

The sales agents, of course, have their own agenda. They made representations concerning the TLC Entities to investors and now may have liability to those investors or others for their role in the fraud. The sales agents' desire to influence these proceedings, while perhaps not surprising, is troubling.

The scope of Kryder's Motion, however, extends beyond monitoring the receivership. She proposes how to liquidate the assets, specifically that an unidentified developer take title to real estate purportedly worth tens of millions of dollars and then repay investors over time through individual annuity contracts issued by an unidentified offshore insurance company. Her liquidation proposal appears risky at best.

Kryder fails to put forth any assurances by the developer that it has the means or the intent to purchase the annuity contracts once it has taken title to the investors' real property. Second, this developer refuses to identify itself to the Receiver, or provide bank references, and audited financial statements. Nor has the developer provided any information to show that it has the ability to finance, and the experience to manage, such an endeavor. Third, Kryder does not represent that she will follow any of the procedures discussed in 28 U.S.C. § 2001 concerning the sale of receivership property. Moreover, any foreign insurance company the developer uses to issue the annuities may not have the financial ability or integrity to make the annuity payments and will be outside the jurisdiction of U.S. regulators. Simply put, the proposal appears devoid of any controls to ensure investors are repaid even a fraction of their investments.

Furthermore, Kryder neglected to inform the Court that she and over one dozen of the so-called investors identified in correspondence to the Receiver are sales agent who sold interests in one or more of the TLC Entities. {[3]The TLC Entities are: TLC Investments And Trade Co., TLC America, Inc. dba Brea Development Company, TLC Brokerage, Inc., Dba Tlc Marketing, TLC Development, Inc., and TLC Real Properties RLLP-1.} (Compare Wisner Dec., Ex. 2 with Motion, Ex. D). Among other things, her conflict of interest makes her an unsuitable class representative.

Kryder also apparently made representations concerning the TLC Entities to defendant Cloud. Cloud, in turn, represented to potential clients that the TLC investments had excellent track records. See Wisner Dec., Ex. 3. Kryder may be liable to her clients, defendant Cloud, and others for her misrepresentations in connection with the sale of fraudulent securities. At a minimum, Kryder appears to have a conflict of interest with at least some investors.

III. ARGUMENT

Kryder's Motion suffers from many deficiencies. First, the motion fails to satisfy the conditions for intervention. Second, Section 21(g) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78u(g) bars Kryder's intervention. Third, Kryder fails to include a pleading, as required by Fed. R. Civ. P. 24(c). Fourth, Kryder fails to address why the stay of litigation against the Receiver should be lifted.

A. Kryder's Motion Fails to Satisfy the Conditions for Intervention

Kryder has the burden to demonstrate that the conditions for intervention are satisfied. See Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 n. 5 (9th Cir.), cert. denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 639 (1981). The large majority of circuit courts that have considered intervention as of right in analogous circumstances have denied intervention. See CFTC v. Chilcott Portfolio Management, Inc., 725 F.2d 584, 586 (10th Cir. 1984); CFTC v. Heritage Capital Advisory Servs., 736 F.2d 384, 386-87 (7th Cir. 1984); SEC v. Everest Management, 475 F.2d 1236, 1239-40 (2d Cir. 1972); SEC v. Charles Plohn & Co., 448 F.2d 546 549 (2d Cir. 1971)).

To obtain an order granting intervention as of right, the application must (1) be timely; (2) assert an interest relating to the subject property; (3) demonstrate that without intervention the disposition may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) must demonstrate that the existing parties will not adequately represent the applicant. See United States ex rel McGough v. Covington Technologies, 967 F.2d 1391, 1394 (9th Cir. 1992). Failure to satisfy any one of these elements constitutes sufficient grounds to deny an intervention application. See United States v. New York, 820 F.2d 554,556 (2d Cir. 1987).

1. Kryder's Motion Is Untimely

In evaluating the timeliness of the proposed application to intervene, the Court must consider the stage of the proceeding, prejudice to the parties, and the reason for and length of the delay in seeking to intervene. See Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995); United States v. Covington Technologies Co., 967 F.2d 1391, 1394 (9th Cir. 1992); County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), cert. denied sub nom. City of Irvine v. Orange County, 480 U.S. 946, 107 S. Ct. 1605, 94 L. Ed. 2d 791.

Although early in the course of the entire litigation, Kryder's motion appears untimely. Kryder seeks to direct how real property assets will be liquidated several months after the Court approved a plan of liquidation. The Receiver proposed a plan of asset liquidation in his second report that he filed on November 9, 2000 and made available on his website. The Court approved the plan with some minor changes and the Receiver has proceeded accordingly. In particular, the Receiver has obtained the Court's approval to expend funds to appraise the real property, maintain and upgrade real property, swap some of the properties for more easily saleable properties, sell properties and purchase a parcel of land adjacent to the Marina Coves Project for the benefit of the Marina Coves Project with notice and the Court's approval.

Kryder waited approximately three months to formally oppose that plan. Kryder's present action disrupts the ongoing Court-approved liquidation process and causes the receivership extra expense. Should Kryder be allowed to intervene and cause the Receiver to engage in lengthy unsuccessful negotiations, investor returns will be irreparably damaged.

2. Kryder Appears To Have An Interest In The Receivership Estate

The Commission concedes that Kryder invested funds with the TLC Entities and has an interest in receiving distributions made from the receivership estate.

