IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION, *Plaintiff*, v. SAM IKKURTY A/K/A SREENIV ASI RAO, RAVISHANKAR AVADHANAM, AND JAFIA LLC, *Defendants*, IKKURTY CAPITAL, LLC D/B/A ROSE CITY INCOME FUND, ROSE CITY INCOME FUND II LLP, AND SENECA VENTURES, LLC, *Relief Defendants*.	)	Case No. 1-22-CV-02465 Hon. Mary M. Rowland Magistrate Judge Jeffrey Cummings

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS SAM IKKURTY AND JAFIA, LLC'S MOTION FOR SUMMARY JUDGMENT, MOTION TO DISMISS, AND MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants Sam Ikkurty ("Mr. Ikkurty") and Jafia LLC ("Jafia") (together, "Defendants") respectfully submit this memorandum of law in support of their Motion for Summary Judgment, Motion to Dismiss Plaintiff Commodity Futures Trading Commission's (the "CFTC's" or the "Commission's") Complaint for Injunctive Relief, Civil Monetary Penalties, and Other Equitable Relief [Dkt. #1] (the "Complaint"), and Motion for Judgment on the Pleadings pursuant to Federal Rules of Civil Procedure 56, 12(b)(1) and 12(c). This Motion cites to the contemporaneously filed Defendants' Sam Ikkurty and Jafia, LLC's Statement of Material Facts Pursuant to Local Rule 56.1(A)(2), referred to hereinafter as "Def. Stmt."

I. INTRODUCTION

The CFTC filed this case last May trumpeting grand claims of a purported "Ponzi scheme" and misappropriation from investors. Def. Stmt. at ¶¶ 50-51. The CFTC alleged, among other things, that Defendants never made any digital asset investments in Rose City Income Fund I ("Fund I") and Rose City Income Fund II LP ("Fund II") (together, the "Funds"), but instead misappropriated most or all of the funds by transferring the funds to other accounts owned or controlled by the Defendants or other participants in the Funds. *Id.* After significant discovery, the CFTC has not unearthed any evidence to support those claims.

Expert analysis has accounted for every dollar of Fund assets and confirmed that Defendants made substantial digital asset investments on behalf of the Funds—all contrary to the CFTC's allegations. *Id.* at ¶¶ 49, 57. Fact and expert discovery have shown: (1) offering documents clearly disclosing the investment and fee structure of the Funds (*Id.* at ¶¶ 9, 21, 24); (2) testimony from the Funds' experienced legal counsel regarding the Funds' operation as exempt private hedge funds, subject to securities laws (*Id.* at ¶¶ 45, 46, 48); and (3) publicly available transaction ledgers reflecting the Funds' ownership in digital assets (*Id.* at ¶¶ 27-30, 38). The evidence also shows that the Commission conducted an entirely inadequate investigation prior to filing its Complaint, failing to review key Fund offering documents or *any* of the Funds' digital asset holdings. *Id.* at ¶¶ 53-55. There was no Ponzi scheme or misappropriation of investor funds. And there were no "commodity interests" or allegedly fraudulent conduct in connection with "commodity" contracts necessary to support jurisdiction over the CFTC's claims.

The Complaint asserts three causes of action against Defendants. Counts I and II concern an alleged failure to register as a commodity pool operator ("CPO") and fraud by a CPO, respectively, while Count III makes allegations under the general anti-fraud provision of the

Commodity Exchange Act (the "CEA" or the "Act"). Counts I and II of the Complaint require a showing that Defendants operated a "commodity pool" for the purpose of trading in "commodity interests." The allegations in the Complaint largely involve the operation of Fund II, which invested in digital assets. The investments in these assets made by Fund II (and, for that matter, Fund I) are not commodity interests regulable under the CPO provisions of the CEA. They are not among the specific transactions included within the statutory definition of commodity interest, which generally includes futures, options, and swaps—not the spot market transactions for immediate delivery at issue in this case. *See* 17 C.F.R. § 1.3. In response to direct written discovery requests from Defendants concerning commodity pools and commodity interests, the CFTC has not identified a single commodity interest allegedly traded by Defendants because there were no such trades. Def. Stmt. at ¶ 40. Because Defendants did not pool money to trade in commodity interests, or actually invest in such interests, the CPO provisions of the Act do not apply.

The Funds' Private Placement Memoranda ("PPMs") and other offering materials contain limited references to commodities and state specifically that the Funds will operate as private investment funds exempt from the CPO registration provisions of the CEA. *Id.* at ¶¶ 39, 44-45. The CFTC has tried to claim that such references somehow render Defendants commodity pool operators because they demonstrate that Defendants raised funds for the purpose of trading in commodity interests, regardless of whether they actually did so. *Id.* at ¶ 41. However, when the provisions of the PPM are read together and harmonized, they simply leave the door open for commodity interest trading in the future *if* the regulatory landscape concerning digital assets, markets for digital assets, and/or the Funds' investment strategy eventually changed. *Id.* at ¶ 39. They do not mandate trading in commodity interests. As this case does not involve commodity interests, the Court lacks jurisdiction over the CFTC's first two causes of action, and the claims

should be dismissed for lack of subject matter jurisdiction. Subject matter jurisdiction is a non-waivable requirement that may be raised at any point in the case. The claims should also be dismissed because the conclusive evidence demonstrates that Defendants did not operate any enterprise for the purpose of trading in commodity interests.

