**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**Camden**

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| Commodity Futures Trading Commission,<br><br>Plaintiff,<br><br>v.<br><br>Traders Global Group Inc., a New Jersey corporation, d/b/a "My Forex Funds"; Traders Global Group Inc., a Canadian business organization; and Murtuza Kazmi,<br><br>Defendants. | Civil Action No. 1:23-cv-11808-ESK-EAP |

# MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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*In re Foreign Exchange Benchmark Rates Antitrust Litig.*,
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**Other Authorities**

*CFTC Mission Statement*,
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Charles Schwab,
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*Paper Trading Explained*, TIME Stamped (July 9, 2023),
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Investopedia,
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Merriam-Webster Dictionary (2024),
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Webull,
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Defendants Traders Global Group Inc. (New Jersey), Traders Global Group Inc. (Canada) (together, "Traders Global" or "TGG"), and Murtuza Kazmi respectfully submit this motion to dismiss the Commodity Futures Trading Commission's (CFTC) complaint.

## PRELIMINARY STATEMENT

In the CFTC's 50-year history, it has never brought an enforcement action like this one. The Commodities Exchange Act is designed to protect retail investors when they risk their own capital in foreign currency ("forex") or commodities transactions—*real* transactions. In this case, Defendants operated a *simulated* trading platform, known as "My Forex Funds" (MFF). Platforms like MFF have existed for many years. Until now, however, the CFTC had never claimed jurisdiction over such platforms.

This action is based on an untenably expansive theory of the CFTC's authority that, for the first time, would extend the agency's regulatory and enforcement jurisdiction to simulated trading. The CFTC's claims must be dismissed for two main reasons. *First*, the alleged conduct is beyond the scope of the authority Congress gave the CFTC. The CFTC's authority extends only to fraud in connection with retail forex or commodities transactions. Because the "trading" on MFF was simulated and customers were never parties to any actual trades, no such transactions occurred here. For much the same reason, Defendants cannot be liable for failure to register

as a retail foreign exchange dealer ("RFED"). That requirement applies only to a "counterparty" to a retail forex transaction. Because there were no retail forex transactions here, there were no parties or counterparties to such transactions. *Second*, the CFTC failed to adequately plead the elements of its fraud claims. The complaint does not allege with the requisite particularity the element of materiality or, with respect to the alleged omissions, a duty to disclose. Nor does the complaint adequately allege Defendants' scienter. Under Rule 12(b)(6) and Rule 9(b), the complaint should therefore be dismissed.

## BACKGROUND

### I. MFF's Business Model

The CFTC's central claim is that Defendants engaged in a "fraud scheme involving . . . retail foreign exchange ('retail forex') and retail commodity transactions." Compl. ¶ 1. Yet the CFTC's own allegations and evidence demonstrate that MFF's business model did *not* involve retail forex or commodity transactions. To the contrary, all retail forex or commodity "transactions" on the MFF platform were *simulated*. They occurred in a simulated environment within an online trading platform that was designed to look and feel like a live trading platform, complete with a simulated account balance. Indeed, the CFTC concedes, and the Court recognized in its opinion on the CFTC's motion for a preliminary injunction, that

"substantially all customer trading" by MFF users took place in a "simulated environment." ECF No. 134 at 9–10; *see* ECF No. 130 at 104.

MFF's customers did not make actual trades in a real market. Rather, after paying a registration fee, MFF customers could access an electronic trading platform that offered simulated market conditions. *See* Compl. ¶¶ 29, 44, 49, 60 (describing MFF as "an electronic trading environment"). In other words, as the CFTC's only investigative interview—its interview of Matthew Chichester (a consultant who helped set up MFF's electronic platform)—confirmed, MFF functioned as a simulator. *See, e.g.*, ECF No. 23-43 at 45 ("It's a completely simulated environment"); *id.* at 123 (noting that rules were "set up . . . to best simulate how a trade would execute").[1] No customer accounts on MFF's platform were funded with

[1] Chichester's February 2023 interview transcript is integral to the complaint and can be considered on this motion because the CFTC relied on it in its complaint. "In deciding a Rule 12(b)(6) motion," a court may consider "undisputedly authentic documents if the . . . claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). "Even if a [c]omplaint does not *explicitly* refer to or cite [a document] . . . the critical [issue] is whether the claims in the complaint are based on an extrinsic document and not merely whether the extrinsic document was explicitly cited." *Arcand v. Brother Int'l Corp*., 673 F. Supp. 2d 282, 291–92 (D.N.J. 2009) (quotation marks omitted). A comparison of the complaint's allegations and the CFTC's preliminary-injunction motion makes clear that the complaint is "based on" the Chichester interview. *Compare, e.g.*, Compl. ¶ 56 ("The so-called 'commissions' are simply a charge against customer account equity imposed by Traders Global") *with* ECF No. 14 at 18 ("These commissions have the effect of reducing customer account equity" (citing Ex. D, Chichester Test. 172:10–177:4)); Compl. ¶ 59 ("Traders Global uses specialized software to automatically add 'delay' or 'slippage' to customer orders") *with* ECF No. 14 at 18 ("Traders Global uses a

customer money. *See id.* at 48–49. Customers paid a fee to access the platform and then "traded" only with virtual capital visible in the MFF dashboard. *See* Compl. ¶¶ 32–33; ECF No. 23-43 at 70 (Chichester noting that the "funds" customers were trading were in essence "a book entry"). For example, a customer could pay $49 for an account with $5,000 of virtual capital. Compl. ¶ 33.

Although customers could earn monetary rewards if their simulated trades were successful, the rewards were not actual "trading profits." *See* Compl. ¶¶ 4, 28–30, 72 ("Traders Global paid out approximately $137 million"); *id.* ¶ 50 ("[S]ubstantially all of these so-called profits come from fees that Traders Global collected"). Nor did customers bear trading losses. If a simulated trade was unsuccessful, the customer did not have to pay TGG or anyone else for the "loss" on the unsuccessful simulated trade. Customers were informed that if they depleted their virtual capital beyond a certain point (the "drawdown limit"), their account would be shut down. *See* Compl. ¶¶ 34–37. Customers were *not* required to replenish

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specialized software program called 'MetaTrader' to handicap customer trading by adding 'delay' or 'slippage' to customer orders" (citing Ex. D, Chichester Test. 116:20–121:7)); Compl. ¶ 88 ("Delay and slippage are applied automatically to customer accounts through the use of 'profiles' to which customers are assigned") *with* ECF No. 14 at 24 ("Delay and slippage are applied automatically to customer accounts through 'profiles' to which groups of customers are assigned" (citing Ex. D, Chichester Test. 116:20–121:7)).

their account (*i.e.*, commit additional funds) to cover trading losses, *see id.*; again, there *were* no such losses, and all a customer could "lose" was a registration fee.

The overwhelming majority of MFF customers—about 111,000 of 135,000—had only "demo" accounts. Compl. ¶ 44. The CFTC concedes that the demo accounts existed in a "purely simulated environment," ECF No. 23-43 at 45, and could generate only "simulated profits," Compl. ¶ 29. The CFTC does not suggest that "trades" in demo accounts were anything other than simulated. *See id.* And it is undisputed that customers in demo accounts *knew* they were in a simulator.

