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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, and individual, Defendants.	**RECEIVER'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE AND SUPPORTING MEMORANDUM** 2:12-cv-00591 BSJ Judge Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of National Note of Utah, LC ("National Note"), Wayne LaMar Palmer ("Palmer"), and the Palmer Entities,[1]

[1] The "Palmer Entities" include any and all subsidiaries and affiliated entities, including but not limited to, Land, Utah, LC; Passport Properties, L.C.; The Property Company, LLC; The Corner Corporation; Territory Land Company, Incorporated; Koala T Investments LLC; Prime Wave I, LLC; Note Systems, Inc.; DPLM LLC; Ovation 106, LLC; Top Flight, LLC; Freedom Minerals I, LLC; Homeland Funding Corp.; Homeland Mortgage, L.C.; Centennial Aviation, LLC; Homeland Minerals, LLC; Riverbend Estates LC; Homeland Holding Corp.; Spanish Fork Development, L.L.C.; Indian Canyon, LLC; Freedom Minerals II LLC; Homeland Mortgage, Inc.; Real Estate Finance Institute, Inc.; Vision Land, LLC; Old Glory Mining Company, LLC; Presidential Utah Properties LC; Traditions in Timber; HSB Technologies, LLC; Bonneville Minerals, LLC; Twin Pines Property, LC; NPL America LLC; Network Leisure Shoppes, Inc.; Elkhorn Ridge, LLC; and Expressway Business Park Owners Organization, LLC.

opposes the Motion to Intervene and Supporting Memorandum (the "Motion")[2] filed by The True & Marjorie Kirk Family Trust (the "Trust") because: (a) the Trust's intervention is barred by Section 21(g) of the Securities Exchange Act of 1934 (the "Exchange Act"); (b) the Motion does not meet the requirements described in Fed. R. Civ. P. 24(a)(2) to intervene as a matter of right; and (c) the Motion does not meet the requirements of Fed. R. Civ. P. 24(b) to intervene permissively. As the Trust has failed to meet the requirements necessary to support the Motion, its request to intervene should be denied. This opposition is further supported by the *Declaration of Receiver R. Wayne Klein in Support of Receiver's Memorandum in Opposition to Motion to Intervene and Supporting Memorandum* (the "Receiver Declaration") filed contemporaneously herewith.

The Court entered the Order staying litigation to provide the Receiver with time to efficiently fulfill his duties with respect to Receivership property. At this point, the case has been pending for only six months. Being forced to confront potential litigation from every creditor or investor who claims an interest in some asset covered by the Receivership will not advance the purpose of efficient administration of the Receivership estate and allowing individual creditors with a limited interest in this case to intervene will unnecessarily complicate such administration.[3] Thus, denying the Motion will allow the Receiver the time needed to unravel the complex network of transactions, secure the assets of the Receivership estate and efficiently formulate a claim and distribution plan for the Court that benefits all creditors and investors. Granting the Motion and/or any similar motions at this stage in the case, filed by individual creditors or investors will hinder the Receiver's ability to marshal the assets of the

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[2] Docket No. 89.

[3] The Trust has not filed a motion to lift the stay imposed by this Court's Receivership Order [Docket No. 9], but the Receiver believes that such a motion is the appropriate way for the Trust to attempt to obtain the relief it seeks through the Motion rather than the present Motion, which seeks unfettered participation in this case.

Receivership estate for the benefit of the collective and will needlessly increase the administrative costs of the Receivership. Accordingly, the Motion should be denied.

BACKGROUND

1. On June 25, 2012, the Securities and Exchange Commission (the "SEC") filed a complaint against National Note and Palmer (the "Complaint").[4]

2. The Complaint arises out of a "Ponzi scheme" operated by Palmer through National Note.[5]

3. The Complaint alleges five causes of action: (a) employment of a device, scheme, or artifice to defraud; (b) fraud in the offer and sale of securities; (c) fraud in connection with the purchase and sale of securities; (d) offer and sale of unregistered securities; and (e) offer and sale of unregistered securities by an unregistered broker or dealer.[6]

4. Also on June 25, 2012, the Court entered the Order,[7] pursuant to which, the Court took exclusive jurisdiction and possession of the assets of Palmer, National Note, and Palmer's interest in the Palmer Entities, and stayed all litigation involving Palmer, National Note, and the Palmer Entities.[8]

5. National Note is the record title owner of the following real property located at 580 North Main, Brigham City, Box Elder County, Utah ("Twin Pines Property"), which is more particularly described as follows:

> BEGINNING AT THE NORTHWEST CORNER OF LOT 4, BLOCK 43, PLAT C, BRIGHAM CITY SURVEY, THENCE

[4] Docket No. 1.

[5] *Id.* at 1-2.

[6] *Id.* at 10-13.

[7] Docket No. 9.

[8] *Id.* at 3-6 and 13-14.

SOUTH 12 RODS, THENCE EAST 10 RODS, THENCE SOUTH 4 RODS, THENCE EAST 3 RODS, THENCE NORTH 10 RODS, THENCE WEST 105.5 FEET, THEN NORTH 6 RODS, THEN WEST 109 FEET TO THE POINT OF BEGINNING.

Tax ID No. 03-089-0035.

6. On August 10, 2011, National Note, as Trustor, executed a Deed of Trust for the Property ("Trust Deed") in favor of the Trust, as Beneficiary, which was recorded in the Box Elder County Recorder's Office on August 11, 2011 as Entry No. 304596.

7. The Trust Deed secures two Promissory Notes in favor of the Trust: a Promissory Note dated July 8, 2011 in the principal amount of $100,000 and a Promissory Note dated August 10, 2011 in the principal amount of $300,000 (collectively, the "Notes").

