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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONOCOPHILLIPS COMPANY, *et al.*, Plaintiffs, v. JAMES W. GIDDENS, Trustee for the SIPA Liquidation of MF Global, Inc., Defendant.	Case No. 1:12-cv-06014-KBF

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION
<u>IN SUPPORT OF THE TRUSTEE'S MOTION TO CONFIRM</u>

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INTRODUCTION

ConocoPhillips agreed, when it opened its futures accounts at MF Global, Inc., that its transactions would be subject to the CFTC's regulations.[1] It did so expressly, and by operation of state and federal law. When ConocoPhillips chose to margin futures transactions through those accounts using letters of credit, it could do so only under conditions permitted by the CFTC. One of those conditions, established in 1983 through formal notice and comment rulemaking, is that, in the event the commodity broker (here, a Futures Commission Merchant or "FCM") should become bankrupt, the liquidation trustee would be entitled to claim the full face value of the letter. ConocoPhillips now seeks to avoid that commitment, exacerbating the injuries already suffered by all other MF Global customers with whom it is to share pro rata in the estate's limited assets.

To achieve that result, ConocoPhillips asks this Court to overrule a 30-year-old interpretation by the CFTC of its own regulation. Alternatively, ConocoPhillips asks that the Court simply void the provision. The latter course of action, as ConocoPhillips has framed the issues, would require the Court to ignore the company's contractual commitments to abide by CFTC rules, impose counter-textual limitations on the CFTC's explicit authority to preempt state law, and/or manufacture additional limitations on the CFTC's jurisdiction that Congress never intended. These arguments, as explained below, reflect a thorough misreading of the Commission's organic statute, the Commodity Exchange Act ("CEA"), and would require the Court to contravene the statute's text, ignore various other expressions of Congressional intent, and deny the Commission, improperly, the *Chevron* deference to which it is entitled. For the

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[1] Plaintiffs are ConocoPhillips Company ("CPC") and ConocoPhillips Canada Marketing & Trading UCL ("CP Canada") (collectively "ConocoPhillips" or "Plaintiffs").

reasons explained below, the Court may not do so, and the Trustee's claim determination should be confirmed.

REGULATORY BACKGROUND

CEA Section 2(a)(1)(A) grants the CFTC "exclusive jurisdiction" to regulate "transactions involving," *inter alia*, "contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(a)(1)(A). This provision "preempts the application of state law." *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980) (Friendly, J.); *see also Stuber v. Hill*, 170 F. Supp. 2d 1146, 1150-51 (D. Kan. 2001). That plain meaning is confirmed by the statute's legislative history, which says that "regulations issued by the Commission . . . preempt the field insofar as futures regulation is concerned," and, if state law conflicts with the Commission's regulations, "Federal law w[ill] govern." H.R. Rep. 93-1383 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5894, 5897; *see Cohn v. United States*, 872 F.2d 533, 534 (2d Cir. 1989) ("Since the conference report sets forth the final agreement of both houses, it is entitled to great weight in determining congressional intent."). Congress codified in the CEA a specific legislative finding that transactions involving commodity futures are "affected with a national public interest." 7 U.S.C. § 5(a). Based on that finding, Congress vested the CFTC with plenary power, within its exclusive jurisdiction, "to make or promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the" CEA. *Id.* § 12a(5).

Soon after enacting the CEA, Congress recognized a special need for customer protections in commodity broker bankruptcies. In the Bankruptcy Reform Act of 1978, therefore, Congress established Subchapter IV of Chapter 7, 11 U.S.C. §§ 761-67, which it "derived largely from the testimony of" the CFTC's then Chairman. H.R. Rep. 95-595, at 271 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963. The linchpin of the Subchapter IV customer protection regime is Section 766(h), which requires the trustee to distribute all "customer property" to customers "ratably" and in priority to other claims. 11 U.S.C. § 766(h). Subchapter IV defines "customer property" to include all "property, or the proceeds of such . . . property, received, acquired, or held by or for the account of the debtor, from or for the account of a customer" including such property "held to margin" a commodity contract. *Id*. § 761(10). Thus, *all* property that the debtor has received from a customer to margin a commodity contract, and all proceeds derived from that property, are subject to pro rata distribution.

In establishing this "framework," Congress recognized that it would be undesirable to legislate "detailed rules to govern every contingency." S. Rep. 95-989, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787. It therefore delegated "general rulemaking authority" to the CFTC. *Id*. Among the powers it delegated, Congress charged the Commission with establishing (1) the "method by which the business of [a] commodity broker is to be . . . liquidated"; (2) the formula for calculating customers' "net equity" claims against the estate; and (3) what constitutes "customer property" to be distributed pro rata. 7 U.S.C. § 24(a). Pursuant to these delegated powers, including its plenary power under 7 U.S.C. § 12a(5), the CFTC in 1983 enacted the Part 190 Rules, 17 C.F.R. §§ 190.01 *et seq*., to govern comprehensively the liquidation of a commodity broker, the calculation of allowed claims, and the marshaling and distribution of assets to customers on a pro rata basis. *See Bankruptcy*, 48 Fed. Reg. 8716, 8739 (Mar. 1, 1983).

As relevant here, Rule 190.02(f) directs the liquidation trustee to "liquidate" all "property held by or for the account of" the debtor. 17 C.F.R. § 190.02(f). If that property includes a letter of credit held by the FCM to margin a customer's trades, Rule 190.08(a)(1)(i)(E) states that the "full proceeds" of that letter become "customer property" to be distributed pro rata. *Id*. § 190.08(a)(1)(i)(E).

The Commission adopted these rules, as well as the disputed interpretation, pursuant to a formal APA notice and comment process. *See* 5 U.S.C. § 553. The Commission proposed Part 190 in 1981, along with detailed interpretations and explanations of how the rules would operate in practice. *See Bankruptcy*, 46 Fed. Reg. 57535 (proposed Nov. 24, 1981). In the proposal, the Commission "singled out" letters of credit, specifying that, if a customer chose to use such an instrument to margin trades, it did so on the condition that the trustee would draw its full face value, and treat those proceeds as customer property, in the event of the FCM's bankruptcy:

> Letters of credit are singled out for special treatment because the Commission believes that it is important ***to make clear that the full value of a letter of credit posted as margin would be drawn in the event of a bankruptcy*** and the full proceeds thereof would be treated as customer property.

