U.S. COMMODITY FUTURES TRADING COMMISSION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KOCH SUPPLY & TRADING, L.P. Plaintiff, v. JAMES W. GIDDENS, Trustee for the SIPA Liquidation of MF Global Inc., Defendant.	Case No. 1:12-cv-05596-NRB

MEMORANDUM OF THE COMMODITY FUTURES TRADING COMMISSION IN SUPPORT OF ITS CONSENT MOTION TO INTERVENE

INTRODUCTION

The U.S. Commodity Futures Trading Commission ("CFTC" or the "Commission") hereby respectfully moves, pursuant to Federal Rules of Civil Procedure 24(a)(2) and (b)(2) and with the consent of both parties, to intervene in the above-captioned action. As explained below, the CFTC has a strong public policy interest, sufficient to give rise to intervention of right under Rule 24(a)(2), in the correct interpretation of the Commodity Exchange Act ("CEA"), correct interpretation of the CFTC regulations at issue, and in defending one of its regulations from Plaintiff's claims of invalidity. The Commission also is eligible to intervene pursuant to Rule 24(b)(2), because each of the original parties has raised claims or defenses based on statutes and regulations administered by the Commission. This motion is timely and will not prejudice the original parties or cause undue delay in these proceedings. For these reasons, and on the consent of the parties, the Commission's motion to intervene should be granted.[1]

BACKGROUND

On July 17, 2012, Plaintiff Koch Supply & Trading, L.P. ("KS&T") commenced this adversary proceeding against James W. Giddens ("Trustee") in the U.S. Bankruptcy Court for the Southern District of New York, Hon. Martin Glenn, seeking a declaratory judgment that "KS&T does not have any liability" with respect to a letter of credit KS&T supplied as initial margin for futures trades through MF Global, Inc. (*Koch Supply & Trading, L.P. v. Giddens*, Adv. Pro. No. 12-01754-mg, ECF ("Bankr. ECF") No. 1.) On July 20, 2012, KS&T filed a motion in this Court to withdraw the reference of that adversary proceeding to the bankruptcy court. (ECF Doc. No. 1.) On October 5, 2012, KS&T filed an amended complaint. (Bankr. ECF No. 24.) The Trustee filed an answer and counterclaim on October 12, 2012, seeking a

[1] In *ConocoPhillips Co. v. Giddens*, the court granted a substantively similar motion by the CFTC to intervene. (No. 12-cv-6014, ECF No. 30 (Oct. 22, 2012).)

declaratory judgment that the full face value of the letter of credit "constitutes customer property pursuant to 11 U.S.C. §§ 761-767 as supplemented by 17 C.F.R. 190 *et seq*." (Bankr. ECF No. 25.) On October 26, 2012, the parties cross-moved for summary judgment. (Bankr. ECF Nos. 33 & 36.) Pursuant to a briefing order entered by the bankruptcy court on November 15, 2012 (Bankr. ECF No. 39), the CFTC, on November 16, 2012, filed a brief in support of the Trustee's motion (Bankr. ECF No. 40). On December 10, 2012, this Court issued a Memorandum and Order granting KS&T's motion to withdraw the reference, concluding that resolution of the parties' claims requires substantial and material consideration of federal non-bankruptcy law, including CFTC Regulation 190.08(a)(1)(i)(E). (ECF No. 14.) KS&T also challenges the validity of that regulation based on, *inter alia*, 7 U.S.C. § 27a of the CEA. (Bankr. ECF No. 43 at 18-26.)

The CFTC now moves to intervene to protect its regulation and to ensure that this rule and the CEA are interpreted and applied correctly. KS&T and the Trustee consent to this relief.

STANDARDS FOR INTERVENTION

Federal Rule of Civil Procedure 24(a)(2) states that, on a timely motion, "the court must permit anyone to intervene who . . . claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." In order to be "cognizable by Rule 24(a)(2)," the asserted interest must be "direct, substantial, and legally protectable." *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010) (internal quotation marks omitted)**.** The final requirement – that "existing parties" not "adequately represent" the interest in question – is "treated as minimal"

and is deemed satisfied so long as the interest "may be" inadequately protected. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

With respect to permissive intervention by the government, Rule 24(b)(2)(A) states that the court may permit a federal agency to intervene "if a party's claim or defense is based on . . . a statute . . . administered by the . . . agency" or "any regulation . . . made under the statute." The Second Circuit has instructed courts to take a "hospitable attitude" toward "allowing a government agency to intervene in cases involving a statute it is required to enforce." *Blowers v. Lawyers Coop. Publishing Co.*, 527 F.2d 333, 334 (2d Cir. 1975); *see also* 7C Wright & Miller, *Federal Practice & Procedure* § 1912, at 471-72 (2007) (noting that the "whole thrust" of Rule 24(b)(2) is to allow "intervention liberally to governmental agencies and officers seeking to speak for the public interest" and that "courts have permitted intervention accordingly").

Under either rule, the motion must be timely and the court must consider whether the intervention will "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(a)&(b)(2)-(3). The Court has discretion to evaluate the timeliness of the motion in light of "all the circumstances" including "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

DISCUSSION

The standards for intervention of right and permissive intervention by a federal agency are met here.

