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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

U.S. COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** **v.** **BANC DE BINARY LTD. (A/K/A E.T. BINARY OPTIONS LTD.),** **Defendant.**	**Case No. 2:13-cv-00992-MMD-VCF** **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS ONE, THREE AND FOUR OF THE COMPLAINT**

The United States Commodity Futures Trading Commission ("CFTC" or "Commission") opposes Banc de Binary's Motion to Dismiss Counts I, III and IV of the Complaint ("Defendant's Motion"),[1] and states as follows:

I. SUMMARY

Since at least May 2012 Banc de Binary Ltd. (A/K/A E.T. Binary Options) ("Banc de Binary" or "Defendant") has been violating the CFTC's long-standing ban on trading options contracts with persons located in the United States off of a contract market designated by the CFTC for that purpose (*i.e.*, "off-exchange"). Accordingly, on June 5, 2013, the Commission filed a four-count *Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties Under the Commodity Exchange Act and Commission Regulations* ("Complaint")[2] charging that Banc de Binary's conduct violated certain provisions of the Commodity Exchange Act ("Act" or "CEA"), 7 U.S.C. §§ 1 *et seq*. (2012), and the Commission's Regulations promulgated thereunder ("Regulations"), 17 C.F.R. §§ 1.1 (2012 & 2013).

Specifically, the Complaint alleges that on its internet trading platform, Defendant calls the financial instruments it markets and sells to U.S. and foreign persons "binary options," "call options" and "put options." (Compl. ¶ 13.) These "binary," "call" and "put" options allow customers "to predict whether the price of a certain 'asset' will go 'up' or 'down' at a future date and/or time." (Compl. ¶ 13.) Banc de Binary lists on its website dozens of these "assets" that customers are permitted to buy and sell binary options on, including on commodities such as wheat, oil, gold, platinum, sugar, coffee, corn, the US dollar/Japanese Yen foreign currency ("forex") pair, and the Euro/Japanese Yen forex pair. (Compl. ¶¶ 14, 17.) The website also lists the then-current price of each asset. (Compl. ¶ 15.)

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[1] Defendant's Motion to Dismiss is cited hereinafter as "Def. Mot. at ____."

[2] The CFTC's Complaint is cited hereinafter as "Compl. ¶ ___."

Through the website, customers predicting that the price of the commodity will rise above the then-current listed price execute what Banc de Binary lists on its trading website as a "Call Option." (Compl. ¶ 15.) Conversely, customers predicting that the price of the commodity will fall below the then-current listed price execute what Banc de Binary lists on its trading website as a "Put Option." (Compl. ¶ 15.) Customers may execute trades from between $1 and $8,000 and pick the date and time of the contract expiration. (Compl. ¶ 16.) The website also lists the "payout" on each contract should the price of the commodity move in the direction predicted by the customer. (Compl. ¶ 16.) Customers also were solicited via telephone, emails, and other communications to purchase "trading 'signals'" from Banc de Binary or its brokers to assist the customer in his or her trading. (Compl. ¶ 24.) Banc de Binary also offered to its customers a bonus program. This bonus program allowed customers to "leverage" their options transactions. (Compl. ¶¶ 24, 25.)

Banc de Binary is not a designated contract market ("DCM"), exempt board of trade ("EBOT"), or a foreign board of trade ("FBOT"), and has never been registered with the CFTC in any capacity. (Compl. ¶¶ 12, 23.) Nonetheless, Banc de Binary offered to, executed with, and accepted orders and funds from U.S. customers to trade binary options. (Compl. ¶¶ 17-22.)

Accordingly,

- Count I of the Complaint charges (for the period May 2012 through June 25, 2012) that Banc de Binary violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2012), and old Regulations 32.2 and 32.11, 17 C.F.R. §§ 32.2 and 32.11 (2012) (repealed and replaced June 26, 2012),[3] by offering to, entering into with,

[3] On June 26, 2012, Regulations 32.1 to 32.13 (17 C.F.R. §§ 32.1-32.13 (2012)) were repealed and replaced by new Regulations 32.1 to 32.5 (17 C.F.R. §§ 32.1-32.5 (2013)). Since Banc de Binary's conduct occurred both before and after June 26, 2012, for the purpose of clarity, the Commission will refer to the Part 32 Regulations that were in effect during the time period relevant to Count I, *i.e.*, May 2012 through June 25, 2012, and then repealed as, *e.g.*, "old" Regulation 32.x. When referring to the Part 32 Regulations that became effective on June 26, 2012, the Commission will refer to each Regulation as, *e.g.*, "new" Regulation 32.x.

confirming the execution of or maintaining a position in, and soliciting and accepting orders and funds from U.S. customers to trade options not excepted or exempted from the Commission's ban on trading options off-exchange;

- Count II of the Complaint charges (for the period October 12, 2012 through at least March 2013) that Banc de Binary violated Sections 4c(b) and 2(e) of the Act, 7 U.S.C. §§ 6c(b) and 2(e) (2012), and new Regulation 32.2, 17 C.F.R. § 32.2 (2013), by offering to, entering into with, confirming the execution of or maintaining a position in, and soliciting and accepting orders and funds from U.S. customers to trade options not excepted or exempted from the Commission's ban on trading options off-exchange;

- Count III of the Complaint charges (for the period July 2011 through at least March 2013) that Banc de Binary violated Section 4(a) of the Act, 7 U.S.C. § 6(a) (2012), which prohibits off-exchange futures trading, by trading with non-eligible contract participant ("ECPs") U.S. persons "retail commodity transactions" defined in Section 2(c)(2)(D) of the Act, 7 U.S.C. § 2(c)(2)(D) (2012), and treated in Section 2(c)(2)(D) "as if" they are futures contracts for the purposes of Section 4(a) of the Act; and

- Count IV of the Complaint charges (for the period from July 2011 through at least March 2013) that Banc de Binary operated as an unregistered futures commission merchant ("FCM") and solicited and accepted orders (and funds) from U.S. customer, including customers who were not ECPs, in violations of Sections 2(c)(2)(B)(iv)(I) and 4d(a) of the Act, 7 U.S.C. §§ 2(c)(2)(B)(iv)(I)(aa) and 6d(a) (2012), and Regulation 5.3(a)(4)(i)(B), 17 C.F.R. §§ 5.3(a)(4)(i)(B) (2013).