8. At the time of the commencement of this case, the Trust had received interest in the approximate amount of $135,000.00 on the Notes. The Trustee asserts that the transfer of the Trust Deed as security for the Notes may be avoidable.

9. In August 2012, the Receivership estate paid for numerous repairs to the Twin Pines Property including structural work, repairing leaks in the roof, replacing carpeting, repairing plumbing, and repainting the interiors of several units.[9]

10. On August 13, 2012, the Receiver filed a motion to approve a settlement agreement with the Trust, which if granted, would have conveyed title to the Twin Pines Property to the Trust (the "Settlement Motion").[10] In the memorandum filed in support of the Settlement Motion, the Receiver noted that the Trust's Notes and the Trust Deed was the subject of disputes and could be subject to litigation.[11] On August 31, 2012, the Court entered an Order

[9] Receiver Declaration at ¶ 4.

[10] Docket No. 38.

[11] Docket No. 39 at p. 10.

denying the Settlement Motion without prejudice.[12]

11. The Trustee asserts that the transfers providing the Trust with a secured interest are avoidable and subject to recovery for the benefit of all investors in this case. The Trust disagrees, and although the parties have attempted to settle this dispute, to date no agreement has been reached.

ARGUMENT

I. Section 21(g) Of The Exchange Act Bars The Trust's Intervention

The Motion is barred by Section 21(g) of the Exchange Act,[13] which provides:

> Notwithstanding the provisions of section 1407(a) of Title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.[14]

Section 21(g) serves as an "impenetrable wall" against parties wishing to intervene in an action commenced by the SEC without the consent of the SEC.[15] The language of Section 21(g) is plain and unambiguous, clearly barring intervention, and "[e]xceptions not made by the text of the statute should not be read into it by courts that are entrusted to apply the law as written."[16] "Without a bar on intervention, § 21(g) could easily be eviscerated: while a private action could

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12 Docket No. 50.

13 SEC Opposition at 3-5.

14 Exchange Act Section 21(g).

15 *SEC v. Wozniak*, No. 92 C 4691, 1993 U.S. Dist. LEXIS 1241 at *1 (N.D. Ill. Feb. 8, 1993).

16 *SEC v. Homa*, 99 C 6895, 2000 U.S. Dist. LEXIS 14582, at **6–7 (N.D. Ill. Sept. 29, 2000); *see also SEC v. Egan*, 821 F. Supp. 1274, 1275 (N.D. Ill. 1993); *SEC v. Thrasher*, 92 Civ. 6987, 1995 U. S. Dist. LEXIS 10775, at *9 (S.D.N.Y. Aug. 2, 1995) (holding that Section 21(g) bars third-party and cross-claims in the absence of the SEC consent).

not be consolidated with an SEC action, those proceeding in a private action could merely end that action and instead intervene in the SEC's action."[17]

In analogous contexts, courts have broadly applied Section 21(g) to preclude any interference by private parties in an SEC enforcement action.[18] Absent the consent of the SEC, the Motion is barred by Section 21(g) of the Exchange Act. Even if this Court decides that Section 21(g) is not a complete bar to intervention, the Court should still deny the Motion in light of the policy considerations behind the section. The Senate report discussing Section 21(g) raised concerns that the delay associated with complex pretrial procedures would interfere with the SEC's ability to obtain timely relief and thereby harm investors.[19] Section 21(g) was enacted to ensure that SEC enforcement proceed efficiently.[20]

The cases cited in the Motion are inapposite. First, in *SEC v. Merrill Scott & Assoc., Ltd.*,[21] the Court granted a motion to intervene filed by a secured creditor only after the case had been pending for over two and a half years, during which time the receiver did not establish a claims procedure, and the receiver's reports showed that the property had declined in value by $200,000.00.[22] In *SEC v. Novus Technologies, LLC, et al.*,[23] JP Morgan Chase Bank ("Chase")

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[17] *SEC v. TLC Invs.& Trade Co.*, 147 F. Supp. 2d 1031, 1040 (C.D. Cal. 2001).

[18] *See Aaron v. SEC*, 446 U.S. 680 at 717, n.9 (1980) (Blackmun, J., concurring in part, dissenting in part); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 n.17 (1979); *SEC v. Randy*, No. 94 C 5902, 1995 U.S. Dist. LEXIS 15609, at *7 (N.D. Ill. Oct. 17, 1995) (counterclaims); *SEC v. Downe*, 92 Civ. 4092, 1994 U.S. Dist. LEXIS 2292, at *7 (S.D.N.Y. Mar. 3, 1994) (cross-claims); *SEC v. Keating*, CV91-6785, 1992 U.S. Dist. LEXIS 14630, at *10 (C.D. Cal. July 23, 1992) (indemnification and contribution); *SEC v. Am. Free Enter. Inst.*, 580 F. Supp. 270, 272 (D. Ariz. 1984) (counterclaim).

[19] *See SEC v. Kings Real Estate Inv. Trust*, 222 F.R.D. 660, 664 (D. Kan. 2004).

[20] *See Parklane Hosiery Co.*, 439 U.S. at 332, n.17. *See also Thrasher*, 1995 U.S. Dist. LEXIS 10775 at *10.

[21] Case No. 2:02-cv-0039 TC [Docket No. 317]. A copy of which is attached hereto as **Exhibit A**.

[22] *Id.* at pp. 1-2.

