IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

CASE NO: 6:14-CR-00043

Plaintiff,

v.

BLAYNE S. DAVIS, et al.,

Defendants.

MOTION TO DISMISS INDICTMENT AND MEMORANDUM OF LAW IN SUPPORT

COMES NOW the defendant, Blayne S. Davis ("Mr. Davis"),[1] and moves this Court, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, to dismiss the indictment in this case. Mr. Davis has already faced punishment for the acts alleged in the indictment in enforcement proceedings brought by the Commodities Futures Trading Commission ("CFTC"). United States Commodity Futures Trading Commission v. Capital Blu Management, LLC, et al., No. 6:09-cv-508, 2011 U.S. Dist. Lexis 62182 (M.D. Fla. June 9, 2011) ("Exhibit 1"). Although nominally civil in nature, the nature of the CFTC enforcement scheme and the punishments actually imposed render the sanctions criminal for the purposes of double jeopardy analysis. Thus, the Double Jeopardy clause of the Fifth Amendment to the United States Constitution guarantees that Mr. Davis cannot be punished again. Mr. Davis requests that the Court dismiss the indictment in its entirety. In support thereof, Mr. Davis submits the following memorandum of law.

[1]This motion was prepared with the aid of an attorney.

Memorandum of Law in Support

I. Facts

A. Previous Enforcement Proceedings by the Commodity Futures Trading Commission

Earlier civil proceedings squarely targeted the misconduct of the three Capital Blu conspirators that is now alleged in the indictment. In 2009, the CFTC initiated enforcement proceedings that ultimately resulted in a judgment imposing fines and a permanent injunction against Mr. Davis having any connection with the business of trading of any commodity or commodity interest. United States Commodity Futures Trading Commission v. Capital Blu Management, LLC, et al., No. 6:09-cv-508, 2011 U.S. Dist. Lexis 62182 (M.D. Fla. June 9, 2011) ("the CFTC case"). The CFTC's First Amended Complaint (D.E. 269) ("Exhibit 2") shows that the CFTC case was based on the same facts underlying the indictment. Mr. Davis was alleged to have "misappropriated millions of dollars of pool participant funds . . ., commingled them with funds in bank and trading accounts held in the name of Capital Blu, and . . . used these funds for their personal use." (Id. at 2). The CFTC complaint also alleged that "[t]o conceal and perpetuate their fraud, Defendants provided pool participants with false account statements misrepresenting the earnings in their accounts, *i.e.*, that their accounts were increasing by as much as seven percent per month, when, in fact, the Pool was losing money." (Id. at 3; see also id. at 9-10 (alleging that the defendants had falsely represented that forex pool participants were earning a consistent rate of return on their investments using mail, electronic mail, and the Capital Blu website)). The CFTC invoked 7 U.S.C. § 6b(a)(2), which at all relevant times and for all covered transactions made it unlawful to "cheat or defraud or attempt to cheat or defraud" the other party; to wilfully "make or cause to be made any false report or statement"; and, to wilfully "deceive or attempt to deceive the other person by any means whatsoever" with respect to any order or contract, or to the execution of that order or contract.[2] (Id. at 12-13, 15). The CFTC also invoked regulations that mirrored the language of

[2]The statutory landscape governing CFTC enforcement changed somewhat when the CFTC Reauthorization Act took effect

these statutes (id. at 18) and regulations that prohibited commingling funds or accepting funds not provided in the name of the pool (i.e., to the controlling person directly).

Finally, the CFTC alleged violations of 7 U.S.C. § 6o(1) (prohibiting commodity pool operator from using mails or other instrumentality of interstate commerce to defraud or deceive a client, prospective client, or participant). The CFTC alleged that Capital Blu and Mr. Davis (as an associated person) defrauded participants and prospective participants by "misappropriating pool participant funds" and "providing pool participants fraudulent periodic account statements that misrepresented the value of pool participants' accounts and pool participants' holdings." (Id. at 21).

