UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC., d/b/a PAR FUNDING, *et al.*,

Defendants

_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO: "NON-PARTY, LEAD FUNDING II, LLC, MOTION TO INTERVENE AND LIFT LITIGATION INJUNCTION TO ALLOW IT TO PROCEED WITH FORECLOSURE ACTION IN COLORADO STATE COURT" [DE 386]

The Court should deny the Motion to Intervene filed by Movant, Non-Party Lead Funding II, LLC [D.E. 386], for the reasons set forth below.

I. The Motion Must Be Denied For Failure To Comply With Rule 24(c)

Lead Funding II, LLC seeks to intervene as of right under Federal Rule of Civil Procedure 24. Rule 24(c) requires that a motion to intervene be accompanied by the pleading the movant seeks to file and litigate in the action if permitted to intervene.[1] Here, the movant has failed to file any such accompanying motion. Accordingly, the Court should deny the motion to intervene.

[1] Rule 24 provides as follows:

> (c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

II. Even If the Movant Had Complied With Rule 24(c) – And It Did Not – Its Motion to Intervene as Of Right Would Have Been Futile

Even assuming, *arguendo*, that Lead Funding II had attached to its Motion the pleading it seeks to file in this case if permitted to intervene – and it did not –their effort would have been futile. Without seeing the Motion they seek leave to file if permitted to intervene, it is, quite frankly, impossible to fully respond. However, we will endeavor to at least preliminarily address it here and will respond more fully once – if ever – Lead Funding II files an amended Motion in compliance with Rule 24(c).

The Movant seeks leave to intervene in this case to become a party – as of *right* pursuant to Federal Rule of Civil Procedure 24(a), apparently to engage in litigation with the Receiver over whether a state court case in Colorado should be litigated by the Receiver. To accomplish this, the movant would apparently also have to include in its motion a request for relief from the Court's Orders appointing a Receiver, issuing an asset freeze, and staying litigation related to the Receivership Estate. In this regard, it appears the Movant seeks to release Receivership assets from the asset freeze and to release Par Funding from the stay of litigation with respect to a state court foreclosure action pending in Colorado – and for an Order from this Court "allow[ing] it [movant] to proceed with its Foreclosure Action against … Par Funding." (Motion, DE 386, at Para. 10). ***In other words, it seeks to lift the litigation stay this Court issued so that it can force the Receiver to spend investor money defending a lawsuit in Colorado.***

A. Rule 21(g) Bars Intervention In This Case To Litigate Against The Receiver

Third party actions are barred by Section 21(g) of the Securities Exchange Act of 1934 which provides:

> 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.

15 U.S.C. § 78u(g). The Commission does not consent to the movant litigating its dispute with the Receiver in the Commission's enforcement action.

B. The Movant Has Not – And Cannot – Meet Its Burden For Mandatory Intervention Under Rule 24(a)

Turning to Rule 24(a), which is the Rule providing for intervention as of right, "Rule 24 of the Federal Rules of Civil Procedure provides that the Court must permit someone to intervene who brings a timely motion and 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.'" *Qantum Communs. Corp. v. Star Broad., Inc.*, No. 05-21772-CIV, 2009 U.S. Dist. LEXIS 92868, 2009 WL 3055371 (S.D. Fla. Sept. 14, 2009).

To establish a right to intervene under Fed. R. Civ. P. 24, the prospective intervenor must establish: "1) that the application to intervene is timely; 2) that the intervenor has an interest relating to the property or transaction that is the subject of the action; 3) that the intervenor is situated so disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and 4) that the intervenor's interest is not adequately represented by the existing parties to the suit." *Id.* (citing *Purcell v. BankAtlantic Financial Corp.*, 85 F. 3d 1508, 1512 (11th Cir. 1996)).

The Movant has established ***none*** of these facts.

1. The Movant Has Not Established His Motion Is Timely

The threshold question under Rule 24(a) is whether the motion to intervene is timely. If it is not, the motion must be denied. *See National Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 365 (1973) (holding that a district court decision that a motion to intervene is untimely should not be reversed unless the district court abused its discretion in so deciding). Accordingly, we begin with the untimeliness of the motion.

