UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

SECURED CHEHEBAR INVESTORS' REPLY IN SUPPORT OF MOTION TO INTERVENE

The Secured Chehebar Investors (SCIs) file this reply in support of their Motion to Intervene (ECF No. 1842) and in support state as follows:

According to the Securities and Exchange Commission ("SEC") and the Receiver, the Secured Chehebar Investors' ("SCIs") motion to intervene to protect their security interests in the property and assets that have been brought into the Receivership is based on a "fallacy" because the SCIs "explicitly consent[ed] to the claims process as the vehicle for resolving their claims." ECF No. 1851 at 1–2; *see* ECF No. 1854 at 2 (adopting and incorporated the SEC's Response as if fully set forth therein). But the SEC and the Receiver ignore the SCIs and the Receiver's written agreement that:

> (1) "the [SCIs] will participate in the claims administration process, ***without prejudice to [the SCIs'] right to assert lien priority inside and outside of the claims administration process***";
>
> (2) "in the event [the SCIs and the Receiver] are unable to negotiate a resolution of the [SCIs']claims, we will ***present the dispute to [the] Court so the Court can rule upon the [SCIs'] position that they have priority***"; and

> (3) "***This will be done prior to any agreements being entered with any claimants/creditors, and prior to any distributions made to any claimants/creditors.***"

(the "Agreement"). *See* March 20, 2023, Email from T. Kolaya to D. Louis (a copy of which is attached as "Exhibit A") (emphasis added).

Based on the SCIs' Agreement with the Receiver, who is "a 'neutral officer of the Court,'" *see F.T.C. v. On Point Global LLC*, 2020 WL 5819809, at *2 (S.D. Fla. Sept. 30, 2020) (quoting *Sterling v. Stewart*, 158 F.3d 1199, 1201 n.2 (11th Cir. 1998)), and for the reasons explained below, the Court should grant the SCIs' motion to intervene.

I. Reply to the SEC's Summary of the Relevant "Background"

As a preliminary matter, two parts of the SEC's statement of the factual and procedural background require correction. The first is the SEC's assertion that "CBSG provided [certain of the SCIs] with 'compensation' in the form of a profit sharing arrangement whereby these [SCIs] received a percentage of the investments" in exchange for the SCIs "assist[ing] CBSG in the offering by contacting investors." ECF No. 1851 at 3. To be clear, there are no allegations that any of the SCIs referred a single person to invest in CBSG or that any of the SCIs ever received a referral fee. Regardless, to the extent the Court is going to act on the SEC's assertion by deeming the SCIs' security interests invalid, the SCIs are entitled to intervene to rebut the SEC's claims.

The second part of the SEC's statement of the factual and procedural background that requires correction is timing of the SCIs' filing of liens against CBSG's assets and property. Contrary to the SEC's assertion that the SCIs filed liens against CBSG's assets and property in violation of a Court order, *see* ECF No. 1851 at 3, the Court did ***not*** enjoin the creation of a lien upon any Receivership property until August 13, 2020, six days ***after*** the SCIs filed their liens on

August 7, 2020, *see* ECF No. 141 ¶ 29. Thus, there was nothing improper about the SCIs filing liens against CBSG's assets and property on August 7, 2020.

II. The SCIs have established a right to intervene under Federal Rule of Civil Procedure 24(a)

The SCIs' motion to intervene is timely, the SCIs have established each of the necessary elements for intervention a matter of right under Rule 24(a), and Section 21(g) of the Exchange Act does not bar the SCIs' intervention.

a. The SCIs' motion is timely

The SCIs' motion is timely pursuant to the SCIs' Agreement with the Receiver. The Receiver agreed that the SCIs' participation in the claims administration process was "without prejudice to their right to assert lien priority . . . outside of the claims administration process" and that, in the event the SCIs and the Receiver were unable to resolve the SCIs' claims of lien priority, the SCIs' would "present the dispute to [the] Court . . . prior to any agreements being entered with any claimants/creditors, and prior to any distribution made to any claimants/creditors." Ex. A. The timing of the SCIs motion to intervene is consistent with the Agreement: the SCIs maintained the right to assert lien priority outside of the claims administration proceed and now seek to intervene to present the dispute to the Court prior to the Court approving the Receiver's proposed treatment of claims.

