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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

U.S. COMMODITY FUTURES TRADING COMMISSION Plaintiff, v. U.S. VENTURES LC, a Utah limited liability company, WINSOME INVESTMENT TRUST, an unincorporated Texas entity, ROBERT J. ANDRES and ROBERT L. HOLLOWAY, Defendants.	Case No. 2:11CV00099 BSJ PLAINTIFF U.S. COMMODITY FUTURES TRADING COMMISSION'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Plaintiff United States Commodity Futures Trading Commission ("Commission") hereby respectfully responds to the Motion to Intervene ("Motion") filed by Steve Bottorf ("Bottorf") and Daren Hamlin ("Hamlin") (collectively, "Applicants") (Docket Entry #351) and sets forth its opposition thereto.

I. BACKGROUND

On January 24, 2011, the Commission filed a Complaint (Docket Entry #1) against U.S. Ventures, Winsome Investment Trust, Robert J. Andres and Robert L. Holloway (collectively, "Defendants") alleging, among other things, that Defendants fraudulently solicited at least $50.2 million from at least 243 individuals in connection with the trading of commodity futures contracts, misappropriated participant funds to operate a Ponzi scheme and pay personal expenses and issued false account statements to participants.

On January 25, 2011, the Court entered a Statutory Restraining Order ("SRO") against Defendants (Docket Entry #15). Among other things, the SRO appointed R. Wayne Klein of Klein & Associates, PLLC as the Receiver for Defendants' assets. The Receiver was charged, among other things, with marshalling Defendants' assets for eventual return to Defendants' victims. To that end, the Receiver established a claims process for accepting and evaluating claims submitted by Defendants' victims (Docket Entry #114). This process, which was approved by the Court (Docket Entry #157), included a deadline of July 31, 2012 to submit claims. Neither Bottorf nor Hamlin submitted claims through the claims process.

On December 20, 2012, the Receiver filed with the Court his recommendations as to which of those claims submitted through the claims process should be allowed (Docket Entry #233). Anyone objecting to the Receiver's recommendations had until January 22, 2013 to file objections with the Court. Neither Bottorf nor Hamlin filed any objections.

On November 8, 2013, the Receiver filed a motion proposing a plan of distribution (Docket Entry #306). The Court held an initial hearing on the matter on February 4, 2014, and reserved ruling pending the resolution of an interested party's outstanding case (Docket Entry #321). The Court subsequently scheduled a hearing for further consideration of the Receiver's motion for June 25, 2014 (Docket Entry #356).

On June 2, 2014, Applicants filed their Motion to Intervene (Docket Entry #351).

On June 6, 2014, upon previous motion of the Commission, the Court entered an Order of Default Judgment against Defendants (Docket Entry #358).

II. ARGUMENT

A. Applicants Should Not Be Allowed to Intervene Post Judgment

The Court's entry of an Order of Default Judgment against Defendants, in effect, rendered a final judgment on this matter. "Intervention attempts after final judgments are ordinarily looked upon with a jaundiced eye." *U.S. v. U.S. Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977) (citing *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1072 (5th Cir. 1970)). Such attempts have a "strong tendency to prejudice existing parties to the litigation or to interfere substantially with the orderly process of the court. *Id.* at 1235 (citations omitted); *see Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985) (affirming intervention denial in part because time and effort spent to formulate settlement of case would be for naught). In the instant matter, the Court has entered a final judgment which includes restitution and civil monetary penalties and has before it the Receiver's proposed plan of distribution. To allow intervention at this stage would substantially interfere with the orderly process of these proceedings.

B. Applicants' Motion is Based on a Mistaken Premise Regarding the Nature of this Matter

Even if the Court were inclined to consider a motion to intervene post judgment, Applicants' motion is defective in that it is based on the mistaken premise that the matter before the Court is a class action suit. Applicants' motion states that they seek to "intervene...and be included with the current class action complaint in accordance with Rule 23" because they are "similarly situated as the other plaintiffs involved in the class action." (Motion at p.1). This matter is not a class action and there are no "similarly situated" plaintiffs.

This matter is, in fact, a federal law enforcement action brought by an agency of the U.S. Government to enjoin violations of the Commodity Exchange Act and for certain ancillary equitable relief. There is a strong judicial policy against private intervention in government enforcement litigation. *See, e.g., Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 693 (1961). Thus, private intervention in Commission law enforcement actions has been denied. *CFTC v. Chilcott Portfolio Management, Inc.*, 725 F2d 584, 587 (10th Cir. 1984); *CFTC v. Heritage Capital Advisory Services, Ltd.*, 736 F2d 384, 387 (7th Cir. 1984). This policy reflects the public interest in the expeditious and economical resolution of government law enforcement actions. *See generally Chilcott*, 725 F2d 584.