[23] Case No. 2:07-cv-0235 DB [Docket No. 206]. A copy of which is attached hereto as **Exhibit B**.

sought to intervene in an SEC enforcement proceeding to protect its asserted interests in money obtained from Chase and invested in a Ponzi scheme at the heart of the enforcement proceeding.[24] In denying Chase's motion to intervene, the Court contrasted the holding in *Merrill Scott* to Chase's situation and stated:

> the court is also concerned with the potential for complicating this case. In *SEC v. Merrill*, Judge Nuffer allowed a secured creditor to intervene based upon a right to intervene under Rule 24(a) two and a half years into the case following interim agreements between the intervener and receiver regarding the property. In essence, the intervener in Merrill was seeking a "place at the table" toward the end of the case.[25]

The *Novus* Court then denied Chase's motion because: (a) the case was in an "early phase" (it had been pending for approximately eight months),[26] (b) if the Court allowed Chase to intervene, other similarly situated creditors would likely seek to intervene,[27] and (c) "the Court believes it is best to consider the question of who owns which assets after they have been marshaled by the Receiver not while the process is ongoing."[28] The other cases cited by the Trust, *SEC v. Kings Real Estate Investment Trust*,[29] *SEC v. Credit Bancorp, Ltd.*,[30] and *SEC v.*

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[24] *Id.* at p. 2.

[25] *Id.* at p. 10.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] 222 F.R.D. 660, 664 (D. Kan. 2004) (denying the intervention pursuant to Fed. R. Civ. P. 24(a)(2), but granting permissive intervention when proposed intervenor argued that he did not invest in the REIT that was the subject of the SEC's enforcement action).

[30] 194 F.R.D. 457, 469 (S.D.N.Y. 2000) (denying intervention of right pursuant to Fed. R. Civ. P. 24(a)(2), but granting permissive intervention to the largest customer of Credit Bancorp when it became clear that the proposed intervenors would have extensive involvement in the case whether intervention was granted or not and the Court felt that allowing intervention would not prolong the SEC's involvement in the matter or its efforts to obtain a resolution).

Prudential Sec. Inc.[31] also do not support its contention that the Trust should be allowed to intervene.

II. The Trust Does Not Meet The Requirements For Intervention Under Fed. R. Civ. P. 24(a)(2)

The Tenth Circuit has described the four requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a)(2) as follows:

> (1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by the existing parties.[32]

"Failure to satisfy even one of these requirements is sufficient to warrant denial of a motion to intervene as a matter of right."[33] The Trust's Motion fails to demonstrate that its interests will be impaired or that it is not adequately represented by the existing parties.

A. The Receivership Does Not Impair Or Impede The Trust's Interests

Fed. R. Civ. P. 24(a)(2) requires a party seeking to intervene in litigation "to demonstrate that the disposition of this action may as a practical matter impair or impede their ability to protect their interest."[34] To meet this test, the party attempting to intervene must show that "impairment of its substantial legal interest is possible if intervention is denied.[35]

Here, the Motion is unaccompanied by any supporting affidavit or evidence to support its claims. Simply put, occupancy of, the net income generated by, and the value of the Twin Pines

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[31] 171 F.R.D. 1, 4 (D.D.C. 1997) (concluding that Section 21(g) of the Exchange Act does prevent intervention during post judgment proceedings, but denying proposed intervention under Fed. R. Civ. P. 24(a) and 24(b)).

[32] *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005).

[33] *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Serv.*, 736 F.2d 384, 386 (7th Cir. 1984).

[34] *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001).

[35] *Id.*

Property have increased since the Receiver's appointment.[36] Thus, in the absence of any decrease in the value of the Twin Pines Property, the Motion can only allege that "[t]he Court's Order Freezing Assets[37] entered June 25, 2012 impairs the Trust's right to pursue foreclosure of the Twin Pines Property and otherwise impairs its security interest."[38] However, being unable to immediately foreclose is not alone sufficient to show that the Trust's legal interest is being impaired, and the Trust has other less intrusive remedies to seek approval to pursue its claimed right to foreclose.

The Receivership estate should not be subject to piecemeal challenges by creditors and investors asserting their individual rights at the expense of the collective body of creditors and investors whose interests are represented by the Receiver. The Tenth Circuit has echoed this view in *Commodity Futures Trading Comm's v. Chilcott Portfolio Mgmt., Inc.*,[39] where it affirmed the District Court's denial of an investor's attempt to intervene in an action where a receiver had been appointed. In *Chilcott* the Tenth Circuit stated that when a court appoints a receiver to collect, administer, and distribute property, it will make "an order directing creditors to present their claims to the receiver."[40] Thus, "the claims procedures set up by the Receiver will permit [the investor] to protect his claimed interest in the assets presently under the control of the Receiver."[41]

The Receiver intends to set up a claims process with Court-approval and creditors, such

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36 Receiver Declaration at ¶ 5.

37 Docket No. 8.

38 Motion at p. 7.

39 725 F.2d 584 (10th Cir. 1984).

40 *Id.* at 586.

41 *Id.* at 587.

as the Trust, will be able to assert their interests in the property of the Receivership estate. Thus, at this early stage in the process, the Trust cannot establish that its interests have been or will be impaired without intervention. If the Receiver challenges the Trust's asserted interests in the Twin Pines Property, the Trust will have standing to contest any such challenge in that separate proceeding. Accordingly, the Receiver submits that allowing the Trust to intervene in this case is unnecessary and unwarranted.

