IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
Civil Action No: 1:13-cv-1036

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ROBERT A. HELMS; JANNIECE S. KAELIN; DEVEN SELLERS; ROLAND BARRERA; VENDETTA ROYALTY PARTNERS, LTD.; VENDETTA ROYALTY MANAGEMENT, LLC; VESTA ROYALTY PARTNERS, LP; VESTA ROYALTY MANAGEMENT, LLC; IRON ROCK ROYALTY PARTNERS, LP; IRON ROCK ROYALTY MANAGEMENT, LLC; ARCADY RESOURCES, LLC; BAREFOOT MINERALS, GP; G3 MINERALS, LLC; HALEY OIL COMPANY, INC.; LAKE ROCK, LLC; SEBUD MINERALS, LLC; and TECHNICOLOR MINERALS, GP,

Defendants,

and

WILLIAM L. BARLOW, and GLOBAL CAPITAL VENTURES, LLC,

Relief Defendants, solely for the purposes of equitable relief.

REPLY IN SUPPORT OF MOTION TO INTERVENE

Clovis Capital Ventures, LLC ("Clovis") files this Reply in Support of its Motion to Intervene. (Doc. No. 99).

INTRODUCTION

The SEC and the Receiver acknowledge their non-objection to Clovis' intervention to oppose the Receiver's motion found at Doc. No. 95 ("Receiver's Motion"). (*See* Doc. No. 105, at 2; Doc. No. 106, at 1). However, they oppose Clovis' intervention for other purposes. Clovis does not seek intervention to file causes of action and disrupt the proceedings, as is the case in most of the cases relied upon by the SEC.[1] Instead, Clovis simply seeks to protect its interest. The Receiver has already shown disregard for the Court-mandated procedure in place (Doc. No. 77, ¶¶ 7-8) by filing the Receiver's Motion. There is every reason to believe he will persist in his effort to undermine Clovis' security interest, using any and all means at his disposal. At that time, Clovis seeks only to be ready and able to respond, rather than being forced to scramble to file multiple motions, such as the instant Motion, solely to protect its legal, bargained-for rights.

ARGUMENT

I. SECTION 21(g) OF THE SECURITIES AND EXCHANGE ACT, 15 U.S.C. § 78u(g), IS NOT A BAR TO INTERVENTION.

By citing to and quoting from published case law from the Eight Circuit Court of Appeals and from three federal district courts, Clovis made clear in its Motion that Section 21(g) does not prohibit intervention. (Doc. No. 99, at 8-9). In its response, the SEC purports to cite authoritative law from the Supreme Court and the Second Circuit Court of Appeals. (Doc. No. 105, at 2-3). However, those cases do not stand for the interpretation of Section 21(g) that the SEC advances, and the subsequently decided cases cited by Clovis would not have reached the

[1] References herein to arguments made by the SEC refer equally to the Receiver, who joined in the SEC's response. (Doc. No. 106).

opposite conclusion if that were the case. Neither of the cited Supreme Court cases had anything to do with intervention in an SEC enforcement action. *See Aaron v. SEC*, 446 U.S. 680, 682 (1980) (deciding "whether the [SEC] is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17(a) of the Securities Act of 1933"); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 324 (1979) (deciding "whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issue before a jury in a subsequent legal action"). More importantly, one of the cases cited in the SEC's brief undermines its reliance on any Supreme Court case law on this issue. *See SEC v. Cogley*, 2001 WL 1842476, at *3 (S.D. Ohio March 21, 2000) ("there is no Supreme Court . . . jurisprudence directly on point").

The specific *dicta* that the SEC relies on from the Supreme Court cases it cites is unpersuasive and inapposite. With regard to *Aaron*, the footnote relied upon by the SEC appears in a portion of the opinion concurring in part and dissenting in part. *See* 446 U.S. at 717 n.9. Moreover, that footnote explains the legislative history and purpose of Section 21(g) in terms of the concern about "private suits for damages" and the fact that "issues related to scienter, causation, and the extent of damages[] are elements not required to be demonstrated in a Commission injunctive action." *Id.* The footnote does not speak to intervention, and none of the enumerated legislative concerns applies to Clovis' request to intervene for purposes of protecting its security interest. Clovis has not filed, and does not plan to file in conjunction with the underlying case, a separate cause of action against Vendetta Partners and its principals.

Parklane Hosiery is no more persuasive because the language relied upon by the SEC from that case arose in the unrelated context of whether to allow "the offensive use of collateral estoppel." 439 U.S. at 331-32. The quote from *Parklane* on which the SEC relies allegedly

finds support in a Second Circuit case—the same case also relied upon by the SEC—which did not even mention Section 21(g). *Id.* at 332 (citing *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1973). *Everest Management* addressed whether victims of security fraud could intervene in a particular SEC enforcement action. *Everest Management* supports Clovis' position because, although the court affirmed the denial of a motion to intervene, the court did so under Federal Rule of Civil Procedure 24 without even mentioning or discussing Section 21(g). Because neither the Supreme Court cases nor the Second Circuit case cited by the SEC supports its position, the Commission is left to rely exclusively on unpublished district court opinions.[2]

