IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	§	
v.	§	Case No.: 3:16-cv-01735-D
CHRISTOPHER A. FAULKNER, et al., Defendants,	§	
and	§	
TAMRA M. FREEDMAN and JETMIR AHMEDI, Relief Defendants.	§	

RECEIVER'S RESPONSE IN OPPOSITION TO PDM HOLDINGS, LLC'S MOTION FOR LEAVE TO FILE MOTION FOR ORDER DIRECTING RECEIVER TO TREAT PDM HOLDINGS, LLC AS A SECURED PARTY

Thomas L. Taylor III ("Receiver"), Court-appointed temporary receiver in the above-entitled action ("Enforcement Action"), respectfully files this response in opposition to the Motion (ECF No. 469) ("Motion for Leave") of PDM Holdings, LLC ("Movant") for leave to file a motion seeking entry of an order directing the Receiver to treat Movant as a secured creditor with respect to the overriding royalty interest(s) ("ORRI") purportedly conveyed to Movant by Receivership entities.[1]

Movant's Motion for Leave should be denied because Movant has failed to seek leave to intervene in the Enforcement Action pursuant to Rule 24 of the Federal Rules of Civil Procedure

[1] Based upon a comparison using Adobe Acrobat Professional, differences between the Motion and the "Amended Motion to Amend/Correct" (ECF No. 470) are limited to the Certificate of Service. Accordingly, the Receiver refers to the originally filed Motion for Leave in this Response.

("Rules"); seeking leave to intervene would be futile, in any event. Movant is not entitled to intervene as of right (Rule 24(a)), and permissive intervention would be improper (Rule 24(b)). Moreover, through the present Motion for Leave Movant improperly (1) seeks relief outside of the objection procedures ordered by the Court (*see* ECF No. 435) ("Objection Procedures") with respect to the Receiver's proposed Plan of Distribution (*see* ECF Nos. 406 and 407 ("Plan Motion")); and (2) attempts to preempt the procedures (a) for determining claims against the Receivership Estate as proposed by the Receiver in his Plan Motion (*see* ECF No. 406 at 29 – 30 ("Claims Confirmation Process")), and (b) for determining the validity of certain conveyances of Receivership Assets from Offering Entities to Conveyance Investors through summary proceedings. *See* ECF No. 406 at 32 – 33 ("Conveyance Procedures")).

I. Movant's Motion for Leave should be denied because it cannot obtain the affirmative relief sought without first obtaining leave to intervene in the Enforcement Action; intervention is neither required nor permissible in the present circumstances

Movant seeks affirmative relief from the Court outside of the Objection Procedures, the proposed Claim Confirmation Process, and the proposed Conveyance Procedures. Intervention in the Enforcement Action would be required to seek relief from the Court in this manner. Movant is not entitled to intervene as of right and has not shown that it should be granted permissive intervention. Accordingly, seeking leave to intervene would be futile.

A. Movant does not meet the requirements to intervene as of right pursuant to Rule 24(a)

Pursuant to Rule 24(a), "the court must permit anyone to intervene who … 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, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a).

"Failure to satisfy any one requirement precludes intervention of right." *Haspel & Davis Milling & Planting Co., Ltd. v. Bd. Of Levee Comm'rs of the New Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007) (citing *New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 463 (5th Cir. 1984)). Although Movant "claims an interest relating to [certain] property … that is the subject of the [Enforcement A]ction," disposing of the Enforcement Action will not "impair or impede the [M]ovant's ability to protect its interest." FED. R. CIV. P. 24(a).

In this regard, intervention by Movant would solely be to oppose an anticipated effort by the Receiver to invalidate the purported conveyance of ORRI to Movant, which the Receiver has not yet sought before this Court.[2] Movant -- like all other victims of the Breitling fraudulent scheme who received purported conveyances of oil and gas-related interests from Receivership entities -- will "have the opportunity to appear and oppose the Receiver's [proposed invalidation of such conveyances] within the time limits set forth in the Local Rules," after the Receiver has sought such relief. Plan Motion, ECF No. 406 at 33. Should the Receiver's Plan be finally approved, the Receiver intends to move the Court specifically with respect to the conveyance validity issue, give notice to all affected parties consistent with the Rules, and permit such parties an opportunity to oppose the relief the Receiver seeks. *See id*.