III. The Trust Does Not Meet The Requirements For Intervention Under Fed. R. Civ. P. 24(b)

Rule 24(b) of the Federal Rules of Civil Procedure gives the Court discretion to allow permissive intervention upon motion by a party who "has a claim or defense that shares with the main action a common question of law or fact."[42] "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[43] In acting on a request for permissive intervention, it is proper to consider, among other things, "whether the intervenors' interests are adequately represented by other parties," whether they "will significantly contribute to the full development of the underlying factual issues in the suit," "'the nature and extent of intervenors' interest," and "their standing to raise relevant legal issues."[44] Here, the Trust does not have an interest in this case at large and it will contribute nothing to the development of the underlying factual issues in this case. As stated in the Motion, the Trust intends to participate in the case with respect to the Twin Pines Property,[45] the Trust's counsel is already counsel of record in this case and the Trust is receiving every docket entry via ECF as soon as it is filed. Thus, because the Trust has already expressed

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[42] Fed. R. Civ. P. 24(b)(1)(B).

[43] Fed. R. Civ. P. 24(b)(3).

[44] *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

[45] Motion at p. 8-9.

its intention to participate in the proceedings relevant to its alleged interests and is receiving notice of all activities in the case, granting the Trust unfettered access to intervene in and potentially participate in issues wholly unrelated to its alleged security interest in the Twin Pines Property is unwarranted.

CONCLUSION

Because Section 21(g) of the Exchange Act bars the Trust's intervention, and the Trust has not and cannot demonstrate that it meets the requirements for intervention the Court should deny the Motion in all respects.

DATED this 24th day of December, 2012.

DORSEY & WHITNEY LLP

/s/ Jeffrey M. Armington
Peggy Hunt
Chris Martinez
Jeffrey M. Armington
Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above RECEIVER'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE was served via email on this 24th day of December, 2012 on the following:

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EXHIBIT A

FILED
CLERK, U.S. DISTRICT COURT
2004 AUG 23 P 5:03
DISTRICT OF UTAH
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. MERRILL SCOTT & ASSOCIATES, LTD., MERRILL SCOTT & ASSOCIATES, INC., PHOENIX OVERSEAS ADVISERS, LTD., PATRICK M. BRODY, DAVID E. ROSS II, and MICHAEL G. LICOPANTIS, Defendants.	**CORRECTED[1] ORDER GRANTING MOTION TO INTERVENE** Case No: 2:02-CV-0039 TC District Judge Tena Campbell Magistrate Judge David Nuffer

Charles Cozean moved to intervene[2] in this SEC enforcement action. He claims to be a secured creditor as to one of the assets[3] in the possession of the receiver appointed to manage the defendants's assets.[4] The SEC does not dispute these facts and agrees the receiver's many efforts to sell the property have been futile.[5]

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[1] This order is a corrected version of the order filed August 18, 2004, as docket no. 313.

[2] Docket no. 276, filed May 25, 2004.

[3] Memorandum in Support of Charles Cozean's Motion to Intervene as of Right (Supporting Memorandum), docket no. 277, filed May 25, 2004, at ii. *See also* Memorandum in Opposition to Charles Cozean's Motion to Intervene as of Right (Opposing Memorandum), docket no. 290, filed June 21, 2004, ¶¶ 12-15 at 4-6, and attached Exhibits M-R.

[4] Docket no. 15, filed January 23, 2002.

[5] Declaration of David K Broadbent, docket no. 291, filed June 21, 2004, ¶ 7.

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This action has been pending since January 2002.[6] In the fall of 2002 and January 2003 the receiver and Cozean entered into agreements regarding the property.[7] Cozean complains that the receiver has established no claims procedure;[8] that his secured position accrues interest at the rate of $6,000 per month;[9] and that the receiver's reports show the property has declined in value by $200,000.[10]

DISCUSSION

The first issue the SEC raises to oppose the intervention is that 15 U.S.C. § 78u(g) presents an absolute bar to intervention:

> Notwithstanding the provisions of section 1407(a) of Title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

On first review, the statute seems inapplicable. It speaks only of 'consolidation.' Further, the cited "section 1407(a) of Title 28 " deals with multidistrict litigation. There is no mention of Fed. R. Civ. P. 24, governing intervention. Nonetheless, some cases hold that the statute

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[6] Docket no. 1, filed January 15, 2002.

[7] Declaration of David K Broadbent, ¶ 6.

[8] Supporting Memorandum at iii. This claims procedure was established by an order filed August 2, 2004, as docket no. 304.

[9] *Id.*

[10] Charles Cozean's Reply Memorandum in Support of Motion to Intervene, docket no. 298, filed July 15, 2004, at 9.

prevents any party from intervening in an SEC enforcement action.[11] The SEC relies on these cases. The SEC regards 15 U.S.C. § 78u(g) as an "impenetrable wall"[12] which a prospective intervenor cannot overcome.

There is, however, significant authority holding that 15 U.S.C. § 78u(g) does not limit rights of prospective intervenors. These appear to be the better reasoned cases. They examine the language of the statute:

> [T]he purpose of the subsection 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. It does not mention Fed. R. Civ. P. 24, nor does Rule 24 contain any clause giving special privileges to the SEC.[13]

The most recent case to consider intervention under the statute thoroughly examined the legislative history to see if Congress had an unstated intent to prohibit intervention. The court found that the statute was enacted to bar plaintiffs from mirroring the SEC case to obtain personal damages.

