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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

vs.

BANC DE BINARY LTD.,

Defendant.

Case No. 2:13-CV-00992-MMD-VCF

BANC DE BINARY'S MOTION TO DISMISS COUNTS ONE, THREE AND FOUR OF THE COMPLAINT

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MOTION

Defendant Banc de Binary ("BDB"), by and through its undersigned counsel, hereby moves the Court to dismiss Counts One, Three and Four of the Complaint because the Commodity Futures Trading Commission ("CFTC") has failed to allege that the products offered and sold by BDB to United States individuals fall within the categories of financial instruments and/or transactions over which the CFTC had or has authority in the period covered by each of its claims. This motion is supported by the following memorandum of points and authorities and by the entire record of this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises from BDB's offer and sale of certain financial products to individuals in the United States – and in many other places around the world – via the internet. While BDB refers to the products using the colloquial term "binary options," these products differ in very important respects from what is traditionally considered an "option" by those in the financial services industry. The particular characteristics of these products and the transactions in which BDB offered and sold them are determinative of the limited extent to which and period of time in which the CFTC has been authorized to regulate them. It is for this reason that Counts One, Three and Four of the Complaint fail to state a claim for which relief may be granted, and should therefore be dismissed.

First, the CFTC had no authority to regulate BDB's products during the period covered by Count One of the Complaint – May 2011 through June 25, 2012. During this period, which was prior to the effective date of many of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the sole basis on which the CFTC claims the right to regulate BDB's products is the authority it held over "options." But because of the way that "options" were defined in the Commodities Exchange Act at that time, and because BDB's products differ in material respects from the instruments that are commonly viewed as "options," the CFTC had no authority over BDB's products during this period, and Count One is therefore deficient.

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Second, the Court should reject the CFTC's assertion that the transactions in which BDB entered with U.S. individuals were "on a leveraged or margined basis," which is the basis on which the CFTC claims authority to regulate BDB's transactions in Count Three. The CFTC's assertion that BDB's bonus program constituted "leverage" or a "margin" is a misuse of those terms. While the bonus program increased the amount that and individual was able to invest beyond the amount of his or her deposit, it did not expose the investor to the risk of additional liability that is the hallmark of investing on margin. Because the bonus program did not constitute "leverage" or "margin" within the meaning of those terms as used in the statute, the Court should dismiss Count Three of the Complaint as well.

Finally, the Court should dismiss Count Four, in which the CFTC claims authority over BDB transactions involving foreign exchange products under the provision of the Commodity Exchange Act ("CEA") that specifically addresses those products. But because these products were neither futures contracts nor options (as defined in the statute), this provision of law simply does not apply. For that reason, the Court should find that Count Four fails to state a claim and should be dismissed.

II. FACTUAL BACKGROUND

As the CFTC alleges in its Complaint, BDB is a company based in Cyprus and Israel that offers an online trading platform for relatively new but now widely available products known by the colloquial name of "binary options." Complaint ¶¶ 12, 13. BDB is registered with and regulated by the Cyprus Securities Commission ("CySec"). Complaint ¶ 12. During the period covered by the Complaint, BDB offered its products, via the internet, to individuals not only in the United States but in countries all around the world. Complaint ¶ 12.

BDB's products are commonly called "binary options" – despite significant differences with traditional "options" – because there are only two possible results for each investment. As the Complaint alleges, when an individual purchases a binary option, he or she invests a set sum of money and receives a return that depends upon a future circumstance. Each binary option references the stock of a particular asset such as a commodity, (*e.g.*, wheat, oil, gold, platinum, sugar, coffee, corn, etc.), foreign exchange pair (*e.g.*, EUR/USD, GBP/USD, USD/JPY, etc.) or

stock index (*e.g.*, S&P 500, NASDAQ futures, etc.). Complaint ¶ 14. At the time that the investor makes his or her investment, he or she "predicts" whether or not the price of that asset will reach a referenced point by a set point in time. Complaint ¶¶ 15, 16. The products are called "binary" or "all or nothing" because there are only two outcomes: If the investor predicts correctly, he or she receives a payout expressed as a percentage of the amount that he or she invested (*e.g.*, 72 percent), and otherwise, he or she simply loses the amount invested. There is no allegation in the Complaint that the purchase of one of BDB's binary options gives an investor the contractual right to buy or sell the underlying asset by some specific date at a specified fixed price (or otherwise).[1]