If a customer generated sufficient simulated profits at the demo stage (or enrolled in a program that bypassed the demo stage), the customer could access the next level of simulated trading, at which point the complaint alleges the customer would have the opportunity to gain access to TGG's "live trading funds" and earn monetary rewards. *Id.* About 24,000 of MFF's 135,000 customers accessed the platform at that higher level. *Id.* ¶ 44. But these customers, too—referred to by TGG internally as the "B book"—remained "in an electronic trading environment" (*i.e.*, a simulation). *Id.* ¶ 49; *see* ECF No. 134 at 9–10; ECF No. 23-43 at 45:18–49:5 (Chichester explaining that "B book" means the trade is "internalized on the platform in the same way" as "all the demo orders" and "does not go to a counterparty"). MFF incorporated certain features to make the simulated trading approximate what customers would experience in a real trading environment (for example, if they

opened and traded through a brokerage account). *See* ECF No. 23-43 at 123. These features included measures to address issues such as pricing latency and to mitigate the risk that customers could exploit the simulated nature of the trading to obtain an unfair or unrealistic advantage. *See id.* at 93:21–95:9, 113, 123:3-15, 128:8-12.

Finally, a tiny fraction of B-book customers—"fewer than 100" customers in total—allegedly "may" have been so successful in simulated trading that TGG began attempting to mirror their trading strategies by making its own trades with its own money through an external liquidity provider. *See* Compl. ¶¶ 64–66; ECF No. 23-43 at 77–80. The complaint refers to this as "straight through processing" or "STP'ing," *id.*, and these high-performing customers were referred to internally as the "A book." Even this miniscule group of customers, however, were not making their own actual trades. *See* Compl. ¶ 2. If an A-book customer executed a simulated transaction on the platform, TGG might send a replica of the trade to an external liquidity provider called CDO Markets to be executed in TGG's own brokerage account.[2] *See* ECF No. 23-43 at 77–80; Compl. ¶ 66. Thus, with respect to "A-book" trades, TGG was the trading party and CDO Markets either was the counterparty or identified a (third-party) counterparty. At no point did MFF customers themselves—whether in the demo phase, the B book, or the A book—become parties to actual trades.

[2] These real trades by TGG did not necessarily duplicate an A-book customer's simulated trades exactly—for instance, the prices or quantities might differ.

## II. Procedural History

In or before July 2022, the CFTC initiated a covert investigation of Defendants. ECF No. 23-4 ¶ 4. Over the next year, the CFTC gathered documents from third-party vendors and interviewed a single witness—Chichester, a mid-level analyst at a third-party risk management and technology consulting firm used by Defendants. The CFTC did not seek documents or information from Defendants, did not interview any of Defendants' staff members, and did not seek documents or information from any of Defendants' customers. Notably, the CFTC's initial disclosures *still* do not reflect any customers who are expected to testify at trial.

In August 2023, with no prior notice, the CFTC filed a complaint against Defendants alleging violations of the Commodity Exchange Act ("CEA") and moved *ex parte* for a statutory restraining order ("SRO"). ECF No. 1; *see* ECF No. 13 (granting SRO). On November 14, 2023, the Court issued an opinion and order substantially narrowing the SRO and granting in part and denying in part the CFTC's motion for a preliminary injunction. ECF Nos. 134, 135.

The complaint pleads five claims under the CEA and regulations thereunder. Counts I and II allege fraud in connection with retail forex transactions and retail commodities transactions. Counts III and IV allege that Defendants acted as an unregistered RFED or associated person. And Count V alleges that Defendants engaged in retail commodities transactions off-exchange.

## LEGAL STANDARDS

Under Rule 12(b)(6), the Court asks whether the plaintiff has articulated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility 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). Although courts generally "assume the[] veracity" of "well-pleaded factual allegations," *id.* at 679, "[t]he Court need not accept 'unsupported conclusions and unwarranted inferences,'" *Callaway v. Small*, 2022 WL 970214, at *2 (D.N.J. Mar. 31, 2022) (quoting *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007)); *see also Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir. 2007) ("a court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss") (citation omitted).

"For claims based on misrepresentations or omissions, a plaintiff must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)." *CFTC v. Gorman,* 587 F. Supp. 3d 24, 38 (S.D.N.Y. 2022); *see* Fed. R. Civ. P. 9(b) ("party must state with particularity the circumstances constituting fraud"). The circumstances that must be pled with specificity include "the 'who, what, when, where, and how' of the conduct giving rise to the claim." *Kowalsky v. Deutsche Bank Nat'l Tr. Co.*, 2015 WL 5770523, at *8 (D.N.J. Sept. 30, 2015). "The purpose of Rule

9(b) is [to] provide defendants with notice of the precise misconduct that is alleged and to protect defendants' reputations by safeguarding them against spurious allegations of immoral and fraudulent behavior." *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 172 n.10 (3d Cir. 2002) (quotation marks omitted)).

## ARGUMENT

### I. The Alleged Conduct Falls Outside of the CFTC's Delegated Authority.

The CFTC's claims are all predicated on its authority to police retail forex and retail commodities transactions. But that authority does not extend to simulated trading, as simulated trading does not involve any retail forex or commodities transactions. Trading simulators, also known as "paper trading" or "sim trading" systems, have existed for many years. These platforms "can look, feel, and function much like a live trading platform, complete with a sim account balance that goes up and down as you close out positions at a profit or loss. Because paper trading uses a sim account balance and not real cash, you can't make or lose any money, making it a risk-free way to hone your trading skills."[3] Until now, the CFTC has not attempted

[3] *See* Erik Haagensen, *Paper Trading Explained*, TIME Stamped (July 9, 2023), https://time.com/personal-finance/article/what-is-a-paper-trade/. Examples of other "sim trading" platforms include Charles Schwab's "virtual trading experience" called "paperMoney." *See* Charles Schwab, *thinkorswim paperMoney* (2024), https://www.schwab.com/trading/thinkorswim/paper-trading. The online brokerage platform Webull also offers a "Paper Trading" simulator that offers the "excitement

to extend its regulatory and enforcement jurisdiction to firms with that basic business model—and for good reason. The mission Congress gave the CFTC is "to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets"—*i.e.*, *real* markets.[4] In particular, the Commodity Exchange Act is designed to protect retail investors from certain risks of trading their own money. "The CEA . . . protect[s] the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived." *In re Platinum & Palladium Antitrust Litig.*, 61 F.4th 242, 266 (2d Cir. 2023) (quoting *Loginovskaya v. Batratchenko*, 764 F.3d 266, 270 (2d Cir. 2014)). The regulatory scheme applies to real trading, not to computer games or simulations.

