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.

MOTION TO INTERVENE

Clovis Capital Ventures, LLC ("Clovis") files this Motion to Intervene. Both the Receiver and the S.E.C. consent to the Motion for the limited purpose of opposing the Receiver's motion pertaining to Clovis' security interest (Doc. No. 95), filed just last Friday, August 29, 2014. Clovis, however, seeks to intervene fully in the case and to have all the rights of the existing parties in the case. In further support thereof, Clovis shows the Court the following:

FACTUAL BACKGROUND

In late 2012, after conducting extensive due diligence, meeting with Robert Helms ("Mr. Helms") and Janniece Kaelin ("Ms. Kaelin"), and seeking the advice and consult of counsel, Clovis decided to make an investment with Vendetta Royalty Partners, Ltd. ("Vendetta Partners"). Before Clovis made its investment, prior counsel for Clovis suggested that Clovis seek some type of security for the investment to ensure that it could ultimately recover at least its principal investment. Clovis had no control over Vendetta Partners selling its portfolio. Moreover, Clovis was an outsider, with no inside information or any pre-existing relationship with Vendetta Partners or its principals. Therefore, Clovis merely wanted to ensure that if Vendetta Partners' portfolio was not liquidated as promised, or if the portfolio was liquidated at a price significantly lower than promised, it could get back its principal investment.

At all times prior to making any investments with Vendetta Partners, Clovis believed the Vendetta Partners investment opportunity to be legitimate and never had any reason to believe otherwise. Clovis' decision to seek security for its investment, as explained herein, was in no way related to any concerns it had about the legitimacy of the Vendetta Partners investment opportunity.

In response to Clovis' request for security for its investment, Ms. Kaelin noted that Vendetta Partners owned certain overriding mineral royalty interests and that Vendetta Partners

could escrow those interests with the option to sell as a means of providing Clovis collateral for its investment. As a result, Clovis and Vendetta Partners executed a Side Letter Security Agreement ("Side Letter").[1]

The Side Letter explains: "As part of the inducement to [Clovis] to invest capital in [Vendetta Partners], [Vendetta Partners] has agreed to extend to [Clovis] certain collateral security in the form of two (2) Assignment, Conveyance and Mineral Deeds . . . to designated mineral royalty holdings." (Doc. No. 95-1, Exh. E, at 1). The Side Letter further notes: "It is the intent of the parties hereto to fully and completely collateralize and secure the investment capital which [Clovis] shall place with [Vendetta Partners] upon the closing of the transaction herewith by transferring the Assignments to [Clovis] . . . ." (*Id.*). Moreover, the Side Letter specifies that "[a]ll parties hereto have been represented by counsel and have had adequate opportunity to review this Side Letter with counsel." (*Id.* at 5-6). Thus, the Side Letter was the result of a fair, arm's length negotiation from which both sides benefitted—Vendetta Partners obtained Clovis' investment and Clovis acquired security for the investment. Clovis' investment was especially important to Vendetta Partners because, at the time of the investment, Vendetta Partners expressed an urgent need for an influx of money in order to maximize new business opportunities and keep its scheme afloat. Therefore, it was understandable for Vendetta Partners to offer the security interest to Clovis but not to investors who made investments at an earlier time when the need for investment money was not as great.

Anticipating a need to protect itself from contingencies that might arise in any investment transaction, Clovis included in the Side Letter certain "Trigger Events." Notably, one of the Trigger Events is the conviction of a crime of dishonesty or a violation of any provision of the

[1] The Side Letter can be found at Doc. No. 95-1, Exhibit E.

Securities and Exchange Act by any of the General Partners of Vendetta Partners. (*See id.* at 3). Under the Side Letter agreement, and upon the occurrence of a Trigger Event, Clovis would be entitled to "liquidate the Mineral Rights on behalf of [Clovis] in order to receive the *full return* of the Capital Contribution." (*Id.* at 4 (emphasis added)).