The Complaint also includes allegations regarding the bonus program under which BDB credited the accounts of some United States customers with additional funds that they could invest using BDB's internet trading platform. Under BDB's bonus program, an account holder who deposited an amount in his or her account over a minimum threshold was provided with a "bonus" that matched the amount deposited, thereby giving that customer twice as much money to invest in the products offered on BDB's platform. Complaint ¶ 25. Any customer who received such a bonus was not permitted to withdraw funds, however, until they conducted an amount of trading activity usually equal to some multiple of the amount that they deposited. *Id.* On the other hand, the "bonus" was in no sense a loan, and there was no circumstance under which BDB would seek repayment from a customer of an amount credited to the customer's account as part of the bonus program.

III. ARGUMENT

Each of Counts One, Three and Four of the Complaint suffers from the deficiency that the instruments or transactions to which those Counts relate did not (or do not) fall within the scope of the CFTC's regulatory authority during the period to which each Count relates. For that reason, the Court should dismiss each of these Counts.

[1] As we explain below in detail, in this regard and others, these products differ in significant ways from the financial instruments commonly known to the financial services trade as "options."

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A. The Court should dismiss Count One of the Complaint because the instruments that BDB offered and sold were not "options" as defined in the CEA and were not otherwise subject to regulation by the CFTC during the period in question.

First, the Court should find that the Count One of the Complaint is deficient because the CFTC lacked authority to regulate BDB's products during the period relating to that Count – May 2011 through June 25, 2012. In particular, the Court should find that BDB's products did not constitute "options" (or "puts" or "calls," which are essentially variations of options) as those terms are defined in the CEA. Given that there is no other basis on which the CFTC claims the right to regulate these products during the relevant period, the failure (and inability) of the CFTC to allege that BDB offered or sold "options" is fatal to Count One, which must be dismissed.

In Count One of the Complaint, the CFTC asserts that BDB violated Section 4c(b) of the CEA. Complaint ¶ 29. That section makes it unlawful to

> offer to enter into, enter into or confirm the execution of, ***any transaction involving any commodity regulated under the [CEA] 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 [CFTC] prohibiting any such transaction or allowing any such transaction under such terms and conditions as the [CFTC] shall prescribe.

7 U.S.C. § 6c(b) (2012) (emphasis added). The CFTC then alleges that certain regulations that were in force between May 2011 and June 25, 2012, prohibited transactions into which BDB entered (or offered to enter) based upon this statutory provision. Complaint ¶¶ 30-31.[2] Specifically, the CFTC references:

- Old Regulation 32.2, which prohibits transactions in certain 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 guarantee,' or 'decline guarantee'" unless they fell within certain exemptions not at issue here. 17 C.F.R. § 32.2 (repealed June 26, 2012) (emphasis added);[3] and

[2] The CFTC refers to the regulations that were repealed as of June 25, 2012 using the terminology "Old Regulation 32.x" and refers to the regulations in force beginning on June 26, 2012 by the terminology "New Regulation 32.x." Complaint at 2 n.1. For ease of reference, we use that same terminology in this memorandum.

[3] Notably, in its description of Old Regulation 32.2, the CFTC omitted the phrase quoted above in the text. Complaint ¶ 30.

- Old Regulation 32.11, which prohibits transactions involving a "commodity option" unless it is exempt under other related regulations or "conducted on or subject to the rules of a contract market or a foreign board of trade 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 (repealed June 26, 2012).