On March 14, 2011, the CFTC filed a motion for default judgment against Mr. Davis. In its June 9, 2011 Order in the CFTC case, the Court ultimately imposed a permanent injunction against Mr. Davis having any further involvement in "activity related to trading in any commodity" or "engaging in any business activities related to commodity interest trading." No. 6:09-cv-508, 2011 U.S. Dist. Lexis 62182, * 4 (M.D. Fla. June 9, 2011). The Court also ordered joint and several restitution of $2,463,592.12, the amount by which the defendants were unjustly enriched, id. at *5-6, and a civil monetary penalty. Finding that a maximum penalty of $71,760,000 could be imposed based on the "524 false account statements . . . 26 distinct acts of misappropriation . . . . [and] two violations" of commingling funds, id. at 7, the Court imposed against each individual defendant a separate civil monetary penalty of $4,927,184.24, "an amount equal to twice the Defendants' gain" through misappropriation. Id. at 10. The Court explained that "because the remedy is punitive, it should also be carefully measured. The penalty should be sufficient but not harsher than necessary to meet the goals of relatedness, proportionality, and deterrence." Id.; (see also D.E. 323-1 (final judgment)).

B. The Indictment

on June 18, 2008. Accordingly, the CFTC charged Mr. Davis with violations occurring after June 18, 2008 pursuant to the recodified statutes at 7 U.S.C. § 6b(a)(2)(A-C). These provisions do not appear to materially differ with respect to Mr. Davis's case.

On February 26, 2014, the United States filed an indictment in this case. (D.E. 1). The indictment alleges that Mr. Davis, as Director of Trading for Capital Blu Management, LLC ("Capital Blu"), conspired with Donovan Davis (Managing Member of Capital Blu) and Damien L. Bromfield (Director of Operations for Capital Blu) to "commit mail fraud and wire fraud, in violation of [18 U.S.C. §§ 1349, 1341, 1343], that is, to defraud [Capital Blu's CBM Foreign Exchange or "FX"] Fund's investors and to obtain money and property from those investors by means of materially false and fraudulent pretenses, representations, and promises, including misrepresentations about Capital Blu's and the Fund's trading performance, the value of each investor's investment in the Fund, and the risks associated with the Fund." (Indictment at 4).

The indictment charges that Mr. Davis, Donovan, and Bromfield ("the conspirators"), "[f]rom no later than on or about January 22, 2008, through in or about August 2008 . . . solicited investors by falsely and fraudulently representing" that: the FX Fund had more assets under management than had actually been invested; that the total amount invested was greater than it actually was; the earnings of the fund were greater than they actually were; and, that the FX Fund employed a risk strategy that exposed only ten to twenty percent of any investor's investment to risk of loss. (Indictment at 7). According to the indictment, the conspirators knew in January 2008 that the FX Fund had lost a significant amount of money through trading, but subsequently engaged in a scheme to "report false positive monthly gains" and to overstate to investors the value of the fund. (Indictment at 8). The conspirators subsequently agreed to raise additional money from investors, cut costs, and continue to falsify reports to conceal the FX Fund's problems. (Indictment at 8-9). From February 2008 through August 2008, the conspirators are alleged to have "caused Capital Blu to send monthly account statements to each of the Fund's investors that included false information about the Fund's monthly trading results and misrepresented the value of each investor's account in the Fund." (Indictment 9). The indictment also alleges that Donovan and Mr. Davis diverted money from investment accounts to pay for operating expenses (including salaries) and to pay redemptions to current investors.

(Indictment 11-13).

In addition to the conspiracy count, Mr. Davis was charged in Counts 2-6 with mail fraud for five allegedly false account statements sent to investors (Indictment 13-15); in Counts 7-13 for wire fraud consisting of three emails about an investor's monthly statement (Counts 7-9) and four wire transfers of funds from investors (Counts 10-13) (Indictment 15-17); and, in Counts 14 – 21, with money laundering for using funds in Capital Blu's operating account for expenses and salaries. (Indictment 17-18). Donovan and Bromfield are also charged in additional counts for actions not undertaken in connection with Mr. Davis. (Indictment 18-25).

