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# [***United States Cftc v. Innovatrade, Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5S4D-M7D1-FFTT-X1TN-00000-00&context=)

United States District Court for the Western District of Missouri, Western Division

December 15, 2017, Decided; December 15, 2017, Filed

No. 4:11-cv-00092-NKL

**Reporter**

2017 U.S. Dist. LEXIS 220271 \*; 2017 WL 8792697

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. INNOVATRADE, INC., Defendant.

**Prior History:** [*United States CFTC v. Innovatrade, Inc., 2017 U.S. Dist. LEXIS 175500 (W.D. Mo., Oct. 24, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PSY-6251-JCRC-B3S8-00000-00&context=)

**Core Terms**

intervene, motion to intervene, weighs, default judgment

**Counsel:** **[\*1]**For U.S. Commodity Futures Trading Commission, Plaintiff: Margaret P. Aisenbrey, LEAD ATTORNEY, U.S. Commodity Futures Trading Comission, Kansas City, MO; Charles Dwayne Marvine, Commodity Futures Trading Commission, Division of Enforcement, Kansas City, MO.

Michael J Alcocer, interested party, Pro se, COLEMAN, FL.

**Judges:** NANETTE K. LAUGHREY, United States District Judge.

**Opinion by:** NANETTE K. LAUGHREY

**Opinion**

**ORDER**

This case, filed in 2011, concerned Defendant Innovatrade, Inc.'s violation of the Commodity Exchange Act and related ***regulations***. The Court entered default judgment against Innovatrade on 7/6/2011 and the case was closed. Now before the Court is a Motion to Intervene as of Right Under [*Rules 24(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137X-00000-00&context=) and [*24(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137X-00000-00&context=), and to Set Aside Default Judgment Under [*Rules 55(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JDD-2XH2-8T6X-72R7-00000-00&context=) and [*60(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F16F-00000-00&context=), filed by Michael Alcocer. Doc. 36.

Alcocer was never a party to this case. In support of intervention, he claims that he was criminally prosecuted and sentenced for defrauding Innovatrade's U.S. customers and that the default against Innovatrade negatively impacted his 2016 sentence. He also argues that a Panamanian court entered a favorable judgment in another case connected to Innovatrade and that the Panamanian judgment supports setting aside the default judgment.**[\*2]** The U.S. commodity Futures Trading Commission argues that Alcocer's motion to intervene must be denied because it is untimely, and that Alcocer, a non-attorney, cannot file any motion on behalf of a corporate entity such as Innovatrade. For the reasons discussed below, Alcocer's motion is denied.

[*Rule 24(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137X-00000-00&context=) and [*(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137X-00000-00&context=) only permit intervention "[o]n timely motion." [*U.S. Bank Nat. Ass'n v. State Farm Fire & Cas. Co., 765 F.3d 867, 869 (8th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D12-FRF1-F04K-S091-00000-00&context=). Timeliness is a threshold issue. [*United States v. Ritchie Special Credit Invs., Ltd., 620 F.3d 824, 832 (8th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50XJ-XMJ1-652R-6003-00000-00&context=). In determining the timeliness of a motion to intervene, a district court should consider: (1) the extent that the litigation has progressed at the time of the motion; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties. [*In re Wholesale Grocery Prod.* ***Antitrust*** *Litig., 849 F.3d 761, 766-67 (8th Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N0C-XH21-F04K-S00X-00000-00&context=) (quotation and citation omitted). Further, when a motion to intervene is made after entry of final judgment, "[t]he general rule is that [the motion] will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." [*Planned Parenthood of the Heartland v. Heineman, 664 F.3d 716, 718 (8th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54GT-C6P1-F04K-S06F-00000-00&context=) (internal quotation and citation omitted). Whether to grant a motion to intervene is within a district court's discretion. *See* **[\*3]**[*Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad., 643 F.3d 1088, 1093 (8th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82N8-P281-652R-6029-00000-00&context=).

As for the first factor, progress of the litigation, over six years have elapsed since this case was filed and judgment entered. There was no appeal. That the case has been completely wrapped up weighs against intervention. *See* [*Tweedle v. State Farm Fire & Cas. Co., 527 F.3d 664, 671 (8th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SNR-3HC0-TXFX-B345-00000-00&context=) (holding that the factor of extent of progress in the litigation typically weighs against a finding of timeliness where the motion to intervene is filed after the litigation "is nearly wrapped up").