Clovis ultimately invested over $2.5 million with Vendetta Partners. All of this investment was secured by the overriding mineral royalty interests, as set forth in the Side Letter, and the security interest was properly assigned to Clovis and filed.[2]

In the instant S.E.C. enforcement action, Mr. Thomas L. Taylor III, the receiver appointed by the Court in this action ("Mr. Taylor" or the "Receiver"), has been tasked with, *inter alia*, developing a plan for the liquidation of the Receivership Property, as that term is defined in the pleadings. (Doc. No. 11, ¶ 52). Upon information and belief, there are insufficient funds in the Receivership Property to enable Clovis to recover the principal amounts it invested without the benefit of the security interest. Therefore, if Clovis is deprived of the benefit of its open, fair, and arm's length bargain, Clovis will not recover its principal investment in full, or will at least recover less than it might be able to recover with the security interest. Moreover, upon further information and belief, Clovis is the only Vendetta Partners investor who secured its investment with a security interest. Therefore, Clovis is uniquely situated vis-à-vis the other approximately eighty (80) investors. However, the Receiver seeks to disregard the security interest as a fraudulent transfer and lump Clovis in with the other Vendetta Partners investors who did not have the foresight to secure their investments.

[2] The Collateral Assignment of Overriding Mineral Interests Assignments, excluding voluminous exhibits depicting the geographic scope of the mineral rights, can be found at Doc. No. 95-1, Exhibit F. The Documents Escrow Agreement can be found at Doc. No. 95-1, Exhibit G. And the two filed Notices of Interest can be found at Doc. No. 95-1, Exhibits H and I.

PROCEDURAL POSTURE

Previously, this Court established a procedure through which a secured party such as Clovis could intervene and assert its interest. (*See* Doc. No. 77). Because the Order appointing Mr. Taylor specifically prohibits Clovis from commencing any legal action against Mr. Taylor with regard to the validity and enforceability of Clovis' security interest (*see* Doc. No. 11, ¶¶ 32-34), the procedure established by the Court presented one of the only avenues through which Clovis could assert its interest. According to this procedure, "[p]rior to the closing of any sale of oil and gas interests," the Receiver must "move this Court for an entry of a Confirmation Order." (Doc. No. 77, ¶ 7). Such a motion would then trigger a fifteen-day window in which Clovis could intervene and assert its interest. (*See id.* ¶ 8 ("Any party objecting to the Receiver's proposed sale of any oil and gas interest must do so by intervention within fifteen (15) days of the filing of the Receiver's Motion for entry of a Confirmation Order.")).

In lieu of following this prescribed procedure and addressing Clovis' security as part of a motion seeking confirmation of a sale, the Receiver has circumvented this process, thereby undermining its purpose and function, and has placed Clovis' security interest directly at issue. On August 29, 2014, the Receiver filed a motion styled Receiver's Motion for Entry of an Order (1) Rejecting Secured Claim of Clovis Capital Ventures, LLC; and (2) Authorizing the Sale of Certain Royalty Interests Free and Clear of All Liens, Claims and Encumbrances ("Receiver's Motion"). (Doc. No. 95). As the caption of the motion indicates, the Receiver's Motion seeks to void Clovis' bargained-for security interest negotiated fairly at arm's length. No party other than Clovis has any interest in objecting to the Receiver's Motion and opposing the relief sought therein. Moreover, any order denying Clovis' present motion to intervene would serve to moot the above-described procedure set forth in Doc. No. 77.

LEGAL ARGUMENT

I. Intervention as of Right

When existing parties to a lawsuit do not adequately represent the interests of a non-party seeking to intervene, Federal Rule of Civil Procedure 24(a) requires this Court to permit intervention if the non-party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Apart from the fact that Clovis has invested over $2.5 million with Vendetta Partners, the Receiver's Motion clearly places Clovis's interest at the center of this action. Moreover, because Clovis is uniquely situated vis-à-vis the other investors due to its security interest, and because the Receiver has moved for an order invalidating Clovis' security interest, disposing of the instant action without permitting Clovis to intervene and assert its rights in opposition to the Receiver's Motion will prevent Clovis from protecting its interest.