> Congress enacted section 21(g) [of the Act, codified as 15 U.S.C. § 78u(g)] to limit private plaintiffs from filing their own actions, "the allegations of which closely follow those of the [SEC's] action." S.Rep. No. 94-74, at 74 (1975), 1975 U.S.C.C.A.N. 179, 252. The drafters were concerned that by "merely rid[ing] along on the Government's case," the private actions would delay the enforcement action by "greatly increasing the need for extensive pretrial discovery," particularly with regard to damages which are not generally required in an enforcement action for injunctive relief. *Id.* at 76. The Senate also noted that the

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[11] *S.E.C. v. Wozniak*, No. 92 C 4691, 1993 WL 34702 (N.D. Ill. Feb 8, 1993), *S.E.C. v. Homa*, No. 99 C 6895, 2000 WL 1468726 (N.D. Ill. Sept. 29, 2000); *S.E.C. v. Egan*, 821 F.Supp. 1274 (N.D. Ill.1993); *S.E.C. v. Thrasher*, 92 CIV. 6987, 1995 WL 456402 (S.D.N.Y. Aug. 2, 1995).

[12] *Wozniak*, 1993 WL 34702, at *1.

[13] *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 950 (8th Cir. 1983), cited recently in *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 466 (S.D.N.Y. 2000).

> private plaintiffs' objective in filing suit was to receive damages and to adjudicate private disputes "between citizens," which is "very different" than the objective of an SEC enforcement action--to fulfill the legislature's "mandated scheme of law enforcement in the securities area." *Id.*[14]

The court found that these concerns of "riding on coattails" and claiming damages were not presented when a prospective intervenor sought to protect its voting rights as a majority shareholder. The court therefore permitted the intervention, even though intervention might delay the final disposition of the case.

> Therefore, because intervention is not specifically precluded by section 21(g) and the concerns cited by Congress are not implicated, this Court finds that, for the purposes of this case, section 21(g) does not preclude Inc. from attempting to intervene under Rule 24.[15]

Another recent case cited by Cozean allowed an intervenor to object to receiver's proposed action with regard to an asset under the receiver's control. That court specifically distinguished some of the cases the SEC cites now.

> [T]he court believes the factual scenario here is sufficiently different from *Homa* and *Wozniak* to warrant intervention. In *Homa,* a creditor of an entity partly owned by the defendant in a SEC enforcement action attempted to intervene in the suit. 2000 WL 1468726, at *2. The creditor attempted to recover from defendant payments owed on a contract. *Id.* In *Wozniak,* victims of a fraudulent scheme for which the SEC filed the enforcement complaint sought to intervene in an attempt to recoup their losses. In both situations the would-be intervenors attempted to recover from the very defendants the SEC was suing. As such, it was clear in both cases that the would-be intervenors were "coordinating" or "consolidating" their separate action against the defendants with the SEC's enforcement action. Here, U.S. Trust does not seek to intervene to coordinate or consolidate their "action"

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[14] *S.E.C. v. Hollinger Int'l., Inc.*, No. 04 C 0336, 2004 WL 422729, *2 (N.D. Ill. March 2, 2004). This concern for complication of issues was reflected in *S.E.C. v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2nd Cir. 1973) which declined to permit intervention to private plaintiffs seeking money damages from the defendant without considering the effect of 15 U.S.C. § 78u(g).

[15] *S.E.C. v. Hollinger Int'l., Inc.* 2004 WL 422729, at *3.

> with the SEC's action against Heartland. Instead, it attempts to challenge the actions of the Receiver. Thus, U.S. Trust seeks not to bring a claim against the defendant, as in *Homa* and *Wozniak*.[16]

The SEC is seeking to bar Cozean from complaining about the receiver's actions with regard to property in which Cozean has a secured interest. Cozean is not seeking recovery of damages against Merrill Scott, nor does he allege a claim that tracks the SEC's allegations in any way. Cozean's claim in this case is not similar to the proposed intervention claims in the cases on which the SEC relies. The language of 15 U.S.C. § 78u(g) does not deal with intervention and the purpose of this intervention does not contravene the expressed legislative intent. Therefore, Cozean's right to intervene will be analyzed under Fed. R. Civ. P. 24.

> [A]n applicant may intervene as of right if: (1) the application is "timely"; (2) "the applicant claims an interest relating to the property or transaction which is the subject of the action"; (3) the applicant's interest "may as a practical matter" be "impair[ed] or impede[d]"; and (4) "the applicant's interest is [not] adequately represented by existing parties." This circuit follows "a somewhat liberal line in allowing intervention."[17]

Timeliness: This application was filed nearly two and one half years after the case was filed. However, the grievance (failure of the receiver to take action with regard to the property) only arose after the agreements entered into while the case has been pending.[18] Part of the concern with timeliness is that a late filed claim may interfere with adjudication of the principal case. The intervenor seeks relief collateral to the principal case, so there is no concern of

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[16] *S.E.C. v. Heartland Group, Inc.*, 2003 WL 1089366, *3 (N.D.Ill. 2003).

[17] *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (citations omitted).

[18] The SEC's argument that Cozean should have intervened rather than believe he would recover his asset at an earlier time seems to imply the agreements were a waste of time for which Cozean should be punished. Opposing Memorandum at 9. Prohibiting intervention now would unwisely discourage parties from attempting interim arrangements.

interference.

Interest. The applicant clearly has an interest in property in control of the court through the receiver. The SEC does not argue to the contrary.[19]

Impairment. The allegation of the receiver's continual holding of the property demonstrates a sufficient impairment. The SEC argues that the claims procedure recently established obviates the need to intervene.[20] However, this claims procedure is designed to return funds "to clients or investors who may have a legitimate claim to the Receivership Assets."[21] The more complex issues presented by Cozean's secured creditor status are more suited to conventional litigation. The supervision of the court over the intervention case and Receiver's claims process will ensure neither Cozean nor claimants are impaired.

