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Division
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January 19, 2016

**VIA ECF**
The Honorable Analisa Torres
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: U.S. Commodity Futures Trading Commission v. Donald R. Wilson & DRW Investments, LLC, No. 13-7884 (AT/KF)

Dear Judge Torres:

Pursuant to Rule III.A(ii) of the Court's Individual Practices in Civil Cases ("Individual Practices"), plaintiff U.S. Commodity Futures Trading Commission ("Commission") respectfully opposes prospective *amici curiae*'s ("*amici*")[1] request for leave to file a brief in support of defendants Donald R. Wilson and DRW Investments, LLC's (together, "defendants") summary judgment motion and in opposition to the CFTC's motion for summary judgment ("*amici* letter") (ECF No. 125).[2]

*Amici*'s belated request to file what is, effectively, a sur-reply in opposition to plaintiff's motion for partial summary judgment, and an additional reply brief in support of defendants' summary judgment motion, should not be allowed by the Court. As discussed below, nothing in *amici*'s letter justifies its tardiness or its reiteration of defendants' legal arguments. Therefore, the Commission respectfully requests that the Court deny *amici*'s request for leave.

[1] *Amici* include CME Group, Inc. ("CME"), Commodity Markets Council ("CMC"), Futures Industry Association, Inc. ("FIA"), Intercontinental Exchange, Inc. ("ICE"), and Managed Funds Association ("MFA").

[2] *Amici* did not follow Rule III.A(ii) of the Court's Individual Practices, mandating a pre-motion conference prior to the filing of a motion. Instead, *amici* went ahead and not only filed the motion for leave, but the *amici* brief itself ("*Amici* Br.") (ECF No. 125-1). In addition, the *Amici* Br. does not identify that it is (1) in support of defendants' summary judgment motion and (2) in opposition to the Commission's summary judgment motion. *See* Fed. R. App. P. 29(c).

## I. *AMICI*'S PROFFERED BRIEF IS NOT USEFUL.

"An amicus curiae proves true to its name as a 'friend of the court' when it offers a fresh perspective on an unsettled question of law *that the actual parties to the litigation have not fully addressed*." *United States v. Yaroshenko*, 86 F. Supp. 3d 289, 290-91 (S.D.N.Y. 2015) (emphasis added). "There is no governing standard, rule or statute 'prescrib[ing] the procedure for obtaining leave to file an *amicus* brief in the district court.'" *Lehman XS Trust, Series 2006-GP2 v. Greenpoint Mortg. Funding, Inc.*, Nos. 12 Civ. 7935, 7942, 7943, 2014 WL 2655784, at *1 (S.D.N.Y. Jan. 23, 2014) (alteration in original; citation omitted). "Nevertheless, the Court looks to the Federal Rules of Appellate Procedure, which does provide a rule for the filing of an *amicus* brief, and also considers the instances when an *amicus* brief serves a laudable, rather than distractive, purpose." *Id.* As *amici* correctly point-out, the decision for leave to file is in the "firm discretion" of the Court. *Id.*

Courts in the Second Circuit often use the Seventh Circuit's "useful" litmus test for when an *amicus* brief would be beneficial, including (1) when a party is not represented competently or is not represented at all; (2) when the *amicus* has an interest in some other case that may be affected by the decision in the present case; or (3) when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. *Id.* at *2. None of these factors are present here. *See also Ryan v. CFTC*, 125 F.2d 1062, 1063 (7th Cir. 1997) (Posner, J.) (noting that "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party.").

Consistent with the defendants' position and without adding anything new, *amici* ask the Court to credit their view that a claim for attempted manipulation requires proof of specific intent to create an artificial price and that any other interpretation violates Due Process. *Amici* Br. at 4-10. Defendants have repeatedly touted this argument over the last two years, even after the Court considered the parties' extensive motion to dismiss briefs, and subsequently rejected this argument in *CFTC v. Wilson*, 27 F. Supp. 3d 517, 530-35 (S.D.N.Y. 2014). *See* Defs.' Mem. in Support of Mot. to Dismiss or Transfer Venue at 18-19 (ECF No. 33) (raising Due Process argument); Defs.' Reply in Support of Mot. to Dismiss or Transfer Venue at 8-11 (ECF No. 37) (arguing intent standard, interpreting *In re Indiana Farm Bureau Coop. Ass'n, Inc.* and raising Due Process argument); Defs.' Mem. in Support of Mot. for Summary Judgment at 23-38, 46-48 (ECF No. 112) (same); Defs.' Reply in Support of Mot. for Summary Judgment at 4-13, 30-35 (ECF No. 126) (same); Defs.' Opp. to Pl.'s Mot. for Partial Summary Judgment at 4-11 (ECF No. 120) (arguing intent standard and interpreting *Indiana Farm Bureau*). Therefore, *amici*'s attempt to parrot the defendants' arguments should not be permitted. *See Ryan*, 125 F.2d at 1063-64 (holding that the Chicago Board of Trade's attempt as *amicus* falls into "forbidden category" by duplicating litigant's arguments and "merely extending the length of the litigant's brief").