More importantly, in light of this Court's Order appointing Mr. Taylor as Receiver, Clovis cannot protect its interest in any way other than intervening in the instant action. As this Court knows, the Order appointing Mr. Taylor specifically prohibits Clovis from commencing any legal action against Mr. Taylor with regard to the validity and enforceability of Clovis' security interest. (*See* Doc. No. 11, ¶¶ 32-34). If Clovis is denied the opportunity to intervene in the instant enforcement action, it will have no other legal avenue through which to protect its interests. Therefore, because Clovis claims an interest in the Receivership Property, because the Receiver has filed a Motion seeking to invalidate Clovis' security interest in the Receivership Property, and because Clovis is so situated that disposing of the instant action (or simply disposing of the Receiver's Motion) without permitting intervention would prevent Clovis from

protecting its interests, Clovis is entitled to intervene as of right under Rule 24(a) as a matter of due process.

II. Permissive Intervention

Alternatively, the Court may permit any non-party to intervene if the non-party "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). As stated above, Clovis claims a right to a portion of the Receivership Property as do all of the other Vendetta Partners investors. Moreover, the determination of the enforceability of Clovis' security interest will affect all of the other investors insofar as it affects the size of the distributions from the Receivership Property to which each investor is ultimately entitled. On this point, the Receiver is in agreement. (*See* Doc. No. 95, at 29 ("If the purported security interest conveyed to Clovis is given effect, Clovis would receive a return of its entire investment before any distributions are made to limited partners.")). In addition, because the instant enforcement action is still in relatively early stages, permitting Clovis to intervene will not unduly delay the proceedings. *See* Fed. R. Civ. P. 24(b)(3).[3] Therefore, as an alternative to intervention as of right under Rule 24(a), this Court should in the least permit Clovis to intervene under Rule 24(b)(1)(B).[4]

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[3] Clovis did not file a motion to intervene sooner in reliance on the Court's prescribed procedures set forth in Doc. No. 77. In other words, because the Court indicated its preference to address Clovis' security interest in conjunction with a motion to confirm the sale of the secured assets, Clovis has been monitoring the filings in this matter in anticipation of that opportunity. The Receiver's end-run around this process has forced Clovis to file the instant motion now in order to protect its interests.

[4] In addition to intervening for purposes of opposing the Receiver's Motion, Clovis also needs to intervene for other purposes. The Receiver, without any foundation or support, characterizes Clovis as fraudulent (Doc. No. 95, at 5, 6), inequitable (Doc. No. 95, at 28) and aiding and abetting the breach of a fiduciary duty (Doc. No. 95, at 29). These statements, and the Receiver's related actions, give rise to a Rule 11 claim and a claim for abuse of process.

III. Relevant Case Law

Relevant case law further supports the granting of Clovis' Motion to Intervene. More specifically, *S.E.C. v. Kings Real Estate Inv. Trust*, 222 F.R.D. 660 (D. Kan. 2004), should guide this Court's evaluation of the instant Motion. In that case, an investor moved to intervene in an S.E.C. enforcement action against a trust that was involved in a fraudulent securities scheme. The investor alleged that he was uniquely situated vis-à-vis the other investors and therefore had some priority to the distribution of the investment money. *See* 222 F.R.D. at 661. The investor sought to intervene as of right under Rule 24(a) and also by permission under Rule 24(b)(1)(B).