In the complaint and at the preliminary-injunction stage, the CFTC made conclusory and inaccurate assertions about Defendants' business. Whether the CFTC did so out of confusion or obfuscation, the result was to give the Court a misleading impression, leading the Court to endorse—on a preliminary basis at an early, emergency stage of the proceedings—the CFTC's self-contradictory theory that "[t]he environment may have been simulated, but the trading was real." ECF No. 134

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of real-time trading without risking your capital." *See* Webull, *Paper Trading* (2024), https://www.webull.com/paper-trading. And the investment news and information website Investopedia hosts a stock market simulator that allows users to "[p]ractice stock trading with virtual money." *See* Investopedia, *Stock Market Simulator* (2024), https://www.investopedia.com/simulator/.

[4] *CFTC Mission Statement*, https://www.cftc.gov/About/AboutTheCommission.

at 15. But in light of the Rule 12(b)(6) standard under *Twombly* and *Iqbal*, which excludes "unsupported conclusions and unwarranted inferences," *Baraka*, 481 F.3d at 195 (quoting *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997)), and in light of evidence that the CFTC (selectively) relied on in drafting the complaint, it is clear that the CFTC is overstepping by bringing this action.

Because all of the CFTC's claims are based on a novel and unsupportable theory of the agency's authority, they should all be dismissed with prejudice. Defendants did not engage in retail forex or commodities transactions, so they cannot be subject to the provisions of the CEA or the regulations relied on by the CFTC. Nor are Defendants subject to the CEA's registration requirements for retail foreign exchange dealers or its restrictions on off-exchange retail transactions. But even if the Court declines to dismiss the CFTC's claims in their entirety at this stage, at the very least the Court should limit the CFTC's claims to "A-book" (or "STP") trades—which are the only trades the CFTC has even arguably (albeit incorrectly) alleged were real. The CFTC recognizes that the "demo" accounts were simulated—a concession to reality that dooms the vast majority of this case, as the vast majority of customers had only demo accounts. And the CFTC has offered no well-pleaded factual allegations that show that B-book customers engaged in real trades either. To

the contrary, as the Chichester interview and this Court's findings at the preliminary-injunction stage confirm, B-book "trades" were likewise entirely simulated.

### A. Counts I and II fail because there were no retail forex or commodities transactions.

The CFTC is seeking to act outside of the mandate authorized by Congress. The agency's enforcement authority extends only to fraud "in connection with" retail forex and commodities transactions. Count I relies on Regulation 5.2, which prohibits cheating, defrauding, or willfully deceiving any person "in connection with any retail forex transaction." 17 C.F.R. § 5.2(b)(1), (3); *see* Compl. ¶¶ 103–05. A "retail forex transaction" includes certain foreign exchange contracts with persons other than "eligible contract participants" (*i.e.*, corporations with assets exceeding $10 million, *see* 7 U.S.C. § 1a(18)(A)). *See* 17 C.F.R. § 5.1(m); 7 U.S.C. § 2(c)(2)(C). There is no indication in the relevant provisions that retail forex transactions encompass *simulated* forex contracts, which are not contracts at all.

Count II relies on Section 4b of the CEA, which similarly requires a connection to a set of regulated retail transactions. *See* Compl. ¶¶ 116–18. Section 4b prohibits any person "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" from cheating, defrauding, or willfully deceiving "the other person." 7 U.S.C. § 6b(a)(2)(A), (C). A "commodity" is defined to include products such as "wheat, cotton, rice, corn, oats,

barley" and "other goods and articles." 7 U.S.C. § 1a. Again, there is no indication that the regulated transactions include mere simulated trades, which involve neither actual contracts nor actual commodities. And there cannot be fraud "in connection with" a specified type of transaction where no such transaction exists.

### 1. The alleged misconduct was not "in connection with" retail forex or commodities transactions.

Courts have not squarely addressed whether the CFTC's authority extends to simulated trading because the CFTC has never previously claimed such authority.[5] While the plain language of the statutes invoked by the CFTC forecloses this unprecedented enforcement action, cases interpreting the "in connection with" requirement under the CEA and analogous federal securities laws further confirm that conclusion. Those cases make clear that the "in connection with" requirement cannot be satisfied in the absence of some relationship to the purchase or sale of a commodity or security. *See*, *e.g.*, *Tatum v. Legg Mason Wood Walker, Inc.*, 83 F.3d 121, 122–23 (5th Cir. 1996) (per curiam) (holding that alleged fraud under Section 4b was not "in connection with" a commodity transaction where plaintiffs "never intended to purchase commodities" and "were never parties to an order for the sale

[5] Indeed, the CFTC has acknowledged, and a court found, in two previous cases that trades in simulated accounts are *not* real trades. *See CFTC v. Vasquez*, 2014 WL 7404126, at *4 (W.D.N.C. Dec. 30, 2014) (a "simulated account function . . . does not reflect actual trades or funds"); *CFTC v. Mirror Trading Int'l Proprietary Ltd.*, 2023 WL 5767493, at *5 (W.D. Tex. Sept. 6, 2023) (a "simulated 'demo' account . . . never actually traded forex, Bitcoin or anything else").

of a commodity"); *Crummere v. Smith Barney, Harris Upham & Co.*, 624 F. Supp. 751, 755 (S.D.N.Y. 1985) (concluding that where alleged misrepresentations were unrelated to securities transactions at issue, the "in connection with" requirement was not satisfied). To fulfill the "in connection with" requirement, the alleged deceptions must relate to the purchase or sale of "*specific* securities" (or here, commodities). *Crummere*, 624 F. Supp. at 755 (emphasis added); *cf. Levitin v. PaineWebber*, *Inc.*, 933 F. Supp. 325, 329 (S.D.N.Y. 1996) (no securities fraud in broker's nondisclosure of interest earned on its customers' funds because handling of interest was "merely a term of the arrangement between the broker and its customer").

The relevant provisions of the CEA are generally interpreted in parallel with Section 10(b) of the Securities Exchange Act.[6] As the Supreme Court has explained in that closely analogous context, "Section 10(b) does not punish deceptive conduct" writ large, but rather "only deceptive conduct 'in connection with'" the actual "'purchase or sale'" of a security. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010) (quoting 15 U.S.C. § 78j(b)). And it is only "*parties or prospective*

[6] "The language of § 4b [of the CEA] is similar to that of § 10(b) of the Securities Exchange Act of 1934," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 389 n.88 (1982), and "[t]raditionally, courts have looked to the securities laws when called upon to interpret similar provisions of the CEA." *Saxe v. E.F. Hutton & Co.*, 789 F.2d 105, 109 (2d Cir. 1986).

*parties* to those transactions that the statute seeks to protect." *Id*. (emphasis added) (brackets and quotation marks omitted); *see also Ketchum v. Green*, 557 F.2d 1022, 1025 (3d Cir. 1977) (one "necessary" element of a § 10(b) claim is that "a purchase or sale of a security must occur"). The same is true under the CEA. *See Korwek v. Hunt*, 646 F. Supp. 953, 972–73 (S.D.N.Y. 1986) ("[A] claim under Section 4b must allege a connection to a specific futures transaction. . . . Section 4b is not an unrestricted prohibition of market fraud" (quotation marks omitted)), *aff'd*, 827 F.2d 874 (2d Cir. 1987). While some "courts of other circuits" have found the "in connection with" requirement met "'even where fraudulent conduct is implicated only tangentially in a securities transaction,'" the "[Third] Circuit has rejected such a broad interpretation" and has required a "*causal connection* between the alleged fraud and the purchase or sale of stock." *Williamsport Firemen Pension Bds. I & II v. E.F. Hutton & Co*., 567 F. Supp. 140, 143–44 (M.D. Pa. 1983) (some quotation marks omitted) (quoting *Ketchum*, 557 F.2d at 1026).