Banc de Binary now moves to dismiss Counts I, III and IV of the Complaint for purportedly failing to state a claim upon which relief can be granted ("Motion").[4] First, Banc de Binary moves to dismiss Count I of the Complaint claiming that the binary options, call options, and put options it offered to its customers on its websites are not "options" within the meaning of the Act and Regulations. (Def. Mot at 5-10.) Banc de Binary contends that only physically settled off-exchange options that give the option holder the right to actually receive the

[4] Banc de Binary did not move to dismiss Count II of the Complaint, conceding that the binary options, call options, and put options it traded on its website post-October 12, 2012 (the date of the October 12, 2012 implementation of the final rule further defining "swaps," among other things, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII, §§ 701-774, 124 Stat. 1376 (enacted July 21, 2010) ("Dodd-Frank Act")), which are precisely the same contracts it traded pre-October 12, 2013, are "options" within the meaning of the "swap" definition. (Def. Mot. at 9.)

underlying commodity, as opposed to strictly cash or financially settled off-exchange options, are prohibited by the Act and Regulations.

Second, Banc de Binary moves to dismiss Count III of the Complaint contending that the binary options offered to its customers pursuant to the "bonus program" were not margined, leveraged or financed. Third, Banc de Binary moves to dismiss Count IV of the Complaint essentially rehashing its argument that the binary options it offered to its customers were not options.

Banc de Binary is simply wrong on all counts.

While conceding, as it must, that the definition of an option under the Act and Regulations are those contracts that are "of the character of, or commonly known to the trade as" "options," or "puts," or "calls," Defendant adopts a narrow reading of the definition of an option and uses that crimped and incomplete reading in order to support its argument to dismiss Counts I and IV. Defendant ignores that there is simply nothing in either the Act or Regulations that supports its restricted reading of an option or that limits the Commission's ban on trading options off-exchange to only those options capable at expiration of actual physical delivery of the underlying commodity. Nothing in Section 4c(b) the Act, 7 U.S.C. § 6c(b) (2012) or old Regulations 32.2 and 32.11, 17 C.F.R. §§ 32.2 & 32.11 (2012) suggests that there is a legal difference between physically settled versus cash-settled options contracts.

Further, the binary options offered by Defendant are clearly options and commonly known to the commodities industry as such. This is supported by several factors. First, a broad array of economic and industry treatises dating back more than 15 years describe and analyze binary options as options. Second, the commodities industry currently trades binary options and cash-settled options on markets regulated by the Commission. In fact, market participants

seeking approval from the CFTC (for commodities) and the Securities and Exchange Commission ("SEC") (for securities) define "binary options" as cash-settled "options." Third, the CFTC has long asserted its jurisdiction publicly over binary options. Accordingly, the fact that "binary options," "call options," and "put options" are "commonly known to the trade" as "options" ends the inquiry for the purposes of Defendant's Motion.

Defendant's arguments relating to Counts III and IV are equally meritless. With regard to Count III, the CFTC has pled sufficient facts in the Complaint alleging that Defendant's transactions are, in fact, "leveraged." Defendant's allegations seem to cherry-pick the Complaint only for those facts that support its contention and ignore those that do not. Further, Defendant muddles the issue by conflating the terms "margin," "margin call," and "financed" into one thought, failing to recognize that these are independent concepts with their own definitions. Defendant is simply wrong.

With regard to Count IV, Defendant's argument rises or falls on whether the products it solicits and offers to its customers are options. As the CFTC has pleaded in its Complaint and demonstrated below, certain binary options that Defendant peddles to its customers are options on forex. Therefore, Defendant's Motion with regard to Count IV of the Complain should be denied.

II. STANDARD OF REVIEW

Although Banc de Binary does not identify the Federal Rule of Civil Procedure pursuant to which it seeks dismissal of the Complaint, it argues that "Counts One, Three and Four of the Complaint fail to state a claim for which relief may be granted." (Def. Mot. at 2.) Its Motion is therefore governed by Federal Rule of Civil Procedure 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6) (permitting motions asserting a "failure to state a claim on which relief can be granted.") "When

considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests." *Berhe v. Fed. Nat'l Mortg. Assoc.,* No. 2:13-cv-00552-RCJ-PAL, 2013 WL 3491272, at *1 (D. Nev. July 9, 2013) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). Although a court is not obligated to accept a complaint's conclusory allegations, unwarranted deductions, or unreasonable inferences, in "considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff." *Berhe,* 2013 WL 3491272, at *1 (citing *NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986)); *see also Soto v. Fed. Nat'l Mortg. Assoc.,* No. 2:12-CV-01259-MMD, 2013 WL 1934928, at *1 (D. Nev. May 8, 2013) (Du, J.) (same).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter to 'state a claim to relief that is plausible on its face.'" *Soto,* 2013 WL 1934928, at *1 (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)); *Berhe,* 2013 WL 3491272, at *1 (same). "A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct." *Soto,* 2013 WL 1934928, at *1. "In other words, under the modern interpretation of [Federal Rule of Civil Procedure] 8(a), a plaintiff must not only specify a cognizable legal theory . . . but also must plead the facts of his own case so that the court can determine whether the plaintiff has any plausible basis for relief under the legal theory he has specified, assuming the facts are as he alleges." *Berhe,* 2013 WL 3491272, at *1.

As demonstrated below, the Commission's Complaint satisfies the foregoing standards. As a result, the Court should deny Banc de Binary's Motion in its entirety.

III. LEGAL ARGUMENT

A. The Definition of an Option Is Broad.

"In 1974, Congress, greatly concerned by pervasive fraud in the commodity option industry, broadened regulation of options transactions and vested in the [CFTC] plenary rulemaking powers" over all option transactions, including the power to "ban option transactions altogether." *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1152 n.3 (S.D.N.Y. 1979); *see also Commodity Options, Final Rule and Interim Final Rule*, 77 FR 25320, 25321 (Apr. 27, 2012) (hereinafter, "Commodity Options Rule") ("Congress has given the Commission [through Section 4c(b)] jurisdiction and plenary rulemaking authority over all commodity options transactions[.]"); Commodity Futures Trading Commission Act of 1974, S.Rep. 93-1131, at 5866 (1974) (Conf. Rep.) (adopting the House provision and noting that version gave the CFTC "authority to prohibit trading in options of any kind").

Accordingly, Section 4c(b), 7 U.S.C. § 6c(b) (2012), provides:

> No person shall offer to enter into, enter into or confirm the execution of any transaction involving any commodity regulated under this Act which ***is of the character of***, ***or is commonly known to the trade as***, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

7 U.S.C. § 6c(b) (2012) (emphasis added).[5]

Consistent with the language of Section 4c(b) of the Act, Section 1a(36) of the Act defines an "option" to mean as follows:

> an agreement, contract, or transaction that is ***of the character of, or is commonly known to the trade*** as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty".

[5] Section 4c(b) of the CEA, 7 U.S.C. § 6c(b) (2012), "has been in the Act in substantially the same form since it was added to the [Act] in 1974," and was left unchanged by the Dodd-Frank Act . *Commodity Options Rule*, 77 FR at 2532.

7 U.S.C. § 1a(36) (2012) (emphasis added). And Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1), (2012) defines "commodity option transaction" and "commodity option":

> each [to] mean any transaction or agreement in interstate commerce which is or is held out to be ***of the character of, or is commonly known to the trade as***, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty" involving any commodity regulated under the Act other than [the agricultural commodities listed in Regulation 32.1(b)(1)].