The SCIs' motion is also timely under the four *Campbell* factors. *See Campbell v. Hall-Mark Elecs. Corp.*, 808 F.2d 775, 777 (11th Cir. 1987); *see also In re Terra Invest, LLC*, 2022 WL 19406162, at *3 (S.D. Fla. June 9, 2022) ("The requirement of timeliness must have accommodating flexibility toward both the court and the litigants and does not have precisely measurable dimensions." (internal quotation marks omitted)); *United States v. DeKalb Cnty, Ga.*,

2011 WL 6369569, at *6 (N.D. Ga. Oct. 11, 2011) ("It has been the traditional attitude of the federal courts to allow intervention where no one would be hurt and greater justice would be attained." (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)).

The first factor—the length of time during which the SCIs knew or reasonably should have known of their interest in the case before they petitioned to intervene—militates in the SCIs favor because the SCIs promptly moved to intervene in accordance with their Agreement with the Receiver. *See DeKalb Cnty., Ga.*, 2011 WL 6369569, at *6 ("Although SMVNA initially attempted to be heard through the public comment process, the Court finds the adverse effect of the action upon SMVNA's interest was not confirmed until . . . SMVNA learned that Plaintiffs and Defendant had moved for approval and entry of the Consent Decree . . . [and] when SMVNA perceived that its interests could be adversely affected if the Consent Decree was entered").

The second factor—the extent of prejudice to the existing parties—also weighs in the SCIs' favor because the SEC has "had ample time to prepare for the prospect of intervention by" the SCIs, s*ee Davis v. S. Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 670 (S.D. Fla. 1993) (finding intervention "would not be inequitable" where the party "had ample time to prepare for the prospect of intervention" by the intervenor), and because intervention would not undo any of the SEC's efforts, *cf. Fla. Key Deer v. Fugate*, 2011 WL 6935288, at *2 (S.D. Fla. Dec. 30, 2011) ("Case precedent has found that 'intervention . . . would substantially prejudice the existing parties' when extensive litigation and settlement negotiations occurred prior to the motion to intervene." (quoting *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, 254 F. App'x 769, 771 (11th Cir. 2007)); *S.E.C. v. Creative Capital Consortium, LLC*, 2015 WL 4077451, at *3 (S.D. Fla. July 6, 2015) (finding intervention after the Receiver had "litigated both a bench trial and a jury trial . . . representing a substantial investment of time and money" would prejudice the

Receiver). Indeed, neither the SEC nor the Receiver articulate any prejudice to them that would result from the SCIs' intervention.[1]

The third factor—the extent of prejudice to the SCIs if the motion is denied—similarly weighs in the SCIs' favor because the SCIs will be unable to protect and enforce their security interests within the claims administration process. The Court's Claims Administration Order vests the Receiver with broad authority to resolve any claims without Court intervention. *See* ECF No. 1471 ¶ 19 ("The Receiver shall have the authority to compromise and settle claims . . . without further order of this Court."). Thus, the prejudice to the SCIs that would result from denial of their motion to intervene outweighs any potential prejudice to the existing parties. *See DeKalb Cnty., Ga.*, 2011 WL 6369569, at *7 ("If not allowed to intervene, SMVNA would be precluded from advocating its position during judicial proceedings, now or in the future, on this matter.").