Id. at 57553 (emphasis added).

A six-month comment period followed. 48 Fed. Reg. at 8716. The Commission received several submissions, including three from prominent commenters who focused on the proposed treatment of letters of credit. The Futures Industry Association (FIA), for example, argued that the rule would "impose an unfair burden on those who post letters of credit for margin" and recommended that "Section 190.08(a)(1)(i)(E) *should be amended* to provide that letters of credit may be drawn by a trustee only to meet a broker's or customer's margin requirement." Ltr. from FIA to CFTC (May 12, 1982) at 40-41 (emphasis added) (Schwartz Decl. Ex. A). Similarly, the Chicago Board of Trade argued that "Section 190.08(a)(1)(i)(E) dealing with the full proceeds of a Letter of Credit" would be "unfair" and proposed that the rule "*should be amended* to provide that Letters of Credit may be drawn upon by a trustee, and made property of the bankrupt estate, only to meet the margin requirements of the broker or customer providing said Letters of Credit." Ltr. from Chicago Bd. of Trade to J. Stuckey, Secretariat, CFTC (May 14, 1982) at 10-11 (emphasis added) (Schwartz Decl. Ex. B). Finally, the ABA Committee on Commodities

Regulation agreed that "Proposed § 190.08(a)(1)(i)(E) . . . would require the trustee to draw the full proceeds of a letter of credit into the estate" and argued that it "*should be amended*" because it would "impose an unfair burden" and "cause a reduction in the use of letters of credit for this purpose." Ltr. from E. Schroeder to J. Stuckey (May 15, 1982) at 39 (emphasis added) (Schwartz Decl. Ex. C). Although the ABA Committee included a section of "Technical Comments," proposing clarifications to the language of multiple provisions, *id*. at 45-48, no commenter suggested that the CFTC was misinterpreting the language of its own proposed rules.

The Commission considered the commenters' suggestions, consulted with futures clearing organizations and the trustee in a then-pending liquidation, and voted unanimously to adopt Rule 190.08(a)(1)(i)(E) as proposed. *See* CFTC Minutes (Feb. 15, 1983) at 1 (Schwartz Decl. Ex. D); 48 Fed. Reg. at 8718, 8738. Throughout the adopting release, the unanimous Commission emphasized that its objective was to implement Congress' design of equitable, pro rata distribution in a manner that would protect small customers from unfair disadvantage. *See, e.g.*, *id*. at 8719 (noting that the Code was "intended to assure parity between customers with margining power and those without it"); *id*. ("[T]he Code itself . . . contains no provisions for the reclamation of property free of a pro rata distribution"); *id*. at 8724 (rejecting a suggestion that "would undermine the basic concept of a bankruptcy proceeding which is intended to ensure that no one obtains more than his pro rata share"). With respect to letters of credit, the Commission explained that conditioning their use in futures markets on subjection to pro rata distribution in bankruptcy was necessary to protect other customers, especially smaller traders, from injury in the form of diminished pro rata shares:

> The Commission's proposal was intended to assure that customers using a letter of credit to meet original margin obligations would be treated no differently than customers depositing other forms of non-cash margin or customers with excess cash margin deposits. If letters of credit are treated differently than Treasury bills

> or other non-cash deposits, there would be a substantial incentive to use and accept such letters of credit as margin as they would be a means of avoiding the pro rata distribution of margin funds, contrary to the intent of the Code.

Id. at 8718. In response to the objecting commenters, the Commission explained that the commenters' approach "would favor large customers at the expense of smaller market participants since only larger customers are permitted to make non-cash deposits of margin." *Id*. at 8719. For every large customer permitted to exclude its margin from customer property, the universe of assets to be distributed pro rata would be diminished. The Commission concluded that this would be contrary to the intent of Subchapter IV and "inherently unfair." *Id*.

The Commission also was "guided by additional policy considerations" related to market stability. It expressed concern about the "viability" of letters of credit as margin deposits, because they are relatively cumbersome to convert to cash in response to a market event. *Id.*; *see also id.* at 8718 n.14 (noting clearing organizations' policy changes in response to "periods of volatility"). It would therefore be "unwise," the Commission explained, "to adopt a policy which would further encourage the use of letters of credit and, indeed, their substitution for other forms of margin." *Id.* at 8719. Accordingly, the Commission resolved that if a customer does choose to margin using a letter of credit, it may do so only on the condition that, in the event of bankruptcy, the trustee would be entitled to the full face amount of the letter. *Id*. at 8718.

STANDARDS OF REVIEW

ConocoPhillips asks the Court to overrule multiple interpretations by the CFTC of its organic statute, the CEA, and of the Commission's own regulations. The standards for doing so are extremely high.

1. Where, as here, "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority," and the resulting "legislative regulations are given controlling

weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). The Court must affirm the agency's action so long as it "is rational, based on consideration of the relevant factors, and within the scope of the authority delegated." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). This review is "narrow," and "[the] court is not to substitute its judgment for that of the agency." *Id*. at 43. So long as the agency acts in "a reasonable way," the Court must defer, "even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding." *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 55 (2d Cir. 2004). The Supreme Court has cautioned that the CFTC's "expertise is superior to that of a court when," as here, "a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes'" of the CEA; "the agency's position, in such circumstances, is therefore due substantial deference." *CFTC v. Schor*, 478 U.S. 833, 845 (1986).