The indictment also includes a forfeiture allegation. (Indictment 25-27). With respect to Counts 1-13, the United States invokes 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) to seek to recover the proceeds of the crimes, any property derived from the proceeds, and a "money judgment against the defendants in an amount equal to the value of any property, real or personal, which constitutes or is derived from proceeds traceable to these offenses." (Indictment 25-26). With respect to Counts 14-21, the United States relies on 18 U.S.C. § 982(a)(1) to seek a "money judgment against the defendants in an amount equal to the value of any property, real or personal, involved in these offenses, or any property traceable to such property." (Indictment 26).[3]

II. Analysis

A. The CFTC Case Resulted in Criminal Punishments.

1. Legal Standard

The Double Jeopardy Clause "protects against multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1997) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). The Double Jeopardy Clause does not apply to civil punishments. However, the Supreme Court has explained that "the labels 'criminal' and 'civil' are not of paramount importance" in the

[3]The indictment also makes reference to 21 U.S.C. § 853(p); however, no drug-related crime was charged.

double jeopardy analysis. United States v. Halper, 490 U.S. 435, 447 (1989), overruled on other grounds by Hudson v. United States, 522 U.S. 93, 101-05 (1997). A nominally civil penalty becomes "criminal" if it is "so punitive in form and effect as to render [it] criminal despite congress's intent to the contrary." United States v. Ursery, 518 U.S. 267, 290 (1996). As Justice Stevens explained:

> That proposition is extremely important because the States and the Federal Government have an enormous array of civil administrative sanctions at their disposal that are capable of being used to punish persons repeatedly for the same offense, violating the bedrock double jeopardy principle of finality. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . .

Hudson, 522 U.S. at 110-111 (Stevens, J., concurring) (internal quotations and citation omitted).

The Hudson Court identified seven factors relevant to determining whether a nominally civil punishment is criminal for the purposes of the double jeopardy analysis:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment -- retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 99-100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). The Hudson/Kennedy factors must establish the criminal nature of the penalty by "the clearest proof." United States v. Ward, 448 U.S. 242, 249 (1980). In Hudson, Justice Souter wrote separately to express his view that "clearest proof" should be understood as "a function of the strength of the countervailing indications of civil nature." 522 U.S. at 114 (Souter, J., concurring). Justices Breyer and Ginsburg also found the "clearest proof" language to be "misleading." Id. at 115-16.

The Hudson/Kennedy factors are to be applied to the civil punishment scheme in the abstract, not as applied to an individual defendant. Seling v. Young, 531 U.S. 250, 263 (2001). The reason

given by the Supreme Court for this is that no double jeopardy analysis can take place until civil proceedings are complete; "in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even attempting a second time to punish criminally." Hudson, 522 U.S. at 102.

2. Application

The first Hudson/Kennedy factor, "affirmative disability or restraint," has been interpreted to refer to imprisonment and to exclude debarment. Hudson, 522 U.S. at 104. Mr. Davis was not subject to imprisonment as a result of the CFTC case; however, he was enjoined from participating in any "activity related to trading in any commodity" or "engaging in any business activities related to commodity interest trading." Judgment, United States Commodity Futures Trading Commission v. Capital Blu Management, LLC, et al., No. 6:09-cv-508, 2011 U.S. Dist. Lexis 62182 (M.D. Fla. June 9, 2011). This injunction creates an affirmative restraint on Mr. Davis's ability to engage in a certain kind of business, without regard to whether a license is required. Indeed, the injunction restricts Mr. Davis's ability to spend his own money. CFTC v. Capital Blu et al., 2011 U.S. Dist. Lexis 62182, at *4 (discussing request by other defendants that they not be enjoined from trading using only their own money). Thus, an affirmative restraint is present.