The language of Section 4c(b) is meant to be broadly construed in order to cover the "myriad of forms" options can take. *See In Re Precious Metals Associates Inc., et al*., No. 79-13, Comm. Fut. L. Rep. ¶ 20,882 (C.C.H.), 1979 WL 11601, at *3 n.7 (CFTC Aug. 14, 1979) ("Congress, in recognizing the myriad of forms these transactions can take, included in its prohibition any transaction which is 'of the character of, or is commonly known to the trade as, as 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty'[.]"), *aff'd*, *Precious Metals Associates, Inc. v. CFTC*, 620 F.2d 900 (1st Cir. 1980).[6] An option on a commodity and an option on a futures contract both fall within the purview of the Act. *See CFTC v. American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986); *see also In re Precious Metals,* 1979 WL 11601, * n.12 (there is "no legal significance" to the distinction

[6] Section 4c(a) of the Act, 7 U.S.C. § 6c(b) (2012) which prohibits wash and fictitious sales, contains nearly identical language, *i.e.*, it prohibits "any transaction that is ***of the character of*** a wash sale, is ***commonly understood to the trade as*** a wash sale, or is a fictitious sale." (emphasis added). The Secretary of Agriculture in construing the breadth of that language held that "[t]he language could hardly be broader and, together with the other prohibitions in this section and other parts of the act, evinces an intention to outlaw insofar as possible all schemes of trading that are artificial and are not the result of arms-length trading on the basis of supply and demand factors and trading opinion of these factors." *In re Goldwurm,* 7 Agric. Dec. 265, 11-12 (Apr. 21, 1948).

This Court similarly should broadly construe the phrase "of the character of" and "commonly known to the trade" in determining what is and what is not an option within the meaning of the Act and the Regulations. "Generally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quoting *IBP, Inc. v. Alvarez,* 546 U.S. 21, 34 (2005)).

between options on futures contracts and options on actual commodities given the breadth of Section 4c(b).) As such, Section 4c(b), 7 U.S.C. § 6c(b) (2012), and old Regulations 32.2 and 32.11 of the Act, 17 C.F.R. §§ 32.2 & 32.11 (2012), apply to any transaction involving any commodity option. *See id*.

Given this broad interpretation of options and the ability to regulate them, the Commission banned commodity options in 1978. *See American Board of Trade*, 803 F.2d at 1247 (noting that, "as of October 1, 1978, the Act itself prohibited transactions in all commodity options," with limited exception); *Rosenthal v. Bagley*, 45 F. Supp. 1120, 1123-24 (N.D. Ill. 1978) (finding that the CFTC acted fully within its Congressional authority in banning options trading). Old Regulation 32.11(a), 17 C.F.R. § 32.11(a) (2012), incorporated this ban by prohibiting the offer and sale of off-exchange commodity options. Old Regulation 32.11(b), 17 C.F.R. § 32.11(b) (2012), however, provided an exception to this ban for commodity options traded on a DCM or an FBOT "in accordance with the provisions of section 4c of the Act and any rule, regulation or order promulgated thereunder." 17 C.F.R. § 32.11(b) (2012).

Similarly, old Regulation 32.2, 17 C.F.R. § 32.2 (2012), incorporated this ban by prohibiting all options on agricultural commodities, "if the transaction is or is held out to be of the character of, or is commonly known to the trade as an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty', except as provided under § 32.13[7] of this part." 17 C.F.R. § 32.2 (2012).

In a nutshell, the language "of the character of" and "commonly known to the trade as" was meant to be broadly construed to capture all forms of options trading. The CFTC used that broad authority to ban options except for options that trade on DCMs or FBOTs or in certain other circumstances not germane to this litigation.

[7] Old Regulation 32.13, 17 C.F.R. § 32.13 (2012), is not applicable to the case at bar.

B. Banc de Binary's "Binary Options," "Call Options," and "Put Options" are Commonly Known to the Trade as Options.

Binary options, also known as "all-or-nothing options,"[8] "cash-or-nothing options," and "digital options," are options and have been commonly known to the trade as options for decades. This view is supported by economic and commodity industry treatises, industry practice and more than a decade of CFTC regulation.

1. Economic and Commodity Industry Treatises

Economic and industry treatises define binary options as options. Basic dictionaries of financial and investment terms, as well as basic textbooks on futures, options and derivatives define binary options as a type of "exotic" options "that pay out a set amount if the underlying asset price is above or below the exercise price at the time of expiration[.]" John Downes & Jordan Elliot Goodman, Barron's Financial Guides, Dictionary of Finance and Investment Terms 231 (7th ed. 2006).[9]

Those in the commodities industry similarly define binary options as follows:[10]

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[8] Banc de Binary concedes that the binary options at issue here are "all-or-nothing options." (Def. Mot. at 4.)

[9] In his 2008 book on financial derivatives, Dr. Dimitris Chorafas noted that "[t]en years ago exotic derivatives included all-or-nothing options, barrier and binary options, . . . down-and-out (or in) options, embeddos (embedded options), one-touch options, . . . step-lock options, and up-and-in (or out) options." Dimitris N. Chorafas, Introduction to Derivative Financial Instruments 43 (2008). *See also* Futures and Options Association, Introduction to Future and Options 51-52 (1997) (recognizing the tremendous growth of "exotic" options: "From All-or-Nothing Options to Zero Strike Price Options, there are literally hundreds of them, with more being invented all the time.")

[10] Because the options definition includes the clause "commonly known to the trade," the court must consider trade usage. *See, e.g., Galvin v. First National Monetary Corp*, 624 F. Supp. 154 (E.D.N.Y. 1985) (quoting the definition of leverage contract and emphasizing the "commonly known to the trade language" stating "the distinction between a leverage contract and a futures contract hinges, in large part, upon trade usage."); *see also Kaiser Steel Corp. v. Charles Schwab & Co.,* 913 F.2d 846, 849 (10th Cir.1990) (interpreting "settlement payment" with reference to industry sources).

> **Binary options are options** with discontinuous payoffs. A simple example of a binary option is a *cash-or-nothing* call. This pays off nothing if the asset price ends up below the strike price at time *T* and pays a fixed amount, *Q*, if it ends up above the strike price . . . . A cash-or-nothing put is defined analogously to a *cash-or-nothing* call. It pays off *Q* if the asset price is below the strike price and nothing if it is above the strike price.