Complaint ¶¶ 30-31. The Court should thus dismiss Count One of the Complaint because it is predicated on the unsupportable assertion that the instrument that BDB offered and sold constituted a "commodity option" (per Old Regulation 32.2) or "[was] or [was] held out to be of the character of, or is commonly known to the trade as an 'option,'. . 'put,' [or] 'call'" (per 7 U.S.C. § 6c(b) and Old Regulation 32.11).[4]

> Since 2000, the CEA has included a statutory definition of an "option":
> The term "option" means 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".

7 U.S.C. § 1a(36). *See also* Pub. L. 106–554, §1(a)(5) (2000) (adding definition of "option" as subparagraph 26).[5]

An examination of what is "of the character of" or "commonly known to the trade as" an option makes clear that BDB's products do not fall within that category. Even long before Congress saw fit to attempt to define the term "option," courts had formulated a definition: "a commodity option is 'a contractual right to buy, or sell, a commodity or commodity future by some specific date at a specified, fixed price.'" *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F.Supp. 669, 675 (S.D.N.Y. 1979) (quoting *British Amer. Commodity Options Corp. v. Bagley*, 552 F.2d 482, 484-85 (2d Cir.), *cert. denied* 434 U.S. 938, 98 S.Ct. 427, 54 L.Ed.2d 297 (1977) and citing *CFTC v. U.S. Metals Depository Co.*, 468 F.Supp. 1149 (S.D.N.Y. 1979) and *CFTC v.*

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[4] The Complaint does not allege, and we do not understand the CFTC to assert that BDB's instruments or transactions constituted any of the other items listed in this statutory and regulatory phrase – that is, privileges, indemnities, bids, offers, advance guarantees or decline guarantees.

[5] This definition, which appears in section 1a(36), originally appeared in section 1a(26), but that paragraph was renumbered as part of a subsequent amendment of the statute.

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Crown Colony Commodity Options, Ltd., 434 F.Supp. 911, 914 (S.D.N.Y. 1977)). *See also Precious Metals Assocs. Inc. v. CFTC*, 620 F.2d 900, 907 (1st Cir. 1980) ("option" has "certain uniformly accepted characteristics" and commonly refers to "a contractual right to buy, or sell, a commodity or commodity future by some specific date at a specified, fixed price, known as the 'strike price.'") (quoting *British Amer. Commodity Options Corp.*, 552 F.2d at 484-85). An option that provides a contractual right to buy an asset is a "call," and an option that provides a contractual right to sell an asset is a "put." *Precious Metals Assocs.*, 620 F.2d at 905. *See also CFTC v. British Amer. Commodity Options Corp.*, 2 Comm.Fut.L.Rep. (CCH) ¶ 20,662 at 22-699 (S.D.N.Y. 1978) (same); A. Corbin, Contracts § 259 n.3 (1952) (same). In short, the essence of an option on an asset is that it is an instrument that gives its owner/investor the right to buy or sell the underlying asset to which it relates.

Indeed, it is this contractual right to buy or sell that is the key characteristic of puts, calls and other options. As one Court explained:

> A put contemplates a future sale of a commodity in which the buyer of the put will be the seller of the commodity and the seller of the put will be the purchaser of the commodity. The buyer of the put has the right, but not the obligation, to sell a certain quantity of a commodity at a fixed price at a future time. The seller of the put is obligated to pay the commodity price specified in the put. Those who own puts benefit from a drop in the price of the commodity because they can "exercise" the put, that is, force the seller of the put to pay for the commodity at the price specified in the put, the exercise price, which will be above the market price. If the market price is above the exercise price of the put, then the owner of the put will not exercise it and the put will expire as worthless.

