fraudulent real estate transaction, then the fraud would not include the requisite connection to a purchase or sale of securities."[33]

Although the complaint here alleges fraudulent misrepresentations, as set forth below, those alleged fraudulent misrepresentations are not pled with the required particularity. Without the allegations of fraud, the complaint here simply alleges embezzlement.[34] According to the CFTC's adopting release, however, embezzlement is not activity sufficiently "in connection with" the purchase or sale of a commodity in interstate commerce for the CFTC to take action under Section 180.1. For these reasons, the CFTC has failed to state a claim under Section

[33] 76 Fed. Reg. at 41406 quoting *SEC v. Zandford*, 535 U.S. 813, 825 n.4 (2002).
[34] See *Complaint* ¶¶ 4 & 45 -51.

6(c)(1) of the CEA and Section 180.1 of the regulations. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Complaint should be dismissed.

IV. The Complaint Fails to Plead Fraud with Particularity And Must Be Dismissed Since All Counts Are Based on Fraud

It is axiomatic that allegations of fraud must be pled with the particularity required by Fed. R. Civ. P. 9(b). The essential elements of a fraud claim under the CEA are that the defendant "intended to make and did make a material misrepresentation with scienter." *U.S. Commodity Futures Trading Comm'n v. Wilson,* 19 F. Supp. 3d 352, 362 (D. Mass. 2014). (internal citations omitted). See also *CFTC v. R.J. Fitzgerald & Co.,* 310 F.3d 1321, 1328 (11th Cir.2002) (noting that to establish a violation of section 6(b)(1)(A)-(C), the CFTC must prove that (1) a misrepresentation was made, (2) with scienter, and (3) that the misrepresentation was material).

Rule 9 requires "specification of the time, place, and content of an alleged false representation . . . ." *Doyle v. Hasbro, Inc*., 103 F.3d 186, 194 (1st Cir. 1996). It also requires specific facts indicating that the defendant knew that the statement was false at the time it was made. See *S.E.C. v. Patel*, No. CIV. 07-CV-39-SM, 2009 WL 3151143, at *4 (D.N.H. Sept. 30, 2009). "General averments of the defendants' knowledge of material falsity will not suffice." *Serabian v. Amoskeag Bank Shares, Inc*., 24 F.3d 357, 361 (1st Cir.1994) (citation omitted). Rather, "[c]onsistent with Fed.R.Civ.P. 9(b), the complaint must set forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading." *Serabian*, 24 F.3d at 361 (citation and internal quotation marks omitted).

Where, as here, the Complaint fails to specify the particulars of the allegedly fraudulent transactions, including the dates of the alleged misrepresentations, the identity of the allegedly defrauded parties, the defendants' knowledge that the statements were materially false or

misleading, the Complaint should be dismissed.

Furthermore, promissory statements and statements of conditions to exist in the future are not actionable as fraud. *Gerli v. G.K. Hall & Co*., 851 F.2d 452, 456 (1st Cir.1988); *Doody v. John Sexton & Co.*, 411 F.2d 1119, 1121 n. 1 (1st Cir.1969); *Bolen v. Paragon Plastics, Inc*., 754 F. Supp. 221, 226 (D. Mass. 1990). Here the Complaint falls afoul of this principle, by alleging for example, "My Big Coin has Entered into a Contract where All My Big Coins will be Backed 100% by Gold." Mere nonperformance of a promise, finally, does not support a fraud claim. *Galotti v. United States Trust Co.*, 335 Mass. 496, 501 (1957) ("Intention not to perform a promise, existing when the promise is made, cannot be shown merely by nonperformance of the promise.")

V. If the Court dismisses Count I, Count II must be dismissed as well.

Count II, the only count that applies to the Relief Defendants, cannot stand on its own, and if the Court dismisses Count I, Count II necessarily falls as well. The CFTC seeks the equitable relief of disgorgement from the Relief Defendants, relying on §13a-1 of the CEA: "In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, **on any person found in the action to have committed any violation,** equitable remedies including b) disgorgement of gains **received in connection with such violation.**" 7 U.S.C. § 13a-1. It hardly needs pointing out that if the Court dismisses Count I, there can be no violation upon which to seek disgorgement.

Relatedly, if this Court lacks jurisdiction over the My Big Coin crypto-currency because it does not fall within CEA and CFTC Regulations' definitions of "commodity", the Court also lacks jurisdiction over the Relief Defendants. Jurisdiction over Relief Defendants is wholly dependent on jurisdiction over the subject matter of the litigation. See, e.g., *Commodity Future*

Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 191-192 (4th Cir.2002) ("[b]ecause a nominal defendant has no ownership interest in the funds at issue, once the district court has acquired subject matter jurisdiction over the litigation regarding the conduct that produced the funds, it is not necessary for the court to separately obtain subject matter jurisdiction over the claim to the funds held by the nominal defendant"). As the Fourth Circuit has made clear, "a nominal defendant is part of a suit only as the holder of assets that must be recovered in order to afford complete relief; no cause of action is asserted against a nominal defendant." Id. at 192.

CONCLUSION

As "My Big Coin" is not a commodity under the CEA, the CFTC lacks jurisdiction to bring these claims, this Court lacks subject matter jurisdiction, and there is no violation of the CEA. This Complaint should be dismissed.

Respectfully submitted,

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Date: March 30, 2018

CERTIFICATE OF SERVICE

I, Laura Greenberg-Chao, certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on March 30, 2018.

/s/ Laura Greenberg-Chao
Laura Greenberg-Chao