Furthermore, the CFTC has failed to properly allege a violation of the general anti-fraud provision of the CEA. Count III of the Complaint has no basis because it requires a showing of fraud "in connection with" a contract for a "commodity." The Funds invested in a variety of digital assets that traded publicly online. The CFTC's Complaint only alleges that Bitcoin and Ethereum are commodities and has not alleged that any other digital assets (including assets that comprised the vast majority of investments made by Defendants) are commodities. However, the Complaint fails to allege fraud in connection with a contract or sale related to the alleged commodities and cannot support the fraud claim asserted in Count III. Rather, the CFTC alleges, again without evidence, that Defendants made misleading statements by failing to disclose that the Defendants were "misappropriating" participant funds and failing to disclose that they were using participant funds to pay other participants, and therefore engaged in a fraudulent scheme "in connection with contracts of sale of commodities." Def. Stmt. at ¶ 50. Because the Complaint fails to properly plead fraud "in connection with any…contract of sale of any commodity," Count III should be dismissed pursuant to Federal Rule of Civil Procedure 12(c). 7 U.S.C. § 9(1). The conclusive evidence also shows that Defendants did not engage in fraud in connection with commodities contracts, and summary judgment is appropriate.

Despite the woeful lack of evidence or jurisdiction in support of the CFTC's claims, the Commission took action in this case that resulted in Mr. Ikkurty losing his residence, access to his personal and business accounts, and management of the Funds he proudly founded. Def. Stmt. at

¶¶ 58-59. Additionally, Mr. Ikkurty's reputation continues to suffer as a consequence of the CFTC's public press release, which falsely claims that Defendants operated a Ponzi scheme. *Id.*

II. STATEMENT OF FACTS

A. Defendants and Related Entities.

Mr. Ikkurty established Ikkurty Capital LLC ("Ikkurty Capital") in 2017, doing business under the name Rose City Income Fund I. *Id.* at ¶ 1. Mr. Ikkurty is the founder and general partner of Mysivana LLC, a business entity that is a limited partner in Ikkurty Capital. *Id.* at ¶ 2. Mr. Ikkurty established Jafia in 2006. *Id.* at ¶ 3. Jafia served as the general partner for Fund I and, later, Fund II. *Id.* Mr. Ikkurty is the sole officer, president, and registered agent for Jafia. *Id.* Mr. Ikkurty established Fund II in 2020. *Id.* at ¶ 4. Mr. Ikkurty established Seneca Ventures LLC ("Seneca") in 2021, to collect and pool funds from smaller individual investors for Fund II. *Id.* at ¶ 5. Neither Mr. Ikkurty nor any of his entities has ever been registered with the CFTC. *Id.* at ¶ 6.

B. Key Fund Documents and Provisions.

The Funds were each governed by three operative documents: (1) a PPM, (2) a Limited Partnership Agreement ("LPA"), and (3) a Subscription Agreement. *Id.* at ¶ 7. Each Fund investor received a copy of the applicable PPM, LPA, and Subscription Agreement prior to investing. *Id.* The Fund II documents were drafted by attorneys at Seward & Kissel LLP ("Seward"), a reputable law firm that routinely handles the establishment of investment funds for its clients. *Id.* at ¶ 8. For Fund I, another firm (Cole-Frieman & Mallon LLP) assisted Jafia. *Id.*

Among other things, the PPMs set forth the investment objectives and strategies for the Funds, disclosed risks of investing in the Funds, and described the performance and management fees applicable to Fund accounts. *Id.* at ¶ 9. The Funds were described to investors in the PPMs as "a diversified portfolio of blockchain assets" with the "objective of generating ongoing regular income." *Id.* at ¶ 10. The PPMs further disclosed that the Funds were a "highly speculative

investment…designed only for sophisticated persons." *Id.* Eligibility for investment in the Funds was limited to accredited investors, a term defined in relevant law to include "[a]ny natural person whose individual net worth, or joint net worth with that person's spouse or spousal equivalent, exceeds $1,000,000…" *Id.* at ¶ 11; *see* 17 C.F.R. § 230.501(a)(5). The PPMs also contained a provision stating that investors shall not rely on any representations other than the information in the PPMs. *Id.* at ¶ 12.

The LPAs set forth the rules governing the limited partnership established for purposes of managing the Funds. *Id.* at ¶ 13. Among other things, the LPAs provided that "[t]he Partnership [*i.e.*, the Funds] shall be managed by the General Partner [Jafia], which shall have the sole discretion of making investments on behalf of the Partnership…." *Id.* at ¶ 14. Jafia was granted broad powers under the LPAs to "purchase, hold, sell, sell short, cover, and otherwise deal in" a variety of financial instruments, on the Funds' behalf. *Id.* at ¶ 14-15. The Subscription Agreements documented the terms of the investors' purchases of limited partnership interests in the Funds. *Id.* at ¶ 16.