"[I]ntervention generally is not appropriate where the applicant can protect its interests and/or recover on its claim through some other means." *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 526 (5th Cir. 1994), *cert denied*, 513 U.S. 1014 (1994) (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 – 25 (5th Cir. 1970), *cert denied*, 400 U.S. 878 (1970)). Movant has alternatives to intervention to protect its asserted property interest in the present circumstances. *See CFTC v.*

[2] In fact, the basis for Movant's proposed motion is a statutory affirmative defense to a claim which the Receiver has not yet himself asserted.

Chilcott Portfolio Mgmt., Inc., 725 F.2d 584, 586 (10th Cir. 1984) (affirming denial of motion to intervene by a creditor on the basis that the receiver was in the process of marshaling the assets and setting up claim procedures); *CFTC v. Heritage Capital Advisory Servs.*, 736 F.2d 384, 386 – 87 (7th Cir. 1984) (affirming denial of motion to intervene when the creditor could, among other things, assert its claim in the claims procedure established by the receiver); *see also SEC v. Funding Res. Group*, 2000 WL 1468823, at *4 n. 9 (5th Cir. Sept. 8, 2000) (unpubl.) (affirming the denial of motion to intervene because a procedure for distributing the receivership funds would ensue); and *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 924 (9th Cir. 2004) (affirming denial of motion to intervene when the intervenor's motion was untimely and noting that regardless the claim procedures established by the receiver allowed the intervenor to protect its assets without need for intervention).

Movant's opposition to the Receiver's future efforts in this regard can and should be addressed in an orderly fashion through the Receiver's proposed Claims Confirmation Process and Conveyance Procedures, approval of which are currently pending before the Court. Because the Claims Confirmation Process and Conveyance Procedures will afford the Movant the opportunity to protect its interests, proceedings in the Enforcement Action without intervention will not "impair or impede" Movant's rights. Movant has no right to intervene.

B. Permissive intervention pursuant to Rule 24(b) would not be proper

A court may permit a person to intervene pursuant to Rule 24(b); however, such intervention would also be futile in the present circumstances. Under Rule 24(b), "the court may permit anyone to intervene who … 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). This, however, is only a threshold requirement, and even if it is met, a "court must exercise its discretion in deciding whether

intervention should be allowed." *Stallworth v. Monsanto Co.*, 558 F.2d 257,269 (5th Cir. 1977); *Kneeland v. Nat 'l Collegiate Athletic Ass 'n*, 806 F.2d 1285, 1289 – 90 (5th Cir. 1987), cert denied, 484 U.S. 817 (1987). In deciding whether to grant permissive intervention, the "court may consider, among other factors, whether … intervention will unduly delay the proceedings or prejudice existing parties." *Kneeland*, 806 F.2d at 1289.

Movant is one of approximately 1,300 investors victimized by the Breitling fraud. A substantial number of these investors received a purported conveyance of ORRI. The Receiver has proposed the Claims Confirmation Process and the Conveyance Procedures in order to carry out the claims process in a uniform and orderly fashion. Movant's premature attempt to influence the Receiver's (yet to be sought) invalidation of these purported conveyances should be rejected. Equity receivers appointed in the circumstances present in the Enforcement Action are intended to -- and do -- represent the interests of all defrauded investors. "It would be contrary to the fair and equitable treatment of all victims … to incentivize individual investors who have been defrauded to bring their own actions in an attempt to secure early judgments and beat out other defrauded investors." *SEC v. Santillo*, Case No. 18-cv-5491 (JGK), at *3 (S.D.N.Y. Sep. 17, 2018) (citing *SEC v. Byers*, Case No. 08-cv-7104, 2008 WL 5102017, at *1 (S.D.N.Y. Nov. 25, 2008) ("As a practical matter, it does not make sense to allow individual victims and creditors to intervene as parties.")); *see also SEC v. Canadian Javelin Ltd.*, 64 F.R.D. 648, 650 (S.D.N.Y. 1974) ("[O]ur Court of Appeals has held that intervention as of right by victims of alleged securities frauds in an SEC enforcement action is inappropriate."); *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1239, 1240 (2d Cir. 1972).