John C. Hull, Fundamentals of Futures and Options Markets 481 (7th ed. 2011) (italics in original, bold added); *see also* Robert W. Kolb, Futures, Options, and Swaps 583 (2d ed. 1997) ("Binary options have payoffs that are discontinuous, either paying nothing or a considerable amount depending on the satisfaction of some condition." "[T]ypes of binary options" include "cash-or-nothing" options, "asset-or-nothing options, gap options and supershares," and "are also known as digital options, a name that reflects the all-or-nothing character of their payoffs."); Robert W. Kolb, Options 274 (3d ed.1997) (same); Robert W. Kolb & James A. Overdahl, Financial Derivatives, Pricing and Risk Management 147-48 (2010) (same); *see also* Futures and Options Association, Introduction to Future and Options 197 (1997) (defining "all-or-nothing options" as "[a]n option with a fixed, predetermined payoff if the underlying instrument is at or beyond the strike at expiration.")[11] Accordingly, binary options are of the character of or are commonly known to the trade as "options," "calls," and "puts." *See* Section 1(a)(36) of the Act, 7 U.S.C. 1(a)(36) (2012).

2. Industry Practice

In addition to economic treatises that demonstrate that binary options clearly fit within the definition of options, industry practice also shows that binary options are commonly known

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[11] These options are European-style options because "[a] holder is permitted to exercise the option only on the expiration date." Carolyn R. Gibson, The McGraw-Hill Dictionary of International Trade and Finance 279 (1994); *see also* Jerry M. Rosenberg, Dictionary of Investing 116 (1993) ("an option that can be exercised only on a specified date.")

in the commodities and securities industries as options. Further, in both the commodities and securities industries, both binary and cash-settled options are routinely traded.

At least two DCMs, the Chicago Mercantile Exchange ("CME") and the North American Derivatives Exchange, Inc. ("NADEX"), have traded binary options. Specifically, the CME has traded the PCS Catastrophe Single-Event Insurance contract (binary options with a fixed payout of $10,000)[12] and it currently trades a variety of weather-related binary options.[13] Further, NADEX trades, among other things, crude oil (binary options that settles at 100 or zero),[14] corn (binary options that settles at 100 or zero),[15] and gold (binary options that settles at 100 or zero) contracts.[16]

Further, at least three DCMs, the Chicago Board of Trade ("CBOT"), New York Mercantile Exchange ("NYMEX"), and the Commercial Exchange, Inc. ("COMEX"), trade options that are cash-settled, European-style options similar to the types that Banc de Binary claims the CFTC does not regulate. These contracts are the:

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[12] *See Designation Memorandum, Application of HedgeStreet, Inc. for Designation as a Contract Market pursuant to Section 5 and 6(a) of the Commodity Exchange Act* (Feb. 10, 2004) ("HedgeStreet Mem.") at p. 29-30 available at http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizationsAD&Key=39) (noting similarities between the Catastrophe option and the binary options that HedgeStreet proposed to offer).

[13] http://www.cmegroup.com/trading/weather/files/weather-products-brochure.pdf (discussing hurricane, rainfall, and snowfall binary options)

[14] Crude oil: http://www.nadex.com/trade-crude-oil/binary-options.html

[15] Corn: http://www.nadex.com/trade-corn/binary-options.html

[16] Gold: http://www.nadex.com/gold-trading/binary-options.html

- MGEX-KCBOT Wheat Spread Options, traded on CBOT;[17]
- Crude Oil Volatility Index Options Contract, traded on NYMEX;[18] and
- Gold Volatility Index Options Contract, traded on COMEX.[19]

The securities industry also recognizes binary options as options. For example, the Chicago Board Options Exchange offers Credit Event Binary Options. These options are modified European-style cash-settled binary call options where the payout settlement price is $1,000 per contract (equal to the exercise settlement value of $1 multiplied by the contract multiplier of 1,000) if there is a Credit Event confirmed; $0 if there is no Credit Event confirmed.[20]

Further, in a proposed rule change permitting the Options Clearing Corporation to clear and settle binary options, the SEC defined binary options as "cash-settled options that have only two possible payoff outcomes, either a fixed exercise settlement amount or nothing at all" and that are "subject to automatic exercise." *See SEC Notice, Self-Regulatory Organizations, The Options Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Binary Options*, SEC Release No. 34-56875, File No. SR-OCC-2007-08; 72 FR 69274-01; 2007 WL 4268873, * 69274 (Dec. 7, 2007).[21]

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[17] CBOT Wheat Spread: http://www.cmegroup.com/trading/agricultural/files/mgex-kcbt-wheat-spread-option-contract-specs.pdf

[18] NYMEX crude oil volatility: http://www.cmegroup.com/trading/energy/crude-oil/crude-oil-volatility-index-vix-futures_contractSpecs_options.html

[19] COMEX gold volatility index: http://www.cmegroup.com/trading/metals/precious/gold-volatility-index-vix-futures_contractSpecs_options.html

[20] http://www.cboe.com/micro/credit/introduction.aspx, and http://www.cboe.com/micro/credit/ProductSpecifications.aspx

[21] *See* 2005 ISDA Commodity Derivatives Definitions, § 8.5(e) ("'Automatic Exercise' means, in respect of an Option to which Automatic Exercise is applicable, that, if at the close of

3. CFTC Regulation

In its Motion, Banc de Binary entirely ignores the more than decade that the CFTC has exercised regulatory and enforcement authority over binary and cash-settled options nearly identical to those at issue in this case. For example, HedgeStreet Inc. ("HedgeStreet"), now known as NADEX, applied to the CFTC in 2003 to become a DCM so that it, unlike Banc de Binary, could lawfully offer "binary options" on certain commodities to U.S. customers.[22] In its 2004 public designation memorandum, CFTC staff defined "[a] binary option [a]s a cash-settled option with a fixed payout rather than a payout based on how deep the option is in the money." (HedgeStreet Mem. at 2 n.2.) Following a notice and comment period, the Commission approved HedgeStreet's application for DCM status and permitted HedgeStreet to list the contracts.[23] Accordingly, this Court may consider the HedgeStreet application, designation memorandum, and Commission order as another example demonstrating that binary option

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the Exercise Period the Option has not been exercised, the options will be deemed exercised as of that time. Unless the parties specify otherwise, Automatic Exercise will be deemed to apply to any Option (other than a Swaption . . .).) *available at* http://library.isda.org/onlinelibrary/_membersaccess/isdacommderivdefsup.asp.

[22] HedgeStreet's DCM application was subject to a notice and comment period and ultimately approved by the Commission, all of which are matters of public record. *See* HedgeStreet Mem., *supra* n.12 (noting that the "Commission posted portions of the HedgeStreet application on its website on September 29, 2003 with a request for public comment[,]" "received five comment letters," and recommending approval of HedgeStreet as a DCM to offer European-style binary option contracts); *Order of Designation, In the Matter of the Application of HedgeStreet, Inc. for Designation as a Contract Market* (Feb. 18, 2004) ("HedgeStreet Order") (granting the DCM application) (both documents are available on the Commission's website at http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizationsAD&Key=39).