The Supreme Court's decision in *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014), which interpreted an "in connection with" requirement in another securities law, further reinforces the distinction between regulated and unregulated transactions (and between individuals who merely hope for a benefit in some way relating to a regulated transaction and actual parties to such a transaction). *Troice* concerned the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"),

which precludes state-law class actions alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). The question before the Court was "whether [SLUSA] encompasses a class action in which the plaintiffs allege (1) that they 'purchase[d]' *uncovered* securities . . . but (2) that the defendants falsely told the victims that the *uncovered* securities were backed by *covered* securities." *Troice*, 571 U.S. at 381. The Court held that SLUSA did not apply, reasoning that a misrepresentation "is not made 'in connection with' such a 'purchase or sale of a covered security' unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a 'covered security.'" *Id.* at 387. The certificates of deposit that the plaintiffs were defrauded into buying from a bank were supposedly backed by *the bank's* investments in covered securities, so there was some relationship between the fraud and regulated transactions. *See id*. at 396–97. But the plaintiffs themselves were not party to any regulated transactions—they did not buy or sell covered securities—so the fraud did not occur "in connection with" regulated transactions. Here, similarly, customers were not parties to retail forex or commodities transactions, so the alleged fraud cannot have occurred in connection with regulated transactions.

### 2. No MFF customers were parties to retail forex or commodities transactions.

Here, none of Defendants' customers was ever a party to a real forex or commodities transaction. A "transaction" is typically defined as "an exchange or

transfer of goods, services, or funds."[7] MFF informed customers that they would either be (a) engaging in simulated trading for "simulated profits" or (b) gaining the opportunity to earn monetary rewards based on TGG's "proprietary" trading with "Traders Global's money." Compl. ¶¶ 2, 26, 29; *see id.* ¶ 26 ("On its website, Traders Global proclaims that it is a 'proprietary firm'" and that '[i]t is *our* company money . . . that is being used in all of *our* accounts'" (emphasis added)); *id.* ¶ 55 ("Traders Global tells its customers that they are using Traders Global's funds"). Either way, at no point did MFF enable *customers* to become parties to "an exchange or transfer" of forex or commodities.[8]

Start with the "demo" customers, who comprised the vast majority of MFF's customers. The CFTC's own allegations and evidence establish that "demo" users were not executing real trades in forex or commodities and instead were making only simulated trades for "simulated profits." Compl. ¶ 29; *see* ECF No. 23-43 at 45. As this Court put it in its preliminary-injunction opinion, "a customer was required to

[7] *Transaction*, Merriam-Webster Dictionary (2024), https://www.merriam-webster.com/dictionary/transaction.

[8] The CFTC has previously argued that the language of the relevant prohibitions does not contain the term "investment" or expressly require that a retail customer put money "at risk." ECF No. 123 at 2; *see* ECF No. 134 at 15 ("Neither 'investment' nor 'risk' is a required element"). The absence of those specific words, however, is irrelevant. The CEA and the regulations are about real trading, not simulated trading. MFF customers were not investing in forex or commodities—and bore no risk of loss if trades in forex or commodities resulted in a loss—because customers were not entering into such trades at all.

meet certain 'profit targets' in what the website suggested was *a simulated trading account*." ECF No. 134 at 5 (emphasis added).

It is also clear that B-book customers did not engage in real forex or commodities transactions. *See* Compl. ¶ 49 ("electronic trading environment"); ECF No. 23-43 at 46:10–49:5 (Chichester explaining that "B book" means the trade is "internalized on the platform in the same way" as "all the demo orders" and "does not go to a counterparty"). This Court's statements at the preliminary-injunction stage confirm that model. *See* ECF No. 134 at 9 (B-book "trades" were "internalized" by TGG in a "simulated environment"); *id.* at 27 ("The gravamen of the CFTC's complaint is that Defendants failed to disclose to B Book customers that they were in a simulator, not trading in the real market").[9]

Even A-book customers, who comprised less than 1% of MFF customers, were not parties to any forex or commodities trades. TGG executed replicas of A-book trades on TGG's own behalf using TGG's money in TGG's brokerage account at CDO Markets, the third-party liquidity provider. *See* ECF No. 23-43 at 77:9–80:22. While TGG may have mirrored certain A-book customers' trades in its own

[9] Although this Court stated that "[t]he CFTC has made a *prima facie* showing that Traders Global enters into transactions in foreign currency with its customers," *id.* at 15, that conclusion likely stemmed from the CFTC's mischaracterizations of Defendants' business model and cannot be reconciled with the Court's more specific findings about the simulated nature of the "demo" and B book "trades."

account at CDO Markets, A-book customers themselves did not become parties to the TGG-CDO transactions. Even if (contrary to fact) A-book customers actually entered into transactions with CDO or another third party on behalf of TGG, that would merely make the A-book customers TGG's agents; the forex transactions would still be transactions between TGG and CDO. "[A]n agent of a disclosed principal, even one who negotiates and signs a contract for her principal, does not become a party to the contract." *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 445 (3d Cir. 1999).

Defendants do not believe there is any dispute as to the simulated nature of MFF's customers' "trading." To be sure, the CFTC liberally added legal conclusions to the complaint in its effort to bring MFF's trading simulator within its jurisdiction, *see, e.g.*, Compl. ¶¶ 3, 8–9, 48–50, but conclusions must be disregarded for Rule 12(b)(6) purposes, *see supra* at 8. And while the complaint glosses over the facts concerning what customers did on the MFF platform, *see* Compl. ¶¶ 20–47, it nowhere pleads contrary facts, let alone with particularity, showing that customers were themselves parties to forex or commodities transactions. Moreover, the CFTC knows the true facts now, even assuming that its complaint reflected confusion due to an inadequate pre-suit investigation as opposed to intentional obfuscation. Defendants are confident that, regardless of how isolated parts of the complaint

could potentially be construed in a vacuum, the CFTC will not respond to this motion by making factual assertions it knows are incorrect. *See* Fed. R. Civ. P. 11.[10]

As noted, the CFTC has not argued in any direct or clear way that the CEA provisions at issue here apply to simulated trading; instead, the CFTC has maintained this action by failing to describe clearly or accurately how MFF's platform works. If the CFTC were to argue that simulated trading is covered, the Court should reject that contention as contrary to the plain statutory language for the reasons discussed above. In all events, however, if the Court perceived any ambiguity in the terms of the relevant provisions as they relate to the CFTC's claimed authority here, the "basic" principle of "fair notice" would weigh in favor of Defendants' more lenient interpretation. *CFTC v. EOX Holdings, L.L.C.*, 90 F.4th 439, 441–48 (5th Cir. 2024) (rejecting CFTC's "unprecedented interpretation" of text that was "[o]n its face . . . at best ambiguous"). "Historically, the applicability of penal sanctions has been narrowly construed by the judiciary." *Dravo Corp. v. Occupational Safety & Health Rev. Comm'n*, 613 F.2d 1227, 1231 (3d Cir. 1980); *see also Commissioner v. Acker*, 361 U.S. 87, 91 (1959) ("The law is settled that

[10] The CFTC's response to Defendants' pre-motion letter took the glossing-over approach. According to the CFTC, MFF's "customers' trades qualify as retail forex and commodity transactions" even though they were "executed in Defendants' controlled environment." ECF No. 175 at 2. But because Defendants' "controlled environment" was a simulator—a fact the CFTC's letter does not dispute—there *were no* customer "trades" in the first place.