Cobank, ACB Corp. v. Alexander, 1999 WL 33734462 at *2 (N.D. Ohio July 27, 1999). Similarly, the owner of a call may force the seller of the call to sell a certain quantity of a commodity at an exercise price that is below the market price for that commodity at the time that of exercise, and the call owner therefore benefits from a fall in the price of that commodity. *Id.*

The best evidence that these courts have accurately described the accepted industry understanding of the characteristics of, and what the trade calls an "option" is that the CFTC itself has adopted the same formulation. *See, e.g., In the Matter of The Andersons, Inc.*, CFTC No. 99-5, Comm.Fut.L.Rep. ¶ 27,526, 1999 WL 10036 (CFTC Jan. 12, 1999) (CFTC order instituting proceedings for violations of CEA and approving offer of settlement notes that "[a] commodity

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option 'confers upon the holder the right to buy . . . or to sell . . . either a specified amount of a commodity or a futures contract for that amount of a commodity within a certain period of time at a given price") (quoting *CFTC v. U.S. Metals Depository Co.*, 468 F.Supp. at 1154-55 and *CFTC v. Crown Colony Commodity Options, Ltd.*, 434 F.Supp. at 913-14)

Given this salient characteristic, it is clear that while BDB used the colloquially popular term "binary option" to refer to its product, the product is neither of the character of an option nor is it what those in the futures industry would view as an option. As the CFTC has alleged, the binary options that BDB offered and sold did not give the right to buy or sell the underlying asset. Rather, the instrument merely entitled the investor to a payout expressed in terms of a percentage of the amount invested. This type of payout is entirely different from the obligation to make (or the right to receive) delivery of an asset.

While there are certainly varieties of options that are "cash-settled" – that is, that are paid out in cash at expiration, as opposed to by delivery, the payment involved in a cash-settled option is equal to the cash value of the asset that was to be delivered. Cash-settled options are often used for convenience where delivery of the actual asset (for example, all of the stocks that are included in the underlying asset) would be difficult or inconvenient. But the cash settlement of an option is a reflection of the underlying contractual right to buy or sell the asset that is the *sine qua non* of the option.[6]

The fact that BDB ***called*** its instruments "binary options" and "puts" and "calls" is by no means determinative of the ***character*** of these instruments. Courts have held uniformly that the determination of whether a financial instrument is an option or some other form of agreement does not depend on the name that the issuer chooses to use for its own purposes. *See, e.g.*,

[6] The fact that the BDB products could not be sold in a secondary market, and that the price of the instrument did not fluctuate during the period between issuance and expiration also differentiates these instruments from what has traditionally been viewed by the industry as an "option." But even if the Court were to accept that "European-style options" – options that cannot be sold prior to expiration – fall under CFTC regulatory authority, that in no manner addresses the other material aspects of the BDB instruments that differ from "options." In its motion seeking a preliminary injunction, the CFTC has asserted that it has regulatory authority over such "European-style" options, Plaintiff's [CFTC's] Motion for Preliminary Injunction and Other Equitable Relief and Points and Authorities in Support (Docket No. 15) at 11 & n.4, but can direct the Court to no statutory or case-law confirmation of that claimed authority. Indeed, the sole bases on which the CFTC relies for that authority are a consent order involving Intrade – an instance in which the defendant did not challenge the CFTC's authority – and an agency order approving the designation of HedgeStreet (since renamed as NADEX) as a contract market. *Id.*

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Precious Metals Assocs., 620 F.2d at 908 (holding that name does not determine what type of instrument a particular agreement is, and noting that it is "[t]transactions with the character of 'options'" that fell within the scope of the regulation at issue there); *Morgan, Harris & Scott*, 484 F.Supp. at 676 (rejecting suggestion that names of an instrument used by issuer determine what type of financial instrument it is).