The second Kennedy factor is satisfied when a sanction is historically considered to be a criminal punishment. The Hudson court has explained that fines[4] and debarment are not generally considered to be criminal punishments. 522 U.S. at 104 (explaining that "revocation of a privilege voluntarily granted, such as a debarment, is characteristically free of the punitive criminal element" (citation and internal quotation marks omitted)). In Mr. Davis's case, however, the sanction went beyond the administrative revocation of a privilege; the Court enjoined Mr. Davis from engaging in

[4]In S. Union Co. v. United States, the Supreme Court spoke at great length about the criminal nature of fines, finding "no principled basis under *Apprendi* for treating criminal fines differently" with respect to the the requirement of a jury finding. 132 S. Ct. 2344, 2350 (2012). This reasoning appears to weaken the conclusion that fines are somehow inherently civil in nature.

conduct generally permitted without licensing, thereby imposing a penalty in excess of the revocation of a privilege voluntarily granted by the CFTC. This sanction is more like a condition of supervised release than the revocation of a license. As for the fine, Mr. Davis points out, as explained infra, that the structure of the enforcement scheme to which he was subject (focused on disgorgement of profit rather than repayment of loss) suggests that the nominally civil fines are intended to be punitive rather than remedial, and therefore more like those fines to which the Double Jeopardy Clause applies.

The five remaining Kennedy factors are present. The third factor exists because CFTC must show *scienter* to establish a violation of Section 6b and Section 6o, which are also punishable as crimes. The fifth factor is present because the CFTC case was based on actions that are also a violation of the criminal law. As for the fourth, sixth, and seventh factors, the sanctions imposed promote the traditional aims of punishment and, to the extent that any other purpose exists, the punishments are excessive in relation to those alternative purposes.

Under 7 U.S.C. § 13(a), Mr. Davis could have faced a felony charge for the violations of law found to have occurred in the CFTC case. Instead, the CFTC invoked 7 U.S.C. § 13a-1(d), which allows equitable remedies (including disgorgement) and "a civil penalty in the amount of not more than the greater of $100,000 or triple the monetary gain to the person for each violation." Unlike the situation where a "private attorney general" is rewarded with treble damages and statutory damages in order to create an incentive to enforce even where damages are minimal, the treble and statutory damages provision in the CEA exists solely to deter and punish when the CFTC brings suit to enforce the Act. Cf. Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934 (11th Cir. 2000) ("Punitive damages are generally available for willful or intentional violations of a common law or statutory duty, and their purpose is to punish and deter the wrongdoer rather than to compensate the aggrieved party. Therefore, punitive damages would be out of place in a statutory provision aimed at making the plaintiff whole.").

The law governing equitable restitution under Section 13a-1(d) also shows the punitive, nonremedial nature of the statute. Restitution is to be based on unjust enrichment – that is, the amount

of gain to the wrongdoer – rather than on the losses of the customer. Equitable restitution in a CFTC-initiated suit is punitive because it denies the wrongdoer the benefits of the unlawful act without any corresponding attempt to make the victim whole.[5] This is a punitive characteristic of criminal law designed to impose a punishment that the offender deserves, not a civil remedy drawn to achieve fairness between two private parties. The basic civil penalties are also framed in terms of a multiple of the gain to the wrongdoer ("triple the monetary gain") rather than the loss to the investor. And unlike a CFTC enforcement action, a two-year statute of limitation applies to the remedial private action. CFTC v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1344 n.2 (11th Cir. 2008). Thus, the monetary and injunctive penalties against Mr. Davis rose to the level of criminal penalties.[6]

