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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

NATIONAL NOTE OF UTAH, LC, a Utah
Limited Liability Company and WAYNE
LaMAR PALMER, an individual,

Defendants.

**MOTION TO INTERVENE BY
BARCLAY ASSOCIATES, LLC
AND MEMORANDUM
IN SUPPORT**

Case No: 2:12-CV-591 BSJ

Judge Bruce S. Jenkins

Claimant Barclay Associates, LLC (“**Barclay**”), through its counsel of record and pursuant to Rule 24 of the Federal Rules of Civil Procedure, moves the Court for leave to intervene as a party Defendant in the above-referenced action now pending before this Court. In particular, Barclay moves for leave to intervene as a matter of right pursuant to Rule 24(a) because it claims an interest in real property that is the subject of this action. Alternatively,

Barclay moves for permissive intervention pursuant to Rule 24(b). This Memorandum is submitted in support of the Motion to Intervene.

STATEMENT OF FACTS

1. Plaintiff Securities and Exchange Commission (the “**SEC**”) began this action by filing a Complaint on June 25, 2012. (Doc. 1)

2. On the same date, the Court entered an Order Freezing Assets and Prohibiting Destruction of Documents (Doc. 8) which froze all assets held in the name of the Defendants, including Defendant National Note of Utah, LC (“**National Note**”).

A. Barclay’s Interest in the Riverbend Property.

3. Riverbend Estates LC (“**Riverbend**”), a company controlled by Defendant National Note of Utah, LC (“**National Note**”), borrowed \$3.7 million from Barclay on or about May 31, 2007 (the “**First Barclay Loan**”).

4. The Loan is evidenced by a promissory note (“**Note**”) in favor of Barclay dated May 31, 2007 in the principal amount of \$3.7 million at a rate of 11.25% interest. A copy of the Note is attached as *Ex. 1*.

5. Pursuant to a Mortgage, Assignment of Rents, and Security Agreement dated May 31, 2007 (the “**Barclay Mortgage**”), the Note is secured by five parcels of real property totaling approximately 171.3 acres, located in Middleton, Canyon County, Idaho (the “**Main Property**”). A copy of the Barclay Mortgage is attached as *Ex. 2*.

6. The Main Property is identified by parcel numbers 3390900000, 339090100, 339090110, 3391000000, and 3475200000. The legal description for the Main Property is included in *Ex. 2*.

7. The Barclay Mortgage defines the “Mortgaged Property” as expressly including “all current and future rights, including ... **waters, watercourses and appurtenances** related to or benefiting the Land or the Improvements” (*Ex. 2* at 3 (emphasis added).)

8. A separate parcel of real property adjoining the Main Property was acquired by Riverbend on or about June 18, 2007 (the “**First Adjoining Property**”). The First Adjoining Property is identified by parcel number 33900012B0.

9. Another parcel of real property adjoining the Main Property was acquired by Riverbend (the “**Second Adjoining Property**”). The Second Adjoining Property is identified by parcel number 1853700000. The Main Property, the First Adjoining Property, and the Second Adjoining Property are collectively defined as the “**Middleton Property.**”

10. In November 2011, National Note borrowed an additional \$77,000.00 from Barclay (the “**Second Barclay Loan**”), and in exchange National Note transferred an Assignment of Beneficial Interest in Trust Deed to Barclay (“**Assignment of Trust Deed**”). A copy is attached as *Ex. 3*.

11. The Deed of Trust in which an interest was assigned gives Barclay a security interest in the First Adjoining Property. A copy is attached as *Ex. 4*.

B. Settlement Agreement with Receiver.

12. Riverbend and National Note are in default of their obligations to Barclay under the First Barclay Loan and the Second Barclay Loan. As of April 30, 2013, Riverbend owed Barclay \$5,129,181.24, including interest and penalties under the First and Second Barclay Loans.

13. Barclay obtained an appraisal of the Middleton Property on September 24, 2012, which valued the Property at \$1.0 million. Pursuant to an updated appraisal on March 26, 2013, the value of the Middleton Property increased by a total of \$8,500.00.

