

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

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Federal Trade Commission,

Plaintiff,

vs.

DOTAuthority.com, Inc., et al.,

Defendants.

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Case No. 0:16-cv-62186-WJZ

**Motion to Intervene**

**Motion to Intervene of The Small Business in Transportation Coalition, Inc.  
and Memorandum of Law in Support**

The Small Business in Transportation Coalition, Inc. (“SBTC”) should be allowed to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2) because its motion is timely, SBTC has an interest in the property and transactions which are the subject of the above-captioned Federal Trade Commission (“FTC”) litigation against the defendants, disposition of the FTC litigation may impair the SBTC’s ability to protect its interests, and SBTC’s interests are not adequately represented by the existing parties. Alternatively, it should be allowed to intervene under Fed. R. Civ. P. 24(b)(1)(B) because this application is timely and the SBTC’s defense shares a common question of law or fact with the main action.

**I. Background Facts**

The SBTC is not a named party defendant in FTC’s complaint against the corporate and individual defendants in this case. Yet about a month after this Court issued the order on preliminary injunction in this case, (DE 48) Karen Hobbs, on behalf of the FTC, sent a letter to the SBTC asserting that this Court’s preliminary injunction applied to the SBTC. Declaration of James Lamb (Oct. 2, 2017) (“Lamb Decl.”, a copy of which is attached hereto as Exhibit A) ¶¶ 16. Specifically, the FTC asserted that the order’s requirement that notices regarding automatic

renewals be sent to defendants' customers applied to the SBTC and that the SBTC must send the same notices to its members. *Id.* ¶ 17. The FTC asked to be provided evidence that those actions had been taken by the SBTC. *Id.*

The SBTC is a not-for-profit corporation organized under Florida Statutes Chapter 617 in July 2014. *See* Lamb Decl. ¶ 2. The SBTC is a business league composed of small businesses in the transportation industry. *Id.* ¶ 3. James Lamb is the Chairman, and he serves as executive officer and registered agent of the SBTC. *Id.* ¶ 4. The SBTC's address is 1775 Eye Street, NW, Suite 1150, Washington, DC 20006. *Id.* ¶ 5.

Members of the SBTC typically enroll in one of two ways. They either join directly from the SBTC website, through its "About Us" page, or they join the SBTC from a web page to which they were directed after securing a UCR registration or renewal through the website of one of the corporate Defendants in this action. Lamb Decl. ¶ 6. The rates for an annual membership are \$45.00 for individuals and \$500.00 for corporate members. *Id.* ¶ 7. The SBTC has approximately 8,000 dues-paying members at this time. *Id.* ¶ 8.

The SBTC pools the resources of individuals and entities employed or interested in the transportation industry and serves as a "watchdog" and advocate on issues of concern to the transportation industry and the SBTC members. *Id.* ¶ 10.

The SBTC's chairman James Lamb has a history of transportation industry watchdog activities, including bringing to light overcharges of motor carriers by the State of Missouri's UCR program. An internal audit revealed that the overcharges amounted to approximately \$30,000 over two years. *Id.* ¶ 11. Similarly, in 2012, Lamb confronted Maine and Iowa for overcharging in its UCR programs. *Id.* ¶ 12. The SBTC has also defended a trucker who was arrested on an obstruction of justice charge, which was dismissed after the SBTC filed a

complaint with the U.S. Department of Justice against the Georgia law enforcement agency involved. *Id.* ¶ 13.

**II. Intervention Should be Granted Under Fed. R. Civ. P. 24(a)(2).**

The SBTC should be allowed to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2) because the SBTC has an interest relating to the property or transactions that are the subject of the FTC complaint. Unless the SBTC is afforded the opportunity to affect the outcome of the FTC action, as a practical matter, the action will continue to impair or impede the not-for-profit trucking group's ability to protect its interests. The SBTC's interests are not adequately represented by the existing parties to the suit. Alternatively, the SBTC asks that this Court to exercise its discretion and allow it to intervene under Fed. R. Civ. P. 24(b)(1)(B).

Pursuant to Fed. R. Civ. P. 24(a)(2), the four requirements that must be met in order for an applicant to be entitled to intervention as of right are: (1) the motion for intervention must be timely; (2) the proposed intervenor must have an interest relating to the property or transaction which is the subject of the underlying action; (3) the proposed intervenor must be so situated that disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) the proposed intervenor must demonstrate that its interest is represented inadequately by the existing parties to the underlying lawsuit. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (citing *Athens Lumber Co. Inc. v. Federal Election Commission*, 690 F.2d 1364, 1366 (11th Cir. 1982)). If each of these four requirements are met, the court must allow the party to intervene in the action. *Federal Savings & Loan Insurance Corp. v. Falls Chase Special Taxing District*, 983 F.2d 211, 215 (11th Cir. 1993). In this case, the SBTC meets all four of the requirements for intervention as of right.

With regard to the first criterion, the motion to intervene is timely.<sup>1</sup> The SBTC learned of the case near its filing and of *its interest in the case* when the FTC notified it that it considered the SBTC to subject to the Court's orders in the case. *See* Lamb Decl. ¶ 17. Intervention is sought approximately eleven months later, and no party to the case is substantially prejudiced as a result of moving now instead of eleven months ago. *Chiles*, 865 F.2d at 1213. The case is in discovery, and no legally significant proceedings have taken place. *See id.* (intervention timely seven months after complaint's filing and three months after a motion to dismiss; filing "more than a year after the action was commenced" timely when there had been "no legally significant proceedings *other than the completion of discovery*" (citations omitted, emphasis added)).<sup>2</sup>

The SBTC has a "direct, substantial, and legally protectable interest in the proceeding." *Athens Lumber*, 690 F.2d at 1366; *see also Georgia v. United States Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002). First, the FTC has made it plain that it sees the SBTC as subject to the action and of this Court's orders affecting the named defendants. The FTC has effectively joined the SBTC and expects it to comply with rulings litigated in proceedings to which it presently is not a party. Ordering the SBTC to send notices to its members that imply that the members have been or are being wronged certainly threatens the SBTC's relationship

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<sup>1</sup> "[T]imeliness is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice." *Georgia v. United States Army Corps of Eng'rs*, 302 F.3d 1242, 1259 (11th Cir. 2002) (citations omitted).