The definition of a "swap" that Congress created as part of the Dodd-Frank Act offers further evidence that BDB's products do not have the character of nor are what the trade considers "options." As part of that statute, Congress added a definition of "swap" that expanded the authority of the CFTC (though it did not become effective, pending required rulemaking, until October 12, 2012). Under the new definition, a "swap" includes options. *See* 7 U.S.C. § 1a(47)(A)(i) (definition "swap" to include "an agreement, contract or transaction . . . that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind"). But Congress added to the CFTC's authority other instruments that did not constitute options and were not previously subject to the CFTC's regulations. Section 1a(47)(A)(ii) specifies that the definition of "swap" also includes "an agreement, contract or transaction . . . that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." The inclusion of this additional category of instruments – which, unlike options, do not necessarily include a contractual right to sell or buy an asset – expanded the CFTC's authority to include the types of instruments that BDB offered and sold. The fact that it was necessary to include this description in order to do so is strong evidence that BDB's products and transactions simply did not fall within the definition of "options" previously subject to the CFTC's authority.

Thus, given that the instrument BDB offered and sold did not give a contractual right to buy or sell an underlying asset, it did not constitute an "option" and therefore was not subject to

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the regulatory authority of the CFTC during the period from May 2011 through June 25, 2012. For that reason, the Court should dismiss Count One of the Complaint.

B. The Court should dismiss Count Three of the Complaint because the productions and transactions that BDB offered and sold were not offered or sold on a leveraged or margined basis, or financed by BDB or any related person.

The Court should likewise dismiss Count Three of the Complaint, which alleges "illegal off-exchange futures trading" because the CFTC has similarly failed to allege sufficiently that the transactions that BDB offered and sold were entered into, or offered, "on a leveraged or margined basis, or financed by the offeror" or any other related person. In the absence of such leverage, margin or financing, the prohibition against off-exchange trading on which the CFTC relies simply does not apply.

Section 4(a) of the CEA, 7 U.S.C. § 6(a), generally prohibits off-exchange trading of "futures contracts." *See* Complaint ¶ 48 (quoting section 4(a) of the CEA).[7] In Count Three, the CFTC bases its claim on sections 2(c)(2)(D)(i) and 2(c)(2)(D)(iii) of the CEA, which piggy-back on this prohibition. Complaint ¶ 46. Specifically, these sections of the statute provide that certain retail transactions – that is, transactions with individuals who are not "eligible contract participants" – will be subject to the same off-exchange trading prohibition as futures contracts ***if*** the "agreement, contract, or transaction in any commodity . . . is . . . entered into, or offered (even if not entered into), ***on a leveraged or margined basis, or financed*** by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis." 7 U.S.C. § 2(c)(2)(D)(i)(II) (emphasis added).

There is no allegation in the Complaint that BDB's transactions were entered into on a leveraged or margined basis, or that they were financed (other than the conclusory assertion in

[7] "A futures contract enables an investor to hedge the risk that the price of the commodity will change between the date the contract is entered and the date delivery is due—without having to take physical delivery of the commodity." *CFTC v. Noble Metals Int'l Inc.*, 6 F.3d 766, 772 (9th Cir. 1995) (citing *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 579–80 (9th Cir.1982)). "A futures contract provides that a specific amount of the commodity will be 'delivered' to the buyer at a specified date (trade date) at an agreed-upon price. If the buyer does not want to take delivery of the commodity on the trade date, he enters an 'off setting transaction' to sell the same amount of the commodity. The investor's profit or loss depends upon the difference between the amount the investor contracted to pay for the commodity and what he gets for it when he sells it." *Noble Metals Int'l Inc.*, 6 F.3d at 772 (internal citations omitted).

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paragraph 49 parroting the language of the statute). The sole factual basis on which the CFTC bases the claim that BDB is subject to this off-exchange trading prohibition relate to BDB's bonus program. The features of that program do not, however, constitute leverage, margin or financing.

Leverage, margin and financing refer specifically to arrangements in which an investor is required to submit cash representing only a percentage of the amount of his or her investment, but is ultimately liable for the full extent of the investment. *See, e.g., CFTC v. Hunter Wise Commodities, LLC*, 2013 WL 718503 at *6 (describing financing of commodity transactions in which customers made down payment to dealer of 25 percent of total purchase price of commodity). Margin, leverage and financing thus increase the amount that a customer may invest, but subject to terms under which the customer may be liable for the entire amount – and not just his or her initial down-payment – depending on the change in circumstances of the particular asset in question. *See, e.g., Cobank, ACB Corp. v. Alexander*, 1999 WL 33734462 at *2 (describing margin call as a requirement that a party to a futures contract put up additional money to ensure performance on the futures contract, and noting that margin calls may be "triggered by shifts in the price of a commodity which disfavor the seller of a put or a call").