[23] The contracts HedgeStreet requested to list for trading via "computer-to-computer interface via the internet" were cash-settled "European-style binary options" contracts, which could be purchased directly from HedgeStreet in individual bundles consisting of two components, a call option and a put option." HedgeStreet would be the only "source of contract bundles," the sole option writer, would price the bundles at $10, and "[u]pon expiration, the component option that was in the money would pay $10 and the other component option would be worthless." (HedgeStreet Mem. at 2.)

contracts are "commonly known to the trade" as "options." *See U.S. v. Mead*, 533 U.S. 218, 228 (2001) (discussing levels of deference given to agency interpretations); *see also City of Arlington v. FCC*, 133 S.Ct. 1863, 1871-73 (2013) (applying deference to an agency's interpretation of its own jurisdiction).

Further, in an enforcement context, the CFTC simultaneously filed and settled an administrative action against The Trade Exchange Network ("TEN"). *See In re Trade Exchange Network*, CFTC Docket No. 05-14 (Sept. 29, 2005) ("2005 Order"). The 2005 Order found that from at least January 2003 through May 2005, TEN violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Regulation 32.11, 17 C.F.R. § 32.11 (2004), by offering on its affiliated websites, including www.intrade.com, for trading to U.S. customers, and soliciting and accepting orders and funds from U.S. customers for the trading of, binary option contracts not excepted or exempted from the Commission's ban on trading options off-exchange. The contracts that concerned the Commission at the time included, among others, binary option contracts on the price of daily crude oil, gold futures, crude oil futures, and currency pairs.[24]

4. CFTC Has Pled Sufficient Facts to Establish That Binary Options are Options

The Complaint sets forth facts clearly establishing that the binary options, call options, and put options offered by Banc de Binary on its website fall squarely within the definitions set

[24] Banc de Binary claims in a footnote, without citation to any authority, that its options are different from "traditional" options because they are not "sold in a secondary market" and that "the price of the instrument" is not subject to price fluctuations. (Def. Mot. at 8 n.6.) Trading in a "secondary market" has nothing at all to do with whether the binary options at issue here fall within the purview of the Act and Regulations. Indeed, one dictionary of financial terms defines a "traditional options" as an option where "[a] holder cannot resell the option, which expires if not exercised." Carolyn R. Gibson, The McGraw-Hill Dictionary of International Trade and Finance 280 (1994). In any event, how the binary options are priced by Banc de Binary (including the reference prices for valuing the underlying commodity, *e.g.*, prices set in the futures or OTC markets), whether those binary options are subject to price fluctuations, and even whether those contract can be traded as spreads in reference to other commodities or arbitraged against options contracts traded on designated exchanges, are all questions of fact not resolvable at the motion to dismiss stage.

forth above. Indeed, Banc de Binary itself characterizes its options as "Call Options" and "Put Options." (Compl. ¶ 15.) Paragraph 15 of the Complaint further alleges that

> Once customers open and fund accounts through the website, customers execute trades by electing a particular asset on the website and predicting if that asset's current price will go up or down on a date and time certain. For example, customers who predict that the price of oil will rise above the then-current price listed on the website on a specific future expiration date or time, execute a "Call Option" by clicking the "UP" button on the website. Conversely, customers who predict that the price of oil will fall below the then-current price listed on the website on a specific future expiration date or time, execute a "Put Option" by clicking the "DOWN" button on the website.

(Compl. ¶ 15.) Paragraph 16 of the Complaint alleges that "customers may execute trades from between $1 and $8,000" and that the options only include a "payout" or "return" "should the predicted event occur." (Compl. ¶ 16.) Paragraphs 28 through 35 of the Compliant, *i.e.*, Count I, clearly set forth the provisions of the Act and Regulations that Banc de Binary violated when it offered to and executed these options with U.S. customers. (Compl. ¶¶ 28-35 (incorporating by reference the factual allegations contained in Paragraphs 1 through 27).)

Accordingly, the Complaint gives the Defendant "fair notice of a legally cognizable claim and the grounds on which it rests," and alleges sufficient facts, if taken as true, that establishes a "plausible basis for relief" under the Act and Regulations. *Berhe*, 2013 WL 3491272, at *1. Nothing more is required to be pleaded.

C. The Commission's Ban on Trading Options Off-Exchange Options is Not Limited to Options Capable of Actual Delivery of the Underlying Commodity.

Defendant argues that there purportedly is but one definition of an option – *i.e.*, "a contractual right to buy, or sell, a commodity or commodity future by some specific date at a specified, fixed price." (Def. Mot. at 6 (citing *CFTC v. Morgan, Harris & Scott*, 484 F. Supp. 669, 675 (S.D.N.Y. 1979).) From this definition, Defendant opines that "the essence of an option on an asset is an instrument that gives the owner/investor the right to buy or sell the

underlying asset to which it relates." (Def. Mot. at 7.) In other words, Banc de Binary contends that only physically settled off-exchange options, as opposed to cash or financially settled off-exchange options, are prohibited by Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2012), and Old Regulations 32.2 and 32.11, 17 C.F.R. § 32.2 & 32.11 (2012).

Defendant's argument is meritless. There is nothing in Section 4c(b) or old Regulations 32.2 or 32.11 that limits the Commission's ban on trading options off-exchange to only those options requiring or capable of actual physical delivery of the underlying commodity at expiration if the option is in the money. There is nothing in those provisions to suggest that there is a legal difference between physically settled versus cash-settled options.[25]

Defendant's narrow and inaccurate reading of the term option is misplaced. *Cf. Caiola v. Citibank, N.A., New Yor*k, 295 F.3d 312, 325 (2d Cir. 2002) (an "'option' under section 3(a)(1) of the Security Exchange Act "does not distinguish between physically-settled and cash-settled options.") Nor does Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2012), or the Part 32 regulations, 17 C.F.R. pt. 32 (2012), require that the option grant the holder of the option the right to receive the underlying commodity. *Cf. Caoila*, 295 F.3d at 327 (cash-settled synthetic options contracts are securities under Section 3(a)(10) of the Security Exchange Act – "the right to take possession does not define an 'option' under section 3(a)(10), which covers options that can be physically delivered as well as those that cannot"; and there is "no textual basis for reading Section 3(a)(10) to define 'option' as including only transactions that give the holder the right to receive the underlying commodity.") Instead, an option is "[a] simple method of speculating in the rise or

[25] In fact, the Commission has already determined that the definition of "option" is broad enough to include both those products that allow for physical delivery of the underlying commodity, and those that do not. *See, e.g.*, Domestic Exchange-Traded Commodity Options; Expansion of Pilot Program To Include Options on Physicals, 47 FR 56996-01 at 7 (Dec. 22, 1982).

fall of the market price of commodities or stocks, no actual transaction by sale or purchase being contemplated." Ballentine's Law Dictionary 894 (3d ed. 1969).