<sup>2</sup> Another factor to be considered is "the existence of unusual circumstances militating either for or against a determination that their motion was timely." *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1259 (11th Cir. 2002). Such circumstances exist here. Because James Lamb has borne the brunt of the actions taken by the FTC in this suit, attention to the interests of the SBTC has been understandably limited.

with its membership. In short, the SBTC has a protectable interest in maintaining its relationship with its membership, and the present action threatens that interest.

In addition, the complaint and preliminary injunction seek to preserve the defendants' accounts and monies so that the FTC, if it is successful at trial, can invoke a disgorgement theory in order to recover money in the defendants' possession. If, as seems apparent, the FTC believes that the renewal procedures employed by both the defendants and the SBTC violate federal law, and that any corrective action imposed on defendants applies equally to the SBTC, then there is good reason to think that any remedies sought by FTC of the defendants would apply equally to the SBTC. In effect, then, the funds in the SBTC trade group's account, used to advance the trade group's mission, are at issue in this case. The SBTC has a legally protectable interest in property that is in dispute in the underlying FTC litigation against the defendants.

The disposition of the lawsuit will, as a practical matter, impair the SBTC's ability to protect its legal interests. Even if the SBTC's enrollment procedures are not themselves already at issue in the case, the disposition of the case, including the potential for appeals, raises *stare decisis* concerns. *Chiles*, at 1214; *see also Stone v. First Union Corp.* 371 F. 3d 1305, 1309-10 (11th Cir. 2004) (a negative *stare decisis* effect "may supply that practical disadvantage which warrants intervention of right").

With regard to the fourth criterion, the interests of the SBTC are not adequately represented by any of the existing parties to the underlying FTC litigation. The Supreme Court has held that the inadequate representation requirement of rule 24(a)(2) "is satisfied if the [proposed intervenor] shows that representation of his interest 'may be' inadequate", and "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n10 (1972). "[T]he fact that the interests are similar does not

mean that the approaches to litigation will be the same.” *Id.* at 539. The intervenors “should be allowed to intervene unless it is clear that [defendants] will provide adequate representation.” *Chiles*, 865 F 2d at 1214.

The SBTC is a not-for-profit trade group, unlike the defendants in the FTC action, which are for-profit corporations and individuals. Rather than make profits from UCR registrations and renewals, the objective of the SBTC is to advocate, lobby, and litigate issues of importance to common carriers and truckers. Common carriers and truckers have become members of the SBTC in order to participate in its advocacy activities without using the defendant’s for-profit websites to register their UCRs or renewals. The federal statutory requirements for automatic annual renewal of membership in a not-for-profit trade group such as the SBTC is or may be different than the requirements for for-profit corporations such as the corporate defendants. The SBTC has made the required “minimal showing” that the current defendant’s representation “may be inadequate,” and therefore the SBTC has met the fourth requirement for intervention as a matter of right.

**III. In the Alternative, the SBTC Should Be Granted Permission to Intervene Under Fed. R. Civ. P. 24(b)(1)(B).**

Alternatively, pursuant to 24(b)(1)(B), the Court has broad discretion to allow a nonparty to intervene where the application is timely and the non-party’s claim contains a common question of law or fact and intervention will not delay or unduly prejudice the adjudication of the original lawsuit. *Athens Lumber*, 690 F2d at 1366; see *Howse v. S/V “Canada Goose P”*, 641 F.2d 317 (5th Cir. 1981). As articulated above, this motion is timely. The SBTC wishes to intervene in order to raise an affirmative defense that addresses common questions of law and fact. Granting the motion to intervene will not delay or hinder the disposition of the FTC’s

lawsuit. The SBTC files with this Motion a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on the grounds that the FTC has no statutory authority to bring the underlying FTC lawsuit because in 15 U.S.C. §§ 45(a)(2) and 46(a), Congress has exempted common carriers such as the corporate defendants here from FTC's jurisdiction. The SBTC's intervention then, may well facilitate and hasten disposition of the suit.

**Certification Under Local Rule 7.1(3)**

In accordance with S.D. Fla. L.R. 7.1(3), counsel for proposed Intervenor certifies that he has contacted counsel for all other parties by telephone and/or electronic mail to ascertain their position on the motion to intervene in a good faith effort to resolve the issues raised in the motion. The FTC is opposed to the SBTC's intervention and Defendants Uliana Bogash, DOTFilings.com, Inc., and Excelsior Enterprises International, Inc., are unopposed.

WHEREFORE, SBTC respectfully requests that the Court grant the Motion to Intervene and accept as filed as of this date SBTC's accompanying Motion to Dismiss.

Date: October 12, 2017      Respectfully submitted,

*/s/ Gregg J. Breitbart*  
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*Lead Counsel for Proposed  
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\*Amended *pro hac vice* applications to be filed

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**Certificate of Service**

I HEREBY CERTIFY that on October 12, 2017, I electronically filed the foregoing Motion to Intervene with the Clerk of the Courts by using the CM/ECF system, which will send a notice of electronic filing to counsel of record appearing on the Certificate of Service generated by the ECF system.

*/s/ Gregg J. Breitbart*  
Gregg J. Breitbart