2. It is likewise "a dominant, well-settled principle of federal law," *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992), that "[a]n agency's interpretation of [the] statute" it "administers is entitled to considerable deference." *Skandalis v. Rowe*, 14 F.3d 173, 178 (2d Cir. 1994). The first question is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842-843. The Court must use "traditional tools of statutory construction" to determine whether "Congress had an intention on the precise question" presented. *Id.* at 843 n.9. This includes review of the statute's "text, legislative history, structure, and purpose." *Feimei Li v. Renaud*, 654 F.3d 376, 382 (2d Cir. 2011) (internal quotation marks omitted). If Congress has not "unambiguously expressed" a "clear" intent on the issue, the question is "whether the agency's answer is based on a

permissible construction of the statute." *Chevron*, 467 U.S. at 842-843. In this inquiry, "the court does not simply impose its own construction" of the statute. *Id.* Rather, it must accept "any reasonable interpretation" by the agency. *Mei Fun Wong v. Holder*, 633 F.3d 64, 74 (2d Cir. 2011); *Khouzam v. Ashcroft*, 361 F.3d 161, 164 (2d Cir. 2004) (a court must defer "so long as that construction is reasonable"). This standard is "highly deferential." *NRA of Am., Inc. v. Reno*, 216 F.3d 122, 137 (D.C. Cir. 2000).

3. Where an agency is interpreting its own regulation, "an even greater degree of deference than the *Chevron* standard" is required. *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 702 (D.C. Cir. 1994). The agency's view is "controlling" unless "plainly erroneous or inconsistent with the regulation" itself. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). Deference is "even more clearly in order" when the agency offers a "contemporaneous construction" of its own regulation at enactment, *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (internal quotation marks omitted), and courts must "normally accord particular deference to an agency interpretation of 'longstanding' duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). Nevertheless, controlling deference is due "even if th[e] interpretation appears in a legal brief." *Union Carbide Corp. v. Comm'r of Internal Revenue*, _ F.3d_, No. 11-2552, 2012 U.S. App. LEXIS 18876, at *11-12 (2d Cir. Sept. 7, 2012); *see also Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011); *Auer*, 519 U.S. at 461.

4. Finally, whether the agency is interpreting a statute or regulation, the highest deference is required where, as here, the interpretation was subject to notice and comment and, therefore, can "create no unfair surprise." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

DISCUSSION

I. The Trustee's Interpretation of Rule 190.08(a)(1)(i)(E) Is Correct.

The Trustee is correct that when a customer uses a letter of credit to margin futures trades, it does so on the condition that, if the FCM becomes bankrupt, the trustee is entitled to the full face amount of the letter, which must be distributed pro rata. Indeed, that is precisely what the Commission stated when it enacted Part 190. 46 Fed. Reg. at 57553; 48 Fed. Reg. at 8718. A customer must agree to this condition, as ConocoPhillips did, if it chooses to use a letter of credit as collateral in CFTC-regulated transactions and markets. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) ("The businessman in a regulated industry in effect consents to the restrictions placed upon him."). This is clear on the face of Part 190, and it is confirmed by the agency's contemporaneous interpretation of those rules. Plaintiffs' contrary interpretation is, as explained below, not plausible and, in any event, cannot overcome the deference owed the Commission's long-standing construction, established through notice and comment.

1. Rule 190.02(f) states that, once an FCM is placed into bankruptcy, all "property held by or for the account of [the] debtor must be liquidated . . . by the trustee promptly and in an orderly manner." 17 C.F.R. § 190.02(f). To "liquidate," as used here, means to "convert (a nonliquid asset) into cash" or "[t]o settle (an obligation) by payment or other adjustment." *Twp. of Spring v. Std. Ins. Co.*, No. 09-5518, 2011 U.S. Dist. LEXIS 59241, at *16 (E.D. Pa. June 1, 2011) (quoting Black's Law Dictionary 1014 (9th ed. 2009)); *Lumber Liquidators, Inc. v. Stone Mt. Carpet Mills, Inc.*, No. 3:08-cv-573, 2009 U.S. Dist. LEXIS 59388, *21-22 (E.D. Va. July 10, 2009) (stating that "'liquidate' can be defined broadly . . . to mean 'to convert assets to cash'" (quoting Webster's New Collegiate Dictionary 697 (9th ed. 1987)). To "liquidate" a letter of credit means to draw it down. *See, e.g., In re SI Restructuring, Inc.*, 542 F.3d 131, 134 n.3 (5th Cir. 2008); *Motrade v. Rizkozaan, Inc.*, 95 Civ. 6545, 1999 U.S. Dist. LEXIS 10397, at *3,

*7 (S.D.N.Y. July 6, 1999) (Chin, J.). Thus, when an FCM goes into bankruptcy, the trustee is directed to draw down or otherwise convert to cash any letters of credit the FCM is holding in a customer account. *See* 46 Fed. Reg. at 57553; 48 Fed. Reg. at 8718.

2. Rule 190.08(a)(1)(i)(E) provides that, once the letter of credit is liquidated, the "full proceeds" are customer property, subject to pro rata distribution. 11 U.S.C. § 766(h); 17 C.F.R. § 190.08(a)(1)(i)(E). The term "proceeds" has its usual meaning: "something that results or accrues; the total amount derived from a sale or other transaction." *Random House Unabridged Dictionary* 1542 (2d ed. 1993). "[P]roceeds" is used consistently in this way throughout Part 190. *See* 17 C.F.R. §§ 190.04(e)(3), 190.05(a)(3), 190.07(b)(1)(iii)(A)(2), (B)(3), &(e)(1), (4)-(5). Thus, when customer property includes a letter of credit as margin, the trustee must designate the total amount of the letter for pro rata distribution.

3. Plaintiffs' contrary interpretation, summarized in footnote 6 of the Court's October 4, 2012 Memorandum and Order (ECF Doc. No. 26 at 11 n.6), is not possible. As the Court summarized Plaintiffs' position, Rule 190.08(a)(1)(i)(E) "could apply to a situation where there has been a trigger for a letter of credit and the trigger may actually have occurred thereby making the CFTC provision live and actually relate to real proceeds as opposed to generation of proceeds." But such proceeds would *not* generally be customer property. Instead, they would be owed as margin payments to cover trading losses already incurred. As the CFTC explained in the Part 190 releases, "margin payments would not be able to be distributed pro rata because, as in ordinary practice, they would be credited directly for the account to which they were made." 46 Fed. Reg. at 57542; *see also* 48 Fed. Reg. at 8727. The CFTC explained that "the standby feature of the letter [of credit] only guarantees the payment of variation margin." 48 Fed. Reg. at 8718. Thus, if there is a margin call and the customer defaults, the funds received cannot be

distributed pro rata, because they are owed to the clearinghouse to cover losses. Plaintiffs' interpretation is implausible, because it misapprehends the mechanics of a futures transaction.