B. The Indictment Violates the Double Jeopardy Clause.

1. Legal Standard

For successive criminal prosecutions, the Blockburger test protects defendants from reprosecution unless the statutes proscribe different conduct – that is, each offense includes an element that the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932). However, the Supreme Court does not appear to have held that, if the Hudson/Kennedy factors render a prior civil punishment to be criminal in nature, lower courts must then apply Blockburger to the elements of the civil and criminal claims. In overruling Halper, the Hudson Court drew on principles established in Kennedy to reaffirm the importance of other factors when deciding whether a punishment is criminal or civil. However, the majority did not consider whether to then apply Blockburger's same-elements test. See Hudson, 522 U.S. at 110 (Kennedy, J., concurring) (contending that the Court should have applied

[5]In 2010, the statute was amended to allow "restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)." 7 U.S.C. § 13-a(d)(3). At the time of the conduct underlying the CFTC case, however, the law was clear that the focus of the award was the amount of gain by the violator, not the loss to the victim. See, e.g., CFTC v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1345 (11th Cir. 2008).

[6]In Grossfeld v. CFTC, the Eleventh Circuit held that a civil fine was not criminal in nature. 137 F.3d 1300 (11th Cir. 1998) (per curiam). However, in that case the defendant sought to wield the Double Jeopardy clause as a shield to CFTC enforcement based on a prior private settlement action, which could not have violated the Double Jeopardy Clause because the State was not involved.

Blockburger rather than addressing the criminal/civil issue);[7] see also id. at 112-13 (Souter, J., concurring) (agreeing that Blockburger controlled).[8]

It is unclear whether Blockburger played any role in earlier cases granting relief. See Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 770-72 (1994) (finding that tax on "the possession and storage of dangerous drugs" was barred by a previous conviction for possession of marijuana where defendant was required to file a return upon arrest and amount of tax was great without parsing elements of civil and criminal violations for identity of elements under Blockburger); Halper, 490 U.S. at 437-38 (noting that the lower court had granted summary judgment based on "the facts established by Halper's conviction" without any analysis of the elements of the respective violations). Additionally, the United States Court of Appeals has recently reiterated the ultimately flexible nature of the "same offense" inquiry. See Delgado v. Fla. Dep't of Corr., 659 F. 3d 1311, 1322 n. 7 (11th Cir. 2011) (explaining that the cases governing this "exceedingly complex area of constitutional law" support other approaches to "same offense" question besides Blockburger's "same element" test).

2. Application

Mr. Davis has been indicted for conspiracy and fraud in connection with Capital Blu. These are the same acts which underlie Mr. Davis's punishment in the CFTC case for the allegations that Mr. Davis "cheated or defrauded or attempted to cheat or defraud pool participants or prospective pool

[7]Justice Stevens also expressed concern that, although he believed the majority's opinion appeared to allow lower courts to apply the Double Jeopardy Clause in extreme cases even when only one or two factors of the Hudson test were present, "the Government and lower courts" would "be unduly influenced by the Court's new attitude, rather than its specific prescribed test." 522 U.S. at 111-12.

[8]Justice Souter wrote separately to state his view that the requirement of "clearest proof" of the criminal nature of a nominally civil penalty should not be misapplied, especially with regard to increasing use of civil forfeitures in drug cases. 522 U.S. at 113-14 (Souter, J., concurring). Justices Breyer and Ginsburg did not mention Blockburger (unlike Justices Stevens and Souter); however, they also disapproved of the "clearest proof" language. Id. at 115-16 (Breyer, J., concurring). They also disagreed with the majority on whether courts should refrain from considering the penalties actually imposed in a specific case, reasoning that "a statute that provides for a punishment that normally is civil in nature could nonetheless amount to a criminal punishment as applied in special circumstances." Id. at 117.