1. The CFTC's public-interest mission as a regulator and law-enforcement authority is directly implicated in this litigation, and is more than sufficient to warrant intervention of right under Rule 24(a)(2). Congress, in the CEA, codified specific findings that transactions involving futures, such as the set of transactions at issue here, are "affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." 7 U.S.C. § 5(a). It therefore established the CFTC with "exclusive jurisdiction" over those and other transactions, *id*. § 2(a)(1)(A), and vested the Commission with plenary authority 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" statute, *id*. § 12a(5). In the Bankruptcy Reform Act of 1978, Congress further empowered the Commission under the CEA to establish what constitutes "customer property" to be distributed ratably to former customers in the liquidation of a commodity broker. *Id*. § 24(a)(1). The Commission must exercise these powers in service of the CEA's public interest purposes, including "to ensure the financial integrity of all transactions subject to" the statute and "the avoidance of systemic risk," as well as to "protect all market participants from . . . misuses of customer assets." *Id*. § 5(b). It was pursuant to these powers to regulate the futures markets in the public interest that the Commission, in 1983, promulgated the Part 190 Regulations, including Rule 190(a)(1)(i)(E). *See* 48 Fed. Reg. at 8739.

The federal government has "an undeniable interest in the enforcement of its laws" and "implementing regulations" that is recognized as "sufficiently cognizable for purposes of Rule 24(a)(2)." *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 155 (D.D.C. 2002); *see also Dixon v. Heckler*, 589 F. Supp. 1512, 1515 (S.D.N.Y. 1984) (granting State of New York's

motion to intervene of right in a suit challenging federal regulations by which the State operated its disability program). Here, the CEA and the Part 190 Regulations are not merely at issue, but directly threatened. The facial validity of Rule 190(a)(1)(i)(E) itself is challenged, while Plaintiff's arguments, if accepted, could jeopardize certain provisions of the CEA and other CFTC regulations in Part 190 and elsewhere. The cognizable interest requirement of Rule 24(a) is, therefore, satisfied.

The "minimal" requirement that existing parties "may be" insufficient to protect the Commission's interests, *Trbovich*, 404 U.S.at 538 n.10, likewise is satisfied. The CFTC does not base this conclusion on any concern with the Trustee's advocacy on behalf of the MF Global estate. Rather, it is because the Trustee's duties are to the MF Global estate, including its specific customers and creditors, while the Commission serves the broader public interest purposes set forth in the CEA. *See* 7 U.S.C. § 5(a). Congress specifically recognized this distinction in 11 U.S.C. § 762(b), which states that the Commission has the right to "raise" and "appear and be heard on any issue" in a commodity broker liquidation. The Commission approaches the issues presented in this case in the context of its mission to protect the stability and healthy operation of the futures markets, apart from the specific controversy between the Trustee and KS&T. Thus, the requirement that existing parties "may be" inadequate to protect the Commission's interests is met in this case.

2. The requirements for permissive intervention under 24(b)(2) are also met, because the parties base claims or defenses on the CEA, which is "a statute . . . administered by the" CFTC, and/or on the Part 190 Regulations, which are "regulation[s] . . . issued or made under th[at] statute." Both parties' claims are based upon and will require this court to interpret, *inter alia*,

the Part 190 rules. (ECF Doc. No. 14 at 5.) KS&T also disputes the scope of the Commission's authority under the CEA. (*Id*. at 15.)

3. Finally, this motion is timely and will not prejudice any party or cause undue delay. *See* Fed. R. Civ. P. 24(a)&(b)(2)-(3). In fact, both original parties consent to the Commission's intervention. Less than two weeks have elapsed since this Court ordered this matter withdrawn from the Bankruptcy Court (ECF No. 14 (Dec. 10, 2012)), and the Commission believes that the briefing schedule approved by this Court on December 17 (ECF No. 15) continues to be appropriate. If this motion were denied, however, the Commission would be prejudiced in its efforts to protect the public interest as it pertains to futures markets. No circumstances exist that would militate against a finding that this motion is timely.[2]

CONCLUSION

The CFTC respectfully requests that its consent motion to intervene be granted.

[2] Rule 24(c) requires that a motion to intervene be accompanied by "a pleading." To comply with Rule 24(c), the Commission therefore attaches as Exhibit A a Proposed Rule 15(d) Supplemental Pleading stating that the Commission joins in the Trustee's cross-motion for summary judgment. Because the Commission has already filed a brief in the bankruptcy court supporting the Trustee's motion, the Commission's interest in this action is clear, and Rule 24(c) is satisfied. *See Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, No. 01-cv-8539, 2003 U.S. Dist. LEXIS 21164, at *9 (S.D.N.Y. Nov. 25, 2003) ("[A]dopting claims already asserted against a defendant can be sufficient where it does not cause prejudice to the parties."); *Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 393 n.8 (S.D.N.Y. 2002) (not requiring the Government to file a separate "pleading" where "the Government's presence in the pending litigation, and its position therein, come as no surprise to anyone").

Respectfully submitted,

COMMODITY FUTURES TRADING COMMISSION

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