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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

MEMORANDUM OF THE COMMODITY FUTURES TRADING COMMISSION IN SUPPORT OF ITS UNOPPOSED 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), 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, correct interpretation of the CFTC regulations at issue, and in defending one of its regulations from Plaintiffs' 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 any delay in these proceedings. The original parties have indicated that they do not oppose this motion. For these reasons, the Commission's motion to intervene should be granted.

BACKGROUND

On July 30, 2012, James W. Giddens, liquidation trustee ("Trustee") for MF Global Inc. ("MFGI"), filed a motion in the U.S. Bankruptcy Court for the Southern District of New York, Hon. Martin Glenn, to confirm the Trustee's determination of claims by two ConocoPhillips entities ("ConocoPhillips") to customer property in the MFGI estate. (*In re MF Global, Inc.*, No. 11-02790-mg, ECF Doc. No. 2632.) On August 6, 2012, ConocoPhillips filed a motion in this Court to withdraw the reference of that contested motion to the bankruptcy court. (ECF Doc. No. 1.) This Court granted ConocoPhillips' motion in a Memorandum and Order dated October 4, 2012, determining that resolution of the Trustee's motion requires substantial and material consideration of federal non-bankruptcy law, including, *inter alia*, the Commodity Exchange

Act, 7 U.S.C. §§ 1, *et seq.*, and the CFTC's Part 190 Regulations, 17 C.F.R. § 190.01, *et seq.* (ECF Doc. No. 26.)

As summarized in the Court's October 4, 2012 Memorandum and Order, the Trustee contends that the full face amounts of six letters of credit posted by ConocoPhillips to margin futures trades constitute customer property subject to ratable distribution under the Bankruptcy Code and Part 190 Regulations. (*Id*. at 5.) The Trustee relies, in part, on CFTC Rule 190.08(a)(1)(i)(E), which states that "[c]ustomer property" includes "[a]ll cash, securities, or other property or the proceeds of such" property "received, acquired or held" by the debtor "from or for the account of a customer," including the "full proceeds of a letter of credit if such letter of credit was received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract." (*Id*. at 7, 9.) The Trustee also relies on the CFTC's adopting release for the Part 190 Regulations, which sets forth the Commission's interpretation of Rule 190.08(a)(1)(i)(E), confirming that a liquidation trustee is entitled to demand the full proceeds of such a letter of credit. (*Id*. at 16 n.11; *see Bankruptcy*, 48 Fed. Reg. 8716 (Mar. 1, 1983).) ConocoPhillips, on the other hand, contends that (1) the Trustee and the CFTC have incorrectly interpreted CFTC Rule 190.08(a)(1)(i)(E); (2) if the Trustee's and CFTC's interpretation is correct, the regulation is invalid under the Commodity Exchange Act; and (3) if the Trustee's and CFTC's interpretation is correct, the regulation is invalid as impermissibly in conflict with state law. (ECF Doc. No. 26 at 10.)

The CFTC now moves, unopposed, to intervene to defend its regulation and to ensure that the Part 190 Rules and the Commodity Exchange Act are interpreted and applied correctly.

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 practical impairment requirement is established when "there is a significant likelihood that the ultimate resolution of th[e] litigation will lead to . . . conclusions of law on issues of first impression" adverse to the intervenor's interest. *Oneida Indian Nation v. New York*, 732 F.2d 261, 265 (2d Cir. 1984); *see generally* 6-24 Moore's Federal Practice - Civil § 24.03 (LexisNexis 2012) ("An intervenor's interest can be impaired or impeded as a practical matter if a pending action will cause a *stare decisis* impact that is harmful to the applicant."). Finally, the 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, Rule 24(b)(2)(A) states that the court may permit a federal government 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 (2012) (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 both 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 granted the CFTC "exclusive jurisdiction" over those and other transactions, 7 U.S.C. § 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 the challenged Rule 190(a)(1)(i)(E). *See* 48 Fed. Reg. at 8739 (citing sources of authority).

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. Plaintiffs challenge the validity of Rule 190(a)(1)(i)(E) on its face and their arguments, if accepted, could jeopardize certain other provisions of the CEA and CFTC regulations in Part 190 and elsewhere. The Court has already concluded that, in this regard, Plaintiffs raise matters of first impression. (ECF Doc. No. 26 at 11.) Thus, Rule 24(a)'s requirements of a cognizable interest that may be impaired are 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 MFGI estate. Rather, it is because the Trustee's duties are to the MFGI 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 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 ConocoPhillips. 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 both parties base claims or defenses on the CEA, which is "a statute . . . administered by the" CFTC, and/or on the Part 190 Regulations, "regulation[s] . . . issued or made under th[at] statute." The Trustee bases his motion to confirm the claim determination on, *inter alia*, the Part 190 rules and Section 20(a) of the CEA, 7 U.S.C. § 24(a). (ECF Doc. No. 3-1, Ex. A at 12-16, 20.) ConocoPhillips bases its defense on, among other things, 7 U.S.C. § 27a of the CEA. (ECF Doc. No. 2 at 21-23 of 30.)

3. Finally, this motion is timely and will not prejudice any party or cause delay. *See* Fed. R. Civ. P. 24(a)&(b)(2)-(3). Approximately two weeks have elapsed since this Court ordered this matter withdrawn from the Bankruptcy Court (ECF Doc. No. 4 (Oct. 4, 2012)), and intervention will not require any change to the briefing schedule established by this Court's

October 10, 2012 Order (ECF. Doc. No. 27) or delay argument scheduled for December 19, 2012 (ECF. Doc. # 26 at 19.)[1] On the other hand, if this motion were denied, the Commission would be prejudiced in its efforts to protect the public interest as it pertains to futures markets.

CONCLUSION

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

[1] Rule 24(c) requires that a motion to intervene be accompanied by "a pleading." Due to the procedural posture of this matter, however, no "pleadings" have been filed by either party. *See* Fed. R. Civ. P. 7(a) (recognizing as "pleadings" only a complaint, answer, counterclaim answer, crossclaim answer, third-party complaint, third-party complaint answer, or reply to an answer). 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 motion to confirm. Particularly in light of the Commission's previous participation in this case, from which the Commission's interest in this action is clear (*see* ECF Doc. No. 20), 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

By: /s/ *Robert A. Schwartz*

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Dated: October 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, I caused the foregoing document to be served on all counsel via the Court's CM/ECF system.

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