The Funds were established as limited partnerships, under Delaware law, in which Jafia served as the general partner and investors in the Funds were limited partners. Incoming Fund investors were issued limited partnership interests in exchange for amounts contributed to the Funds. *Id.* at ¶ 18. The Funds were designed for sophisticated investors, and all Fund investors were confirmed as high net-worth, accredited investors. *Id.* at ¶ 19. Mr. Ikkurty oversaw Fund operations, with the assistance of Mr. Avadhanam and third-party administrators Tower Fund Services (for Fund I) and Intertrust Group (for Fund II) (together, the "Fund Administrators"). *Id.* at ¶ 20. In establishing Fund II, Defendants filed a Form D with the SEC evidencing reliance on

SEC Regulation D as a hedge fund raising capital privately from accredited investors. *Id.* at ¶ 17; *see* 17 C.F.R. § 230.500.

The Fund agreements entitled Defendants to a monthly management fee calculated at an annual rate of 2% on each Fund account. *Id.* at ¶ 21. The Fund agreements also entitled Defendants to a performance fee of 20% of monthly gains in Fund accounts, in the event the Funds outperformed certain thresholds specified in the Fund agreements. *Id.* The independent Fund Administrators calculated investor payments, management and performance fees due to Defendants, and periodic investment performance figures. *Id.* at ¶ 22, 25. Additionally, the Fund Administrators circulated monthly statements to investors, as well as effectuated certain transactions in the Funds' accounts. *Id.* at ¶ 23. Under the PPMs, Defendants were entitled to periodic fees for the management of the Funds, as well as fees based on the performance of the Funds over time. *Id.* at ¶ 24. The management and performance fees payable to Defendants pursuant to the PPMs were independently calculated, verified, and deducted from Fund accounts by the Fund Administrators. *Id.* at ¶ 25.

As outlined in the PPMs, the Funds' investment objective was to "achieve superior returns for investors by constructing a diversified portfolio of blockchain assets." *Id.* at ¶ 26. The Funds invested in digital assets available online through public blockchain ledgers. *Id.* at ¶ 27. A blockchain is a network database reflecting transactions in cryptocurrencies, digital assets, or tokens. *Id.* at ¶ 28. Each blockchain ledger contains a public, verified record of transactions made on the blockchain. *Id.* The Funds' investments were viewable to investors and the general public online throughout the time period relevant to the CFTC's claims. *Id.* at ¶ 29. In addition to the publicly available blockchain ledgers, Fund investments were disclosed to investors through periodic email update communications from Fund management. *Id.* at ¶30.

The Funds sought "mid to long term positions" in digital assets and used "proof-of-stake" tokens to generate returns for investors. *Id.* at ¶ 31. Proof-of-stake tokens are "staked," or contributed to a blockchain to support the validation of other digital transactions. *Id.* at ¶32. The holder of such tokens receives additional tokens of the same type in exchange for contributing the original tokens for validation. *Id.* The Funds did not trade in any futures, options, or swaps relating to digital assets or tokens. *Id.* at ¶ 33. All Fund investments were made as spot-market transactions, meaning that the Funds' purchases and sales were followed by immediate (or near-immediate) delivery of the relevant assets. *Id.* at ¶ 34. The Funds did not make any investments of digital assets for future delivery, or on a conditional basis dependent on market events, demonstrating that such transactions are not commodity interests, as shown below. *Id.* at ¶ 35.

The CFTC alleges that Bitcoin and Ethereum ("ETH") are commodities. *Id.* at ¶ 52. The CFTC has not identified any other relevant commodities in written discovery in this case. *Id.* The Funds invested a relatively small percentage of their holdings in spot purchases of wrapped Bitcoin ("WBTC," a digital token representing Bitcoin), not Bitcoin itself, and ETH. *Id.* at ¶ 36. The Funds generally purchased ETH with US dollars, then for transactional convenience used the ETH to purchase other digital assets and tokens pursuant to the Funds' investment strategy. *Id.* All such transactions were straightforward purchases or sales, with no forward-looking or conditional component. *Id.* With respect to cryptocurrencies, Gary Gensler, the Chairperson of the SEC, has stated that "[e]verything other than bitcoin" is subject to the SEC's jurisdiction. *Id.* at ¶ 52.

C. Limited Language Concerning Commodity Interests and Commodities.

The PPMs contained limited language concerning commodity interests and commodities. The PPMs do not state that the general partner, Jafia, will trade in commodity interests; instead, they simply allow Jafia discretion to make such investments. *Id.* at ¶ 39. The PPMs note regulatory uncertainty surrounding certain digital assets, the development of new digital asset-related

instruments that may be regulated by the CFTC, and the potential that Jafia may register as a CPO in the future. *Id.* However, they do not represent that Jafia will, in fact, operate a commodity pool or invest in commodity interests. *Id.* The CFTC has also not identified any language in the governing documents under which Defendants stated that they would or will definitively trade in commodity interests. *Id.* at ¶ 40. Instead, the language merely reflects that, if Jafia in the future decided to engage in trading activities that fell within the jurisdiction of the CFTC, it may have to take additional steps.

In response to multiple discovery requests, the CFTC has not identified any specific commodity interests in which Defendants allegedly invested. *Id.* In January of 2023, eight months after filing this suit, the CFTC did not identify any commodity interests traded by Defendants when asked. Ex. 14 at No. 7. In April of 2023, eleven months after filing this suit, in response to a request asking the CFTC to admit that Fund II never held any commodity interests, the CFTC stated it "neither admits nor denies the Request as it lacks sufficient knowledge or information, and the information it knows or can readily obtain is insufficient to admit or deny the request." Ex. 15 at No. 1.