4. In any event, even if this were a possible reading of the rule, the Commission's contemporaneous interpretation, established through notice and comment, would control. *Coke*, 551 U.S. at 170-71; *Auer*, 519 U.S. at 461; *Udall*, 380 U.S. at 16. Plaintiffs attempt to avoid the required deference by arguing that the rule text unambiguously supports *their* interpretation. But, for the reasons given above, their interpretation is not even possible, let alone clearly correct. And even if it were possible, a unanimous Commission did not agree with their reading, nor did the FIA, Chicago Board of Trade, or the ABA Committee on Commodities Regulation, all of whom urged the Commission to *amend* the regulation to avoid the very result ConocoPhillips protests here. ConocoPhillips's reading is an outlier and, as described above, the Commission's reading is sound. Thus, Plaintiffs cannot show that the CFTC was unambiguously misinterpreting its own words at the time it proposed and adopted Part 190.

II. Rule 190.08(a)(1)(i)(E) Is Not Arbitrary, Capricious, or Contrary to the CEA.

Rule 190.08(a)(1)(i)(E) is well within Congress' delegations of authority to the CFTC, and it was adopted almost thirty years ago through a formal notice and comment process in which the Commission rationally considered all relevant factors. *Chevron*, 467 U.S. at 843-44; *State Farm*, 463 U.S. at 42. There is no basis to invalidate the rule.

a. The Rule Is Rationally Based on Relevant Factors.

1. The CFTC adopted Rule 190.08(a)(1)(i)(E) to prevent large customers from "avoiding the pro rata distribution of margin funds, contrary to the intent of the Code," because such avoidance would aggravate the injuries suffered by cash customers and others in the event of a shortfall. 48 Fed. Reg. at 8718; *see also id*. ("[E]ncouraging use of letters of credit would favor large customers at the expense of smaller market participants[.]"). The Commission explained

that this would be "inherently unfair" and contravene the "intent of the Code." *Id*. The Commission also cited "additional policy considerations" related to market stability as militating against encouraging expanded use of letters of credit as margin. *See id.* at 8718 & n.14. The Commission concluded, therefore, that customers using a letter of credit to margin should be "treated no differently than customers depositing other forms of non-cash margin or customers with excess cash margin deposits." *Id*. at 8718. This was rational, not arbitrary or capricious.

2. The Commission also considered commenters' contention that, in preexisting practice subject to state law, the terms of a letter of credit used to margin would "generally condition payment on delivery of a certification that additional funds are required to margin or cover a default." *Id*. The Commission noted, on the other hand, that many letters of credit in use are "unconditional" and the bank "cannot refuse to pay it based upon nonperformance of an underlying contract." *Id*.[2] To the extent, however, that commenters urged that such state-law payment conditions control in an FCM bankruptcy, the Commission rejected that approach as inconsistent with and damaging to the pro rata system established by Congress. *Id*. This too was rational, not arbitrary or capricious.

b. The Rule Is Consistent with the CEA.

1. Rule 190.08(a)(1)(i)(E) is also well within the CFTC's authority to regulate futures transactions and commodity broker bankruptcies. The rule plainly falls within the Commission's statutory powers to establish the "method by which the business of [a] commodity broker is to be . . . liquidated"; the formula for calculating customers' "net equity" claims; and what constitutes

[2] Contrary to an assertion by ConocoPhillips at the September 25, 2012 hearing (9/25/2012 Tr. at 29), this is a correct statement of law. UCC § 5-114, cmt. 1 ("[T]he issuer is under a duty to honor the drafts or demands for payment which in fact comply with the terms of the credit without reference to their compliance with the terms of the underlying contract."); *KMW Int'l v. Chase Manhattan Bank, N. A.*, 606 F.2d 10, 15 (2d Cir. 1979) ("As a matter of law, a bank's obligation under a letter of credit is totally independent of the underlying transaction."). ConocoPhillips has cited an exception for fraud, but the Trustee has made clear that he would not make false representations to a bank. 9/25/2012 Tr. at 43.

"customer property" to be distributed pro rata to customers. 7 U.S.C. § 24(a). The Rule is likewise within the Commission's authority to make rules "reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the" CEA. *Id*. § 12a(5). Relevant CEA purposes include ensuring "the financial integrity of all transactions subject to" the CEA and "the avoidance of systemic risk," as well as to "protect all market participants from . . . misuses of customer assets." *Id*. § 5(b). The relevance of these purposes to Rule 190.08(a)(1)(i)(E) is obvious. If large customers who obtain letters of credit were permitted to opt out of pro rata distribution, customers posting cash and securities would be harmed. Prior to transacting, customers posting cash and securities would have no way to determine whether any, and if so how many, of the FCM's customers use letters of credit to margin and, under Plaintiffs' interpretation, would be able to escape the pro rata system, exacerbating any shortfall. Such a rule would undermine confidence in the markets. It would also encourage large customers to use letters of credit to margin, with potentially adverse effects on stability and equitable distribution. 48 Fed. Reg. at 8718. The purposes of the Part 190 Rules, among other things, are "[t]o promote equitable treatment of customers," and to "enhance certainty as to the effects of a bankruptcy distribution." 46 Fed. Reg. at 57535. The rule is equitable precisely because a customer using a letter of credit to margin knows or should know before transacting that the full face value would be owed in the event of a bankruptcy, and it may adjust its practice accordingly.