The contracts offered on the Banc de Binary website share the basic characteristics of options identified in the cases cited by Defendant. Banc de Binary's customers buy and sell binary options on commodities which allow them to predict ("up" or "down") whether a price will rise above the current level, chooses the investment amount that he or she wishes to trade, decides the expiration time of his or her choice, pays a premium, selects a strike price, and the ultimate payout of which, if any, is fixed.

Defendant cites a number of cases (*see* Def. Mot. at 6-7) that define a "commodity option" as "a contractual right to buy, or sell, a commodity or commodity future by some specified date at a specified, fixed price, known as the 'striking price.'" *British American Commodity Options v. Bagley*, 552 F.2d 482, 484-85 (2d Cir. 1977); *see also Precious Metals Associates,* 620 F.2d at 900 (same); *CFTC v. Crown Colony Commodity Options*, 434 F. Supp. 911, 914 (S.D.N.Y. 1977) (same). The majority of these cases dealt with American-style options[26] that could be physically settled at expiration (although not required to be physically settled). *See, e.g.*, *U.S. Metals*, 468 F. Supp. at 1151-52, 1157-59 (in an options fraud case, court found contracts were options contracts notwithstanding defendant's contention that the contracts were forward contracts for "deferred delivery," court not bound by the defendant's "self-serving description" of the contracts); *Morgan*, 484 F. Supp. at 673 (options fraud case where defendant pitched the contracts to customers as actual delivery contracts).[27]

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[26] An American-style option is an option where "[a] holder is permitted to exercise the option at any time up to the expiration date." Carolyn R. Gibson, The McGraw-Hill dictionary of International Trade and Finance 279 (1994).

[27] In *Cobank, ACB Corp. v. Alexandria*, No. 3:96-CV7687, 1999 WL 33734462 at *8-9 (N.D. Ohio July 27, 1999), a case cited by the defendant, it is unclear when the options could be

Finally, it is important to note that none of the cases cited by Defendant were decided at the pleading stage, *i.e*., the court was not asked to determine at the pleading stage whether or not the financial instrument at issue was an option within the meaning of the Act and Regulations, as Defendant asks this Court to do here. *See, e.g.*, *U.S. Metals,* 468 F. Supp. at 1157-59; *see also Morgan*, 484 F. Supp. at 673.[28]

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exercised, because the defendant in that case pitched "hedge-to-arrive" contracts as physical delivery forward contracts; the court found that the contracts were options. *See also In Re The Andersons, Inc.*, CFTC N. 99-5, Comm. Fut. L. Rep. ¶ 27, 526, 1999 WL 10036, *6-7 (CFTC Jan. 12, 1999) (finding hedge-to-arrive contracts were options and not forward contracts).

[28] One Court in the District of Nevada, in a case filed the same day the CFTC filed the Complaint at issue here, *sua sponte* (*i.e*., on an issue not before it and thus without the benefit of legal briefing by the parties on the issue), opined in *dicta* that Banc de Binary's binary options were not options within the meaning of Section § 78c(a)(10) of the Security and Exchange Act ("SEA"), "in cases where the 'option' gives the purchaser no pretense whatsoever to the right to obtain the underlying security." *SEC v. Banc de Binary Ltd*., Case No. 2:13-cv-00993-RCJ-VCF, Slip. Op. at 8, DE # 31. Instead, the Court opined that Banc de Binary's binary options were wagering contracts. *Id*. at 6-9.

The Court's *dicta* in that case is not controlling here. The Court was not construing what constitutes an option under Section 4c(b) of the CEA, 7 U.S.C. §6c(b), or Part 32 of the Regulations, 17 C.F.R. pt. 32 (2013), which broadly define options as transactions "***of the character of or commonly known to the trade as***" options, puts or calls. It was not construing a statute in which Congress granted a federal agency broad plenary authority to regulate, or even ban outright, all options on commodities. And it was not construing the sufficiency of the CFTC's Complaint at the pleading stage. Nor was the Court considering the fact that binary options, like Banc de Binary's options, as well as other necessarily cash-settled options, have been regulated by the CFTC for more than a decade. *See* Section III.B, above. Given that backdrop, the Court's *dicta* on the issue generally, as well as its *dicta* noting its disagreement with the Second Circuit's opinion in *Caiola*, have no application here.

The Court nonetheless ruled that Banc de Binary's binary options are "puts" and "calls" within the meaning of the SEA, and thus that the SEC could regulate them notwithstanding the Court's view that the contracts are wagers. *Id.* at 10-11. Similarly here, regardless of whether this Court agrees that the binary options at issue here are wagering contracts (or even gambling contracts), the CEA grants the CFTC broad authority to regulate them as they are options on commodities within the meaning of the Act.

D. The Complaint Adequately Alleges That Banc de Binary Offered Options and Entered Into Options Transactions on a Leveraged or Margined Basis.

Banc de Binary also asks the Court to dismiss Count III of the Complaint because, it argues, "[t]here is no allegation in the Complaint that [Banc de Binary]'s transactions were entered into on a leveraged or margined basis, or that they were financed (other than the conclusory assertion in paragraph 49 parroting the language of the statute)." (Def. Mot. at 10-11.) As explained below, this argument inexplicably disregards the three different paragraphs of the Complaint which plainly allege that Banc de Binary's options transactions were offered or entered into on a leveraged or margined basis. In fact, as alleged in the Complaint, Banc de Binary's *own website* stated that it offered "trading leverage" to its customers. Given these allegations, Banc de Binary has failed to provide any basis for the Court to dismiss Count III of the Complaint.

1. The Complaint Expressly Alleges That Banc de Binary's Option Transactions Were Leveraged or Margined.

In three distinct paragraphs of the Complaint the Commission expressly alleges that Banc de Binary's options transactions were conducted on a "leveraged" or "margined" basis:

> • "The transactions described in Paragraphs 24-26 [of the Complaint] were ***leveraged or margined*** by Banc de Binary" (Compl. ¶ 27) (emphasis added);
>
> • "Banc de Binary accepted money, securities, or property ***to margin*** . . . ***options transaction*** engaged in by their non-ECP customers" (Compl. ¶ 22) (emphasis added);
>
> • "As further described at Paragraphs 24-27, above . . . Banc de Binary . . . offered to enter into, entered into, confirmed the execution of, and conducted business in the U.S. . . . for the purpose of soliciting or accepting orders for . . . off exchange ***leveraged or margined*** retail commodity transactions . . . ." (Compl. ¶ 49) (emphasis added).

Although Banc de Binary makes passing reference to one of these paragraphs (number 49), it ignores completely paragraphs 22 and 27, and fails to quote any of the language used in the three

paragraphs, which states unambiguously that the subject transactions were "leveraged" or "margined."