The CFTC's reliance upon the bonus program as a form of margin, leverage, or financing is entirely misplaced. Under the bonus program, a customer who deposited a certain amount of money in his or her BDB account was credited with an equal additional amount in the account, and was able to trade the total represented by the aggregate of the deposit and the bonus. Complaint ¶ 25. A customer who accepted a bonus agreed, in exchange, to a limitation on his or her right to withdraw funds from his or her BDB account. *Id.*. But there is no allegation that there was any circumstance under which the customer would be liable for losses in an amount that exceeded his or her deposit. Thus, while an investor who trades on margin may be required to pay not only his or her initial deposit but also the remaining amount of the investment that has

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been financed, there is no allegation that BDB customers who accepted bonuses were exposed to similar liability.[8]

In the absence of any allegation that BDB's transactions were offered or entered on a leveraged or margined basis, or were financed, there is no basis for the CFTC's claim that BDB's transactions were subject to the off-exchange trading prohibition set forth in section 4(a) of the CEA. For this reason, the Court should dismiss Count Three of the Complaint.

C. The Court should dismiss Count Four of the Complaint because the retail foreign exchange transactions that BDB offered and sold were neither futures contracts nor options, and therefore were outside the scope of the CFTC's regulatory authority.

Finally, the Court should also dismiss Count Four of the Complaint on similar grounds relating to the distinct characteristics of the instruments that BDB offered and sold. Because none of the foreign exchange transactions that BDB offered and sold constituted either futures contracts or options, BDB was not obligated to register as a futures commission merchant based on its offer or sale of such products.

The CFTC bases Count Four of the Complaint on section 2(c)(2)(B)(iv)(I)(aa), which prohibits individuals or entities not registered as futures commission merchants from engaging in a specifically described subset of retail foreign exchange transactions. Complaint ¶ 56 (citing 7 U.S.C. § 2(b)(2)(B)(iv)(I)(aa)).[9] That subset of retail foreign exchange transactions is set forth in section 2(c)(2)(B)(i)(I): The agreement, contract or transaction in foreign currency must constitute "a contract of sale of a commodity for future delivery (or an option on such a contract)" – that is, a futures contract or an option on a futures contract – or an "option" traded off-exchange. 7 U.S.C. § 2(c)(2)(B)(i)(I). *See CFTC v.* Erskine, 512 F.3d 309 (6th Cir. 2008) (reference to "contract of sale of a commodity for future delivery" refers to a "futures contract").

[8] The reference on the website to the "extra trading leverage" that would be a result of a bonus does not change this analysis. Complaint ¶ 25. The term "leverage" there was used in the colloquial sense that it permitted investors to make larger investments than would otherwise have been possible without a bonus. That type of "leverage" – as opposed to leverage that exposes an investor to additional liability – does not raise the type of concerns that underlie the inclusion of such transactions in an off-exchange trading prohibition.

[9] As we noted *supra*, the CFTC alleges in the complaint that BDB did not limit its offer or sale of its products to "eligible contract participants." *E.g.*, Complaint ¶ 58. We use the adjective "retail" to refer to transactions that are not limited to ECPs.

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The CFTC's authority to require registration as a futures commission merchant is limited to these particular types of retail foreign exchange transactions.

There is no allegation in the Complaint that the instruments and transactions that BDB offered and sold constituted "futures contracts." And, as we demonstrated *supra*, BDB's products did not constitute "options" as that term is defined in the CEA.