14. Certain real property located adjacent to or near the Middleton Property, referred to herein as the “**Excluded Property**,” is identified as follows (i) .61 acres, including a home, constituting parcel number 339010000; and (ii) .22 acres, including a home, constituting parcel number 1866900000.

15. On June 25, 2012, the Securities and Exchange Commission (the “**SEC**”) filed the Case, and the Court entered its *Order Appointing Receiver and Staying Litigation* and *Order Freezing Assets and Prohibiting Destruction of Documents* (the “**Case Orders**”).

16. Pursuant to the Case Orders, the Receiver was appointed, a Receivership Estate was established, and the Court took “exclusive jurisdiction and possession of the assets, property and interest, of whatever kind and wherever situated of” National Note, Wayne LaMar Palmer (“**Palmer**”), and related and affiliated entities, including Riverbend (collectively, the “**Receivership Parties**”).

17. Pursuant to the Case Orders, the Middleton Property is property of the Receivership Estate.

18. On June 10, 2013, Barclay and the Receiver signed a Settlement Agreement. Pursuant to the Settlement Agreement, and subject to Court approval, the Receiver agreed to convey to Barclay the Middleton Property.

19. Barclay seeks leave to intervene in this Receiver proceeding to seek the Court’s approval of the Settlement Agreement.

20. A proposed Complaint in Intervention is attached to this Motion as *Ex. 5*.

ARGUMENT

POINT I

BARCLAY IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Rule 24(a)(2) of the Federal Rules of Civil Procedure allows a party to intervene as a matter of right “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” FED. R. CIV. P. 24(a)(2).

An applicant must be allowed to intervene if (1) the application is timely; (2) the applicant has an interest in the subject matter of the dispute; (3) that interest is or may be impaired or impeded; and (4) the applicant’s interest is not represented adequately by the existing parties. *Coalition of Arizona/New Mexico Counties for Stable Economic Growth*, 100 F.3d 837, 840 (10th Cir. 1996). Generally, the Tenth Circuit follows a liberal view in allowing intervention under Rule 24(a). *Elliot Industries Limited Partnership v. BP America Production Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005).

Barclay’s Motion satisfies the requirements to intervene in this action as a matter of right. The timeliness of a motion to intervene is viewed in light of 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.” *Id.* Barclay has filed a timely application for intervention because there has been no adjudication of the issues raised in the SEC’s Complaint. No party would be prejudiced by Barclay’s

intervention as a party. Barclay has been in communication with the Receiver about its claim and has reached a Settlement Agreement concerning it. Moreover, the Receiver has previously addressed the Settlement Agreement by motion to the Court. Thus, the Motion to Intervene is timely.

Second, Barclay has also demonstrated an interest in a property that is part of the subject matter of this action, namely the Riverbend Property. For intervention, an applicant's interests in the proceeding must be "direct, substantial, and legally protectable." *Utahns for Better Transportation v. United States Dept. of Transportation*, 295 F.3d 1111, 1115 (10th Cir. 2002) (quoting *Coalition* 100 F.3d at 840). Sufficiency of interest is a fact-specific determination. *Id.* The Tenth Circuit has described the interest test as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* (quoting *Utah Association of Counties, et al. v. Clinton, et al.*, 255 F.3d 1246, 1251-52 (10th Cir. 2001)). Threat of harm to an applicant's economic interest is sufficient to support the requisite interest. *Id.*

Barclay's interest in the Riverbend Property entitles it to a voice in this receivership proceeding. This is a real and present interest as demonstrated by Barclay's liens on the Property. Therefore, Barclay has the requisite interest in this action to intervene as a matter of right.