When asked about its basis for claiming that Defendants were commodity pool operators, the CFTC pointed to a group of documents to claim that Defendants pooled funds "for the purpose of trading on the commodities markets." *Id.* at ¶ 41. Specifically, the CFTC pointed to statements in Fund II's PPM concerning the potential use of leverage, potential future determinations by the CFTC concerning its potential treatment of digital assets, and Fund II's ability to trade in swaps, futures, and digital assets. *Id.* Second, the CFTC pointed to broad language in Fund I and Seneca Ventures, LLC's LPAs giving the general partners the power (but not obligation) to perform specified tasks related to commodities. *Id.* Third, the CFTC pointed to unspecified language in a

document the CFTC titles "RCIF II Investment Approach," a document which refers to commodities once, and only then to show comparative performance. *Id.*; Ex. 20 at 8. Lastly, the CFTC points to a statement from Fund I's auditor in its 2020 financial statements stating: "The Fund classifies its investments in digital assets as commodities, which is consistent with the Commodity Futures Trading Commission's indication that bitcoins are considered commodities under the Commodity Exchange Act." *Id.* None of the cited documents refer to the Funds' investments as commodity interests, let alone state that the Funds will actually invest in commodity interests.

At one point, the Fund II PPM references that Jafia would file a form of exemption from registration as a CPO. *Id.*at ¶ 44. However, Seward lawyer David Nangle, who drafted the Fund offering documents and whose testimony the CFTC obtained under subpoena in this case, testified that the Funds never invested in commodity interests and, therefore, never triggered an obligation to register with the CFTC:

> Q. Do you know if the general partner [Jafia] ever filed an exemption with the National Futures Association?
>
> A. He did not.
>
> Q. Okay. Do you know why not?
>
> A. Yeah. It is my understanding that ***the vehicle [i.e., the Funds] did not trade commodity interests*****.** And as a result, it would not have triggered a registration obligation for the general partner.

Id. at ¶ 45. Mr. Nangle is a hedge fund specialist with extensive experience representing private investment funds. *Id.* at ¶ 46. Mr. Nangle represented the Funds from formation up through the filing of the CFTC's Complaint. *Id.* at ¶ 48. Mr. Nangle also testified about structuring the Funds as exempt securities offerings and the filing of exemption Form D with the SEC. *Id.*

III. THE CFTC'S ALLEGATIONS

The CFTC's Complaint alleges that Defendants perpetrated a "Ponzi scheme" on Fund investors, and made various misrepresentations in connection with the Funds, including statements concerning the purpose of the Funds and their historical performance. *Id.* at ¶¶ 50-51. The Complaint further alleges that "Defendants did not trade digital assets" at all and "instead misappropriated participants' [*i.e.*, investors'] funds." *Id.* According to the CFTC, Defendants' conduct triggered a requirement to register as a CPO and violated the provisions of the CEA that prohibit fraud by a CPO, even though they fail to allege that the Defendants *ever* transacted in any commodity interests. *Id.* at ¶ 51. Additionally, the CFTC claims that Defendants' conduct violated the general anti-fraud provisions of the Act, which apply to certain actions "in connection with any . . . contract of sale of any commodity in interstate commerce," as opposed to commodity interests. Complaint at ¶ 67-72. While the Complaint identifies Bitcoin and Ethereum as alleged "commodities," the Complaint fails to specifically allege fraudulent conduct in connection with any commodity contract related to Bitcoin or Ethereum. Def. Stmt. at ¶ 52.

Many of the CFTC's allegations have been plainly disproven through discovery. A financial expert from StoneTurn Group, LLC ("StoneTurn") recently reconciled Fund accounts down to the dollar. *Id.*at ¶ 57. StoneTurn identified millions of dollars in digital asset and token holdings, showing that there was not, as the CFTC alleged, a "Ponzi scheme" operation in which "Defendants did not trade digital assets." *Id.* The Court-appointed receiver in this case, James L. Kopecky, separately confirmed the existence of substantial crypto holdings, further demonstrating the falsity of the CFTC's allegation that the Funds did not trade digital assets. *Id.* Despite these clear contradictions, the Commission maintains a press release on its public website falsely accusing Defendants of running a Ponzi scheme wherein no investments were actually made. *Id.* at ¶ 56.

Discovery also revealed serious flaws in the CFTC's investigative process. The CFTC's principal investigator, Heather Dasso, admitted in deposition testimony that the Commission did not review the Funds' PPMs or public SEC Form D filing before initiating this litigation. *Id.* at ¶ 53. Additionally, Ms. Dasso admitted that, in performing her limited review, she "just totaled the amounts that were transferred to defendants," with no analysis of Fund governing documents to confirm whether the amounts were for legitimate management or performance fee payments. *Id.* at ¶ 54. Finally, the CFTC failed to review a single Fund investment before filing the Complaint, despite the Funds' digital asset and token holdings being publicly viewable online through blockchain ledgers. *Id.* at ¶ 27, 29, 55.