In its Complaint, having expressly relied upon section 2(c)(2)(B)(iv)(I)(aa) as the basis for its claim, the CFTC then muddles the issues by referencing other types of transactions or by using more general terminology that does not specify the type of transaction at issue. Complaint ¶ 58 (referencing "swaps, retail forex transactions, retail commodity transactions, and/or commodity options" and "retail commodity options transactions"). The CFTC also references the act of "accepting money, securities, or property to margin, guarantee, or secure any trades or contracts that resulted" from these various transactions. *Id.* There is no basis for the CFTC's implicit assertion that these other transactions or this other conduct required that BDB register pursuant to section 2(c)(2)(B)(iv)(I)(aa). Because the obligation to register as a futures commission merchant under section 2(c)(2)(B)(iv)(I))(aa) is limited to those who engage in the particular types of retail foreign exchange transactions listed in section 2(c)(2)(B)(i) – futures contracts and options – the failure of the CFTC to make sufficient allegations that BDB engaged in such transactions is fatal to its claim.

The CFTC's reliance on Regulation 5.3(a)(4)(i)(B) fares no better because, as it must be, it is limited by the scope of the statute. Regulation 5.3(a)(4)(i)(B) appears to impose a registration requirement – though the language is unclear – on any person "[t]hat solicits or accepts orders from any person that is not an eligible contract participant in connection with any retail forex transaction." 17 C.F.R. § 5.3(a)(4)(i)(B). But the reference to "any retail forex transaction" in that regulation by no means expands the subset of foreign exchange transactions that create a registration obligation. Regulation 5.1(m) specifically defines "retail forex transaction" to mean "any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C)" of the CEA. 17 C.F.R. § 5.1(m). As noted above, section 2(c)(2)(B)(i) specifically limited the retail foreign exchange transactions that create a registration obligation to

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futures contracts and options – descriptions that do not fit the instruments or transactions that BDB offered and sold.

Given that the CFTC has failed to allege sufficiently that BDB engaged in transactions that created an obligation for it to register as a futures commission merchant, the Court should dismiss Count Four of the Complaint as well.[10]

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[10] Section 2(c)(2)(A)(ii) of the CEA, 7 U.S.C. § 2(c)(2)(A)(ii), references "swaps" as falling within the CFTC's jurisdiction but this provision of law does not appear to apply here. Indeed, the CFTC has not cited this section, and Regulation 5.1(m) – which defines the scope of transactions to which Regulation 5.3 applies – also does not reference this provision. 17 C.F.R. §§ 5.1(m), 5.3(a)(4)(i)(B). In any case, even if the CFTC were entitled to rely upon section 2(c)(2)(A)(ii) to argue that BDB was obligated to register based on its offer or sale of "swaps," that provision was added to the CEA by the Dodd-Frank Act and, as the CFTC itself notes in its Complaint, the agency deferred the effective date of the definition of "swaps" until October 12, 2012. Complaint ¶ 41. Therefore, even if the Court were to find that BDB was obligated to register as a futures commission merchant based on its offer and sale of "swaps" (notwithstanding the absence of any reference to that provision), the Court should find that any such obligation did not arise until October 12, 2012.

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IV. CONCLUSION

For all of the reasons stated above, Banc de Binary respectfully requests the Court grant the motion to dismiss Counts One, Three, and Four of the CFTC complaint.

DATED: July 15, 2013.

SNELL & WILMER LLP

By: /s/ Craig S. Denney

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On July 15, 2013, I caused to be served a true and correct copy of the foregoing **BANC DE BINARY'S MOTION TO DISMISS COUNTS ONE, THREE AND FOUR OF THE COMPLAINT** by the method indicated:

____ BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

____ BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

____ BY EMAIL: by emailing a PDF of the document(s) listed above to the email addresses of the individual(s) listed below.

____ BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

____ BY PERSONAL DELIVERY: by causing personal delivery by , a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.

__X__ BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

/s/ Dawn Calhoun
An employee of Snell & Wilmer L.L.P.