'penal statutes are to be construed strictly'" (quoting *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954))); *First Nat'l Bank of Gordon v. Dep't of Treasury*, 911 F.2d 57, 65 (8th Cir. 1990) ("Penal provisions, even those involving civil penalties, should be strictly construed").

Although the CFTC may have decided, for the first time, to try to extend its authority to cover simulated trades, it is "axiomatic" that agencies have only such authority as Congress has conferred on them. *Nat. Res. Def. Council v. Regan*, 67 F.4th 397, 401 (D.C. Cir. 2023) (quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017)). For that reason, the CFTC's regulations add nothing to the statutory analysis, and in any event the regulations do not purport to cover simulated trading either. Nor should the Court indulge the CFTC's effort to reinterpret its regulatory domain via an enforcement action: "a regulation cannot be construed to mean what an agency intended but did not adequately express." *Dravo*, 613 F.2d at 1232 (quotation marks omitted); *accord EOX*, 90 F.4th at 444. These principles exist to prevent the very sort of injustice at issue here: the sudden destruction of entire businesses, livelihoods, and reputations when unelected agency officials try to push the limits of their power.

In sum, because customers did not engage in real trading on the MFF platform, the CFTC cannot establish any fraud in connection with retail forex or commodities transactions. Counts I and II must be dismissed.

### B. Counts III, IV, and V fail because Traders Global was not a counterparty to any retail forex or commodities transaction.

Counts III and IV allege that Defendants acted as an RFED or an "associated person" of an RFED. An RFED is "any person that is, or that offers to be, the counterparty to a retail forex transaction." 17 C.F.R. § 5.1(h)(1). Defendants cannot have been an RFED (or an "associated person") because they were not, and did not offer to be, "the counterparty to a retail forex transaction." *Id.* Similarly, Count V alleges that "Traders Global entered into and offered to enter into retail commodity transactions with customers" off-exchange. That claim likewise fails because TGG did not enter into or offer to enter into any regulated transactions with customers.

In an attempt to shoehorn TGG into the definition of an RFED, the CFTC's complaint repeatedly asserts in conclusory fashion that "Traders Global . . . is the counterparty to substantially all customer trades." Compl. ¶¶ 3, 8, 48–50. The Court should not accept that "unsupported conclusion[]," *Callaway*, 2022 WL 970214, at *2 (quoting *Baraka*, 481 F.3d at 195)—which is not only unmoored to specific factual allegations, but outright contradicted by the CFTC's own allegations and evidence. Although the term "counterparty" is "not . . . defined" in the CEA or regulations, "[b]y implication, a counterparty is the party engaging in or offering to engage in a foreign currency futures transaction with a non-eligible party [*i.e.*, with a retail customer]." *CFTC v. Calvary Currencies, LLC*, 437 F. Supp. 2d 453, 461 n.17 (D. Md. 2006). Defendants could not have been a "counterparty to a retail forex

transaction" because, as discussed above, Defendants did not engage in or offer to engage in forex transactions with customers.

Again, start with the "demo" customers. Because all demo "trades" were purely simulated, they were not "retail forex transactions" and Defendants logically could not have been a "counterparty to a retail forex transaction." The demo "trades" could not have had either parties or counterparties because the "trades" did not exist.

The same goes for B-book customers. As discussed above, B-book "trades" were indisputably simulated too. Therefore, there were no "retail forex transactions," and B-book customers did not have any counterparty. Chichester explained all of that in his interview with the CFTC on February 3, 2023:

> Q: Okay. So on the demo server *is there a counterparty to any of these trades or is it a completely simulated environment*?
> A: It's a completely simulated environment.
>
> . . .
>
> Q: And what does B Book mean?
>
> A: That means it's internalized on the platform *in the same way*. *That's how all demo orders are processed.*
>
> . . .
>
> Q: And just one more thing before moving on. I just want to clarify that the term A book is equivalent to STP, which means a trade is passed on to a third-party counterparty and B book means — would you just clarify exactly what that means?
>
> A: Yeah. *B Book means it does not go to a counterparty*. . . . [T]hat's just within the platform. It's internalized it. I guess you could say *it effectively goes nowhere.*

ECF No. 23-43 at 45:18–48:19 (emphasis added). When the CFTC asked whether "internalized" means that "Traders Group Global essentially has the opposite position from the trader that executed the trade," Chichester replied, "I would say that *would* be true *if* it was the customer's own money that they had deposited." *Id.* at 48:20–49:2 (emphasis added). But MFF customers did *not* deposit their own money; they merely paid a flat fee for access to the MFF dashboard and virtual capital. *See id.* at 70:2-20; Compl. ¶¶ 32–33.

Nor was TGG a "counterparty to a retail forex transaction" with respect to the very small number ("fewer than 100") of A-book (*i.e.*, STP'd) users. Compl. ¶ 65. As an initial matter, the CFTC itself alleges that STP'd orders went "to an off-exchange leveraged forex and commodities dealer outside the U.S. (hereinafter, the 'Dealer')"—not to TGG. *Id.* Chichester confirmed that point in his interview. *See* ECF No. 23-43 at 46:6-9 ("Q: Okay. So A book means that a trade is going to a third-party counterparty, is that right? A: Yes."); *id.* at 77:15–80:22 (identifying CDO Markets as the counterparty); *see also* Compl. ¶ 66 (alleging that STP'd orders went to a third-party "liquidity provider").

Moreover, as discussed above, A-book customers were not *parties* to trades executed at CDO Markets, which were executed by TGG "using Traders Global's money, which Traders Global has on deposit with the Dealer [CDO Markets], in a margin account." Compl. ¶ 66; *see* ECF No. 23-43 at 77:15–80:5 ("[TGG] ha[s] a

margin account there"). That TGG may have been replicating A-book customers' trading strategies does not mean the customers themselves were parties to the trades. In sum, the only real trades related to MFF's platform (though not *on* that platform) were transactions between TGG and CDO Markets, both of which are undisputedly "eligible contract participants" and are thus outside the scope of the provisions at issue. *See* 17 C.F.R. § 5.1(h)(1), (m); 7 U.S.C. § 2(c)(2)(C).