2. ConocoPhillips has never taken issue with these statutory sources of authority, but instead misconstrues an unrelated CEA provision, 7 U.S.C. § 27a, as an implied repeal of Rule 190.08(a)(1)(i)(E) and its enabling legislation, 9/25/2012 at 67 (arguing that Dodd-Frank superseded these provisions), and argues that Section 27a "prohibit[s] the CFTC from adopting *any* regulation with respect to letters of credit." ECF Doc. No. 2 at 9 of 30. However, repeals by

implication are strongly disfavored, *Handberry v. Thompson*, 446 F.3d 335, 345 (2d Cir. 2006); *Iowa, Chi. & R.R. Corp. v. Wash. County*, 384 F.3d 557, 561 (8th Cir. 2004), and ConocoPhillips has misstated the language of the statute. Section 27a states that the CFTC "shall not *exercise regulatory authority under the Commodity Exchange Act* (7 U.S.C. 1 et seq.) with respect to, an identified banking product." 7 U.S.C. § 27a(a)(1) (emphasis added). The CFTC's "regulatory authority under the [CEA]" is its exclusive jurisdiction over, *inter alia*, commodity futures. *See* 7 U.S.C. § 2(a)(1)(A). Congress chose this language to provide "certainty that products offered by banking institutions will not be regulated *as futures contracts*." 146 Cong. Rec. S11918, 11925 (Dec. 15, 2000) (Sen. Lugar) (emphasis added). It does not purport to restrict the CFTC from regulating what concededly *are* futures transactions, like ConocoPhillips's transactions with MF Global.[3] To the extent Plaintiffs have identified any ambiguity, the Commission's interpretation is entitled to *Chevron* deference.

3. Step 1 of *Chevron* requires the Court to use "traditional tools of statutory construction," 467 U.S. at 843 n.9, including review of the statute's text, legislative history, structure, and purpose, *Feimei Li*, 654 F.3d at 382, to determine whether Congress has barred the CFTC from imposing conditions on the use of letters of credit in a futures transaction. Here, the statute's text, considered properly in context, does not support Plaintiffs' claim. Rather than prohibiting the CFTC from "any regulation with respect to" letters of credit, even in futures transactions, Congress provided that the CFTC shall not "exercise regulatory authority under the [CEA]" over those products. The CEA delineates that authority, first in Section 2(a)(1)(A)'s grant to the CFTC of "exclusive jurisdiction" over "accounts, agreements . . . and transactions involving" futures and swaps, *id*., and then, in numerous other sections, authorizing and directing

[3] In this respect Rule 190.08(a)(1)(i)(E) is no different from rules by which the CFTC regulates the use of securities as margin for futures transactions even though regulatory authority over securities as such rests with the SEC. *See, e.g.*, 17 C.F.R. §§ 1.25-1.28 (permissible investment of customer margin funds in securities).

the Commission to regulate those transactions comprehensively through, *inter alia*: (1) registration, minimum financial requirements, and ethics training for market participants, *e.g.*, *id*. §§ 6f(b), 6k, 6m, 6p(b), 7a-1(c)(1), 7a-1(c)(2)(B); (2) requirements for clearing, *id*. § 2(h)(2); (3) rules concerning fraud, risk disclosures, books and records, and safeguarding customer funds, *id*. §§ 6(b), 6d(2); (4) the authority to impose fines, *id*. § 13b(d); (5) position limits in CFTC-regulated products, *id*. § 6a; and (6) the adjudication of disputes arising in the CFTC's jurisdictional markets, *id*. § 18. Rule 190.08(a)(1)(i)(E) does not purport to bring letters of credit within the CFTC's "regulatory authority" in that sense, *i.e.*, to regulate them as commodity futures, nor is it a regulation "with respect to an identified banking product," because it has no application to such products *except* to the extent a particular letter of credit is part of a transaction over which the CFTC has exclusive jurisdiction. Rather, Rule 190.08(a)(1)(i)(E) is a regulation of futures transactions and FCM liquidations, well within the CFTC's statutory authority.

4. This reading is confirmed by related sections of the statute, which the Court must consider in interpreting Section 27a(a). *Comm'r v. Engle*, 464 U.S. 206, 223 (1984) (cautioning that the "true meaning of a single section of a statute . . . cannot be ascertained if it be considered apart from related sections"). The Section 27a(a) limit on the CFTC's regulatory authority is linked, in Section 2(a)(1)(A), to the definitions of "commodity" and "swap," which are extremely broad. *Id*. §§ 1a(9)&(47). Absent other limitations, the sweep of Section 2(a)(1)(A) might subject certain products to treatment as futures or swaps when Congress did not intend that result. Thus, the CEA contains provisions specifying that certain financial products are *not* subject to the CFTC's regulatory authority, but are reserved for other regulators. *See, e.g.*, 7 U.S.C. § 2(a)(1)(C)(i)(I) ("this Act shall not apply to and the Commission shall have no

jurisdiction" with respect to options on securities); *id*. § 2(a)(1)(H) ("the [CFTC] shall have no jurisdiction under [the Dodd-Frank Act] with respect to, any security"). Section 27a is one such provision, intended by Congress to "clarify the jurisdictional line between the regulation of banking products and futures products." 146 Cong. Rec. S11855, 11867 (Dec. 15, 2000) (Sen. Gramm).

In Dodd-Frank, Congress expanded the CFTC's jurisdiction to include "swaps", which it defined to include "any agreement, contract, or transaction . . . that provides for any . . . payment . . . 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." 7 U.S.C. § 1a(47). Without a separate exclusion, certain bank products like letters of credit might qualify as swaps, and, as a result, be subject to the CFTC's regulatory authority, including a panoply of requirements under the CEA and CFTC swap regulations. *See, e.g.*, *id*. §§ 2(h) (clearing requirement), 6r (reporting and recordkeeping), 6s (registration and regulation of swap dealers and major swap participants); *Bus. Conduct Standards*, 77 Fed. Reg. 9734 (Apr. 17, 2012). Section 27a gives "legal certainty" to banks and their customers that their transactions will not be drawn inadvertently into this regime, but there is no indication that it is intended to enable traders to intentionally access CFTC-regulated markets unfettered by CFTC regulations of general applicability.