Additionally, "the partiality of an amicus is a factor to consider in deciding whether to allow participation." *Picard v. Greiff*, 797 F. Supp. 2d 451, 452 (S.D.N.Y. 2001) (citation omitted). The *Amici* Br. fails to disclose that defendant Donald R. Wilson, according to

Bloomberg.com, is in fact a member of CME, an *amicus* here.[3] It also fails to disclose Mr. Wilson's various affiliations with FIA.[4] Additionally, the similarities between *amici*'s and defendants' arguments suggest an inherent partiality in favor of defendants; that is, the *amici* here are "friends of the litigant," not "friends of the court."

## II. *AMICI*'S PROFFERED BRIEF IS UNTIMELY.

Rule 29 of the Federal Rules of Appellate Procedure provides that any *amicus* brief must be filed "no later than 7 days after the principal brief of the party being supported." Fed. R. App. P. 29(e). Here, *amici* did not seek leave to file during the briefing on defendants' motion to dismiss, but instead waited nearly eighteen months—*after Wilson*'s holding regarding the applicable intent standard, and after the parties completed briefing their summary judgment motions.[5] *Amici* provide no justification or excuse for their delay. *See Yaroshenko*, 86 F. Supp. 3d at 290 (finding application filed by *amicus* to be untimely as "[o]nly now, ten months after defendant filed his motion and well after defendant's much-delayed final briefing is complete, has [*amicus*] seen fit to approach the Court to request to file its brief and thereby further extend these already protracted proceedings").

## III. *AMICI*'S PROFFERED BRIEF IS WITHOUT MERIT.

*Amici*'s proposed brief offers this Court nothing new. It ignores the Court's considered decision on the motion to dismiss, the Law of the Case Doctrine and Second Circuit case law. *See Wilson*, 27 F. Supp. 3d at 531; *see also DiPlacido v. CFTC*, 364 F. App'x 657, 661 (2d Cir. 2009); Pl.'s Opp. to Defs.' Mot. for Summary Judgment at 26-42 (ECF No. 119); Pl.'s Reply in Support of Mot. for Partial Summary Judgment at 4-14 (ECF No. 123). The Court already has had the benefit of 80 pages of briefing by the parties on the intent and Due Process issues, and has already considered and ruled on the issues, thus setting the law of the case. *See Wilson*, 27 F. Supp. 3d at 530-533; Pl.'s Resp. in Opp. to Defs.' Mot. to Dismiss or Transfer Venue at 48-50, 60-63 (ECF No. 35); Pl.'s Resp. in Opp. to Defs.' Mot. for Summary Judgment at 26-42, 62-65

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[3] *See* Bloomberg Business Overview of DRW Holdings, LLC, http://www.bloomberg.com/research/stocks/private/person.asp?personId=33499153&privcapId=33430748 (last visited Jan. 14, 2016) (attached hereto as Exhibit A) ("Mr. Wilson is a Member of the CME, the Chicago Board of Trade, the Chicago Board Options Exchange, and the LIFFE. Over the course of his Membership at the CME, Mr. Wilson has been an active participant in exchange matters. He has been actively involved in GLOBEX, the electronic trading platform at the CME.").

[4] In March 2013, Mr. Wilson was a member of the board of directors of FIA. *See* https://fia.org/articles/fia-elects-directors-and-officers-0. In 2012, Mr. Wilson was chairman of the FIA Principal Traders Association. *See* https://ptg.fia.org/articles/case-you-missed-it-qa-don-wilson-founder-drw-trading-group. (Both attached hereto as Exhibit B.)

[5] Additionally, even if one ignores the parties'12(b)(6) briefing in 2014, *Amici*'s Br. was still due on November 30, 2015, seven days after the parties' summary judgment motions were filed, and in time for the Commission to respond to it in due course.

(ECF No. 119); Pl.'s Mem. in Support of Mot. for Partial Summary Judgment at 19-21 (ECF No. 109); Defs.' Mem. in Support of Mot. to Dismiss or Transfer Venue at 18-19 (ECF No. 33); Defs.' Reply in Support of Mot. to Dismiss or Transfer Venue at 8-11 (ECF No. 37); Defs.' Mem. in Support of Mot. for Summary Judgment at 23-38, 46-48 (ECF No. 112); Defs.' Reply in Support of Mot. for Summary Judgment at 4-13, 30-35 (ECF No. 126); Defs.' Opp. to Pl.'s Motion for Partial Summary Judgment at 4-11 (ECF No. 120). To put it mildly, this issue has been thoroughly litigated.