The CFTC's flawed investigation, not surprisingly, yielded flawed allegations against Defendants. The Commission's jurisdictional allegations are no exception. Through fact discovery and examination of the Funds' holdings, it is now clear that the CFTC's claims have no jurisdictional basis. There were no "commodity interests" involved in this case (Counts I and II), and any marginal connections to "commodities" (Count III) are grossly insufficient to support the CFTC's claims. The consequences of the CFTC's flawed investigation and unfounded allegations have been horrific for Defendants. Mr. Ikkurty lost his residence, his personal and business accounts were frozen, his management of the Funds was turned over to a Court-appointed receiver, and his employment prospects were hindered by the CFTC's public allegations. *Id.* at ¶ 58-59.

IV. RELIEF REQUESTED

Defendants request the following relief in connection with the CFTC's claims.

With respect to Count I of the CFTC's Complaint (Failure to Register as a CPO): Defendants request summary judgment on Count I, pursuant to Rule 56, because the evidence conclusively demonstrates that Defendants did not operate a commodity pool, trade in commodity interests, or trigger a requirement to register as a CPO. Additionally, Defendants request that the

claim be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction.

With respect to Count II of the Complaint (Fraud by a CPO): Defendants request summary judgment on Count II, pursuant to Rule 56, because the evidence conclusively disproves that Defendants committed fraud as a CPO because Defendants did not engage in the business of a CPO. Defendants also request that the claim be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction.

With respect to Count III of the Complaint (Violation of the General Anti-Fraud Provisions of the CEA): Defendants request summary judgment, pursuant to Federal Rule of Civil Procedure 56, because the evidence conclusively shows that no alleged fraud was committed in connection with any contract of sale for commodities by Defendants as alleged in the Complaint. Defendants request judgment on Count III on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), because the Complaint fails to state a fraud claim that is plausible on its face. Finally, Defendants request that the claim be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction.

V. LEGAL STANDARD

Summary judgment, pursuant to Rule 56, is proper if the pleadings, depositions, interrogatory answers, admissions, and affidavits leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). The moving party bears the burden of establishing both the absence of fact issues and entitlement to judgment as a matter of law. *Id.* In determining whether a material fact exists, the Court reviews the record in the light most favorable to the non-moving party and makes all reasonable inferences in the non-moving party's

favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Ulichny v. Merton Community School Dist.*, 249 F.3d 686, 699 (7th Cir. 2001).

Federal Rule of Civil Procedure 12(b)(1) permits a court to dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The objection that a federal court lacks subject matter jurisdiction under Rule 12(b)(1) may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 126 S. Ct. 1235, 1240 (2006). On a Rule 12(b)(1) motion, the plaintiff bears the burden of persuading the court that subject matter jurisdiction exists. *Kontos v. United States Dept. of Labor*, 826 F.2d 573, 576 (7th Cir. 1987). When contesting a Rule 12(b)(1) motion, the plaintiff must provide competent proof of jurisdictional facts. *Rizzi v. Calumet City*, 11 F.Supp.2d 994, 995 (citing *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S.Ct. 673, 86 L.Ed. 951 (1942); Kontos, 826 F.2d at 576).

Federal Rule of Civil Procedure 12(c) permits a Court to order summary judgment on the pleadings. Fed. R. Civ. P. 12(c). Judgment on the pleadings is appropriate when there are no disputed issues of material fact and it is clear that the moving party is entitled to judgment as a matter of law. *United Here Local I v. Hyatt Corp.*, 862 F.3d 588, 595 (7th Cir. 2017); *Snyder v. U.S. Bank N.A.*, 387 F.3d 867, 870 (N.D. Ill. 2019). To survive a motion for judgment on the pleadings, the complaint must "state a claim to relief that is plausible on its face." *ADM Alliance Nutrition, Inc. v. SGA Pharm Lab, Inc.*, 877 F.3d 742, 746 (7th Cir. 2017). In assessing the motion, the court is "confined to the matters presented in the pleadings" and must consider those pleadings in the light most favorable to the non-moving plaintiff. *United Here*, 862 F.3d at 595.

VI. ARGUMENT

A. Defendants Did Not Trade in Commodity Interests, So Were Not Commodity Pool Operators.

Counts I and II of the Complaint allege failure to register as a commodity pool operator ("CPO") and fraud by a CPO, respectively. Complaint at ¶¶ 51-62. However, evidence shows that none of Defendants' activities constituted a commodity pool or required Defendants to register as CPOs. The CEA defines a CPO as any person "engaged in a business that is of the nature of a commodity pool, investment trust, syndicate or similar form of enterprise and who, in connection therewith, solicits, accepts, or receives from others, funds, securities or property…*for the purpose of trading in commodity interests*." 7 U.S.C. § 1a(11) (emphasis added). Likewise, a "commodity pool" is defined under the CEA as "any investment trust, syndicate, or similar form of enterprise operated *for the purpose of trading in commodity interests*[.]" *Id.* at § 1a(10) (emphasis added). The Act defines a "commodity interest" as:

> (1) [a]ny contract for the purchase or sale of a commodity for future delivery;
>
> (2) any contract, agreement or transaction subject to a Commission regulation under Sections 4c, 19, or 2(c)(2) of the Act; or
>
> (3) any swap as defined in the Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission.
>
> 7 U.S.C. § 1a(11).