The purpose to distinguish banking products from "swaps" is further evident in Sections 27a(b) and (c), which provide exceptions to the "identified banking products" exclusion for products structured "for the purpose of evading *the provisions of* the" CEA. 7 U.S.C. § 27a(b)-(c) (emphasis added). Congress used the phrase "the provisions of," collectively, because the purpose of Section 27a is to draw a line between the CFTC's exclusive jurisdiction and the jurisdiction of banking regulators. Under subparagraph (b), when a banking regulator identifies a product designed to evade "the provisions of" the CEA, but that "would meet the [CEA] definition of a 'swap'," that regulator can "except [the] identified banking product . . . from the exclusion in subsection (a)." *Id*. § 27a(b). The product is then subject to the CFTC's "regulatory authority," including the entire regime applicable to swaps.

In the same vein, amended Section 27a was enacted as part of Dodd-Frank Section 725, the main Dodd-Frank section establishing requirements for derivatives clearinghouses. Dodd-Frank Wall Street Reform & Consumer Protection Act ("Dodd-Frank") P.L. 111-203, § 725, 124 Stat. 1376, 1685 (July 21, 2010). Those requirements are comprehensive, pertaining, *inter alia*, to participant and product eligibility, risk management, settlement procedures, rules for customer defaults, reporting, and recordkeeping. Banking regulators, of course, impose their own requirements in these respects, and the placement of the amendments to Section 27a among those provisions supports the Commission's conclusion that Congress intended the carve out for "identified banking products" to make clear that these products are not subject to dual regulation as futures or swaps. *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) (explaining that "the placement and purpose of th[e] words in the statutory scheme" is part of their "plain meaning" (internal quotation marks omitted)).

5. Numerous references in the legislative history confirm that Section 27a was intended to limit the CFTC from regulating bank products *as futures*. *See, e.g.*, 146 Cong. Rec. S11855, 11867 (Dec. 15, 2000) (Sen. Gramm) (stating that the provision is intended to "clarify the jurisdictional line between the regulation of banking products and futures products"); 146 Cong. Rec. S11918, 11925 (Dec. 15, 2000) (Sen. Lugar) ("[T]his legislation provides certainty that products offered by banking institutions will not be regulated as futures contracts."); 146 Cong.

Rec. E2181 (Dec. 14, 2000) (Rep. Ewing) ("Title IV, the 'Legal Certainty for Bank Products Act of 2000', excludes identified banking products from the Commodity Exchange Act. It provides guidelines to determine the proper regulator for hybrid products."). Conversely, there is no reference in the statute or legislative history, or any other source, indicating that Congress intended to alter the treatment as customer property of letters of credit – or any other banking products – that have been used as collateral by customers of an FCM in bankruptcy. The Court may not "reject [this] plain evidence of congressional intent," nor may it accept Plaintiffs' invitation to "manufacture a restriction on the CFTC's jurisdiction that was nowhere contemplated by Congress." *Schor*, 478 U.S. at 847.

6. Congress has also, since 1983, several times amended Subchapter IV, *see, e.g.*, Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, P.L. 109-8, §§ 907(a)(3), (l), 1502(a)(4), 119 Stat. 23, 174 (April 20, 2005); Dodd-Frank, P.L. 111-203, § 724(b), 124 Stat. at 1684, and, in Dodd-Frank, amended the CEA's delegation to the CFTC of authority to regulate commodity broker liquidations, *id*. § 713, 124 Stat. at 1647. Despite having numerous opportunities to do so, Congress has never addressed the rules or interpretations at issue here. This is further strong evidence that the Commission has correctly interpreted Congress' delegation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Solimino v. Astoria Fed. Sav. & Loan Ass'n*, 901 F.2d 1148, 1153-54 & n.9 (2d Cir. 1990).

7. Plaintiffs' interpretation should also be rejected because it would lead to absurd results. *See United States v. Wilson*, 503 U.S. 329, 334 (1992). It is clear, for example, that the CFTC could altogether bar market participants from margining futures trades using letters of credit. 7 U.S.C § 12a(7)(D) (empowering the CFTC to set "margin requirements" to protect the financial integrity of clearing organizations); *id*. § 12a(5) (plenary rulemaking authority); 17

C.F.R. § 39.13(g)(10) (stating that a clearinghouse "shall not accept letters of credit as initial margin for swaps"). However, the Commission recognizes that certain market participants find the practice useful, and, accordingly, has not imposed a categorical bar. Instead, the Commission identified a specific risk associated with this practice – that it could unfairly harm other customers in the event of a bankruptcy – and imposed a condition, which market participants accept by their own actions. *See Marshall*, 436 U.S. at 313. On Plaintiffs' theory, the CFTC may ban altogether the use of letters of credit to margin futures, but it may not impose reasonable conditions designed to protect market participants. Absent *any* indication that Congress intended that anomalous result, Plaintiffs' interpretation should be rejected.

8. Plaintiffs' interpretation may also cast doubt on other aspects of commodities regulation, with no evidence that Congress intended such a result. For example, CEA Section 4d establishes that an FCM must segregate customers' property deposited as margin. 7 U.S.C. § 6d(a)(2). This is the requirement at the center of the MF Global controversy that, if properly applied, ought to have allowed all customers to be repaid promptly and in full. A critical aspect of this protection is Section 4d(b), which applies to "any depository" in which customer property is kept. *Id*. § 6d(b). The statute renders it "unlawful for any person" receiving such property "for deposit in a separate account" to "hold, dispose of, or use such money, securities, or property as belonging . . . to any person other than the customers." *Id*. Like the Part 190 Rules, Section 4d(b) is a condition by which one must abide in order to participate in transactions involving commodity futures. In so conditioning participation, the statute places a restriction on an identified banking product – a deposit account, *see* Gramm-Leach-Bliley Act § 206, Pub. L. No. 106–102, 113 Stat. 1338 (Nov. 12, 1999) – but, again, only to the extent a given deposit account is involved in a commodity transaction. Similarly, much "customer property" subject to

Part 190 consists of instruments not within the CFTC's "regulatory authority," including securities, but which is nevertheless subject to the CEA and CFTC regulations to the extent it is part of a futures transaction. *See* 11 U.S.C. § 761(10); 17 C.F.R. § 190.08(a)(i). Contrary to ConocoPhillips' argument, Congress did not abrogate such provisions, *sub silentio*, in Section 27a. *Handberry*, 446 F.3d at 345; *Iowa, Chi. & R.R. Corp.*, 384 F.3d at 561.