Additionally, while *amici* (inaccurately) attack the CFTC for purportedly ignoring older Commission cases, they do not reveal that at least three of the *amici* themselves previously (and publicly) endorsed the very legal standard for intent that they now attack, intent to "affect" or "influence" the pre-existing price. In addition, while in their current brief *amici* (inaccurately) characterize this standard as an abrupt departure from precedent, the three previous endorsements accurately noted that this standard was the "traditional" and "long standing" intent standard for attempted manipulation:

- MFA previously explained: "MFA respectfully urges the Commission to adopt a specific intent standard as it is also consistent with the traditional elements required to prove attempted manipulation. Courts have held that to satisfy a claim for attempted manipulation, the Commission must show: (1) an intent to affect market prices and (2) an overt act in furtherance thereof." Letter from MFA to CFTC, dated Dec. 28, 2010, at 6-7 (citing with approval attempted manipulation standard in *McGraw-Hill*) (attached hereto as Exhibit C).

- FIA previously explained: "The Associations support the Commission's statement reaffirming that the traditional four-part test, developed from manipulation cases involving 'corners' and 'squeezes,' needed to impose liability under its proposed rule, which requires the Commission to establish that: (1) *the alleged manipulator had the ability to influence market prices; (2) the alleged manipulator specifically intended to do so*; (3) artificial prices existed; and (4) the alleged manipulator caused the artificial prices. *This is a long-standing test that market participants are familiar with and provides some guidance for their trading activities*." Letter from FIA to CFTC, dated Dec. 28, 2010, at 11 (attached hereto as Exhibit D) (emphasis supplied). *See also id.* at 8 n.21 (citing with approval attempted manipulation standard in *CFTC v. McGraw-Hill Cos.*, 507 F. Supp. 2d 45, 51 (D.D.C. 2007)).

- CME previously explained: "CME Group recommends that the Commission adopt the approach to determining price artificiality outlined in *Cox* . . . ." Letter from CME to CFTC, dated Jan. 3, 2011, at 14 (attached hereto as Exhibit E).

*See also Wilson*, 27 F. Supp. 3d at 531-32 (relying, in part, on *In re Cox* and *McGraw-Hill* in articulating standards for manipulation and attempted manipulation).

These statements of *amici* were in response to a notice of proposed rulemaking pursuant to the Dodd-Frank Act's market manipulation provisions. Yet *amici* now reverse course to support the application of a different wording for the standard, hoping to open the door for an

argument that as long as the defendants, themselves, purportedly believe that the pre-existing price was incorrect, then efforts to move that price to one more to the defendants' liking, in order to profit, is lawful. Of course, none of the decisions *amici* cite apply the "intent to create an artificial price" standard in the rule-swallowing manner *amici* propose. *See generally* Pl.'s Reply in Support of Mot. for Partial Summary Judgment at 9-10 (ECF No. 123); Pl.'s Resp. in Opp. to Defs.' Mot. for Summary Judgment at 39-41 (ECF No. 119). That is, these cases do not stand for the proposition that the intent requirement is unsatisfied where (1) the undisputed evidence (2) demonstrates that a defendant intentionally acted (3) with the purpose of setting its own settlement price, like the immediate case. *See id.* Finally, in their hypotheticals, *amici* conflate intent to affect price with the knowledge that an overt act will likely cause a price movement.[6]

## IV. CONCLUSION.

For the reasons stated above, plaintiff respectfully requests that this Court deny *amici*'s request for leave to file a brief in support of defendants, or in the alternative, and should the Court desire additional briefing on the matter, allow plaintiff to file a responsive pleading.

Respectfully submitted,

/s/ David Kent
A. Daniel Ullman II (*pro hac vice*)
Jason Mahoney (*pro hac vice*)
Sophia Siddiqui (*pro hac vice*)
Jonah McCarthy
David Kent (*pro hac vice*)

**ATTORNEYS FOR PLAINTIFF U.S. COMMODITY FUTURES TRADING COMMISSION**

cc: Counsel of Record
Counsel for *Amici*

[6] Should the Court accept *amici*'s brief, and desire additional briefing, plaintiff will respond to *amici*'s hypotheticals. Plaintiff notes, however, that issues of law should not rest on hypotheticals, especially those that appear to be arguing the evidence of this case.