The CFTC should have known all of this from its investigation, but it filed a complaint that seriously mischaracterized MFF's business model and selectively omitted key facts. For example, the CFTC failed to distinguish clearly between the different categories of customers ("demo," B-book, and A-book) and disregarded the fundamental distinction between real and simulated trading. While relying on the Chichester interview to draft the complaint, the CFTC omitted his explanation that B-book orders were simulated in the same way as "demo" orders and thus never went to *any* counterparty. At the preliminary-injunction hearing, the CFTC again mischaracterized Chichester's testimony. *See* ECF No. 130 at 107–08 ("[T]he most important thing he told us, in these words, is that Traders Global acts as a counterparty to substantially all of its customers").[11]

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[11] After Chichester repeatedly and unequivocally explained that "B book means it does not go to a counterparty," *see* ECF No. 23-43 at 45:18–46:13, 48:9–49:5, 69:5-10, the CFTC asked him: "[I]f the trade never goes to a counterparty on those live servers, who does it go to?" Chichester suggested that, perhaps in a looser sense,

The CFTC's obfuscations no doubt contributed to this Court's statement at the preliminary-injunction stage that TGG was "a counterparty to substantially all of its customers' 'live account' trades." ECF No. 134 at 14–15. The Court appears to have adopted the CFTC's theory that TGG was a retail forex or commodities counterparty because "Traders Global pays customers when they win, and retains their fees when they lose." *Id.* at 15. The CFTC provided no authority for that sweeping redefinition of "counterparty," and to Defendants' knowledge, that understanding of the term has never before been applied by the agency or any court. *Compare Calvary Currencies*, 437 F. Supp. 2d at 461 n.17 ("[A] counterparty is the party engaging in or offering to engage in a foreign currency futures transaction with a non-eligible party"). Indeed, if a "counterparty" were anyone who pays customers when they win and keeps a fee when they lose, the term would be so elastic as to include owners of gaming arcades. Arcades typically charge customers a flat, upfront fee for a set of

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"I guess you would consider Traders Global the counterparty, like taking the other side of it," but he noted that this application of the term was "a little murky" given that "Traders Global [was] also supplying . . . the funds for these accounts." *Id.* at 69:11-21. And he never suggested that TGG—or anyone else—was a counterparty to *actual retail forex or commodities transactions* with customers; indeed, his testimony showed just the opposite. *See id.* at 45:18–46:13, 48:9–49:5, 69:5-10; 70:2-20. Indeed, the CFTC's question quoted above was a trick question: if a trade "never goes to a counterparty" because there never was an actual trade in the first place, then asking "who does it go to" is nonsensical.

tokens, offer customers the opportunity to win rewards for successful gaming, and keep the fees when the customers eventually lose all of their tokens.

As a simulated trading platform, the MFF dashboard functioned much the same way. According to the CFTC's own allegations, when a customer's "trading" was successful, any "profits" that TGG paid came out of its revenues from customers' fees—not from actual trading, as no actual trading was occurring. Compl. ¶ 98. And it is undisputed that, if a customer executed an *unsuccessful* "trade," the customer's notional loss on that "trade" did not become TGG's gain. Far from owing TGG the investment loss on such a simulated trade, the customer could keep engaging in simulated trades, with no risk of liability for any trading losses, until the customer ran out of tokens by reaching the drawdown limit. The possibility that Defendants could benefit in some way if a customer lost enough virtual capital to exceed the drawdown limit (because the customer might pay a new fee to re-register) does not make Defendants a counterparty to a retail forex or commodities transaction. The only "transactions" between MFF and its customers were their payments of upfront fees in exchange for virtual capital for use on the simulator. And the purchase of virtual capital for use in simulated trading is no more within the authority Congress conferred on the CFTC than the purchase of tokens at an arcade.

This Court's preliminary-injunction decision also briefly referenced a contract between TGG and iS Risk (Chichester's employer), which TGG entered into in

September 2021 when MFF was just getting off the ground. ECF No. 134 at 15 (adopting sentence from CFTC's proposed order, *see* ECF No. 132-1 at 17). That standard-form contract, an agreement to lease computer servers from iS Risk, stated that "Customer [defined as TGG] shall be the counterparty to all trades with Client Accounts." Compl. ¶ 97. Even assuming that this boilerplate accurately reflects the contracting parties' expectations at the outset of their relationship, the reality—as the CFTC's other allegations and its interview of Chichester demonstrate—is that TGG did not actually make any trades with customers; all "trades" were either simulated or TGG's own trades with its own money. Furthermore, a lease agreement between TGG and iS Risk cannot possibly have defined the relationship between TGG and *its* customers, who were not parties to the lease agreement. *See Pierce Assocs., Inc. v. Nemours Found.*, 865 F.2d 530, 539 (3d Cir. 1988), *as amended* (Jan. 6, 1989) (holding that "[Party 1] and [Party 2] were but two of three parties in a relationship carefully structured by contract" and could not "change th[e] relationship" between Party 1 and the "third party" because "[w]ithout [Party 3]'s participation that was not possible"). The TGG-iS Risk agreement thus is a red herring.

Count V of the CFTC's complaint must be dismissed for essentially the same reasons. That claim alleges that Defendants engaged in "off-exchange retail commodity transactions" with customers in violation of 7 U.S.C. § 6(a). As

discussed above, however, any real commodity transactions could only have taken place between TGG and CDO Markets. Any such transactions would not fall within the purview of § 6(a), which applies only to persons other than "eligible contract parties." *See* Compl. ¶ 153 (citing 7 U.S.C. § 2(c)(2)(D)(i), (iii)). All other "trading" associated with MFF's platform was entirely simulated.

### C. At a minimum, the Court should limit the CFTC's claims to the "A-book" ("STP'd") customers.

For the reasons discussed above, this Court should dismiss the CFTC's claims in their entirety with respect to all three sets of MFF customers (demo, B-book, and A-book). At the very least, however, the Court should narrow the claims to A-book customers because they are the only customers who could even conceivably have had any connection to real trades. As Defendants have explained, A-book customers' "trades" on MFF's simulator were often mirrored by TGG in executing its own trades with its own money in its own account at CDO Markets. Those TGG-CDO trades were real—but MFF customers were not parties to them.

Even at the pleading stage, there is no reason for this Court to overlook the undisputed differences between "demo" and B-book customers, on the one hand, and A-book customers, on the other. The CFTC now acknowledges that the overwhelming majority of "trading" tied to MFF's platform was simulated and that "real trading" was limited to A-book customers. *See* ECF No. 130 at 104 ("[T]here is no real trading"); *accord id.* at 105 ("[J]ust a hundred customers . . . got to do any

real trading”). Defendants believe that the CFTC’s claims exceed its authority as to A-book customers as well, since A-book customers were not engaged in real forex or commodities trading with TGG as a counterparty any more than demo or B-book customers were. But if the Court believes that the facts about whether A-book customers’ activity on the MFF platform amounted to real trading are unclear at this stage, the Court should dismiss the CFTC’s claims except as to the set of customers for whom trades were allegedly “STP’d.”