At most, some courts perceive a conflict in the proper interpretation of Section 21(g), as the unpublished cases from the SEC's brief suggest. *See SEC v. Nadel*, 2009 WL 3126266, at *1 (M.D. Fla. Sept. 24, 2009) (noting "split of authority among federal courts"); *Cogley*, 2001 WL 1842476, at *3 ("Courts are divided on the issue of whether § 21(g) applies to intervention."). Clovis has directed the Court to the only federal appellate court decision that appears to have addressed the issue, as well as to three published district court opinions. The SEC relies on only a couple unpublished district court opinions. This fact, combined with the fact that Section 21(g) was intended to address requirements of multidistrict litigation, *see SEC v. Flight Transp. Corp.*, 699 F.2d 943, 950 (8th Cir. 1983), not to apply in cases like the underlying enforcement action, should lead the Court to conclude that Section 21(g) does not bar Clovis' intervention.

II. THE COURT SHOULD GRANT CLOVIS' MOTION FOR FULL INTERVENTION PURSUANT TO F.R.C.P. 24.

Clovis is entitled to full intervention as of right under Rule 24(a) because, through its security interest, it "claims an interest relating to the property or transaction that is the subject of

[2] The one published district court opinion cited by the SEC (Doc. No. 105, at 3) refers to a third-party complaint, *see SEC v. Egan*, 821 F. Supp. 1274, 1275 (N.D. Ill. 1993), which is distinguishable from the mere intervention that Clovis seeks.

the action." The SEC asserts that if Clovis is permitted a limited intervention to respond to the Receiver's Motion only, then "[n]othing more is needed." (Doc. No. 105, at 4). The SEC suggests that even though no other party shares the same interest in this action as Clovis, the SEC will protect Clovis' interest because "where—as here—a government entity is plaintiff, adequate representation is presumed." (Doc. No. 105, at 4 & n.1). Apart from the fact that there is absolutely no reason why the SEC would have any interest in fighting to protect the security interest that Clovis obtained through a fair negotiation process, the SEC has already shown its disinterest by failing to weigh in on the Receiver's Motion, either to support it or oppose it. It is inconsistent for the SEC to fail to oppose the Receiver's Motion and to simultaneously suggest that it adequately represents the interests of Clovis.

Apart from responding to the Receiver's Motion, and as the SEC acknowledges, Clovis has grounds to assert a Rule 11 claim and a claim for abuse of process against the Receiver. But even beyond these claims and interests, Clovis, as the only investor possessing a security interest, "is so situated that disposing of the action" without its involvement will no doubt "impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a). Assuming, *arguendo*, that the Court denies the Receiver's Motion, the SEC would have the Court believe that the Receiver will simply sit by idly until such time as he can distribute to Clovis $2.885 million worth of assets that would otherwise fall to the Receivership Estate and be distributed to other limited partners. By disregarding the Court's mandated procedures (*see* Doc. No. 77, ¶¶ 7-8), and by aggressively pursuing Clovis' security interest since the inception of this matter, the Receiver has forecasted for the Court the steps he will likely take going forward, namely using every legal maneuver possible to undermine and invalidate Clovis' bargained-for security interest. If Clovis is not permitted to fully intervene and have all the rights of a party to this

lawsuit, it will be forced to file motion after motion seeking intervention on each and every occasion that the Receiver takes the inevitable steps to attack Clovis' interest in an effort to pull more money into the Receivership Estate, all to the detriment of Clovis and in blatant disregard of the Uniform Commercial Code.

Clovis does not seek to intervene to file cross-claims and counterclaims and otherwise meddle with the SEC enforcement action. Rather, Clovis seeks only to protect its interest whenever, through motion or otherwise, that interest is placed before the Court. Because Clovis satisfies the provisions of Rule 24(a), the Court must permit intervention.

In the alternative, the Court should permit full intervention under Rule 24(b)(1)(B) because Clovis undoubtedly has a claim or defense that shares common questions of law and fact with the main action. Moreover, because Clovis seeks only to protect its interest and not to disrupt the Commission's enforcement action, and because discovery does not close until the end of April, 2015 (Doc. No. 94) with the trial far off in the distance, permitting full intervention would not delay the proceedings.

The *Kings Real Estate* case, discussed in Clovis' Motion (Doc. No. 99, at 8-10), should guide this Court's decision. The factual distinction that the SEC unsuccessfully attempts to delineate (Doc. No. 105, at 5 n.3) is immaterial, and its placement in a footnote at the end of the brief shows the Court how significant the SEC believes it to be.

CONCLUSION

For the foregoing reasons, and those set forth in Clovis' Motion to Intervene (Doc. No. 99), the Court should grant Clovis full intervention, with all the rights of the existing parties. In the alternative, Clovis requests that the Court permit it to intervene to the extent consented to by the SEC and the Receiver.

Respectfully submitted, this 15th day of September, 2014.

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing Reply in Support of Motion to Intervene via the Court's CM/ECF System, which will serve all registered counsel of record as follows:

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This the 15th day of September, 2014.

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