participants" by misappropriating funds in violation of 7 U.S.C. § 6b(a)(2)(i) and (iii) and by "knowingly providing pool participants fraudulent monthly account statements that misrepresented the value of pool participants' accounts and pool participants' holdings, in violation of" 7 U.S.C. § 6b(a)(2)(ii). (CFTC Complaint at 13; see also CFTC Complaint at 15-17 (charging similar violations that occurred after June 18, 2008 under amended version of statute)).[9] As with the defendants in Halper and Kurth Ranch, whose claim was not explicitly analyzed under Blockburger, Mr. Davis faces successive punishment for the same basic course of conduct.[10]

Moreover, applying Blockburger is even less appropriate in Mr. Davis's case because the CFTC case occurred prior to the instant indictment. Unlike Halper and Kurth Ranch, which addressed the use of a criminal conviction to bar subsequent nominally civil proceedings, in Mr. Davis's case, the State has obtained an advantage by delaying criminal proceedings until after administrative enforcement through a civil suit. When the State decides to undertake civil enforcement proceedings while the threat of criminal punishment is still looming, defendants cannot effectively defend the civil case for fear of prejudicing subsequent criminal proceedings. Blockburger's focus on the elements of separate criminal statutes is insufficient to address the unfair advantage that accrues to the State when it forces a citizen to choose between two unpalatable alternatives: either fully defend the civil proceedings or to pursue a strategy that does not prejudice subsequent criminal proceedings. For example, civil litigants unwilling to prejudice their criminal proceedings might invoke the Fifth Amendment right to refuse to testify or answer a specific question, but without the prospect of a jury instruction against drawing any adverse inference. Defendants might also simply default, conceding liability in order to avoid complying with the relatively broad civil discovery provisions. See Fed. R. Civ. P. 26(b)(1)

[9]The statutory landscape governing CFTC enforcement changed somewhat when the CFTC Reauthorization Act took effect on June 18, 2008. Accordingly, the CFTC charged Mr. Davis with violations occurring after June 18, 2008 pursuant to the recodified statutes at 7 U.S.C. § 6b(a)(2)(A-C).

[10]In Halper, although the lower court granted summary judgment based entirely on the record of the criminal trial, the elements of the criminal and civil violations were not discussed. 490 U.S. at 437-38. In Kurth Ranch, the Supreme Court did not analyze whether the tax could have been based on slightly different conduct (such as strict liability "storage" rather than knowing "possession") than the offense of conviction. 511 U.S. at 770-72.

(authorizing discovery of material reasonably calculated to lead to the discovery of material relevant to any claim or defense or, for good cause, material relevant to the subject matter involved in the action). Because a civil case does not afford the same protection a criminal defendant would receive at trial, and allows less precision with respect to the statement and development theories of liability, the government cannot subsequently avoid the double jeopardy problem through artful use of its discretion to craft an indictment that complies with Blockburger.

To the extent further analysis is required, Mr. Davis submits that Blockburger is the most restrictive test that could apply. Some, but not all, of the offenses charged in the indictment require proof of facts not necessary to show the violations in the CFTC case. Blockburger v. United States, 284 U.S. 299, 304 (1932). Mail fraud under 18 U.S.C. § 1341 requires two elements: intentional participation in a scheme to defraud a person of money or property; and, use of the mails in furtherance of that scheme. United States v. Sharpe, 438 F.3d 1257 (11th Cir. 2006). Similarly, wire fraud under 18 U.S.C. § 1343 requires proof of two elements: existence of a scheme to defraud and use of wires in interstate communication for the purposes of executing the scheme. United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986). In the CFTC case, Mr. Davis was sued for violations of 7 U.S.C. §§ 6b and 6o, which prohibit a covered person or entity from "employ[ing] any device, scheme, or artifice to defraud." Mr. Davis was also found to have violated the provisions of Section 6b that prohibit "any untrue statement of a material fact" or the omission of a material fact, along with engaging "in any act, practice, or course of business which operates as a fraud or deceit upon any person." Both statutes require use of the mails or another instrumentality of interstate commerce. While the Title 7 violations require proof of elements that the Title 18 violations do not (the identity of the victim and the defendant) the elements of mail fraud and wire fraud charges are completely subsumed by the offenses in Title 7. "'[W]here the same act or transaction constitutes a violation of two distinct statutory provisions,' cumulative punishment may not be imposed unless 'each provision requires proof of an additional fact which the other does not.'" United States v. Hassoun, 476 F.3d 1181, 1185 (11th Cir.