The Movant has the burden of demonstrating his motion is timely. Instead of addressing any of the four factors for assessing timeliness, the Movant simply makes the hollow assertion that "Lead Funding makes this application timely, just three (3) months after the Court entered its Order Staying Litigation and the Colorado state court entered its Order staying the Foreclosure Action." (DE 386 at Para 17). They argue nothing more. Their argument is wholly insufficient.

Three months does not a timely motion to intervene automatically make. In the Eleventh Circuit, there is not a black and white test based on the number of months that have transpired before filing. Indeed, motions to intervene after a movant knew of the action for two months have been deemed untimely. *See, e,g., In re: CP SHPS Ltd. Securities Litigation*, Case No. 05-cv-1656 (M.D. Fla. June 18, 2008) (denying motion to intervene as untimely when intervener had known of case for almost three months before filing); *SEC v. Marin*, Case No. _, _ (S.D. Fla.) (denying motion to intervene as untimely when intervenor had known of case for 2 months before filing a motion to intervene).

Instead, in this Circuit, Courts consider the following four factors for determining whether a motion to intervene is timely:

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition

> is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Campbell v. Hall-Mark Elecs. Corp., 808 F.2d 775, 777 (11th Cir. 1987).

Here, the Movant addresses only the first factor, claiming it has been three months since the Court entered the litigation stay that purportedly impacts it. The Movant fails to address the remaining three factors. The Movant does not address the extent of prejudice to the Commission, the Receiver, and the Individual Defendants in this case as a result of the Movant's failure to apply three months ago. Nor does the Movant address the extent of prejudice to the Movant if its petition to intervene is denied. Indeed, since the Movant admits in his motion that his pressing need is simply that he wants to collect on a judgment, it is difficult to imagine how waiting to collect money is causing ***prejudice*** – *let alone prejudice that would outweigh the prejudice to the Receiver if he is forced to litigate a case with the movant, the investors/victims in this case whose money would be used to fuel that litigation, and the Commission, whose efforts to enforce the securities laws would be temporarily sidelined while address this ancillary litigation over a foreclosure case in Colorado seeking potential funds and assets subject to the disgorgement Order the Commission seeks in its Complaint in this case*. Nor does the Movant address the existence of any unusual circumstances militating either for or against a determination that the application is timely.

As such, the Movant has not – and cannot – meet its burden for demonstrating the four factors warrant a finding that the motion is timely. Accordingly, the Motion must be denied. ***If*** the Movant files an amended motion and attempts to address these factors, then the Receiver, the Commission, and the Individual Defendants will be afforded an opportunity to respond to whatever arguments the Movant makes. As of now, no such arguments have even been attempted, and therefore the Court must deny the Motion.

Moreover, if a Movant could intervene as of right in a regulatory enforcement action such as this one by simply claiming it is prejudiced because it wants to collect money from a Receivership entity or wants to litigate against a Receivership entity, than nearly anyone could intervene as of right in a Commission enforcement action by simply identifying themselves as a potential creditor of the Receivership. Were that the law, and thankfully it is not, then Commission cases would be filled with and derailed by creditor, investor, and other third party claims against Receivership entities – resulting in the depletion of investor funds/Receivership assets to litigate those matters and the derailment of the securities enforcement action that is before this Court on the Commission's Complaint. In this case, where there are about 2,000 cases pending already, the fact that a movant is a litigant in a lawsuit with a Receivership entity cannot justify the timeliness of a motion to intervene or intervention as of right under Rule 24(a). Such wholesale intervention is not the law.

Because the Movant has not demonstrated the timeliness of its Motion, the Court need not address the remaining factors under Rule 24 and should deny the Motion to Intervene. *SEC v. Callahan*, 2 F.Supp.3d 427, (S.D.N.Y. 2014) (denying Motion to Intervene: "In addition, the Court finds that [Movant] RBS Citizens will suffer minimal prejudice, if any, if its motion to intervene is denied. By virtue of the Asset Freeze in the March 27, 2012 Order, the status quo has been preserved with respect to Hillside and Cromwell AAA, thereby protecting RBS Citizens' collateral. Excluding speculation by RBS Citizens, the Court finds no evidence suggesting that Brian F. Callahan is diverting income from either the Property or the Business elsewhere, save to pay the obligations that Hillside owes to RBS Citizens and to make tax payments to the Town of Cromwell. As RBS Citizens has failed to satisfy the first requirement under Fed.R.Civ.P. 24(a), it cannot intervene as a right and the court need not consider Rule 24(a)'s remaining criteria."). *See also*