Inadequate representation. The receiver and Cozean are, as equitable owner and secured party, adverse. The existing parties do not represent interests consistent with Cozean.

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19 Opposing Memorandum at 9-12.

20 *Id.* at 10.

21 Motion of Receiver to Approve Claims Procedure and Establish a Claims Bar Date for Investors, docket no. 303, filed July 15, 2004, ¶ 5. See also ¶ 10 a., and the CLIENT/INVESTOR claim form at http://www.merrillscott.com/client_Investor_claim_form.pdf.

ORDER

IT IS HEREBY ORDERED that the motion to intervene[22] is GRANTED.

IT IS FURTHER ORDERED that Cozean shall file and serve his complaint in intervention[23] on or before September 7, 2004, and that the motion for summary judgment and accompanying papers lodged in the file on May 25, 2004, shall, *after* the complaint in intervention is filed, be filed by the Clerk of the Court.

DATED this 23rd day of August 2004.

BY THE COURT:

David Nuffer
U.S. Magistrate Judge

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[22] Docket no. 276, filed May 25, 2004.

[23] While the memorandum in support of Cozean's motion for summary judgment, lodged in the file, contains paragraphs outlining Cozean's claim (Fed R. Civ. P. 24(c)), the motion is a *paper* (Fed. R. Civ. P. 7(b)), not a *pleading* (Fed R. Civ. P. 7(a)). Cozean should file a pleading stating his claim for relief (Fed. R. Civ. P. 8(a)), and the parties to the suit should have the opportunity of pleading to a complaint in intervention. Framing the issues in the pleadings before motions will help define the issues.

alt

United States District Court
for the
District of Utah
August 24, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-00039

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF, v. NOVUS TECHNOLOGIES, LLC, a Utah limited liability company, RALPH W. THOMPSON, JR., DUANE C. JOHNSON, RCH2, LLC, a Utah limited liability company, ROBERT CASEY HALL and ERIC J. WHEELER DEFENDANTS, and U.S. VENTURES, LC, a Utah limited liability company, U.S. VENTURES INTERNATIONAL, LLC, a Utah limited liability company, ROBERT L. HOLLOWAY, ONLINE STRATEGIES GROUP, INC., a Delaware corporation, and DAVID STORY RELIEF DEFENDANTS.	Case No. 2:07 cv 0235 DB **ORDER AND MEMORANDUM DECISION** Judge Dee Benson Magistrate Judge Brooke C. Wells

JPMorgan Chase Bank seeks to intervene[1] in this SEC enforcement action pursuant to Federal Rule 24(b)(2).[2] Chase argues that it should be allowed to intervene because no party in the case protects its interests. According to Chase, part of the money that was invested in the Ponzi scheme which is at the heart of the SEC enforcement action came from fraudulent loans obtained from Chase. Thus, by intervening Chase hopes to trace those funds it believes belong to Chase that may be part of the assets collected by the receiver.[3] Chase's proposed Complaint seeks a "constructive trust in assets recovered by the Receiver that would be payable to Chase's borrowers."[4] The SEC opposes Chase's attempt to intervene arguing that section 21(g) of the Securities Exchange Act of 1934 is an absolute bar to intervention. The SEC further argues that if Chase intervenes it will unduly complicate the case and adversely affect the current posture of the case, which according to the SEC is close to resolution. Notably, there is a split of authority across the country regarding the SEC's position concerning Section 21(g). After considering the varied and contrasting case law, the parties arguments and memoranda, and after hearing oral argument,[5] the court exercises its discretion under Rule 24(b)(2)[6] and DENIES Chase's motion to intervene.

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[1] Docket no. 141, filed July 31, 2007.
[2] *See* Fed. R. Civ. P. 24(b)(2).
[3] At the time of this order Chase believes its losses are approximately $3.8 million.
[4] Reply mem. p. 2.
[5] Oral argument was held on December 18, 2007. The SEC was represented by *inter alia*, Karen Martinez and Chase was represented by John Beckstead.
[6] *See* *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996) (stating that the decision of whether or not to allow intervention under Rule 24(b)(2) is a matter within the district court's discretion).

I. Background

On April 11, 2007, the SEC brought this enforcement action and the court entered a Temporary Restraining Order freezing assets and prohibiting the destruction of documents. The SEC's Complaint alleges Defendants violated various securities laws and developed a Ponzi scheme to hide the losses from the illegal securities.[7] One of the Defendants, Eric Wheeler, was employed by Chase and allegedly made fraudulent loans to investors that were used to invest in Defendants Novus and RCH2. During the course of discovery the SEC determined that of the sixty-seven investors in Novus, approximately twenty-three obtained lines of credit from Chase.[8] And, approximately eleven of the forty-five investors in RCH2 obtained similar lines of credit from Chase. Chase alleges that it has suffered losses of approximately $3.8 million. During discovery the SEC also determined that investors obtained loans from other financial institutions which were then invested in Novus, RCH2 and their related entities. On May 16, 2007, the court appointed Lon A. Jenkins of the firm Ray Quinney & Nebeker as Receiver for Novus, RCH2, and their related entities.[9] At issue now is whether or not Chase should be permitted to intervene and be given the opportunity to place a constructive trust on funds it argues came from fraudulent loans.

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[7] *See* Compl. 2-10
[8] *See* Op. p. 3.
[9] Docket nos. 61 and 62.