2007) (quoting Blockburger, 284 U.S. at 304)). This requirement is not met with respect to the mail fraud and wire fraud charges.

Although the remaining charges satisfy the Blockburger test when compared to the elements of the violations in the CFTC case, they are nevertheless barred by Double Jeopardy principles. The indictment alleges that Mr. Davis laundered money when, using funds obtained from investors through fraud and deceit, he used those funds to pay salaries and operating expenses incurred by Capital Blu. The Court factored this into its decision in the CFTC case, explaining that "[o]nce the FX [Foreign Exchange] Fund began losing money, Defendants used FX Fund money to pay the operational expenses of Capital Blu." CFTC v. Capital Blu et al., 2011 U.S. Dist. Lexis 62182, at *3. The Court ordered restitution in the amount of $2,463,592.12, a figure that represented "what Defendants used to pay Capital Blu operating expenses, including payments they made to themselves or otherwise used for their own purposes." Id. at *6.

In the CFTC case, Mr. Davis was punished for "26 distinct acts of misappropriation" of funds originally obtained through fraud, as independent violations of laws which prohibit, *inter alia*, cheating and defrauding an investor. 13 U.S.C. § 6b(a)(2)(A). Mr. Davis "cheated" the investors when he transferred their funds from the operating account to pay for operating expenses. He is now charged with laundering money by engaging in a monetary transaction using criminally derived property, of value greater than $10,000, that is derived from bank or wire fraud. See 18 U.S.C. §§ 1957, 1956(c)(7)(A), 1961(1). Even if the identity of elements required under Blockburger is lacking, the same conduct has been punished under the more flexible civil justice system without the protection of criminal procedure; under the circumstances, all of the conduct described in the CFTC case should be considered the "same offense" as any subsequent criminal trial. See Delgado, 659 F. 3d at 1322 n. 7 (explaining that this "exceedingly complex area of constitutional law" supports other approaches to "same offense" question besides Blockburger's "same element" test even though Supreme Court appeared to reject broadest formulation of "same conduct" test). When a criminal proceeding follows a

civil proceeding, it is appropriate to apply the broader test announced in Grady v. Corbin, 495 U.S. 508, 521 (1990), overruled by United States v. Dixon, 509 U.S. 688 (1993).

Similarly, the sanctions in the CFTC case were clearly imposed against the background of agreements between the alleged conspirators in this case (indicated both by the facts as found by the Court and by the presence of Capital Blu, an entity controlled jointly by the individual defendants, as a defendant), and should be considered punishment for the same criminal conspiracy charged in the complaint. Finally, the Double Jeopardy Clause also precludes the criminal forfeiture allegations in the indictment because the United States has already obtained a civil judgment for the same acts, based on the same damages.

IV. Conclusion

WHEREFORE, premises considered, Mr. Davis requests that this Court dismiss the indictment in its entirety, or provide whatever other relief the Court finds appropriate.

Respectfully Submitted,

Dated _____ _____

Blayne S. Davis
Defendant, appearing pro se
100 Congress Ave- Suite 2000
Austin, Texas 78701

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Motion to Dismiss was served on the following persons by depositing same in the United States Mail on this _____ day of _____, 2014, first-class postage prepaid.

Assistant US Attorneys
Ephraim (Fry) Wernick/
Jonathan Hooks
USA's Office for Washington DC
555 Fourth Street, N.W.
Washington, D.C. 20530

United States District Court
Middle District of Florida
401 W. Central Blvd Suite 1200
Orlando, Fla. 32801

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Blayne S. Davis