## II. The CFTC Fails to Adequately Plead the Elements of Its Fraud Claims.

As explained above, this action exceeds the CFTC’s authority. Even apart from that fundamental defect, the CFTC’s fraud claims fail for the independently sufficient reason that the complaint does not adequately allege the elements of fraud: “(1) the making of a misrepresentation, misleading statement, or a deceptive omission[;] (2) scienter; and (3) materiality.” *CFTC v. WorldWideMarkets, Ltd.*, 2022 WL 3535993, at *13 (D.N.J. Aug. 18, 2022) (quoting *CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1325 (11th Cir. 2018)). Under Rule 9(b), fraud claims must be alleged with particularity. *See Gorman*, 587 F. Supp. 3d at 39. For purposes of this motion, Defendants focus on the complaint’s failure to establish the elements of materiality and scienter.[12]

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[12] Defendants do not, however, thereby concede that the alleged statements and omissions are false or deceptive.

### A. The CFTC's fraud claims (Counts I and II) do not adequately allege materiality or, with respect to the alleged omissions, a duty to disclose.

"A statement or omission is material if 'a reasonable investor would consider it important in deciding whether to make an investment.'" *WorldWideMarket*s, 2022 WL 3535993, at *13 (quoting *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447 (D.N.J. 2000)). An omission is actionable only if the defendant had a "duty to disclose" the allegedly omitted information, which may arise from a fiduciary relationship or the defendant's own prior speech on an issue. *See CFTC v. Gorman*, 2023 WL 2632111, at *8–9 (S.D.N.Y. Mar. 24, 2023). "[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)).

Before filing the complaint, the CFTC failed to identify a single customer who would say the alleged misrepresentations and omissions were material. Even now, several months later, the CFTC's initial disclosures do not identify any customers as anticipated witnesses. And even if the CFTC does eventually identify such a witness, there will be serious concerns about taint due to the CFTC's inflammatory public allegations, including its outlandish suggestion that MFF was "similar to a Ponzi scheme." Compl. ¶¶ 2, 50. This Court should not burden Defendants, who have

already paid such a high personal and financial price for the CFTC's baseless allegations, with discovery on claims that fail as a matter of law.

Taking each of the CFTC's four alleged misrepresentations in turn, none is adequately alleged to be material. First, the complaint alleges that Defendants made "misleading statements that customers receive 'live funds' to trade against third-party 'liquidity providers.'" Compl. ¶ 107(a). To begin with, this alleged misrepresentation is categorically inapplicable to MFF's "demo" customers, since it was undisputedly clear to everyone that "demo" accounts were mere simulations. And as to the other customers, the complaint offers no reason to think the underlying nature of the trading—whether real or a very realistic simulation—would have mattered to MFF's customers. *Cf. SEC v. Goble*, 682 F.3d 934, 944 (11th Cir. 2012) (holding that a misrepresentation that "would only influence an individual's choice of broker-dealers" and was not relevant to a reasonable investor's "investment decision" was immaterial as a matter of law); *Brink v. Raymond James & Assocs., Inc.*, 892 F.3d 1142, 1148–49 (11th Cir. 2018) (holding that alleged misrepresentation regarding processing fee for a certain type of account was immaterial to securities-fraud claim because even if the misrepresentation "might have influenced a reasonable investor's decision to pick [that] [a]ccount over another type of account," "the choice of a type of investment account . . . is not intrinsic to the investment decision itself"). The complaint does not identify any "investment

decision," let alone with particularity, that would have been affected by the difference between "live" trading and a close proxy for live trading. And as for the decision to purchase access to MFF, customers got the full benefit of the bargain: financial rewards if a "trade" was successful, no financial loss if a "trade" was unsuccessful, and unlimited "trading" as long as they did not exceed the drawdown limit.

Second, the complaint alleges that TGG's website contained statements such as "Your success is our business" and "If you lose, we lose." Compl. ¶¶ 39–40, 107(b). The CFTC does not allege with particularity the context in which these alleged misrepresentations appeared and does not identify anyone who was allegedly deceived by them. This fails the "minimum" requirement of Rule 9(b) to support a fraud allegation with the "who, what, when, where, and how of the events at issue." *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002) (quotation marks omitted); *cf. In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 369 (3d Cir. 1993) ("a court must appraise a misrepresentation or omission in the complete context in which the author conveys it"); *Lieberman v. Johnson & Johnson Consumer Cos.*, 865 F. Supp. 2d 529, 539 (D.N.J. 2011) (complaint that failed to specify when or in what medium allegedly misleading statements were made did not satisfy Rule 9(b)).

Moreover, such "generalized statements" are mere "puff[ery]." *In re Aetna Inc. Sec. Litig.*, 34 F. Supp. 2d 935, 945 (E.D. Pa. 1999). "Advertising that amounts to mere puffery is not actionable because no reasonable consumer relies on puffery." *Ponzio v. Mercedes-Benz USA, LLC*, 447 F. Supp. 3d 194, 234 (D.N.J. 2020). "The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions." *Id.*; *see, e.g.*, *Rodio v. Smith*, 587 A.2d 621, 624 (N.J. 1991) (holding that slogan "You're in good hands with Allstate" was "nothing more than puffery").

Third, the CFTC alleges that TGG said it would pay a customer a percentage of trading profits "when in fact those payments come from fees paid by other customers." Compl. ¶ 107(c). But the CFTC does not allege that any customer complained about the source of the payments, and there is no reason to think customers would find it material given that they were paid in full. *Cf. Rinfret, Inc. v. Drexel Burnham Lambert Inc.*, 661 F. Supp. 611, 614–15 (S.D.N.Y. 1987) ("in general, misrepresentations concerning the mechanics of a securities transaction, without particular regard to the nature of the securities themselves, have not been held actionable under § 10(b)"); *Brink*, 892 F.3d at 1149 (alleged hidden profit built into processing fee was immaterial because "customers chose to trade securities with full knowledge of the amount of the Processing Fee for each trade and never paid

more than they agreed" and a reasonable investor would include the fee "in her cost-benefit calculation before making each trade").

Fourth, the CFTC alleges that Defendants misrepresented the purpose of MFF's "drawdown limit." Compl. ¶ 107(d). The CFTC's assertion that drawdown limits were imposed in "bad faith" is conclusory, *id.*, and there is no reason to think Defendants' subjective motivations for the drawdown limits would have been material to customers. Customers had "full knowledge" of the parameters of the drawdown limits. *Brink*, 892 F.3d at 1149; *cf. Johnson v. Ace Cash Express Inc.*, 2015 WL 4397482, at *3–4 (D. Del. July 17, 2015) (allegations that defendant concealed its "business model and/or motivations" when it marketed payday loans as short-term solutions, while actually expecting the loans to be for longer terms, failed to state a claim for fraud where plaintiff did not allege that the parameters of the loans were misrepresented).