As for the second factor, Alcocer admits that he had knowledge of the litigation near the time it was filed, *see* Doc. 36, p. 12, which was six years before he filed the motion to intervene, a significant delay. Therefore, this factor weighs against intervention. [*In re Wholesale Grocery Prod.* ***Antitrust*** *Litig., 849 F.3d at 767*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N0C-XH21-F04K-S00X-00000-00&context=) (holding that the second factor "often weighs heavily in cases where the would-be intervenor was aware of the litigation for a significant period of time before attempting to intervene") (citing [*U.S. Bank Nat'l Ass'n v. State Farm Fire & Cas. Co., 765 F.3d 867, 869-70 (8th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D12-FRF1-F04K-S091-00000-00&context=) (the would-be intervenor knew of litigation for 21 months before filing its motion); [*ACLU of Minn. v. Tarek ibn Ziyad Acad., 643 F.3d 1088, 1094 (8th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82N8-P281-652R-6029-00000-00&context=) (observing that potential intervenors knew of suit for 14 months before filing the motion to intervene and holding that the motion was properly denied).

With respect to the third factor, the reason**[\*4]** for the delay in seeking intervention, Alcocer claims that he was indicted "for essentially the same alleged conduct in the instant case" in September 2015 and was unaware until August 2016 that the federal government would seek to use against him, in his criminal case, the default judgment entered in this case. Doc. 36, pp. 8 and 12; Doc. 39, p. 2. Once he became aware of this information in August 2016, however, he delayed over a year before seeking to intervene in this case. He states that he requested a docket sheet for this case in August 2017, and that the Commodity Futures Trading Commission did not respond to his request for "surrender of all the documents related to" this case until he filed a motion in August 2017. *Id.*, p. 8. But if he needed such documents to seek leave to intervene, Alcocer provides no explanation for his delay in seeking to obtain them. He also argues that in August 2017, his newly-appointed counsel raised objections to his sentence enhancement, Doc. 39, p. 2, but Alcocer does not explain how the timing of such objections justifies his delay in seeking to intervene when he had known about the alleged effect of the default judgment since at least August 2016. Therefore,**[\*5]** the third factor weighs against intervention. *See* [*Tarek ibn Ziyad Acad., 643 F.3d at 1094*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82N8-P281-652R-6029-00000-00&context=) (lack of adequate explanation for 14-month delay in seeking to intervene weighs against granting motion).

With respect to the fourth factor, prejudice, the Commodity Futures Trading Commission argues that granting the motion would unduly delay and prejudice the adjudication of its claims against Innovatrade, inasmuch as the case was filed and final judgment entered six years ago. Doc. 37, p. 3. Alcocer responds that the circumstances are extraordinary in view of the multiple cases that he says have been or are being litigated, and that permitting him to intervene would be efficient and orderly, inasmuch as he may otherwise have to seek relief in another lawsuit. Doc. 39, pp. 5-7. Clearly, reopening and litigating a case that is over six years old is likely to be more difficult due to the lapse of time, would likely cause prejudice to the current parties in their prosecution or defense of the case, and would likely result in undue delay in resolving the claims. And whether multiple cases have been or are being litigated is a matter separate from Alcocer's failure to timely seek leave to intervene in a case of which he was aware**[\*6]** at the time it was filed over six years ago. Furthermore, reopening this long-concluded case to permit Alcocer to intervene is unlikely to be any more efficient and orderly than if Alcocer seeks relief in a new, or currently pending, case. The fourth factor weighs against intervention.

Finally, Alcocer has made no "strong showing of entitlement and of justification for failure to request intervention sooner," as is generally required in a case like this one in which judgment has already been entered. *See* [*Planned Parenthood of the Heartland, 664 F.3d at 718*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54GT-C6P1-F04K-S06F-00000-00&context=). All of the relevant factors weigh against intervention. Accordingly, the Court in its discretion denies Alcocer leave to intervene.

Alcocer's request to set aside the default judgment must also be denied. As a non-attorney, Alcocer may not file a motion on behalf of Innovatrade, and the request to set aside the default judgment cannot be construed as having been filed by Innovatrade, because Innovatrade is not represented by any attorney. *United States v. Van Stelton, 988 F.2d 70, 70 (8th Cir. 1993)* (a corporation cannot appear *pro se* in judicial proceedings).

In view of the foregoing, Michael Alcocer's Motion to Intervene as of Right Under [*Rules 24(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137X-00000-00&context=) and [*24(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137X-00000-00&context=), and to Set Aside Default Judgment Under [*Rules 55(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JDD-2XH2-8T6X-72R7-00000-00&context=) and [*60(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F16F-00000-00&context=), Doc. 36, is denied.

/s/ Nanette K. Laughrey

NANETTE**[\*7]** K. LAUGHREY

United States District Judge

Dated: December 15, 2017

Jefferson City, Missouri

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