To satisfy the third element under Rule 24(a)(2), an applicant must demonstrate that the disposition of the lawsuit "may as a practical matter impair or impede [its] ability to protect [its] interest." FED. R. CIV. P. 24(a)(2). The Tenth Circuit has stated that impairment is not separate from the existence of an interest. *Id.* at 1116. An intervenor "must show only that

impairment of its substantial legal interest is possible if intervention is denied. The burden is minimal.” *Clinton*, 255 F.3d at 1253. The Court’s Order Freezing Assets entered June 25, 2012 impairs Barclay’s right to pursue foreclosure of the Riverbend Property, and otherwise impairs or potentially impairs Barclay’s security interests. The divergence between the interests of the applicant and the parties need not be great in order to satisfy this minimal burden. *Id.* at 1254. Barclay faces the requisite impairment of interests to intervene as a matter of right.

Finally, under Rule 24(a)(2), an applicant for intervention bears the burden of showing that its rights are not adequately represented by the existing parties. FED. R. CIV. P. 24(a)(2). Barclay certainly meets the minimal burden of proving inadequate representation by the existing parties, because its interests and the interests of the other parties in this proceeding are sufficiently divergent. The Receiver appointed by the Court stands in the shoes of National Note, and cannot adequately represent the interests of Barclay. Thus, Barclay faces the threat of economic injury from the outcome of this litigation while the defendants face their own distinct economic injury.

Barclay has met the minimal burden of showing that its interests may not be adequately represented by the existing parties and it should be allowed to intervene. Based on the foregoing, Barclay is entitled to intervene as a matter of right.

POINT II

ALTERNATIVELY, BARCLAY IS ENTITLED TO PERMISSIVE INTERVENTION.

Rule 24(b) of the Federal Rules of Civil Procedure allows a party to intervene permissively if the party “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(d)(1)(B).

Barclay also qualifies for permissive intervention under Rule 24(b) because it has a claim that shares a common question of law or fact with the main action. As shown in its proposed Complaint in Intervention, Barclay contends that its security interests and contract rights in the Middleton Property are common issues with those in main action. Part of the Receiver’s charge in this proceeding is to determine the ownership and value of property in his custody, and to evaluate lienhold and other claims to those properties made by third persons.

Therefore, Barclay’s claims share common questions of law and fact with the main action, and the Court should exercise its discretion to permit the Nielsons and Black Cliffs to intervene in this action under Rule 24(b).

CONCLUSION

Because Barclay claims interests relating to the subject of this action, and because disposition of the action without Barclay’s involvement may impair or impede its ability to protect its interests, Barclay respectfully requests that this Court grant its Motion to Intervene. Alternatively, the Court should grant permissive intervention under Rule 24(b) because Barclay’s claims share common questions of law or fact with the main action.

DATED this 15th day of November, 2013.

RICHARDS BRANDT MILLER NELSON

/s/ Matthew C. Barneck
MATTHEW C. BARNECK
CHAD E. FUNK
Attorneys for Barclay Associates, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 15, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Daniel Wadley, Esq. Thomas M. Melton, Esq. Securities & Exchange Commission 15 West South Temple, Suite 1800 Salt Lake City, UT 84101 wadleyd@sec.gov meltont@sec.gov <i>Attorneys for Plaintiff</i>	Stephen Quesenberry, Esq. Hill, Johnson & Schmutz, L.C. Riverview Plaza, Suite 300 4844 North 300 West Provo, UT 84604-5663 squesenberry@hjslaw.com <i>Attorneys for Wendell A. Jacobson</i>
David K. Broadbent, Esq. Matthew T. Wirthlin, Esq. Cory A. Talbot, Esq. J. Andrew Sjoblom, Esq. Romaine C. Marshall, Esq. Holland & Hart 222 South Main Street, Suite 2200 Salt Lake City, UT 84101 dbroadbent@hollandhart.com mwirthlin@hollandhart.com catalbot@hollandhart.com jasjoblom@hollandhart.com rcmarshall@hollandhart.com	All other persons or entities entitled to receive notice through PACER, pursuant to Fed. R. Civ. P. 5(b)(3) and D.U.Civ.R. 79-1.

and

I HEREBY CERTIFY that on November 15, 2013, I have mailed by United States Postal Service, the foregoing document to the following non-CM/ECF participants:

Wayne LaMar Palmer
 1549 West 7800 South
 West Jordan, UT 84088

/s/ Matthew C. Barneck _____