As a preliminary matter, the *Kings Real Estate* court first concluded that Section 21(g) of the Securities and Exchange Act, 15 U.S.C. § 78u(g), is not a bar to intervention. *See* 222 F.R.D. at 663 ("Section 21(g) does not, by its plan language, prohibit intervention."); *id.* at 664 (concluding that "Section 21(g) does not serve as an impenetrable wall to intervention"). Many other courts have reached the same conclusion. *See S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 950 (8th Cir. 1983) ("[T]he purpose of [section 21(g)] is simply to exempt the Commission from the compulsory consolidation and coordination provisions applicable to multidistrict litigation. It does not say that no one may intervene in an action brought by the SEC without its consent."); *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 466 (S.D.N.Y. 2000) ("Not only does the specific language of Section 21(g) not apply, on its face, to intervention, but the vast majority of cases addressing intervention in the context of SEC enforcement actions neglect to discuss Section 21(g) at all. Instead, intervention has been typically evaluated under the standards governing Rule 24, Fed.R.Civ.P."); *S.E.C. v. Prudential Sec., Inc.*, 171 F.R.D. 1, 4 (D.D.C. 1997) ("While there is significant authority which suggests that section 21(g) bars all private cross-claims, counter-claims, and third-party claims to SEC enforcement actions to which SEC

does not consent, there is no persuasive authority which suggests that section 21(g), likewise, bars *intervention* in all SEC enforcement actions. Indeed, there is case law which indicates that intervention in SEC enforcement actions, even absent SEC consent, may be appropriate in some cases." (internal footnotes omitted)).[5]

The *Kings Real Estate* court then evaluated the investor's claims to intervene. The court granted the motion for permissive intervention under Rule 24(b)(1)(B), noting that the intervening investor was "asserting a claim that is closely intertwined with the claims in the main enforcement action by the S.E.C.," *id.* at 671; that the intervening investor would not unduly delay or prejudice the parties to the enforcement action because the investor primarily sought to show only that "his investment should not be part of the Receivership Assets," *id.*; and that permitting intervention would not unduly delay discovery because the parties still had four months to complete discovery, *id.* The *Kings Real Estate* court concluded by stating the following:

> [T]he Receiver should view the intervention as a possibility to fully discover the proper distribution of the recaptured assets. The Court believes the goal of the Receiver should be to distribute the funds in the fairest manner, even if that means [the intervenor] receives a priority to his investment, should the fact reveal that he is entitles to as much . . . .

Id.

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[5] No Fifth Circuit authority can be found on this issue. The only cases that can be found from the district courts of Texas discussing Section 21(g) involve existing defendants in S.E.C. enforcement actions seeking to file a counterclaim against the S.E.C. *See S.E.C. v. Jantzen*, 2011 WL 250322, at *2 (W.D. Tex. Jan. 25, 2011); *S.E.C. v. Tsukuda-Am., Inc.*, 2010 WL 1050971, at *1 (N.D. Tex. March 22, 2010). Not only are these cases unpublished, and thus non-binding, but more importantly, as the D.C. district court pointed out in *Prudential Securities*, there is a difference between counterclaims and intervention. *See* 171 F.R.D. at 4 (noting significant authority barring counterclaims but no authority barring intervention). Therefore, these two Texas cases should have no bearing on the Court's evaluation of Clovis' Motion to Intervene. Moreover, it appears that in neither case did a receiver file a motion placing the interest of the intervenor directly at issue, thus forcing Clovis to intervene or leave its rights unprotected.

With regard to the *Kings Real Estate* investor's motion to intervene as of right under Rule 24(a), the court denied the motion because the order appointing the receiver in that case specified that the receiver could not distribute receivership assets without making an application to the court. *See id.* at 668. The court reasoned that this procedure would provide the investor sufficient protection because "any investor w[ould] be allowed to present their argument for deviation from the proposed distribution plan" at that time. *Id.*

Kings Real Estate supports Clovis' position with regard to both intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b)(1)(B). With regard to intervention as of right under Rule 24(a), the Order appointing Mr. Taylor in the instant action, just like the same order in *Kings Real Estate*, provides an opportunity for investors to be heard, in conjunction with a motion to confirm a sale of the secured assets, and prior to the Receiver distributing the assets. (*See* Doc. No. 77, ¶¶ 7-8). However, unlike the receiver in *Kings Real Estate*, the Receiver in the instant action has subverted that process by filing the Receiver's Motion and forcing Clovis to file the instant motion in order to protect its interest. If Clovis is not permitted to intervene now, its interest will forever be destroyed and any opportunity for subsequent intervention will be moot.