As an initial matter, the CFTC has been given the opportunity repeatedly to identify any commodity interests at issue in this case and has not done so. Def. Stmt. at ¶¶ 40, 42. Further, the conclusive evidence demonstrates the digital assets held by the Funds are not "commodity interests" as defined in the CEA. The Funds were comprised of digital assets available on public blockchain ledgers and purchased in spot-market transactions. Def. Stmt. at ¶¶ 34, 38. None of the Funds' investments are (1) "contracts for the purchase or sale of a commodity for future delivery,"

(2) "swaps," or (3) one of the specific contracts subject to Commission regulation under Sections 4c, 19, or 2(c)(2) of the CEA. 7 U.S.C. § 1a(11).

1. No Contracts for Future Delivery.

The Funds' investments were made in spot-market transactions, which were settled immediately on the relevant blockchains. Def. Stmt. at ¶¶ 34, 38. Courts interpreting the CEA have characterized a contract for "future delivery" as a contract for the sale of another contract. "A futures contract…does not involve a sale of the commodity at all. It involves the sale of the contract." *Commodity Futures Trading Comm'n v. Zelener*, 373 F.3d 861, 865 (7th Cir. 2004). The Funds' investments—which have now been confirmed by both StoneTurn and the Court-appointed receiver and are reflected online via public blockchain transaction ledgers—did not include contracts "for the sale of a contract." *Zelener*, 373 F.3d at 865. The holdings are straightforward digital assets, which may appreciate or depreciate in value due to market conditions. Def. Stmt. at ¶¶ 37, 36.

The Funds' holdings did not include "digital asset futures," an industry term of art. *Id.* at ¶ 37. The digital asset futures market, a derivatives market that allows for speculation on the price of digital assets without actually owning such assets, is entirely distinct from the spot-market digital asset market invested in by the Funds. In spot-market transactions, assets are purchased and received contemporaneously or near-contemporaneously with the purchases. Def. Stmt. at ¶ 37. The Funds never invested in the digital asset futures market, and the CFTC does not allege otherwise. *Id.* Additionally, none of the Funds' assets or tokens involved contracts for "future delivery." 7 U.S.C. § 1a(11)(a)(1)(I). The investments have no forward-looking component. Def. Stmt. at ¶ 37. An examination of the Funds' historical portfolios confirms that the Funds only invested in straightforward digital assets, not in digital futures or derivatives. *Id.* at ¶¶ 33-38.

2. No Swaps.

Moreover, the Funds' investments do not fall within the "swap" prong of the CEA's definition of commodity interest. *See* 7 U.S.C. § 1a(47). The CEA defines a "swap" as any agreement, contract, or transaction that is: (1) "a put, call, cap, floor, collar, or similar option of any kind…"; (2) "provides for any purchase, sale, payment, or delivery…dependent on the occurrence" of an event or contingency; (3) "provides on an executory basis for the exchange" of payments; (4) known as a swap; (5) a security-based swap agreement of which a material term is based on a security; or (6) a combination of any of the foregoing. 7 U.S.C. § 1a(47)(i)-(vi). The CEA's definition of a swap is highly specific and does not include straightforward, spot-market purchases and sales of digital assets or tokens such as those made by the Funds. None of the Funds' investments were dependent, conditional, or contingent on market events. Def. Stmt. at ¶ 38. The Funds did not invest in puts, calls, caps, floors, collars, options, or transactions dependent on future events. *Id.* None of the Funds' holdings are known in the industry as swaps or were otherwise marketed to Fund investors as swaps. *Id.* The holdings were not based on the value of underlying securities or other assets, but instead held their value independently as digital assets reflected on a public blockchain. *Id.*

3. No Specific Statutory Commodity Interests.

Finally, Funds' investments in digital assets are not among of the specific transaction types included within the definition of "commodity interest." 17 C.F.R. § 1.3 (citing 7 U.S.C.A. §§ 2, 6c, 23). Indeed, none of the CFTC's allegations relate to any of these transaction types, namely, foreign currency futures and options contracts (7 U.S.C. § 2), forms of commodity wash sales, fictitious sales, and market manipulation transactions (7 U.S.C. § 6c), or margined or leveraged transactions "for the delivery of silver bullion, gold bullion, bulk silver coins, bulk gold coins, or platinum" (7 U.S.C. § 23). The CFTC also makes no claims that the Funds' investments were

unvalidated, or that the investments manipulated digital asset markets. Actually, a basic principle of blockchain investing is that transactions are validated on public ledgers and visible to the public. Def. Stmt. at ¶¶ 27-29. Since the specific types of transactions described in Sections 2, 6c, and 23 of the Act were never effectuated in connection with the Funds, the CFTC cannot rely on those provisions to establish a commodity interest.

The Funds' digital assets, limited partnership interests and other investments all fall outside the scope of the "commodity interest" provisions of the CEA. As a result, there was no requirement for Defendants to register as a CPO, and no possibility of fraud by a CPO. The provisions cited by the CFTC in support of Counts I and II are inapplicable to this case, and therefore cannot support subject matter jurisdiction.