Disability Advocates, Inc. v. Paterson, 03–CV–3209 NGG, 2009 WL 5185807, at *6, n. 14 (E.D.N.Y. Dec. 23, 2009) ("Having denied intervention as of right on timeliness grounds, the court need not consider the other requirements *439 under Rule 24(a).... [F]ailure to satisfy even one requirement defeats a claim to intervention as of right.") (citing *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir.2001)).

2. The Movant Has Not Met Its Burden Of Demonstrating The Remaining Factors Required For Intervention As Of Right

Assuming once again that the Movant had filed a pleading that it seeks to file in this case if permitted to intervene, as Rule 24(c) requires, and assuming the Movant had demonstrated its Motion is timely under the factors required in this Circuit (which, we posit, it cannot do), then the Movant would have had to accomplish a third, fourth, and fifth hurdle to intervene – one it did not even attempt to do.

Specifically, a movant seeking intervention under Rule 24(a) must demonstrate the three additional requirements under Rule 24(a), which requirements are not in dispute – namely, that Movant has an interest relating to the property or transaction which is the subject of the action; Movant is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and Movant's interest is represented inadequately by the existing parties to the suit. *Fox v. Tyson Foods, Inc*. 519 F.3d 1298, 1302 (11th Cir. 2008). "[I]ntervention of right will not be allowed unless all requirements of the Rule are met" *Sokaogon Chippewa Community*, 214 F.3d at 946 I. Here, none are met.

a. The Movant Fails To Demonstrate A Substantially Protectible Interest In The Subject Matter Of This Case

The interest asserted by seeking intervention must be a 'significantly protectable interest.'" *Coopers & Lybrand*, 98 F.R.D. at 415 (citing *Donaldson*, 400 U.S. at 531). A "significantly

protectable interest" has been defined as a "direct, substantial, and legally protectable interest." *Hawes v. Gleicher*, 745 F.3d 1337, 1339 n.5 (11th Cir. 2014). In determining the sufficiency of the interest, this Circuit requires that the intervenor "must be at least a real party in interest in the transaction which is the subject of the proceeding" and "must have a direct, substantial, legally protectable interest in the proceeding." *Worlds v. Dept. of Health and Rehabilitative Servs.,* 929 F.2d 591, 594 (11th Cir.1991) (quoting *Athens Lumber Co. v. Fed. Election Commission*, 690 F.2d 1364, 1366 (11th Cir.1982)). Thus, a movant must demonstrate it has an interest in the subject matter of the proceeding in which it seeks to intervene that is direct, substantial and legally protectable. *Id*.

A legally protectable interest requires more than an economic or general interest; substantive law must recognize the interest as belonging to or being owned by the movant. *U.S. v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 710 (11th Cir. 1991). In this regard, the Eleventh Circuit has held that a legally protectable interest is one that "derives from a legal right." *Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308, 1311, n. 5 and 6 (11th Cir. 2005) (collecting similar cases and noting that in *S. Florida Water Mgmt.*, farming corporations were allowed to intervene in an action requesting that the federal court interpret a state regulation because there was a law explicitly gave the farming corporations a legal right to participate in any administrative proceedings interpreting the regulation).

The Movant does not claim, let alone demonstrate, that it has a "legally protectable" interest emanating from substantive law. Instead, the Movant asserts a financial interest in suing Par Funding in a foreclosure action so it can collect on funds it claims it is owed. This is not sufficient. *U.S. v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 710 (11th Cir. 1991); *Fishing Rights Alliance, Inc. v. Pritzer*, Case No. 15-cv-1254, 2016 WL 11491618 (M.D. Fla. June 8, 2016)

(denying motion to intervene on grounds movant "has not identified a 'legally protectable' interest emanating from substantive law" and [c]onsequently, it has failed to demonstrate it is entitled to intervene….").

