UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

THE UNITED STATES OF AMERICA and COMMODITY FUTURES TRADING COMMISSION, Plaintiffs, v. STATE OF WISCONSIN and JOSHUA L. KAUL, in his official capacity as Attorney General of WISCONSIN, Defendants.	Civil Action No.: 2:26-cv-749

REPLY MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE BY KALSHIEX LLC

Kalshi respectfully submits this reply memorandum in further support of its Motion to Intervene (Dkt. No. 24) ("Motion" or "Mot.") and in response to Defendants' Opposition (Dkt. No. 37) ("Opp.").[1]

PRELIMINARY STATEMENT

Defendants' Opposition confirms the Court should grant Kalshi's Motion. Defendants do not dispute that the Motion is timely or that Kalshi has a legally protectable interest in this Action. Defendants argue only that Kalshi's interest will not be impaired if it is excluded and that the CFTC can adequately represent Kalshi's interests. Both arguments fail. Absent intervention, Kalshi will have had no opportunity to be heard in a case that may decide whether it can continue operating in Wisconsin. No market participant has a greater interest in this outcome given that Kalshi is the DCM with the largest trading volume of event contracts in the country. The CFTC

[1] Unless noted otherwise, capitalized terms are as defined in Kalshi's opening brief. *See* Dkt. No. 24.

also is not Kalshi's legal representative and cannot be expected to defend Kalshi's specific business, compliance, or reputational interests.

Defendants overlooked those points. Instead, Defendants claim that Kalshi can simply make its arguments in the Wisconsin Enforcement Action but that does not protect Kalshi's interests in this Action, which may have significant implications for Kalshi's ability to operate now and in the future. Allowing Kalshi to intervene also does not "blow the doors off" Rule 24(a). Opp. at 2. Kalshi is not just a "potentially affected company," *id.* at 1—it has been sued by Wisconsin in a state enforcement action and the CFTC has brought this Action because of it. Kalshi should have the opportunity to protect its interests here, and the Court should grant its Motion.

ARGUMENT

I. KALSHI MAY INTERVENE AS OF RIGHT UNDER RULE 24(a)

As a threshold matter, Defendants misstate Kalshi's position to be that "in every preemption case between a state and the federal government, all private parties affected by the state law at issue have a right to intervene." Opp. at 2. Kalshi never said that. Rather, Kalshi has made the unremarkable argument that when state authorities bring an enforcement action against a federally regulated entity, that entity should be allowed to intervene in a parallel action addressing the same issues brought by its federal regulator against the same state actors.

There is nothing unprecedented about that position. Kalshi cited several cases that granted similar requests by targeted DCMs to intervene in parallel CFTC enforcement actions, but Defendants overlooked them. Mot. at 3 n.1. Beyond those cases, it is common practice for self-regulatory organizations ("SROs") to intervene in actions challenging their rights or obligations. *See, e.g.*, *Chi. Bd. Options Exch., Inc. v. SEC*, 889 F.3d 837, 839-40 (7th Cir. 2018) (securities exchanges intervened in appeal of SEC order); *NetCoalition v. SEC*, 715 F.3d 342, 344-45 (D.C.

Cir. 2013) (securities exchanges intervened to defend proposed changes to their fee-setting rules); *Mayo v. Dean Witter Reynolds*, 258 F. Supp. 2d 1097, 1102 n.4 (N.D. Cal. 2003) (permitting SROs to intervene to defend SEC-approved rules against conflicting state-imposed obligations). Against this backdrop, Defendants' claim that granting intervention would lead to an unprecedented "deluge of intervenors," Opp. at 2, is unpersuasive.

Putting that aside, each of the Rule 24(a) factors is met here. As noted, Defendants challenge only two of those factors—whether Kalshi's interests may be impaired absent intervention and whether the CFTC can adequately protect those interests. Defendants' arguments do not withstand scrutiny or overcome the substantial authority granting intervention in similar circumstances.

A. Excluding Kalshi From this Action Would Impair Its Interests

Kalshi explained all the reasons why the disposition of this Action will have a direct impact on Wisconsin's enforcement efforts against it, now and in the future. Mot. at 2-3, 11-12. Defendants largely ignored those points. Instead, they claim that Kalshi can protect its interests by asserting a preemption defense in the Wisconsin Enforcement Action, Opp. at 2-3, but that is a non sequitur. Rule 24(a) asks whether Kalshi's interests may be impaired in this Action absent intervention, not whether it can raise similar arguments in another one.

Kalshi's interests clearly would be so impaired because it would not have the opportunity to address questions in this case that are also at the core of the Wisconsin Enforcement Action, such as whether the CFTC has exclusive jurisdiction over swaps traded on DCMs. An adverse ruling would likely be invoked by Defendants against Kalshi in the Wisconsin Enforcement Action. And any decision by the Seventh Circuit on appeal would bind the district court presiding over that enforcement action. Given this state of affairs, Defendants' claim that "this litigation won't impact Kalshi at all," Opp. at 3 n.2, does not hold water.

Defendants argue that Kalshi should simply file an amicus brief in the Seventh Circuit if it is concerned about an adverse appellate ruling. Opp. at 3. That argument could be made in any case in which a party seeks to intervene. Regardless, if Kalshi is excluded and forced to wait for appeal, Kalshi will have had no ability to present arguments or develop the factual record at the district court level, which will significantly impair its interests now and on appeal.