9. At most, Plaintiffs have identified an ambiguity. If it were otherwise, ConocoPhillips would not have based its argument on a rewording of the statute. *See* ECF Doc. No. 2 at 9 of 30 (stating that Section 27a "prohibit[s] the CFTC from adopting *any* regulation with respect to letters of credit"); 9/25/2012 Tr. at 67 (arguing that the rule's validity turns on whether it is "a regulation"). To the extent of any ambiguity, the Court must resolve it in favor of the CFTC's interpretation. *Schor*, 478 U.S. at 844-45; *Chevron*, 467 U.S. at 843-44. As explained, the Commission interprets Section 27a to specify that the CFTC cannot regulate identified banking products as futures and swaps, but not to abrogate any of the Part 190 Rules. The Commission bases this conclusion on (1) the words Congress used, including in exceptions to the exclusion, 7 U.S.C. § 27a(a)-(c); (2) the structure of the CEA and Dodd-Frank, including the broad definitions of "swap" and "commodity," which necessitate limiting provisions like Section 27a; (3) numerous statements in the legislative history of Section 27a; (4) the absence of any reference in the legislative history to Part 190; (5) Congress' placement of amended Section 27a within Dodd-Frank Section 725; (6) the avoidance of the absurd and harmful consequences that would result from Plaintiffs' interpretation; and (7) the need to prevent unfair harm to other customers, which the Commission believes Congress would have addressed if it intended to alter Part 190. This interpretation is reasonable, and therefore entitled to *Chevron* deference.

III. State Law Does Not Prevent the Application of Part 190.

a. There Is No Preemption Question Because ConocoPhillips Agreed to Abide by the Part 190 Rules.

ConocoPhillips' objections based on state law are unfounded, because its customer agreements provide that federal regulations, including CFTC regulations and the Commission's interpretations, govern its transactions with MF Global. CPC's agreement states that "[a]ll transactions shall be subject to all applicable regulations of all federal . . . agencies." *See* CPC Agreement ¶ 2 (ECF Doc. No. 3-3); *see also id*. § 29.A ("This Agreement . . . shall be governed by . . . the laws of the United States."). CP Canada's agreement adopts "all rules *and interpretations* of the Commodity Futures Trading Commission." CP Canada Agreement (ECF Doc. No. 3-9 at 11 of 35) ¶ 1 (emphasis added). These undertakings are binding. *Vencor, Inc. v. Webb*, 33 F.3d 840, 844 (7th Cir. 1994) (holding that Illinois courts "will enforce" a choice of law clause)[4]; *Harmelin v. Man Fin., Inc.*, No. 06-1944, 2007 U.S. Dist. LEXIS 73851, at *15-16 (E.D. Pa. Oct. 2, 2007) (enforcing same "all applicable . . . federal" law clause in case involving MF Global predecessor entity); *McDaniel v. Bear Stearns & Co.*, 196 F. Supp. 2d 343, 360 & n.12 (S.D.N.Y. 2002) (applying an SEC release under identical clause).

In any event, even if the agreements had not expressly incorporated all CFTC regulations, the Part 190 Rules would nevertheless apply as a matter of state contract law. *Costello v. Grundon*, 651 F.3d 614, 640 (7th Cir. 2011) ("[U]nder Illinois law, laws in existence at the time a contract is executed, are deemed, in the absence of contractual language to the contrary, part of the contract as though they were expressly incorporated therein." (internal quotation marks omitted)); *2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir. 1991) (holding under New York law that "[l]aws and statutes in existence at a time a

[4] Both entities' customer agreements provide that Illinois supplies the applicable state law. CPC Agreement ¶ 29.A (ECF Doc. No. 3-3); Conoco Canada Agreement ¶ 13(a) (ECF Doc. No. 3-9 at 13 of 35).

contract is executed are considered a part of the contract"). "When parties enter into a contract, they are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law." *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 673 (2d Cir. 1995). And, while ConocoPhillips relies on various UCC provisions to argue that there is a conflict, the UCC provides that "principles of law and equity, including . . . bankruptcy, . . . supplement its provisions." UCC. § 1-103(b); *see also New Jersey Bank, N.A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 345 (3d Cir. 1982) ("[T]he UCC does not purport to preempt the entire body of law affecting the rights and obligations of parties to a commercial transaction."). The UCC also states that its terms "may be varied by agreement," UCC § 1-102(a), and Article 5, governing letters of credit specifically, states that "the effect of this article may be varied by agreement," *id*. § 5-103(c), which ConocoPhillips expressly and impliedly did here.

Thus, there is no conflict between Part 190 and state law, and ConocoPhillips must honor its commitment to abide by CFTC regulations.

b. Rule 190.08 Preempts State Law to the Extent of Any Conflict.

If state law did purport to govern the conditions on which a letter of credit may be used to margin futures trades, it would be preempted by the CEA and applicable CFTC regulations in Part 190. Because the CFTC's authority over "transactions involving" commodity futures is "exclusive," CFTC regulations preempt state law. 7 U.S.C. § 2(a)(1)(A); *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980) (Friendly, J.) ("[T]he courts have held that § 2(a)(1) of the CEA preempts the application of state law."); *Stuber v. Hill*, 170 F. Supp. 2d 1146, 1150-1151 (D. Kan. 2001) (holding that 7 U.S.C. § 2(a)(1)(A) "precludes states from exercising supplementary regulatory authority over commodity transactions"); H.R. Rep. 93-1383 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5894, 5897 ("Federal law would govern."). ConocoPhillips's transactions, in which it provided MF Global with letters of credit in consideration for futures contracts, plainly were "transactions involving" commodity futures. The CFTC therefore has exclusive jurisdiction, and its rules apply, notwithstanding any state law to the contrary.