B. Fund Disclosure Documents Do Not Establish Jurisdiction.

Knowing that Defendants did not trade in any actual commodity interests, the CFTC claims that jurisdiction is still proper here because certain documents purportedly show that Defendants pooled funds "for the purpose of trading on the commodities markets." Def. Stmt. at ¶ 41. Specifically, the CFTC has pointed to statements in Fund II 's PPM, which has provisions stating:

- "The Fund ***may*** use leverage,"
- "[T]he CFTC ***may*** find certain transactions in Digital Assets to be futures contracts,"
- "The CFTC has determined that ***at least some cryptocurrencies, such as Bitcoin, fall within the definition of a "commodity"*** under the [CEA] . . .," and
- "The Fund ***may*** trade in swaps, and may trade on a limited basis in futures, on Digital Assets."

Id. (emphasis added). The CFTC also points to broad language in the Fund I and Seneca Venture's LPA giving their general partners the power (but not obligation) to perform a number of tasks related to commodities. *Id.* The CFTC next points to unspecified language in a document the CFTC titles "RCIF II Investment Approach," a document which refers to commodities once to show

comparative performance. *Id.* Lastly, the CFTC points to a statement from Fund I's auditor in its 2020 financial statements stating: "The Fund classifies its investments in digital assets as commodities, which is consistent with the Commodity Futures Trading Commission's indication that bitcoins are considered commodities under the Commodity Exchange Act." *Id.*

The CFTC's arguments do not hold water. If the CFTC were correct, any general partner with the power, but no obligation, to trade commodities may find itself accidentally under the CFTC's jurisdiction. None of the aforementioned language actually states that the Funds will purchase or sell a commodity interest. At the same time, Fund I's PPM makes clear that the Fund did not "currently intend to trade products that are regulated by the Commodity Futures Trading Commission." *Id.* at ¶ 39. The Fund II PPM points to regulatory uncertainty and the possibility of registering as a CPO in the future. *Id.* Neither state that the Funds will actually operate as CPO or purchase or sell commodity interests. *Id.* The proper reading of the documents is that, to be careful and flexible, the Funds disclosed the possibility of future operation as a CPO while giving their general partners the power to trade in a wide range of assets, including assets that may be considered commodity interests, if needed in the future. No portion of the documents should be read in isolation, and related materials must be harmonized as a whole.[1]

In a previous deposition in this case, the CFTC questioned the Funds' lawyer regarding language in the PPMs about language in the Fund II PPM stating that Jafia would file a claim of exemption from registration as a CPO with the CFTC. Def. Stmt. at ¶¶ 44-45. Importantly, there is no allegation concerning the exemption language in the Complaint or the CFTC's written

[1] *See Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 783 (7th Cir. 2005) (citing *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995)) (Under federal principles of contract construction, "a document should be read as a whole with all its parts given effect, and related documents must be read together."); *Sprague v. Cent. States, Se. & Sw. Areas Pension Fund*, 143 F. Supp. 2d 948, 954 (N.D. Ill.), *aff'd*, 269 F.3d 811 (7th Cir. 2001) (citing *Cent. States, Se. & Sw. Areas Pension Fund v. Kroger Co.*, 73 F.3d 727, 731 (7th Cir. 1996)) ("related contract documents must be read together so as to give effect to all of their provisions and render them consistent with each other.").

discovery responses; however, Defendants are addressing the issue out of an abundance of caution. The Funds' lawyer testified that "the vehicle [*i.e.*, the Funds] never traded in commodity interest[s]." Def. Stmt. at ¶ 44. As Fund II never traded in commodity interests, "it would not have triggered a registration obligation for the general partner." *Id.* The inclusion of language in the PPMs that merely references the possible future filing a claim of exemption does not mean that Fund II was already a CPO, and the Court should reject the CFTC's efforts to conflate the concepts.

C. Defendants Did Not Commit Fraud "in Connection with" a Contract for Sale of a "Commodity."

Count III of the Complaint alleges that Defendants violated the general anti-fraud provision of the CEA. Complaint at ¶¶ 63-72. The anti-fraud provision makes it unlawful for "any person, directly or indirectly, to use or employ, or attempt to use or employ, *in connection with* any…*contract of sale of any commodity* in interstate commerce…any manipulative or deceptive device or contrivance" in contravention of CFTC regulations. 7 U.S.C. § 9(1) (emphasis added). CFTC regulations prohibit the intentional or reckless use of deceptive, manipulative, or fraudulent devices in connection with any "contract of sale of any commodity in interstate commerce." 17 C.F.R. § 180.1(a).

The CFTC argues that Bitcoin and Ethereum are "commodities." Def. Stmt. at ¶ 52. In reality, the Funds did not invest in Bitcoin itself, but did invest in WBTC, a digital asset representing the value of Bitcoin. *Id.* at ¶ 36. In any event, in its Complaint, the Commission makes broad allegations concerning Defendants' alleged misrepresentations to investors and therefore violations of the CEA's anti-fraud provision without making any connection to the sale or contract in a commodity. For instance, the Complaint broadly alleges Defendants' violation of the anti-fraud provision by "failing to disclose that they were misappropriating participant funds, making misrepresentations to their participants about their historical performance and fee structure, and

failing to disclose to participants that they used participant funds to pay other participants…" Complaint at ¶ 67. These allegations have nothing to do with a contract in connection with the sale of WBTC, ETH, or any other supposed commodity.