Kings Real Estate also supports Clovis' position with regard to permissive intervention. Just like the investor in *Kings Real Estate*, Clovis asserts a claim closely intertwined with the instant enforcement action; Clovis' intervention would not unduly delay or prejudice the parties to the enforcement action because Clovis seeks primarily to only file an opposition to the Receiver's Motion so that the Court can evaluate that

motion with full information; and Clovis' intervention would not unduly delay discovery because Clovis and the Receiver have already exchanged extensive information.

CONCLUSION

In sum, both Rule 24 and the case law cited herein support Clovis' position that the Court should grant Clovis' motion to intervene. If the Court were to deny this relief, Clovis would be unable to sue the Receiver for a declaratory judgment separate and apart from the instant enforcement action and would be left without a legal avenue through which to protect its bargained-for security interest. Simply put, Clovis should not be left without an opportunity to respond to the Receiver's Motion.

For the foregoing reasons, Clovis respectfully requests that the Court grant its Motion to Intervene and afford Clovis all the rights of a party to participate fully in all matters within the scope of this case. Pursuant to Local Rule 7(g), a Proposed Order granting Clovis' Motion to Intervene is attached hereto as **Exhibit A**.[6]

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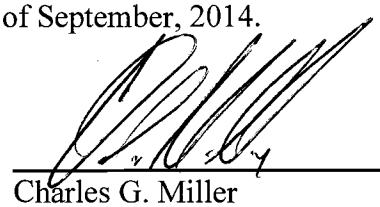
[6] Pursuant to Federal Rule of Civil Procedure 24(c), a motion to intervene must normally "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Here, intervention is sought, at least initially, so that Clovis can respond in opposition to the Receiver's Motion seeking to invalidate its security interest. (Doc. No. 95). However, Clovis has filed herewith a Motion for Extension of Time to Respond to the Receiver's Motion ("Motion for Extension"). Pursuant to Local Rule 7(e)(2), and upon information and belief, Clovis has only seven days to respond to the Receiver's Motion. For the reasons set forth in the Motion for Extension, Clovis seeks an extension of time, up to and including Monday, September 22, 2014, to respond to the Receiver's 230-page motion received via email on a Friday, before Labor Day weekend, at 5:30 p.m. In light of these circumstances, Clovis respectfully requests that the Court consider the instant motion without the accompanying pleading usually required under Rule 24(c), with full knowledge that Clovis' response in opposition to the Receiver's Motion is forthcoming. Moreover, in light of these pending deadlines, Clovis respectfully requests that the Court rule on this Motion to Intervene and the accompanying Motion for an Extension as soon as possible so that counsel may plan accordingly.

Respectfully submitted, this 5th day of September, 2014.



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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7(i), Counsel for Clovis has made a good-faith effort to reach an agreement with the Receiver and the S.E.C. with regard to the instant Motion. Both the Receiver and the S.E.C. consent to the Motion for the limited purpose of opposing the Receiver's Motion. However, both the Receiver and the S.E.C. oppose the Motion for any other purpose.

Attorney for Clovis Capital Ventures, LLC

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Intervene upon all counsel of record via US Mail:

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This the 5th day of September, 2014.

Attorney for Clovis Capital Ventures, LLC

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
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SECURITIES AND EXCHANGE COMMISSION,

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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.

PROPOSED ORDER

This matter came before the Court upon the motion of Clovis Capital Ventures, LLC ("Clovis"), filed on September 5, 2014, seeking to intervene pursuant to Federal Rules of Civil Procedure 24(a) and 24(b). For the reasons set forth in Clovis' Motion, it is hereby ORDERED

that Clovis' Motion to Intervene is GRANTED. Clovis is made Intervenor with all the rights of a party to participate fully in all matters within the scope of this case.

This the ___ day of September, 2014.

Judge Lee Yeakel
United States District Judge