Plaintiffs have mischaracterized the CFTC's position in this regard. It is not the "Supplemental Information" in the rule release that preempts state law of its own force – it is the CEA and Part 190 Rules. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."). Plaintiffs, therefore, are mistaken to rely on *Wyeth v. Levine,* 555 U.S. 555 (2009). There, the Supreme Court found no preemption because "Congress ha[d] not authorized the FDA to pre-empt state law." *Id*. at 576; *see, e.g.*, *id*. at 575 ("Congress has not enacted such a provision for prescription drugs."); *id*. at 578 (citing "Congress' decision not to pre-empt common-law tort suits"). The Court scoured the legislative history of the Federal Food, Drug, and Cosmetic Act for any indication that the FDA was so authorized, but found "silence on this issue," which was "powerful evidence that Congress did not intend" preemption. *Id*. at 574-75 & n.7. The Court also faulted the FDA for failing to give adequate notice of the purported preemptive effects of its rule. *Id*. at 577. In its proposal, the FDA stated that its rule would "*not* . . . preempt State law." *Id*. (emphasis added). But, in the final rule, the agency reversed course "without offering States or other interested parties notice or opportunity for comment." *Id*. The Court held that the FDA's "views on state law [we]re inherently suspect in light of this procedural failure." *Id*.

This case presents the opposite circumstances. The CFTC's power to preempt state law is codified in CEA Section 2(a)(1)(A). The CEA also specifies applications of state law that are *not* preempted – none of which are relevant here. 7 U.S.C. § 12(e). In contrast to *Wyeth*, where the legislative history was "silen[t]" on preemption, 555 U.S. at 575, the CEA's legislative history confirms that CFTC regulations preempt state law:

> Under the exclusive grant of jurisdiction to the Commission, the authority in the Commodity Exchange Act (and the regulations issued by the Commission) would *preempt the field* insofar as futures regulation is concerned. Therefore, if any substantive State law regulating futures trading was contrary to or inconsistent with Federal law, the Federal law would govern. In view of the broad grant of authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States.

H.R. Rep. 93-1383, *reprinted in* 1974 U.S.C.C.A.N. 5894, 5897 (emphasis added). Finally, in contrast to the FDA in *Wyeth*, the CFTC here thoroughly vetted the preemptive effect of the rule in formal notice and comment rulemaking. *See* 46 Fed. Reg. at 57553. At the culmination of that process, the Commission considered and reasonably rejected commenters' proposals to amend the rules so that only state law would apply. 48 Fed. Reg. at 8718-19.

Thus, even if ConocoPhillips had not agreed, as it did, to abide by CFTC regulations, the CEA and Part 190 Rules would preempt any conflicting state law.

IV. The Trustee's Calculation Does Not Depend on the Letter's Expiration Date.

The Commission interprets the reference in Rule 190.08(a)(1)(i)(E) to the "full proceeds" of a letter of credit to indicate the letter's full value as margin, equivalent to cash, at the time of the bankruptcy filing. This interpretation is required for consistency with the pro rata distribution system established in 11 U.S.C. § 766(h) and the Part 190 Rules, and is "controlling." *Auer*, 519 U.S. at 461 (holding agency's interpretation of own regulation in amicus brief "controlling unless plainly erroneous or inconsistent with the regulation."); *see also Union Carbide*, _ F.3d_, 2012 U.S. App. LEXIS 18876, at *11-12.

As commenters noted, Rule 190.08(a)(1)(i)(E) entitles the trustee to the full proceeds of letters of credit "irrespective of their terms." 48 Fed. Reg. at 8718. The Commission adopted Rule 190.08(a)(1)(i)(E), as proposed, so as to "assure that customers using a letter of credit to meet original margin obligations would be treated no differently than customers depositing other forms of non-cash margin or customers with excess cash margin deposit." *Id*. Indeed, "[t]he purpose of a letter of credit is to substitute for, and therefore support, an engagement to pay money." *First Commercial Bank v. Gotham Originals, Inc.*, 64 N.Y.2d 287, 294 (1985). Once the FCM is placed into bankruptcy, the Trustee's right to that money, and any resulting obligations on the part of the customer, are fixed. The Commission, in fact, stressed the need "to 'fix'" each customer's "bankruptcy loss at a particular point in time." 46 Fed. Reg. at 57547. Each of these purposes would be defeated if a letter-of-credit customer were to receive a windfall, which it would have no basis to expect or to rely on, based on the expiration of the letter of credit after the bankruptcy filing date.

The Commission also notes ConocoPhillips' admission that it "probably would have [sought] an injunction" if the Trustee had presented the letter for payment. 9/25/2012 Tr. at 30. The Commission stated in the adopting release that it was "not the intent of the Commission to require the trustee to engage in useless activities or to expend debtor funds needlessly." 48 Fed. Reg. at 8720. In light of ConocoPhillips' position, it would have been futile for the Trustee to present the letter for payment, and the fact that he did not do so should not increase the distribution to ConocoPhillips at the expense of other customers. If, in a given case, there is to be litigation, it would be wasteful of estate assets to require that it be done hurriedly in the context of an injunction proceeding. On the other hand, no purpose would be served by having the allocation of the limited estate assets among customers turn on whether the trustee makes demand before or after the expiration date, so long as the letter was valid and being used to margin at the time of bankruptcy.

CONCLUSION

For these reasons, and the reasons set forth in the Trustee's memoranda, the Trustee's claim determination should be confirmed.

Respectfully submitted,

COMMODITY FUTURES TRADING COMMISSION

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Dated: October 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2012, I caused the foregoing document to be served on all counsel via the Court's CM/ECF system.

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