The CFTC's four alleged omissions have similar fatal defects. Each one lacks both adequate allegations of materiality and particularized allegations of a duty to disclose. First, the CFTC alleges that Defendants "fail[ed] to disclose that commissions are assessed by Traders Global, not a third-party liquidity provider[.]" Compl. ¶ 107(e). But it is undisputed that the amount of the commissions was fully disclosed, *see id.* ¶ 27 ("$3 'per lot'"); there is no reason to think customers would have found the particular "mechani[sm]" by which commissions were assessed to be

material. *Rinfret*, 661 F. Supp. at 614–15 (allegation that clearing agent overcharged plaintiff in violation of agreement regarding commissions failed to state a claim under the CEA); *see Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539, 540–41 (2d Cir. 1996) (alleged "hidden commissions" mislabeled on confirmation slips as transaction fees were immaterial as a matter of law where plaintiffs were never charged more than the amounts reported on the confirmation slips); *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 616–17 (7th Cir. 2012) (same); *Manela v. Garantia Banking Ltd.*, 5 F. Supp. 2d 165, 175 (S.D.N.Y. 1998) (alleged misrepresentation or omission regarding identity of seller of bonds was immaterial because seller's identity "had nothing to do with the value of the bonds themselves"). Nor does the complaint allege what, in particular, purportedly gave Defendants a duty to disclose that the commissions were assessed by TGG, not a third party. The CFTC does not allege that Defendants had a fiduciary duty to MFF customers and does not identify particular statements that would create a duty to disclose.

Second, the CFTC alleges that TGG did not disclose its application of "delay" and "slippage" mechanisms in MFF's "electronic trading environment." Compl. ¶ 107(f). But as Chichester noted in his interview, customers would likely expect "slippage" to occur with large-volume simulated orders because that is what happens in actual trading; when supply at a requested price runs out, portions of large orders tend to "slip" to a less favorable price. *See* ECF No. 23-43 at 113:8-17 (explaining

that for "a large order, for example" customers knowledgeable about trading would "would understand that there might be inherent slippage involved"); *id*. at 128:8-12 (confirming that MFF customers would generally "get more slippage if their order is bigger"). And "delay" was imposed to ensure that customers were not "taking advantage of deficiencies" with the simulated trading software, such as pricing latency. *Id.* at 92:12-23. There is no reason to think customers would find the alleged omissions about slippage or delay material. *Cf. Levitin v. PaineWebber, Inc*., 159 F.3d 698, 702 (2d Cir. 1998) (holding that § 10(b) claim predicated on broker's omission of fact that it might earn money on customers' collateral posted in short-sale transactions was "fatal[ly] flaw[ed]" because "certain information is 'so basic that any investor could be expected to know it'" (quoting *Zerman v. Ball*, 735 F.2d 15, 21 (2d Cir. 1984))). Again, the complaint also does not allege with particularity any basis for a duty to disclose the imposition of slippage and delay.

Third, the complaint alleges that Defendants failed to disclose that STP'd orders "were expected to—and did—trade unprofitably" or "less profitably" than purely simulated trades. Compl. ¶ 107(g). As a matter of fact, this allegation is not true. The MFF website admonished customers to "[t]ake it slow, observe good risk management techniques. Most traders who pass the evaluation quickly fail on their

live account." ECF 23-40 at 45.[13] Moreover, reasonable customers know that beating the market with an active trading strategy is very hard. There are no particularized allegations establishing that Defendants had a duty to disclose that common knowledge, and the CFTC offers no reason to think that such a disclosure would have affected customers' decision-making. *Cf. Zerman*, 735 F.2d at 21 (holding that alleged omissions related to the nature of margin accounts were immaterial because "it is clear that the information Zerman claims was withheld from her was so basic that any investor could be expected to know it"); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220 (9th Cir. 1980) ("It is not a violation of any securities law to fail to disclose a result that is obvious even to a person with only an elementary understanding of the stock market").

Finally, the CFTC alleges that Defendants did not disclose that TGG imposes "artificial spreads" on prices visible to STP'd customers. Compl. ¶ 107(h). Spreads are a common feature of trading. *See In re Interest Rate Swaps Antitr. Litig.*, 261 F. Supp. 3d 430, 443 (S.D.N.Y. 2017) (explaining bid-ask spreads); *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 586–87 (S.D.N.Y. 2015) (same). There are no particularized facts explaining why the alleged spreads were "artificial," and the complaint offers no reason to think customers would find

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[13] The MFF website is incorporated by reference in the complaint and is otherwise integral to the complaint and may, therefore, be considered on this motion.

the alleged omission about spreads material. And the CFTC neglects to identify any fiduciary duty or specific statement that would give rise to a duty to disclose.

**B. The CFTC fails to adequately plead scienter.**

Scienter is an "intent to deceive, manipulate, or defraud." *CFTC v. Equity Fin. Grp. LLC*, 572 F.3d 150, 159 (3d Cir. 2009). Although Rule 9(b) permits scienter to be "alleged generally," courts "must not mistake the relaxation of Rule 9(b)'s specificity requirement regarding condition of mind for a 'license to base claims of fraud on speculation and conclusory allegations.'" *Actio v. IMCERA Grp., Inc.*, 47 F.3d 47, 52 (2d Cir. 1995) (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)). "It is not enough for plaintiffs to allege generally that defendants 'knew or recklessly disregarded each of the false and misleading statements for which [they were] sued'; plaintiffs must allege facts that could give rise to a 'strong' inference of scienter." *Burlington Coat Factory*, 114 F.3d at 1422 (first quoting complaint, then quoting *Suna v. Bailey Corp.*, 107 F.3d 64, 68 (1st Cir. 1997)). Furthermore, the allegations must establish a strong inference that the defendant knew or recklessly disregarded that each of the alleged misrepresentations or omissions was material. *See McLean v. Alexander*, 599 F.2d 1190, 1202 (3d Cir. 1979) (holding that liability under Rule 10b-5 for failure to disclose material facts "requires knowledge, not only of the facts withheld, but also of the risk that the buyer or seller will be thereby misled").

The allegations here fall far short of raising a "strong inference" of fraudulent intent with respect to each alleged misrepresentation and omission. The complaint recounts various alleged misrepresentations and omissions and then simply asserts in conclusory fashion that "Defendants did so with scienter—i.e., knowingly or recklessly." Compl. ¶¶ 109, 123. With respect to Mr. Kazmi, the complaint makes a few cursory, scattershot allegations about his knowledge of certain documents and then simply declares, in an undifferentiated blanket assertion, that Mr. Kazmi "thus knew that the statements set forth in paragraphs 18 through 45 above were false or misleading, or failed to disclose material information to customers." Compl. ¶¶ 97–101. These "boilerplate and conclusory allegations will not suffice." *Burlington Coat Factory*, 114 F.3d at 1418. The complaint does not establish a "strong inference" that Defendants not only knew (or recklessly disregarded) that the alleged statements were false or misleading, but also knew (or recklessly disregarded) that they were material.

## CONCLUSION

For the foregoing reasons, the complaint should be dismissed in its entirety with prejudice.

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Respectfully submitted,

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