The fourth factor—the existence of unusual circumstances—militates in favor of a determination that the SCIs' motion is timely because the SCIs' security interests in the assets and property brought into the Receivership distinguish them from other objecting claimants. As the SCIs explained in their Motion, the Receiver took CBSG's property "subject to all liens, priorities or privileges existing or accruing under the laws of the State," *Marshall v. New York*, 254 U.S. 380, 385 (1920), and the SCIs' security interests "cannot be affected by the principal of equality of distribution," *see S.E.C. v. Mgmt. Sols., Inc.*, 2013 WL 594738, at *3 (D. Utah Feb. 15, 2023); *Bank Midwest v. R.F. Fisher Elec. Co., LLC*, 514 F. Supp. 3d 1310, 1320 (D. Kan. 2021) ("Bank Midwest had existing liens and security interests at the time of the Receivership. Neither the Receivership Order nor Kansas statutes establish that the Union's wage claims take priority over

[1] The lack of prejudice to the existing parties "may well be the only significant consideration." *See DeKalb Cnty., Ga.*, 2011 WL 6369569, at *6 n.6 (quoting *Lavino Co.*, 430 F.2d at 1073).

Bank Midwest's prior existing liens and security interests."). Accordingly, the unusual circumstances here—the SCIs' need to protect and enforce their security interests—weigh in the SCIs' favor.

b. The SCIs have demonstrated an interest in the assets and property that have been brought into the Receivership

There can be no reasonable dispute that the SCIs' security interests in the assets and property that have been brought into the Receivership is a sufficient "interest in property" to support the SCI's entitlement to intervene as a matter of right under Rule 24(a)(2). *See BLC-Equip. Leasing, LLC v. Davis*, 2016 WL 115696, at *2 (E.D. Tex. Jan. 11, 2016); *ARC Energy Partners, LLC v. Polo N. Country Club, Inc.*, 309 F.R.D. 191, 192 (D.N.J. 2015). And binding Eleventh Circuit precedent makes clear that the SCIs' participation in the Receiver's claims administration process did not extinguish their security interests. *SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339, 1345 (11th Cir. 2017) ("[A] federal district court cannot order a secured creditor to either file a proof of claim and submit its claim for determination by the receivership court, or lose its secured state-law property right that existed prior to the receivership.").

The SEC and the Receiver attempt to distinguish *Wells Fargo* on the grounds that (1) the SCIs "primarily seek to enforce post-receivership liens"; (2) "there is no argument to extinguish the liens on grounds the [SCIs'] Proof of Claim Forms were untimely"; and (3) the SCIs' liens are not limited to specific real estate properties. ECF No. 1851 at 8. But it is unclear why any of these distinctions matter. The fact remains that the SCIs have security interests in the assets and property that have been brought into the Receivership and that those security interests "readily support" the SCIs' entitlement to intervene as a matter of right under Rule 24(a)(2). *See ACR Energy Partners*, 309 F.R.D. at 192 ("Here, the Court need not belabor the inquiry because BNYM's security interest

in all of the claimed ACR property disputed in this litigation readily supports BNYM's entitlement to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2).").

c. The SCIs have established that disposition of this action may impede or impair their ability to protect their interests

The SEC and Receiver assert that the claims resolution process sufficiently protects the SCIs' security interests. ECF 1851 at 8–9. But that assertion ignores that the claims resolution process treats assets and property that are subject to the SCIs' liens as though it is available for general distribution to other claimants and creditors. As explained above, the SCIs' security interests "cannot be affected by the principal of equality of distribution." *See Mgmt. Sols., Inc.*, 2013 WL 594738, at *3; *Bank Midwest*, 514 F. Supp. 3d at 1320 (D. Kan. 2021). The SCIs are entitled to intervene as a matter of right because the disposition of assets and property through the claims resolution process may impede or impair their ability to protect their security interests in those assets and property.

d. The SEC and the Receiver do not adequately represent the SCIs' rights

The SEC and Receiver argue that the SCIs' have "consented" to the SEC and Receiver representing the SCIs' rights as claimants in the claims resolution process. ECF No. 1851 at 9–10. As explained above, however, the SCIs participated in the claims resolution process ***based on the Agreement with the Receiver*** that their participation was ***"without prejudice*** to their right to assert lien priority . . . outside of the claims administration process" and that, in the event the SCIs and the Receiver were unable to resolve the SCIs' claims of lien priority, the SCIs' would "present the dispute to [the] Court . . . prior to any agreements being entered with any claimants/creditors, and prior to any distribution made to any claimants/creditors." Ex. A (emphasis added). Neither the SEC nor the Receiver adequately represent the SCIs' interests in enforcing their liens against

the assets and property that have been brought into the Receivership. To be sure, the SEC and the Receiver have deemed the SCIs "insiders" who should not receive any distribution in this case. ECF No. 1826 at 67:15-18; ECF No. 1843 at 16–17.