To permit the Movant to intervene to address the conveyance issue outside of the Claims Confirmation Process and the Conveyance Procedures would "unduly delay the proceedings [and]

prejudice" other defrauded investors who also received these purported conveyances. Requiring the Receiver to address prematurely Movant's opposition outside of the proposed Claims Confirmation Process and Conveyance Procedures would consume additional assets of the Receivership Estate available for ultimate distribution to all claimants. Further, if Movant were permitted to intervene, other investors will surely seek to intervene; what was intended to be an orderly process for the conclusion of this Receivership Estate will become a morass of competing investor claims consuming significantly more of the Receiver's and this Court's time. Accordingly, this Court should deny Movant's Motion for Leave on the grounds that a motion seeking leave to intervene would be futile under Rule 24(b)(1).

II. The Motion for Leave is outside the Court-ordered procedures through which potential claimants to the Receivership Estate could object to the Receiver's proposed Plan of Distribution

The Court approved the Objection Procedures by order entered May 15, 2019, permitting non-parties to the Enforcement Action to object to the Receiver's proposed Plan of Distribution. ECF No. 435. Pursuant to that order, and upon the Receiver's filing of a Certificate of Service on June 5, 2019 (ECF No. 440), objections to the Receiver's Plan of Distribution were due by June 26, 2019 and the Receiver's reply(ies) was due by July 17, 2019. Movant filed its objection to the Plan of Distribution on April 25, 2019. ECF No. 429 ("Objection"). The Receiver filed his reply to all objections, including Movant's, on July 17, 2019. ECF No. 460 ("Omnibus Response"). The Receiver's Plan Motion is fully briefed and pending decision by the Court.

Movant's Motion for Leave is, at least in part, a belated attempt to file an improper, extensive sur-reply without seeking leave of the Court to do so. In its Motion for Leave, Movant raises the issue of whether it is a secured creditor, just as it did in its Objection. *See* Objection, ECF No. 429 at 1 – 3. Additionally, Movant overtly employs arguments against the legal authority

cited to by the Receiver in his Plan Motion and Omnibus Response, and which could and should have been addressed in Movant's Objection. Mot. for Leave at 6 – 7. Movant should not be permitted another proverbial "bite at the apple" through the Motion for Leave.

III. The Motion for Leave is outside the Receiver-proposed procedures through which claims against the Receivership Estate would be determined and the validity of conveyances from Receivership entities would be determined, approval of which is currently pending before the Court

In the Plan Motion, the Receiver asked the Court to approve a "claims confirmation process with respect to all claims identified or received ("Claims Confirmation Process")." ECF No. 406 at 29. Through the Claims Confirmation Process the Receiver would determine a notional claim amount for each potential claimant, transmit a letter to every potential claimant stating that notional claim amount, and permit potential claimants to dispute their notional claim amount with the Receiver and, if necessary, the Court. *Id*. at 29 – 30.

Additionally, the Receiver asked the Court to approve the Conveyance Procedures through which the Receiver would seek to invalidate certain conveyances from Receivership entities to certain investors, such as the ORRI purportedly conveyed to Movant. *Id*. at 32 – 33. The Receiver would seek to do so through summary proceedings before the Court, with notice to affected non-parties -- including the Movant -- consistent with Fed. R. Civ. P. 5(b)(2)(C). *Id*.

Although several putative claimants (including Movant) filed objections to the Receiver's proposed Plan of Distribution none, including Movant, articulated any objection to the proposed Claims Confirmation Process or Conveyance Procedures. *See* Omnibus Response, ECF No. 460 at 5 n.4. Movant now, after failing to raise the issue in its Objection, asks the Court to reject the procedures proposed by the Receiver in the Plan Motion and permit Movant to seek -- prematurely and without legal basis -- affirmative relief related to its potential claim and ORRI conveyance. The Court should decline to do so, and deny the Motion for Leave, so that the issues raised by the

Movant may be addressed through the proposed Claims Confirmation Process or Conveyance Procedures.

IV. Movant's Motion for Leave lacks any legal basis upon which the Court could declare Movant a secured creditor

Movant fails to cite any legal -- or even plausible -- basis upon which the Court might upon the present motion enter an order declaring it a secured creditor of the Receivership. Movant appears to seek affirmative relief based upon a statutory affirmative defense to the avoidance of a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE §24.001 *et seq*. ("TUFTA"). But, no TUFTA claim has, at this juncture, been asserted by the Receiver. Because the statutory affirmative defense of good faith and reasonably equivalent value (*id*. at §24.009(a)) is a shield, and not a sword, it is not a basis upon which to award Movant the affirmative relief it seeks. Any relief requested by Movant premised upon the TUFTA affirmative defense is premature -- at best.