Although these three paragraphs suffice to refute Banc de Binary's argument that Count III of the Complaint should be dismissed, paragraph 25 of the Complaint provides a further, detailed description of how, according to Banc de Binary, its leverage program worked:

> [A]ccording to [Banc de Binary's] website, if the company "offers you a 50% deposit match of up to $50,000, it means that if you open a new real trading account and make a first deposit of $1,200, Banc [d]e Binary will instantly fund your account with an additional $600 that will go straight to your trading balance allowing you to trade with $1,800 instead of the $1,200 you initially deposited."

(Compl. ¶ 25.) In fact, in the same paragraph, the Complaint quotes Banc de Binary's own description of its leverage program, in which Banc de Binary candidly describes the money it offers to its customers as "trading leverage."[29] (Compl. ¶ 25.) Accepting the allegations in paragraphs 22, 25, 27 and 49 as true, as the Court is required to for the purposes of adjudicating Banc de Binary's Motion, *Soto,* 2013 WL 1934928, at *1; *Berhe,* 2013 WL 3491272, at *1, the Complaint more than adequately alleges that Banc de Binary's options transactions were offered or entered into on a leveraged or margined basis.

As for Banc de Binary's claim that the Complaint's allegations are "conclusory," at this stage of the litigation the Commission is only required to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This means that

[29] Banc de Binary attempts to downplay this admission by arguing that the term "leverage," as advertised on the Banc de Binary website, "was used in the colloquial sense that it permitted investors to make larger investments that would otherwise have been possible without a bonus." (Def. Mot. at 12 n.8.) As explained below, however, this is precisely what is commonly understood by the term "leverage." (*Infra* at 23-24.) Moreover, while the meaning Banc de Binary claims it ascribed to the word "leverage" may be the proper subject of an evidentiary presentation to the Court at trial or in a motion for summary judgment, it is irrelevant to the resolution of a motion to dismiss, which challenges only the allegations of the complaint. *See, e.g., Kearney v. Foley & Lardner, LLP,* 590 F.3d 638, 647 (9th Cir. 2009); *Miglin v. Mellon,* No. 2:08-CV-01013, 2009 WL 3719457, at *4 (D. Nev. Nov. 4, 2009).

the Complaint need only " 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' " *Berhe,* 2013 WL 3491272, at *1 (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). The Commission's several allegations concerning the "leveraged or margined" nature of Banc de Binary's options transactions accomplish this. (*Supra* at 21.) The Commission is not obligated, as Banc de Binary apparently assumes, to plead with particularity the allegations supporting Count III of the Complaint, as it would be if the Commission was alleging fraud, for example.[30] Nor, of course, is the Commission obligated, at the pleading stage, to *prove* the allegations of the Complaint—the allegations themselves suffice. *See, e.g., Kearney v. Foley & Lardner, LLP,* 590 F.3d 638, 647 (9th Cir. 2009) (holding that trial court erred in not "taking [the] allegations" of plaintiff's complaint "as true," and that a "question of fact" underlying the allegations of plaintiff's complaint was "not properly dealt with at the pleading stage"); *Miglin v. Mellon,* No. 2:08-CV-01013, 2009 WL 3719457, at *4 (D. Nev. Nov. 4, 2009) (refusing to "consider disputed facts" at the pleading stage because "resolution of" factual issues "is not appropriate on a motion to dismiss").

Finally, Banc de Binary argues that the Complaint fails to adequately allege that the "trading leverage" Banc de Binary has admitted offering its customers was, in fact, "leverage" because "there is no allegation that there was any circumstance under which the customer would be liable for losses in an amount that exceeds his or her deposit." (Def. Mot. at 11.) But Banc de Binary provides no authority to support its novel assertion that the quantity of customer losses, or the relationship of such losses to a customer's initial deposit, are components of the definition of "leverage." They are not. The term "leverage," as it relates to financial investments, refers

[30] Particularity in pleading violations of the Act is only required when the Commission is "alleging fraud or mistake." *See* Fed. R. Civ. P. 9(b). Because the Commission's Complaint does not allege fraud or mistake, the more permissive notice pleading standard of Federal Rule of Civil Procedure 8(a)(2) applies.

generally to any use of borrowed money to increase the size of a trading position, and is unrelated to a customer's liability to repay its losses. *See, e.g.,* Carolyn R. Gipson, The McGraw-Hill Dictionary of International Trade and Finance 234 (1994) (defining leverage as "[t]he use of borrowed money to increase the value of an investment"); John Downes & Jordan Elliot Goodman, Dictionary of Finance and Investment Terms 384 (7th ed. 2006) (defining leverage as a "means of enhancing return or value without increasing investment"). Applying the correct definition of leverage, Banc de Binary concedes that the "trading leverage" it offered its customers was in every respect "leverage" as that term is commonly understood in the financial markets. (*See* Def. Mot. at 11) (describing Banc de Binary's "trading leverage" program as one in which customer accounts were "credited with an equal additional amount [of money]" which allowed customers to "trade the total [amount of money] represented by the [customer's] deposit and the bonus").

More to the point, however, Banc de Binary's argument about the "trading leverage" it offered its customers—including whether customers "would be liable for losses in an amount that exceeds his or her deposit"—is, at bottom, a factual question about customers' obligations under Banc de Binary's leverage program. It cannot be decided on a motion to dismiss, *Kearney,* 590 F.3d at 647; *Miglin,* 2009 WL 3719457, at *4, and does not, therefore, provide a basis for the Court to dismiss Count III of the Complaint.

2. The Cases Banc de Binary Cites Do Not Support its Definition of the Terms "Leveraged" and "Margined."

Banc de Binary cites two cases to support its argument that its options transactions were not "margined" or "leveraged" within the meaning of Section 2(c)(2)(D)(i): *CFTC v. Hunter Wise Commodities, LLC,* No. 12-81311-CV, 2013 WL 718503 (S.D. Fla. Feb. 26, 2013) and *Cobank,*1999 WL 33734462. (Def. Mot. at 11.) Neither case, however, defines what margin or

leverage is, much less the meaning of those terms as they are used in Section 2(c)(2)(D)(i) of the Act, 7 U.S.C. 2(c)(2)(D)(i) (2012). As a result, neither case provides support for Banc de Binary's definition of "margin" or "leverage" in this case.

As an initial matter, both *Hunter Wise* and *Cobank* are procedurally distinguishable because neither arose from a motion to dismiss. In *Hunter Wise*, in which the court resolved a motion for preliminary injunction, the court's decision was based on the evidence submitted by the parties, including live testimony, sworn declarations and documentary evidence. *Hunter Wise,* 2013 WL 718503, at *1, *3, *11. Similarly, the *Cobank* decision arose from the parties' cross-motions for summary judgment and was decided based on the parties' testimony and affidavits. *Cobank,* 1999 WL 33734462, at *6, *8. That is, in both *Hunter Wise* and *Cobank* the court's decision was determined by the sufficiency of the plaintiff's *evidence* rather than the sufficiency of the *allegations* of the complaint. Here, by contrast, the viability of Count III of the Commission's Complaint depends entirely on the sufficiency of the Complaint's allegations, which the Court is obligated to accept as true for the purposes of deciding Banc de Binary's Motion. *See Soto,* 2013 WL 1934928, at *1; *Berhe,* 2013 WL 3491272, at *1. And as demonstrated above, the Complaint expressly and repeatedly alleges that Banc de Binary's options transactions were conducted on a "leveraged" or "margined" basis. (*Supra* at 23-24.) This procedural distinction renders both *Hunter Wise* and *Cobank* irrelevant to Banc de Binary's Motion.