III. Section 21(g) of the Exchange Act Does Not Bar the SCIs' Intervention

The Eleventh Circuit has not addressed whether Section 21(g) of the Exchange Act bars third parties from intervening in SEC enforcement actions, and other federal courts are split. *See S.E.C. v. Torchia*, 2016 WL 7423189, at *2 (N.D. Ga. July 1, 2016). In the absence of binding authority, the SCIs submit that the Court should follow the better-reasoned line of cases holding that "Section 21(g) does not bar intervention." *See, e.g.*, *Torchia*, 2016 WL 7423189, at *2 (finding "persuasive the reasoning of the court in *SEC v. Kings Real Estate Inv. Trust*, 222 F.R.D. 660 (D. Kan. 2004)"); *SEC v. Chen*, 2016 WL 7444921, at *2 (C.D. Cal. Jan. 15, 2016) ("Having considered both camps as well as the plain language of section 21(g), the Court concludes that section 21(g) does not prohibit intervention in a securities action."); *S.E.C. v. Novus Techs., LLC*, 2008 WL 115114, at *3 (D. Utah Jan. 10, 2008) (same). These courts' decisions are better reasoned because they are (1) based on the plain language of Section 21(g), which bars only consolidation and makes no mention of intervention, and (2) consistent with the Federal Rules of Civil Procedure, which contain no exception to intervention for SEC actions. *E.g.*, *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 950 (8th Cir. 1983) ("[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."); *Kings Real Estate*, 22 F.R.D. at 664 ("It is notable that not only is intervention not mentioned in the statute, no reference to intervention or

Fed. R. Civ. P. 24 is made in the Congressional history."). Thus, contrary to the SEC's assertion, *see* ECF No. 1851 at 11, "Section 21(g) does not serve as an impenetrable wall to intervention," *see Kings Real Estate*, 22 F.R.D. at 664.

IV. Conclusion

For the reasons stated above and in their motion, the SCIs respectfully request this Court grant them leave to intervene.

Dated: May 7, 2024

Respectfully submitted,

s/ Marshall Dore Louis

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EXHIBIT A

Marshall Dore Louis

From: Timothy Kolaya <tkolaya@sknlaw.com>
Sent: Monday, March 20, 2023 6:47 PM
To: Marshall Dore Louis
Cc: Bruce A. Weil
Subject: RE:

Follow Up Flag: Follow up
Flag Status: Flagged

Dore:

The Receiver is in agreement with the proposed points you outlined below.

Regards,

Tim

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STUMPHAUZER KOLAYA NADLER & SLOMAN PLLC

From: Marshall Dore Louis <mlouis@BSFLLP.com>
Sent: Thursday, March 16, 2023 11:27 AM
To: Timothy Kolaya <tkolaya@sknlaw.com>
Cc: Bruce A. Weil <bweil@BSFLLP.com>
Subject:

Good morning Tim,

Thank you for taking the time to speak with me the other day. The following are my proposed points of agreement between us. If you are satisfied with them, I ask that you confirm so to me:

1) We agree that the Chehebar Secured Creditors will participate in the claims administration process, without prejudice to their right to assert lien priority inside and outside of the claims administration process;

2) The Receivership will not enter into any agreements to distribute funds or assets to investors/creditors, or distribute any funds to investors/creditors, until after attempting to negotiate a resolution with the Chehebar Secured Creditors;
3) In the event we are unable to negotiate a resolution of the Chehebar Secured Creditors's claims, we will present the dispute to Court so the Court can rule upon the Chehebar Secured Creditors's position that they have priority;
4) This will be done prior to any agreements being entered with any claimants/creditors, and prior to any distributions made to any claimants/creditors.

I can be reached on my cell phone – [redacted]73 – if you need to discuss further.

Thanks,

Dore

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