UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee, v. TRAFFIC MONSOON, LLC, a Utah Limited Liability Company, and CHARLES DAVID SCOVILLE, an individual, Defendants-Appellants.	Case No.: 17-4059

OPPOSITION TO RECEIVER'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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I. INTRODUCTION

Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure and Rules 27 and 29 of this Court, Appellants oppose the Receiver's Motion for Leave to File as Amicus Curiae (the "Motion") because the proposed brief (the "Brief") attempts to raise issues in violation of this Court's stated guidelines for an amicus curiae brief, namely that the proposed amicus brief (1) offers arguments not raised in the proceedings below and (2) offers duplicative arguments already addressed in the Answering Brief.

The Receiver first argues that Traffic Monsoon is not a proper party to this appeal, which should be not be considered by this Court because it was, at no point, argued before the District Court or by either party. *Lopez v. Davis*, 531 U.S. 230, 248 (2001). Next, the Receiver parrots the arguments made by the SEC, a tactic that "merely extend[s] the length of the [SEC]'s brief . . . and should not be allowed." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Neither argument should be considered by this Court. Accordingly, this Court should deny the Receiver's Motion.

II. LEGAL ARGUMENT

A. THE RECEIVER'S STANDING ARGUMENT CANNOT BE CONSIDERED BECAUSE IT WAS NOT RAISED BELOW.

Courts rarely entertain arguments that were not raised below and are not advanced by any party. *Lopez*, 531 U.S. at 248. This Court has stated it will only exercise its discretion to do so in "exceptional circumstances." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997) (citations omitted). Specifically, this Court will not consider issues raised only by an amicus if "the parties did not adopt them by reference, they do not involve jurisdictional questions or touch on issues of federalism or comity." *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000).

Specifically, the Receiver argues "that Traffic Monsoon is not properly a party to this appeal," because the Receiver did not authorize filing an appeal on behalf of Traffic Monsoon. Brief at 5–6. This argument was not raised below, was not raised in the briefing and, thus, should not be considered. Indeed, this argument was not raised when Appellants filed the notice of appeal, or in the six months between the notice and Appellants' filing of their Opening Brief on behalf of Mr. Scoville and Traffic Monsoon. This argument was likewise not raised in the Opening Brief, the Answering Brief, or at any point before the District Court, and should not be considered. Further, because the parties have not adopted the

position by reference and the arguments do not involve jurisdictional questions, federalism, or comity, this Court should not consider the arguments raised for the first time in the Brief. Accordingly, this Court should disregard the argument and deny the Motion.

B. THE PROPOSED AMICUS BRIEF MERELY PRESENTS SLANTED FACTS, RESTATES THE SEC'S ARGUMENTS, AND DOES NOT PRESENT UNIQUE INFORMATION OR PERSPECTIVE.

The Receiver is not a friend of the Court, but, rather, a friend of the SEC. Indeed, although the Receiver purports to have a unique perspective on the issues on appeal, the Brief merely presents a highly partisan account of the facts and simply summarizes and repeats the arguments made by the SEC. Brief at 7–9. This Court should, therefore, disregard the Receiver's arguments and deny the Motion.

The term "amicus curiae" means friend of the court, not friend of a party. *See United States v. Michigan*, 940 F.2d 143, 164–165 (6th Cir.1991). Amicus briefs that simply duplicate the arguments made in the litigants' briefs, in effect merely extend the length of a litigant's brief, are an abuse, and should not be allowed. *Ryan*, 125 F.3d 1062, 1063 (7th Cir. 1997). This remains true, even if the potential amicus has a purportedly "unique perspective" on the appeal. *See, e.g.*, *In re Halo Wireless, Inc.*, 684 F.3d 581, 595–596 (5th Cir. 2012) (denying

motion for leave to file as amicus curiae because while potential amicus "may have a 'unique perspective' . . . its brief . . . contains no information or arguments that the Appellees did not already provide to the Court.").

Although the Receiver claims to have a unique perspective on the issues in question, the Brief contains only information and argument that the SEC already provided to the Court—the Brief simply provides the SEC nine additional pages of argument. Indeed, instead of presenting new or objective arguments to this Court, the Brief instead acts as a line-by-line summary of the major points argued in the SEC's Answering Brief. *Compare* Brief at 7–9, *with* Appellee's Br. 24–57. This Court should not be persuaded by this blatant duplication, however, and should disregard the Brief in its entirety. Accordingly, this Court should deny the Motion.

III. SHOULD THIS COURT GRANT THE MOTION, APPELLANTS SHOULD GET ADDITIONAL TIME TO REPLY.

The Court should deny the Receiver's Motion. In the alternative, if the Court grants the Motion, Appellants respectfully request that the Court grant it leave to file a separate brief of no more than one thousand words responding to Receiver's brief, or grant Appellants additional time and an increased word count in the Reply Brief to address the Receiver's argument in a single Reply Brief. Based upon the current November 13, 2017, filing deadline for the Reply Brief, this Court should extend the deadline to November 30, 2017. If the Court grants

the Motion, the Court should also allow a total of 13,000 words for the Reply Brief, given that Appellants will have to Reply to two distinct sets of arguments. *Cf.* Fed. R. App. P 32(a)(7).

IV. CONCLUSION

The participation as an amicus as a friend of the Court is dependent upon the proffered information of the amicus being useful or otherwise necessary to the administration of justice. The Receiver's proposed amicus curiae brief falls wells short of this mark. Appellants therefore respectfully request this Court deny the Motion.

Dated this 26th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

1. This document complies the word limit of FRAP 27(d)(2)(A) because, excluding the parts of the document exempted by FRAP 32(f) and FRAP 27(a)(2)(B), this document contains 992 words.
2. This document complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this document has been prepared in a proportionally spaced typeface using WORD 2007 in Times New Roman, 14-point font.
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Dated this 26th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **OPPOSITION TO RECEIVER'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on the 26th day of October, 2017.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

☐ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

s/Nancy R. Knilans
an employee of Marquis Aurbach Coffing