B. The CFTC Does Not Adequately Represent Kalshi's Interests

Defendants do not engage with Kalshi's adequacy arguments. Instead, they assert in one sentence that "the federal government adequately represents private parties' interest in avoiding state regulation." Opp. at 2.[2] This argument is unpersuasive and contrary to Seventh Circuit precedent. *See Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 747 (7th Cir. 2020).

Driftless is directly on point. There, a regulated party sought to intervene in an action in which its regulator was defending a decision impacting the proposed intervenor's interests. 969 F.3d at 744. The Seventh Circuit reversed the district court's order denying intervention because the regulator did not adequately represent the intervenor's distinct economic and business interests. *Id.* at 748-49 ("[T]he [state] Commission *regulates* the transmission companies, it does not *advocate for* them or represent their interests. The transmission companies cannot be forced to rely entirely on *their regulators* to protect their investment." (emphasis in original)).

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[2] Defendants at times cross-reference their opposition to CDNA's motion for intervention, Dkt. No. 28, and CDNA addressed those arguments in its reply, Dkt. No. 35. To the extent Defendants purport to incorporate arguments by reference, that approach is "disfavored" in the Seventh Circuit. *Magnuson v. Exelon Corp.*, 658 F. Supp. 3d 652, 660 (C.D. Ill. 2023) (citing *Miller UK Ltd. v. Caterpillar, Inc.*, 292 F.R.D. 590, 592-93 (N.D. Ill. 2013) ("Adopting by reference arguments in documents other than in the brief dealing with the particular point under consideration . . . unnecessarily complicates the task of the . . . judge." (citation modified))). For efficiency, Kalshi responds only to the specific arguments Defendants raised in their opposition to Kalshi's Motion.

The same is true here. The CFTC's and Kalshi's "interests and objectives overlap in certain respects but are importantly different." *Driftless*, 969 F.3d at 748. The CFTC is Kalshi's federal regulator, not its legal representative. It filed this action to protect its sovereign and institutional interests, not Kalshi's interests. Kalshi, on the other hand, is the largest prediction market in the United States with its own specific business, compliance, and reputational interests. The fact that this Action may benefit Kalshi does not mean the CFTC is acting to protect those distinct interests. *Id.* at 748-49.

C. Kalshi is Not Claim-Splitting

Defendants devote most of their Opposition to arguing that Kalshi's intervention amounts to impermissible claim-splitting. Opp. at 3-5. A threshold problem is that Defendants cite no Seventh Circuit authority applying claim-splitting to bar Rule 24 intervention. This is unsurprising because the doctrine targets plaintiffs who affirmatively file duplicative suits, not parties seeking to join existing litigation. *See Scholz v. United States*, 18 F.4th 941, 951 (7th Cir. 2021).

Regardless, the elements of claim-splitting are not met. Claim-splitting requires "identity of the parties and of the causes of action between the two lawsuits." *Scholz*, 18 F. 4th at 952. But the parties differ (the CFTC is plaintiff here while Wisconsin is plaintiff in the enforcement action), the postures differ (affirmative declaratory relief here versus an anticipated defense in the enforcement action), and the scope differs (all trading on DCMs here versus Kalshi's specific Sports Event Contracts in the enforcement action). Kalshi also is asserting no "claim" in the Wisconsin Enforcement Action—it is a defendant defending against claims Wisconsin brought against it. Defendants suggest, Opp. at 4, that an affirmative defense is the equivalent of a claim, but the case they rely on had nothing to do with claim splitting. *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). In any event, that affirmative defenses "are pleadings" subject to the pleading rules does not convert a defendant's anticipated defense into a duplicative offensive suit. *Id.*

II. DEFENDANTS WAIVED ANY ARGUMENT ABOUT PERMISSIVE INTERVENTION

Defendants failed to address Kalshi's request for permissive intervention and have waived any argument about it. Permissive intervention therefore stands unopposed and should be granted. *See, e.g.*, *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver."); *Garross v. Medtronic, Inc.*, 77 F. Supp. 3d 809, 817-818 (E.D. Wis. 2015) (same). Nor could Defendants have reasonably opposed permissive intervention. Wisconsin already conceded in its motion to transfer venue, Dkt. No. 9, that this case "arises from" the Wisconsin Enforcement Action and raises "virtually identical" preemption issues that "run[ ] the risk of inconsistent rulings" if litigated separately, *id.* at 2, 11-12 (citation modified). That concession is largely dispositive as to permissive intervention, which is appropriate where the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009) (Posner, J.) (granting permissive intervention where intervenor "wants to present the same defense that the defendants presented").

Defendants also offer no reason why the Court should not exercise its discretion in favor of intervention, but there are myriad reasons Kalshi's intervention makes good sense. Kalshi's counsel has briefed and argued these very preemption issues in cases nationwide, including in the Third Circuit, which recently ruled in Kalshi's favor, *see KalshiEX LLC v. Flaherty*, 172 F.4th 220 (3d Cir. 2026), and pending appeals in the Fourth, Sixth, and Ninth Circuits and the Massachusetts Supreme Judicial Court. Kalshi is therefore well-prepared to assist the Court in the just and equitable resolution of the legal questions presented. Granting its intervention also would cause no undue delay or prejudice given the early stage of this matter.

CONCLUSION

For the foregoing reasons, the Court should grant Kalshi's Motion to intervene as of right under Rule 24(a)(2) or, in the alternative, grant Kalshi permissive intervention under Rule 24(b).

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Respectfully submitted,

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