II. Discussion[10]

Chase seeks to intervene in this action pursuant to Rule 24(b)(2). Rule 24(b)(2) states, "Upon timely application anyone may be permitted to intervene in an action: (2) when an applicant's claim or defense and the main action have a question of law or fact in common."[11] Chase asserts that it is the largest claimant to the receivership estate yet, no one in this action represents Chase's interests including the Receiver. According to Chase, the "positions of Chase and the borrowers/investors are adverse and in conflict"[12] because Chase seeks priority over the claims of the borrowers/investors. Chase argues intervention is appropriate under Rule 24(b)(2) because its application is timely, there are "extensive common questions of fact and law"[13] and intervention will not cause delay or prejudice to the original parties. In support of its position Chase primarily relies upon two cases. A decision out of the District of Kansas permitting intervention in an SEC enforcement action, *SEC v. Kings Real Estate Investment Trust*,[14] and a

[10] On December 20, 2007, following the hearing held on Chase's motion, the court received a memorandum from the Receiver opposing Chase's intervention. Chase filed a corrected response opposing the Receiver's memorandum on December 27, 2007 seeking to strike the Receiver's memorandum as improper. As noted by Chase, "The Post-Hearing Brief does not present any new law or facts that were overlooked in the other memoranda or in oral argument." Chase's Rep. p. 2. Therefore, the court finds it unnecessary to strike the memoranda. Moreover, Chase has had the opportunity to respond, so there would be no prejudice to Chase in not striking the memorandum.

[11] Fed. R. Civ. P. 24(b)(2). Congress proposed an amendment to this rule that was to take effect on December 1, 2007. The proposed amendment, however, is essentially the same save for a few organizational changes. The court cites to the wording of the rule in place at the time of Chase's motion which is prior to any amendment, but the proposed changes would not effect the court's decision.

[12] Mem. in Supp. p. 3.

[13] *Id.* at p. 2.

[14] 222 F.R.D. 660 (D.Kan. 2004).

decision reached by Magistrate Judge Nuffer in *SEC v. Merrill Scott & Assoc.*, a case from this court.[15]

In opposition the SEC argues that Chase's attempt to intervene is barred by Section 21(g) of the Securities Exchange Act of 1934 and Rule 24(a) does not provide a right to intervene.[16] The SEC next argues that even if the court finds that 21(g) is not a complete bar to intervention, the court "should preclude Chase from intervening because doing so would needlessly complicate this litigation and distract the Commission from its enforcement efforts."[17] Finally, the SEC asserts that Chase should be precluded from intervening because "there is no common question of law or fact between the main enforcement action and the allegations in Chase's proposed complaint."[18]

1. Section 21(g)

The SEC argues that Chase's motion to intervene is barred by statute, specifically section 21(g) of the Exchange Act. Section 21(g) of the Exchange Act (15 U.S.C. § 78u(g)) provides:

> (g) Consolidation of actions; consent of Commission
> Notwithstanding the provisions of section 1407(a) of Title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such actions may involve common questions of fact, unless such consolidation is consented to by the Commission.[19]

[15] *See* 2:02-CV-039 TC.
[16] *See* Op. p. 2.
[17] *Id.*
[18] *Id.*
[19] 15 U.S.C. § 78u(g) (2002).

In support of this argument the SEC relies on a line of cases that has adopted the general position that entities seeking to intervene in an action brought by the SEC are "blocked from entering [the] lawsuit by an impenetrable wall, Securities Exchange Act of 1934 . . . § 21(g), 15 U.S.C. § 78u(g)."[20]

The SEC also cites to the Supreme Court case *Parklane Hosiery Co. v. Shore*[21] as support for its position. *Parklane* involved a stockholder's class action suit for damages against a corporation, its officers, directors and other stockholders who allegedly issued a materially false and misleading proxy statement in violation of the securities laws.[22] The SEC filed a separate suit against the same defendants alleging essentially the same violations of law as those alleged in the shareholder suit. After the SEC prevailed on declaratory judgment in the separate action, the shareholders sought to apply the doctrine of collateral estoppel preventing the defendants from relitigating the issue of whether or not the proxy statements were materially false and misleading.[23] In essence the plaintiffs sought the offensive use of collateral estoppel. The Supreme Court held that the use of offensive collateral estoppel-as sought by the plaintiffs-would not violate the Seventh Amendment right to a jury trial.

[20] *SEC v. Wozniak*, 1993 U.S. Dist. Lexis 1241 *1 (N.D.Ill Feb. 8, 1993); *see also SEC v. Homa*, 2000 U.S. Dist. Lexis 14582 *6 (N.D.Ill. September 29, 2000) (concluding that the plain language of Section 21(g) bars intervention in a Commission enforcement action); *SEC v. Thrasher*, 1995 U.S. Dist. Lexis 10775 *9 (S.D.N.Y. Aug. 2, 1995) (holding that section 21(g) bars the defendant's third-party claims and cross-claims).
[21] 439 U.S. 322 (1979).
[22] *See id.* at 322.
[23] *See id.*

The SEC specifically relies on dicta found in a footnote in the *Parklane*[24] decision. In reference to 15 U.S.C. § 78u(g) the Supreme Court stated "consolidation of a private action with one brought by the SEC without its consent is prohibited by statute."[25] According to the SEC, the Supreme Court's statement is consistent with the purpose of the statute, which is to "preclude any interference by private parties in Commission law enforcement proceedings without Commission consent."[26] Therefore, Chase should not be allowed to create interference in this enforcement proceeding by intervening.