The alleged misappropriation from one account to another had nothing to do with a WBTC or ETH contract. The alleged inaccurate historical performance figures for the Funds appear to be about Fund performance *as a whole*, not specifically for WBTC or ETH, which made up a small portion of the Funds' value, which did not exceed ten percent. The alleged "Ponzi scheme" is certainly not tied directly to a scheme or artifice to defraud in connection with a WBTC or ETH transaction. Given that the Chairperson of the SEC contends that all cryptocurrencies with the exception of Bitcoin are subject to SEC jurisdiction (Def. Stmt. at ¶ 52), any overall statements concerning the portfolio without a connection to the alleged commodities in the portfolio themselves is insufficient to establish liability for commodities fraud. And the alleged "Ponzi scheme" is certainly not tied directly to a scheme or artifice to defraud in connection with a WBTC or ETH transaction.

Because the CFTC has yet to specifically identify in its pleadings fraud in connection with a commodity contract, it has therefore failed to meet its burden to present sufficient evidence that it has jurisdiction over Count III of the Complaint. *See, e.g., CFTC v. Fleury*, 2006 WL 8434784 (S.D. Fla. 2006) (CFTC failed to show a contract for "commodity," as transactions were spot transactions not subject to CFTC jurisdiction). Defendants are entitled to judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), because the CFTC's allegations in Count III do not "state a claim to relief that is plausible on its face." *ADM Alliance Nutrition, Inc. v. SGA Pharm Lab, Inc.*, 877 F.3d 742, 746 (7th Cir. 2017).

Further, the conclusive evidence demonstrates that, with respect to Ethereum, the Funds generally purchased ETH with US dollars, then for transactional convenience used the ETH to purchase other digital assets and tokens pursuant to the Funds' investment strategy. Def. Stmt. at ¶ 36. All such transactions were straightforward purchases or sales, with no forward-looking or conditional component. *Id.* With respect to Bitcoin, the Funds never traded in Bitcoin itself, but instead traded in WBTC. *Id.* The positions in WBTH and ETH were small and did not exceed ten percent of Fund assets. *Id.* There was simply nothing fraudulent about the holdings or trades involving them, and summary judgment is appropriate.

D. <u>There Is No Jurisdiction Independent of the CEA.</u>

Since the CFTC's claims do not actually arise under the CEA, the Court does not have jurisdiction under either 28 U.S.C. § 1331 or 28 U.S.C. § 1345. An administrative agency's powers are limited to those granted by the legislature, and any action taken by the agency must be authorized specifically by statute.[2] Where it acts outside that authority, the agency acts without jurisdiction, and "[i]ts actions are void, a nullity from their inception." *Daniels v. Industrial Comm'n*, 201 Ill. 2d 160, 165, 266 Ill.Dec. 864, 775 N.E.2d 936 (2002). "Because agency action for which there is no statutory authority is void, it is subject to attack at any time in any court, either directly or collaterally." *Id.* at 166. The CFTC is without jurisdiction to regulate the transactions in question, so the Court must dismiss this action.[3]

E. <u>Defendants' Jurisdictional Challenge Is Timely and Has Not Been Waived.</u>

While Mr. Ikkurty consented to jurisdiction last year, in an effort to reasonably and efficiently resolve this case, such consent does not constitute a waiver of any future challenges on

[2] *Pinkston v. City of Chicago*, 2022 IL App (1st) 200957, ¶ 26, 203 N.E.3d 942, 950 (2022) (citing *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, ¶ 16, 25 N.E.3d 637, 641 (2015)).

[3] *See e.g.*, *CFTC v. Uforex Consulting, LLC*, 551 F.Supp.2d 513 (W.D. La. 2008) (court granted motion to dismiss holding that CFTC lacked jurisdiction over agreements that were not futures contracts).

subject matter jurisdiction grounds.[4] Furthermore, the fatal jurisdictional defects in the CFTC's case have become apparent through the recent close of discovery and the depositions of the parties' respective witnesses. Defendants can now plainly see that there is no basis under the CEA for bringing an enforcement action against them. The lack of subject matter jurisdiction in this case can be challenged by Defendants at any time. *U.S. v. Cotton*, 535 U.S. 625, 630 (2002); *Promisel v. First Am. Artificial Flowers, Inc.*, 943 F.2d 251, 254 (2d Cir. 1991).

VII. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court dismiss this action, and grant Defendants all such other and further relief to which they may be justly entitled.

[4] *See U.S. v. County of Cook*, Ill., 167 F.3d 381, 387-88 (7th Cir. 1999) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988)) ("No court may decide a case without subject-matter jurisdiction, and neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction. If the parties neglect the subject, a court must raise jurisdictional questions itself.").

Dated: October 16, 2023

Respectfully Submitted,

By: /s/ *Ronald D. Smith*

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CERTIFICATE OF SERVICE

This pleading was served on all counsel of record via the Court's CM/ECF service in compliance with Rule 5 of the Federal Rules of Civil Procedure on October 16, 2023.

/s/ *Ronald D. Smith*
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