A wealth of case law holds that private intervention in Federal enforcement actions where receiverships have been established to preserve and protect assets for the benefit of the victims should not be permitted. *See, e.g., Heritage Capital,* 736 F.2d 384; *CFTC v. Carter, Rogers, and Whitehead & Co.*, 497 F.Supp. 450 (E.D.N.Y 1980); *CFTC v. Lofgren, et. al*, No. 02 C 6222, 2003 WL 21639118 (N.D.Ill. July 9, 2003); *CFTC v. Eustace*, No. Civ.A. 05-2973, 2005 WL 2862945 (E.D. Pa. October 31, 2005); *SEC v. Charles Plohn & Co.*, 448 F.2d 546, 549 (2nd Cir. 1971); *SEC v. TLC Investments and Trade Co.*, 147 F.Supp.2d 1031 (C.D. Ca. 2001); *SEC v.*

Behrens, No. 8:08CV13, 2008 WL 2485599 (D.Neb. June 17, 2008); and *SEC v. Steven Byers*, No. 08 Civ. 7104 (DC), 2008 WL 5102017 (S.D.N.Y. November 25, 2008). These cases also reflect the public interest in the expeditious and economic resolution of government law enforcement actions. Hence, the Court should deny Applicants' motion to intervene as judicial policy requires the unhindered progression of this litigation.

C. Applicants Should Not Be Permitted to Intervene in this Matter Under Rule 24(b)

1. Applicants' Motion is Not Timely

Rule 24(b) provides that "[o]n *timely* motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." [emphasis added].

The Commission filed its complaint in this matter in 2011; Applicants' Motion now comes three years later. While three years is not alone dispositive of the timeliness requirement under Rule 24(b), it is certainly an important factor. Courts in this Circuit have held that "the timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (citations omitted); *see U.S. v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), which set forth four factors for use as guidelines in determining the timeliness of a motion to intervene pursuant to Rule 24(b)).

It is clear from Applicants' Motion that they have known of their interest in this matter for several years. Applicants' Motion states that Bottorf completed and returned a questionnaire sent by the Receiver to investors (Declaration of Steve Bottorf at ¶ 7). This questionnaire was

sent to investors in February 2011 (see *Initial Report of R. Wayne Klein, Receiver* at ¶ 77 (Docket Entry #47)). Despite having known of their interest in this matter for over three years, Applicants have waited until now to seek to intervene. Allowing intervention after a final judgment has already been rendered would certainly prejudice the Commission in that it would open the door not only to these applicants, but to other potential applicants, thereby complicating and delaying the final resolution of this matter. Conversely, Applicants would not be prejudiced by denial of their Motion because they have other alternatives to pursue their claim, including moving the Court to recognize a claim after the Claims Bar Date or filing an independent private action against Defendants. Applicants have demonstrated no unusual circumstances to support granting their Motion at this late date.

2. Granting Applicants' Motion Would Unduly Delay and Prejudice the Adjudication of the Commission's Rights

In analyzing a motion for permissive intervention under Rule 24(b) "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Courts in this Circuit have denied permissive intervention under Rule 24(b) when to do so would needlessly complicate discovery, introduce collateral issues, increase the costs, and generally delay disposition of the litigation. *See City of Stillwell, Oklahoma v. Ozarks Rural Electric Cooperative Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996); *see also Kane County, Utah v. U.S.*, 597 F.3d 1129 (10th Cir. 2010) (rejecting applicant's 24(b) motion and affirming the district court's ruling, adding language from the district court decision that "allow[ing] SUWA to intervene…under Rule 24(b) would be an invitation to any member of the public who holds strong views about the outcome to seek to intervene.").

As stated above, allowing Applicants to intervene after a final judgment has been rendered in this matter would unnecessarily complicate and delay the final resolution of this

matter. If allowed to intervene, Applicants conceivably could demand deposition testimony and the production of documents, and file motions, all of which would delay the final adjudication of the Commission's case and the distribution of funds to victims. Moreover, if Applicants are permitted to intervene, any claimant who previously failed to comply with the claims process similarly could seek intervention, thereby further complicating and delaying the final resolution of this matter. Additional time and complexity in this case would also likely increase the costs of administering the Receivership, thus depleting the assets available for distribution back to all those claimants who did comply with the claims process.

3. Applicants Failed to Comply with Rule 24(c)

Federal Rule of Civil Procedure 24(c) requires that applicants seeking to intervene in a lawsuit serve upon the parties "a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). "Whether of right or permissive, intervention under Rule 24 is conditioned by the Rule 24(c) requirement that the intervenor state a well-pleaded claim or defense to the action." *Rhode Island Fed'n of Teachers v. Norberg*, 630 F.2d 850, 854-55 (1st Cir. 1980). *See also Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 205 n. 6 (1st Cir. 1998) (dereliction with respect to Rule 24(c) ordinarily warrants dismissal of motion).

Despite this requirement, Applicants failed to file a proposed pleading with their Motion and did not "state a well-pleaded claim or defense to the action." *Norberg*, 630 F.2d at 854. The purpose of Rule 24(c)'s pleading requirement is to provide the parties with notice of the applicant's position, the nature and basis of the claim asserted, and the relief sought by the intervenor. *See Dillard v. City of Foley*, 166 F.R.D. 503, 506 (M.D. Ala. 1996). Applicants' Motion fails on all three counts and should therefore be denied.

III. CONCLUSION

For the reasons set forth above, the Commission respectfully requests that Applicants' Motion be denied.

Respectfully submitted,

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Dated: June 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all parties or counsel of record identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing:

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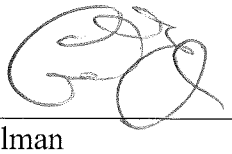

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