In contrast to those cases cited to by the SEC are a number of cases holding that 15 U.S.C. § 78u(g) does not limit the rights of prospective interveners. Generally these cases examine the language of the statute and the purpose behind it. For example, the Eighth Circuit has stated:

> the purpose of the subsection 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. It does not mention Fed. R. Civ. P. 24, nor does Rule 24 contain any clause giving special privileges to the SEC.[27]

The Tenth Circuit has not specifically addressed whether or not Section 21(g) is an absolute bar to intervention. In *S.E.C. v. Kings Real Estate Investment Trust*,[28] however, a sister

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[24] 439 U.S. 322, 332 n. 17.
[25] *Id.* at 332 n. 17.
[26] Op. p. 5.
[27] *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 950 (8th Cir. 1983); *see also* *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 466 (S.D.N.Y. 2000).
[28] 222 F.R.D. 660 (D.Kan. 2004).

court in this circuit, the District of Kansas, held that Section 21(g) does not serve as an impenetrable wall to intervention. That court thoroughly analyzed the differing case law and the legislative history behind the statue in finding that "Section 21(g) does not automatically preclude intervention in S.E.C. enforcement actions."[29]

> The holding in *Wozniak* notwithstanding, the Court finds no support for the proposition that Congress, by including only the words "coordinate" and "consolidate" in the language of Section 21(g), meant for that provision to apply to all possible interventions in S.E.C. enforcement actions . . . "there is no persuasive authority which suggests that [S]ection 21(g) . . . bars intervention in all SEC enforcement actions."[30]

The court finds the reasoning in *Kings Real Estate* persuasive. The Supreme Court in *Parklane Hosiery*,[31] does reference Section 21(g) but only to the extent that the Supreme Court appears to confirm that Section 21(g) does not permit consolidation or coordination of SEC enforcement actions with private suits. The Supreme Court, however, does not address intervention like that sought in this case. Moreover, the legislative history behind the statute, the plain language of the statute and Rule 24(b) do not support the SEC's position that Section 21(g) is an absolute bar to intervention.[32]

Accordingly, the court concludes that Section 21(g) is not a complete bar to intervention by Chase.

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[29] *Id.* at 664.

[30] *Id.* at 667 (quoting *S.E.C. v. Prudential Sec. Inc.*, 171 F.R.D. 1, 3 (D.D.C. 1997) (rejecting Section 21(g) as a bar to non-consensual intervention in certain S.E.C. actions) (alteration in original)).

[31] 439 U.S. 322, 99 S.Ct. 645 (1979).

[32] *See Kings Real Estate*, 222 F.R.D. 660 for a detailed analysis of the legislative history behind the statute.

2. Rule 24(b)(2)

Rule 24(b)(2) states, "Upon timely application anyone may be permitted to intervene in an action: (2) when an applicant's claim or defense and the main action have a question of law or fact in common."[33] Chase argues intervention should be allowed because its application is timely and there are common questions of fact and law. In contrast, the SEC argues that there is no common question of law or fact between the main enforcement action and Chase's proposed complaint.

This case was filed in April 2007 and Chase's motion was filed in July 2007. Therefore the court finds Chase's motion to intervene is timely.

Chase alleges that the following are common issues of law and fact: (1) what type of conversations occurred between Eric Wheeler and the investors? (2) What representations were made to Chase's borrowers? And (3) how will the assets be distributed?[34] Admittedly there does appear to be some overlap between the Commission's fraud claim and Chase's interest in showing the borrowers/investors knowingly cooperated with Mr. Wheeler in creating the fraud scheme. Despite the appearance of some overlap of issues, however, the court agrees with the SEC that Chase's complaint focuses on the investors and their alleged fraudulent conduct in obtaining loans not whether or not the federal securities laws were violated by Defendants. Chase's proposed complaint is more concerned with compensating an investor-Chase, although it

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[33] Fed. R. Civ. P. 24(b)(2).
[34] *See* Chase's Rep. p. 7.

may have been an unwilling investor-not protecting the public or forcing Defendants to give up their unjust enrichment.[35] As noted by the Commission, the primary purpose of enforcement actions is not to compensate investors.[36]

Accordingly, the court finds that the main action brought by the SEC and Chase's proposed complaint do not share the requisite common issue of law and fact.

Finally, the court is also concerned with the potential for complicating this case. In *SEC v. Merrill*, Judge Nuffer allowed a secured creditor to intervene based upon a right to intervene under Rule 24(a) two and a half years into the case following interim agreements between the intervener and receiver regarding the property. In essence, the intervener in *Merrill* was seeking a "place at the table" toward the end of the case. Here, Chase, most likely at best an unsecured creditor,[37] seeks permissive intervention at an early phase. If the court were to allow Chase to intervene, then other financial institutions which may be in a similar situation as Chase,[38] would likely seek to intervene. And, certainly the investors whose purported assets would be affected by a constructive trust would seek to intervene. The court believes it is best to consider the question of who owns which assets after they have been marshaled by the Receiver not while the process is ongoing.

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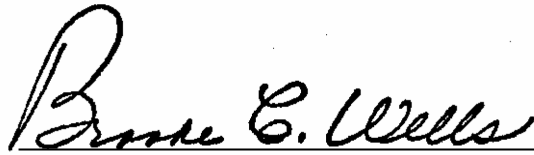
[35] *See generally* *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1952).
[36] *See* *SEC v. Cavanagh*, 445 F.3d 105, 117 (2nd Cir. 2006); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2nd Cir. 1978) ("However, the primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched.").
[37] There is some dispute regarding whether or not Chase has a claim upon the receivership estate. The court makes no determination of Chase's status at this time.
[38] *See* Op. p. 4.

Accordingly, for the forgoing reasons Chase's Motion to Intervene is DENIED.

DATED this 10th day of January, 2008.



Brooke C. Wells
United States Magistrate Judge