If simply wanting to litigate against a Receivership entity was sufficient to intervene, it would drain the resources of the judiciary as well as the Commission. Every single potential claimant and every party in litigation with any Receivership entity would be able to intervene.

b. The Movant Fails To Demonstrate That Its Legally Protected Interest Would Be Adversely Impacted The Litigation Stay

Even if the Movant had demonstrated a legally protected interest in this *securities enforcement* proceeding (and it did not), it fails to demonstrate how that legally protected interest will be adversely impacted by the litigation stay remaining in effect at this time. The Movant claims it will be adversely impacted by the disposition of this proceeding without the Movant's intervention for one reason – it will "impede its ability to foreclose the Property at issue in its Foreclosure Action." This alleged adverse impact has nothing to do with the securities claims at issue in this case or the Receiver's ability under the Court Order to protect, preserve, and marshall the Receivership assets. *See In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006) ("[T]he plain language of Rule 24 requires the intervenor's interest to be based on the action pending before the court."). Further, the litigation stay and the asset freeze the Court has entered in this case maintain the status quo. Thus, there is no risk to the Movant or the investors that the Receivership estate will be misappropriated to the detriment of the Movant.

c. The Movant Fails To Demonstrate That The Receiver or the Commission Inadequately Represent Its Interests In This Case

The Movant must also demonstrate that the parties to this case do not adequately represent its interests. Fed. R. Civ. P. 24(a)(2). Here, the Movant simply states that no party to this action

adequately represents its interests, and nothing more. Absent a review of the pleading Rule 24 requires the Movant to file with the motion to intervene, it is impossible to determine whether the Receiver, the Commission, and/or the Individual Defendants adequately or inadequately represent the Movant's interests as reflected in that yet-to-be filed pleading.

The Court should deny this Motion. As the Court in *Callahan* explained in denying a Motion to Intervene to lift a litigation stay and asset freeze in a similar situation:

> The Court finds that permissive intervention would be inappropriate in this case, as '[c]oncerns about undue delay and complication resulting from permissive intervention are acute where the Government, and particularly the SEC, is a party to the underlying action.' *SEC v. Bear, Stearns & Co. Inc.*, 03 CIV.2937 WHP, 2003 WL 22000340, at *3 (S.D.N.Y. Aug. 25, 2003).
>
> Here, if RBS Citizens were permitted to intervene to exercise its rights to its collateral, it would cause significant interference with the Receiver's ability to administer the Receivership Estate and recover assets for the Investors. In this regard, $228,000 of the monies the Investors contributed to the Callahan Funds was allegedly diverted to Cromwell AAA and Hillside. Allowing RBS Citizens to intervene for the purpose of unfreezing these assets would prejudice the Receiver in that he would be powerless to prevent RBS Citizens from foreclosing or liquidating the Property and the Business. Indeed, the Receiver needs to be able to determine whether a more lucrative sale of the Property and the Business is possible, thereby maximizing the funds that will be available for the Investors to recover once Hillside's obligations to RBS Citizens have been satisfied.
>
> Accordingly, the Court denies the motion to intervene by RBS Citizens.

2 F.Supp.3d at 439.

Similarly, if the Movant here were permitted to intervene to exercise its rights to Receivership assets, it would cause significant interference with the Receiver's ability to administer the Receivership Estate and recover assets for the Investors. The Movant does not address this necessary element in its Motion. If it files an amended Motion, the Receiver and the Commission will expend the resources to address this in more detail. Allowing the Movant to intervene for the purpose of unfreezing Receivership assets – which we argue belong to the victim

investors in this case – would prejudice the Receiver, would, according to the Movant, result in the foreclosure of Receivership assets, and would prejudice the Commission's ability to obtain disgorgement for the ultimate benefit of the investor victims.

When a claims distribution process occurs in this case, the Movant, the investors, and all creditors have an opportunity to be heard before this Court. That is how an orderly Receivership operates. For now, the Receiver needs to be permitted to do his job, unfettered by ancillary lawsuits that will drain the investors' funds, and third parties such as the Movant who come to this Court essentially arguing their interest is superior to those of the victims in this case cannot intervene simply on those grounds. Instead, they will have an opportunity to be heard, during the claims distribution process. The asset freeze and litigation stay Order will maintain the status quo and maintain the protection of the assets until that time has come.