Moreover, proceedings in *SEC v. Helms*, Case No. A-13-CV-1036-ML (W.D. Tex. Mar. 10, 2015) are neither similar to -- nor instructive in -- the present circumstances. In *Helms*, the enforcement action defendants had induced Clovis Capital Ventures, LLC ("Clovis") to purchase limited partnership interests by offering to fraudulently secure that investment with collateral in the form of two of the limited partnership's highest-valued overriding royalty interests. Pursuant to Court-approved sales procedures, the Receiver proceeded to sell those interests "free and clear of all liens, claims and encumbrances" and sought confirmation of the sale. *Id*. at 2. Clovis sought leave to intervene in the Helms action to oppose confirmation, which intervention was granted "for the limited purpose of addressing issues relating to Clovis' purported security interest." *Id*. at 3. The question was ripe for determination because the Receiver had moved to confirm the sale "free and clear." The receiver asked the court to void the security agreement as a fraudulent transfer

under TUFTA. *Id*. at 11. The court voided the "side letter" security agreement with Clovis, *id*. at 24 – 25, holding that Clovis lacked objective good faith with respect to the transaction upon several factual bases including, *inter alia*, that no other investors were offered collateral to secure their investments (*id*. at 22) and that the "side letter" through which they accomplished the deal violated the Partnership Agreement in several respects. *Id*. at 19 – 21.

Movant here is correct that the facts of *Helms* are clearly distinguishable from the present circumstances (cite). In fact, Movant's citation of the *Helms* proceeding is utterly pointless. There is no conceivable path from the *Helms* proceeding to a determination that Movant is a secured claimant in the present circumstances. Movant did not negotiate and receive a security agreement like Clovis in *Helms*. Movant did not receive a materially dissimilar (and better) deal vis-à-vis other investors in the Jericho offering. Movant is in the same shoes as all Breitling royalty interest investors that received purported conveyances of property from Receivership entities. The Receiver has not sought confirmation of a sale of the interest in question. And it bears repeating that the Receiver has not moved the Court for relief under TUFTA.

The Court must also reject the main premise upon which Movant's request is based: that its investment through the Receivership entities -- and subsequent receipt of a conveyance of ORRI -- was an otherwise legitimate transaction. This premise fails for a number of reasons. First and foremost, the Receiver and the Commission have presented extensive evidence to this Court that investor funds, once received by Breitling entities, were comingled with funds of investors in separate offerings in "operating" accounts. *See*, *e.g.*, Plaintiff's Brief in Support of Motion for various injunctive relief, ECF No. 103 at 13, 16 – 17, 19 – 21; Receiver Motion to Expand Receivership Estate, ECF No. 281 at 9 – 15, 17, 19; Receiver Motion to Place Crude into Receivership Estate, ECF No. 404 at 8 – 11, 15 – 17; Plan Motion, ECF No. 406 at 12 – 13;

Omnibus Response, ECF No. 460 at 8 – 9. Movant has not offered any evidence which establishes that the Jericho ORRI was purchased with untainted investor funds.

Moreover, Movant has not -- and cannot -- offer any evidence to prove that its investment in the Jericho offering, relative to all other investors in the Jericho offering, entitled it to the 0.00450000% interest in certain ORRI purportedly conveyed to it by Receivership entities. Mot. for Leave at 5. As the Receiver has previously detailed to the Court, some royalty investors received conveyance documents, others received none, and still others received only partial conveyances. *See* Omnibus Response, ECF No. 460 at 12 – 13 (certain investors "received 'conveyances of some, but not all, of their interests'"). Movant fails to substantiate its claim that it received what it paid for, no more and no less. It is precisely because of the haphazard manner in which these conveyances were made -- and the comingling of investor funds from separate offerings -- that the Receiver intends to seek the invalidation of all such conveyances pursuant to the Conveyance Procedures he has proposed to the Court. Accordingly, the Movant's Motion for Leave should be denied.

V. Conclusion

For the reasons stated above, the Receiver respectfully requests that the Court deny Movant's Motion for Leave.

Dated: August 27, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 27, 2019 I filed the foregoing document through the Court's CM/ECF filing system, which satisfies service requirements under FED. R. CIV. P. 5(b)(2)(E).

/s/ Andrew Goforth
Andrew M. Goforth