

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

v.

My Big Coin Pay, Inc., My Big Coin, Inc., Randall Crater,
Mark Gillespie, John Roche, and Michael Kruger,

Defendants,

Kimberly Renee Benge, Kimberly Renee Benge d/b/a
Greystone Advertisement a/k/a Greystone Advertiser, Barbara
Crater Meeks, Erica Crater, Greystone, LLC, Greystone
Technology, LLC,

Relief Defendants.

Case No. 18-CV-10077-RWZ

**PLAINTIFF’S OPPOSITION TO DEFENDANT CRATER AND RELIEF
DEFENDANTS’ MOTION FOR LEAVE TO FILE A REPLY BRIEF**

Plaintiff Commodity Futures Trading Commission (“Commission”) respectfully submits its opposition to Defendant Randall Crater and all Relief Defendants’ (collectively, “Moving Defendants”) motion for leave to file a reply brief (“Motion for Leave”) in support of Moving Defendants’ motion to dismiss the amended complaint (“Motion to Dismiss”).

Recognizing that their Motion to Dismiss is doomed, Moving Defendants ask this Court to bend the Local Rules, granting them twenty more pages in the form of a reply brief to respond to an argument that they failed to anticipate—that virtual currencies are “goods” (or “articles”) within the meaning of 7 U.S.C. § 1a(9). They should have anticipated it, among other reasons, because that was the holding of *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018) (Weinstein, J.) (“Virtual currencies are ‘goods[.]’”)—the case the Commission gave notice of to the Court and Moving Defendants nearly *two months* before Moving Defendants filed their

Motion to Dismiss. *See* Notice of Suppl. Authorities, Mar. 8, 2018, ECF No. 37. Indeed, Moving Defendants discussed this case extensively in their brief. Mem. Supp. Mot. to Dismiss 12-14, 18-19, ECF No. 69. Moving Defendants request for a second bite at the apple should be denied as unnecessary, prejudicial, and contrary to the Local Rules.

First, more one-sided briefing is unnecessary here. This is not a complicated case. Even if the question of whether the virtual currency, My Big Coin (“MBC”), is a “commodity” under Section 1a(9) of the Commodity Exchange Act (“Act”), 7 U.S.C. § 1a(9) (2012), is novel, it certainly is not so complicated that the Court needs more than the forty pages of briefing already before it. Moreover, the one reason Moving Defendants claim justifies more briefing—to respond to the Commission’s contention that MBC is a “good or article” under the Act—is flawed. *See* Motion for Leave at 5. Conceding that the Commission’s consistent prior positions are due deference, Moving Defendants assert that the Commission’s contention is “an about-face” from the Commission’s position that virtual currency is a “service, right or interest.” (*Id.*) Setting aside that Moving Defendants provide no support for this assertion, the fact that they admittedly failed to address this issue sufficiently in their memorandum does not justify bending the Local Rules. It is plain from the text of § 1a(9) that the definition of “commodity” includes the category “all other goods and articles” that apparently surprised Moving Defendants. 7 U.S.C. § 1a(9). Moreover, at the time they filed their Motion to Dismiss, Moving Defendants were well aware of *McDonnell*, 287 F. Supp. 3d 213 at 228, and the contention that virtual currency is a “good” or “article” under the Act. *See* ECF No. 37. Nevertheless, Moving Defendants simply breezed past the issue in their memorandum, with the cursory statement that MBC “is not a ‘good’ or an ‘article’ because it has no tangible existence.” Mem. Supp. Mot. to Dismiss 5, ECF No. 69; *see also* Plf.’s Opp. to Mot. to Dismiss 7-8, ECF No. 70 (responding to

Moving Defendants' argument that MBC was not a good or article). Moving Defendants already had ample opportunity to brief the issue and should not be rewarded with a "do over" because they chose to give the issue short shrift in their first bite at the apple.

Second, the motion should be denied as unfairly prejudicial and contrary to the Local Rules. Local Rule 7.1(b) plainly and fairly provides each side *one* opportunity to submit a twenty-page memorandum of reasons why a motion should or should not be granted. Operating within the confines of this rule, Moving Defendants and the Commission crafted their arguments and drafted papers knowing the page limit and that no other papers would be submitted. Only now having the benefit of the Commission's opposition brief, Moving Defendants want to change the rules—only as to them of course—and submit a second memorandum doubling the number of pages of argument the Local Rules allow. It is telling that Moving Defendants waited until briefing was complete to move for a reply. The more appropriate course of action would have been, of course, to confer with the Commission, before the motion to dismiss was filed, on an appropriate briefing schedule the parties could submit to the Court for approval.

Moreover, Moving Defendants have once again flouted their obligations under Local Rule 7.1(a)(2) to confer and attempt in good faith to resolve or narrow the issue. Well aware that counsel for the Commission was out of the office on this past Friday afternoon—the day before the Memorial Day holiday weekend—and despite having counsel's cell phone number, Moving Defendants went ahead and filed the Motion for Leave less than four hours after first attempting to contact counsel via email. That is not conferring or attempting in good faith to resolve or narrow the issue at hand, and accordingly violates Local Rule 7.1(a).¹

¹ This is not the first time counsel has disregarded their obligations under L.R. 7.1(a)(2). Prior to filing the Motion to Dismiss, counsel waited a mere sixteen minutes from their first attempt to confer before filing their motion.

CONCLUSION

For the foregoing reasons, the Court should deny Moving Defendants' request for leave to file a reply brief.

Dated: May 29, 2018

Respectfully submitted,

By: /s/ Jonah E. McCarthy

Traci L. Rodriguez

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on May 29, 2018.

/s/ Jonah E. McCarthy

Jonah E. McCarthy

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