III. The Movant Cannot Meet Their Burden For Lifting The Litigation Stay

As set forth in Section I above, the Movant failed to comply with Rule 24(c) by failing to file with its motion to intervene the pleading it seeks leave to file in this case. However, based on the motion to intervene, which makes passing reference to the burden for lifting a litigation stay, we are compelled to note that the Movant will likely fail in its endeavor to take a priority position over the investors and other creditors and litigants interested in this case.

The Movant claims that to lift a litigation stay, a court should consider "(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim." *SEC v. Stanford Int'l Bank Ltd.*, 424 Fed. Appx 338, 341 (5th Cir. 2011) (quoting *SEC v. Wencke*, 742 F. 2d 1230, 1231 (9th Cir. 1984)).

As to the first factor, the Movant asserts, with no support, that it will suffer substantial injury because the price of the property at issue in the Colorado litigation could fluctuate and the Movant could essentially suffer a financial loss. The Movant makes no further argument – and misses the mark completely.

"The first *Wencke* factor balances the interests of the Receiver in preserving the status quo against the interests of the moving party." *SEC v. Illaramendi*, 2012 WL 234016, at *5. "The purpose of a litigation stay is to enable the receiver to 'do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant .' " *Id.* (quoting *Acorn Tech. Fund,* 429 F.3d at 443). "The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets," and requiring the receiver to defend lawsuits drains receivership assets. *Liberte Capital Grp., LLC v. Capwill,* 462 F.3d 543, 551 (6th Cir.2006); *see also FTC v. Med Resorts Int'l, Inc.,* 199 F.R.D. 601, 609 (N.D.Ill.2001) (permitting ancillary litigation would "[n]ot only ... take [the receiver's] attention away from other tasks, but the assets of the receivership estate would quickly be diminished"). "Bearing in mind these realities, '[a] district court should give appropriately substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate.' *Illaramendi*, 2012 WL 234016, at *5 (quoting *Acorn Tech. Fund,* 429 F.3d at 443).

Obviously, the relief the Movant seeks will cost the Receiver – and thus the investors. These facts and not addressed, let alone balanced, by the Movant, who does not argue that its interests outweigh the interests of the Receiver in preserving the status quo. In sum, the Movant utterly fails to address, let alone demonstrate, that this factor is met. The interests of the Receiver

in preserving the status quo weighs in favor of the Movant's desire to litigate their isolated claim absent any evidence to the contrary – of which there is none.

As to the second factor, the Movant claims its Motion is timely because it learned about the stay three months ago. However, this is not the inquiry under the second factor. The second factor is the time in the course of the receivership at which the motion for relief from the stay is made. The receivership is still in its early state, and the Movant does not acknowledge let alone address the fact that the Receiver's need to organize and understand the entities in the Receivership. "Where the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim." *Wencke,* 742 F.2d at 1231.

In *Illaramendi*, the Court considered this factor and found it weighed in factor of the maintaining the stay because the Receivership had been in place for about 6 months and was still investigating the claims and issues associated with it. The Court found that the Receiver's need to continue that process outweighed the movant's desire to continue litigation. 2012 WL 234016, at *6.

As to the third factor, the Movant claims it is very likely to prevail in the Colorado foreclosure case. Under the third *Wencke* factor, even if the Movant could show this, courts are generally unwilling to delve deeply into the merits where, as here, the first two factors weigh heavily in favor of maintaining the litigation stay. *Byers I,* 592 F.Supp.2d at 537 ("Even assuming the Movpants' claims are strong, however, the other two *Wencke* factors weigh heavily against lifting the injunction."). Therefore, this factor does not assist the Movant in its goal.

These factors do not support lifting the stay, and if the Court permits the litigation to occur in this case, then the Court should require the Movant to pay the Receiver's costs and fees if it loses it yet-to-be filed potential motion under Rule 24(c).

IV. CONCLUSION

The Movant must file the pleading with its Motion to Intervene that it would litigate in this case if permitted to intervene. It did not do that. The Movant must demonstrate that all factors support intervention. Here, the Movant has demonstrated none of them. Accordingly, the Court cannot grant the Motion as it was filed.

Accordingly, the motion should be denied.

November 27, 2020

Respectfully submitted,

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