Hunter Wise and *Cobank* are also distinguishable because they involved distinctly different facts from those alleged in the Complaint. In *Hunter Wise*, for example, the Commission did not allege that, and the court did not decide whether, the transactions at issue were "leveraged" or "margined." Instead, the Commission alleged that the transactions were

"financed," and the court's decision was based on evidence presented by the Commission which established that the transactions were financed by the defendant. *Hunter Wise,* 2013 WL 718503, at *8. In fact, the court was careful to distinguish the terms "leveraged" and "margined" from the term "financed" in interpreting Section 2(c)(2)(D)(i), 7 U.S.C. 2(c)(2)(D)(i) (2012). *Id.* In other words, *Hunter Wise* provides no guidance on the meaning of the terms "leveraged" and "margined" as they are used in Section 2(c)(2)(D)(i) of the Act, 7 U.S.C. 2(c)(2)(D)(i) (2012), nor did the court decide whether the allegations of the Commission's complaint sufficiently alleged that defendant's transactions were "leveraged" or "margined" under that provision. *Hunter Wise* is not, therefore, relevant to the Court's resolution of Banc de Binary's Motion.

Similarly, in *Cobank* the court was not asked to decide, and did not decide, whether the futures contracts at issue there were "leveraged," "margined" or "financed." *See generally Cobank,* 1999 WL 33734462. In fact, *Cobank* had nothing to do with Section 2(c)(2)(D) of the Act, 7 U.S.C. 2(c)(2)(D) (2012), at all. Instead, Banc de Binary cites the case for its definition of a "margin call," and attempts to use that definition to support its argument that, in order for their investments to be deemed "leveraged" or "margined" within the meaning of Section 2(c)(2)(D), 7 U.S.C. 2(c)(2)(D) (2012), Banc de Binary's customers would have been required to "be liable for losses in an amount that exceeded his or her deposit." (Def. Mot. at 11.)

However, a margin *call* is not the same thing as margin. The term "margin" refers generally to the amount of money deposited by a customer in return for a loan which the customer uses to buy a financial product. *See, e.g.,* John Downes & Jordan Elliot Goodman, Dictionary of Finance and Investment Terms 405 (7th ed. 2006) (defining margin as the "amount a customer deposits with a broker when borrowing from the broker to buy securities"); Carolyn R. Gipson, The McGraw-Hill Dictionary of International Trade and Finance 246 (1994)

(defining margin as "the deposit posted as security for a loan obtained to purchase securities or guarantee a commodities contract"). A margin *call*, by contrast, is a "lender's demand that a customer surrender additional funds or eligible securities to offset losses from a margin loan." The McGraw-Hill Dictionary of International Trade and Finance 246 (emphasis added); *see also* Dictionary of Finance and Investment Terms 408 (defining margin call as a "demand that a customer deposit enough money or securities to bring a margin account up to the initial margin or minimum maintenance requirements"). There is nothing inherent in the concept of "margin" that requires a customer to be "liable for losses in an amount that exceeds his or her deposits," as Banc de Binary assumes. So while *Cobank* may have been relevant had this Court been asked to interpret the term "margin call," it is not relevant to Banc de Binary's Motion, which concerns the wholly distinct concept of "margin"—which is the relevant term for the Court's analysis of Section 2(c)(2)(D)(i), 7 U.S.C. 2(c)(2)(D)(i) (2012).

E. Banc de Binary Offered Retail Foreign Exchange Transactions that were Options.

Count Four of the Complaint rises or falls on whether Banc de Binary was soliciting or accepting orders from its customers for options.[31] Banc de Binary's entire argument is that its binary options were not options. Their argument does not withstand scrutiny.

As a preliminary matter, and as demonstrated in Section III.A, B, and C above, the binary options offered by Banc de Binary to its customers are options. Further, the Complaint plainly alleges that Defendant was soliciting and accepting orders in connection with forex options. (Compl. ¶¶ 13-22.)

Section 2(c)(2)(B)(I) of the Act, 7 U.S.C. § 2(c)(2)(B)(I) (2012), provides that the CFTC has jurisdiction over, among other things, options which are in connection with agreements,

[31] Defendant's contention that the binary options it offered were not futures contracts is not disputed. The Complaint alleged that Defendant's offered options, not futures.

contracts and transactions in forex. Section 2(c)(2)(B)(iv)(I)(aa) of the Act, 7 U.S.C. § 2(c)(2)(B)(iv)(I)(aa) (2012), provides that an unregistered FCM cannot solicit or accept orders from non-ECPs in connection with agreements, contracts, or transactions involving forex futures or options. The forex options that Banc de Binary solicited and offered to its customers (*see* Compl. ¶¶ 14, 17) thus violated Section 2(c)(2)(B)(iv)(I)(aa) of the Act, 7 U.S.C. § 2(c)(2)(B)(iv)(I)(aa) (2012).

Further, Regulation 5.1(m), 17 C.F.R § 5.1 (2013) defines a retail forex transaction as being any "account, agreement, contract or transaction described in section 2(c)(2)(B) . . . of the Act." Banc de Binary's options are therefore also considered retail forex transactions. Regulation 5.3(a)(4)(i)(B), 17 C.F.R. 5.3(a)(4)(i)(B) (2013), requires that all FCMs who solicit or accept orders from any person that is not an ECP in connection with any retail forex transaction must be registered. As discussed above, Banc de Binary solicited and accepted orders from its customers in connection with retail forex transactions (*i.e.* options). Further, Banc de Binary operated as FCM as defined in Section 1a(28), 7 U.S.C. § 1a(28) (2013), and as set out in the Commission's Complaint. In its Motion, Banc de Binary does not, dispute that it meets the FCM definition. Thus, Defendant violated 5.3(a)(4)(i)(B), 17 C.F.R. 5.3(a)(4)(i)(B) (2013), as well as Section 4d(a) of the Act, 7 U.S.C. § 6d(a) (2012) (making it illegal for any person to act as an FCM without registration).

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion must be denied in its entirety.

Dated: August 8, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David Slovick, hereby certify that on August 8, 2013, I electronically filed the foregoing Opposition to Defendant's Motion to Dismiss Counts One, Three and Four of the Complaint with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such following to the following attorneys of record:

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Dated: August 8, 2013

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