3. Kryder's Motion Fails To Demonstrate That The Commission And The Receiver Will Not Adequately Represent Her and Other Investors

In evaluating whether there already exists a party who will adequately represent the proposed intervenors' interests, the Court must consider three factors: (1) whether the interests of a present party to the suit are such that it will undoubtedly make all of the intervenors' arguments; (2) whether the present party is able and willing to make such arguments; and (3) whether the intervenors would offer any necessary element to the proceedings that the other parties would neglect. See United States v. Stringfellow, 783 F.2d 821, 827 (9th Cir. 1986).

When an applicant for intervention and an existing party "have the same ultimate objective, a presumption of adequacy of representation arises." Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996) (upholding denial of intervention of environmental group where it alleged only minor differences in opinion with the Defendant Secretaries of the Interior and Agriculture in interpreting statute at issue). Minor differences of opinion and differing strategies in pursuing the litigation will not overcome this presumption. Id.

The Commission and the Receiver undoubtedly share Kryder's purported objective – protection of TLC Entity investors. The Commission exposed this fraud and brought an emergency action to halt further fraudulent sales and cease the dissipation of investors' assets. The Commission's job is to protect investors, ensure the safety of the securities markets, and return assets recovered as disgorgement to investors. The Receiver, under the Court's watchful eye, is similarly acting for the benefit of investors by maximizing the return to investors through the orderly sale of the estate's assets and frugal management of the estate. SEC v. Wencke (Wencke II), 783 F.2d 829, 837 n. 9 (9th Cir. 1986). (primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court).

Whether Kryder is in fact motivated by a desire to protect TLC Entity investors remains to be seen. As discussed above, Kryder and the sales agents who are funding the Motion have a conflict of interest with the majority of investors. Kryder does not offer any necessary element to the proceedings that the Receiver would not explore. Clearly, Kryder's stated ultimate objective, to maximize investor returns, is the same as the Receiver's. Accordingly, there is a presumption of adequacy of representation. See Northwest Forest Resource Council, 82 F.3d at 838.

B. Section 21(g) of the Securities Exchange Act of 1934 Bars Kryder's Intervention

Section 21(g) of the Exchange Act, 15 U.S.C. § 78u(g), bars Kryder's intervention. The statute 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 consideration is consented to by the Commission.

The Commission has not consented to Kryder's intervention, and, accordingly, Section 21(g) bars the intervention. See SEC v. Wozniak, 1993 U.S. Dist. LEXIS 1241, No. 92 C 4691, *1 (N.D. Ill. Feb. 8, 1993) (holding that Section 21(g) operates as an "impenetrable wall" to intervention). SEC v. Homa, 2000 U.S. Dist. LEXIS 14582, *7 (plain language of Section 21(g) clearly bars intervenor from joining the SEC's enforcement action as a party).

Kryder barely acknowledges Section 21(g). She argues that:

said statute is unconstitutional in that property of the applicants is being taken for public use (i.e. payment of fees to the Receiver in furtherance of "investor protection") without just compensation or participation by the investors (i.e. lack of due process).

Motion 6:5-9. Kryder's assertion is wrong. First, Section 21(g) of the Exchange Act, 15 U.S.C. § 78u(g), does not address the appointment of receivers or payment of their fees. The statute pertains only to the ability of private parties to intervene in a law enforcement action. {[4]SEC v. Navin, 166 F.R.D. 435 (1995), is a Northern District of California decision that grants intervention as of right. This decision fails to consider Section 21(g) of the Exchange Act, is not controlling authority, and does not appear well-reasoned. }

Second, there is no taking or violation of due process. The District Court has long had the inherent equitable authority to appoint a receiver in a Commission enforcement action. See, e.g., In re San Vicente Medical Partners Ltd., 962 F.2d 1402, 1407, 1408 n. 4 (it is well-settled that receivership expenses may be charged against receivership property); SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980); Los Angeles Trust Deed & Mortgage Exchange v. SEC, 285 F.2d 162, 181-82 (9th Cir. 1960), cert. denied, 366 U.S. 919 (1961). The District Court has extremely broad power to determine the appropriate action for a receiver to take. See SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986).

C. Kryder Has Not Provided the Court with the Pleading Required by F. R. Civ. P. 24(c)

Fed. R. Civ. P. 24(c) requires that an entity desiring to intervene shall state the grounds for intervention in a motion that "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." This failure is fatal to a motion to intervene unless the entity seeking intervention has "fully stated the legal and factual grounds for intervention" in its motion. Beckman Indus. v. International Ins. Co., 966 F.2d 470, 474-475 (9th Cir. 1992). No pleading accompanies Kryder's Motion. For this reason alone Kryder's motion should be denied.

D. Kryder Failed To Establish That The Stay Order Lifted

Kryder is essentially seeking to lift the stay of litigation against the Receiver that is included in the receivership order so she can direct how the estate's real property should be liquidated. Wisner Dec., Ex. 4. In doing so, however, she has failed to address the test established by the Ninth Circuit for lifting of such stays, the elements of which are (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 claims. SEC v. Universal Financial, 760 F.2d 1034, 1038 (9th Cir. 1985), quoting SEC v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984). In deciding to lift the stay, the Court must balance the interests of the Receiver and the moving party. SEC v. Universal Financial, 760 F.2d at 1038. The interests of the Receiver are very broad and include not only protection of the receivership res, but also protection of defrauded investors and considerations of judicial economy.

Here, Kryder has not shown that investors will suffer substantial injury if she is not permitted to proceed because she has failed to meet her burden to show that her liquidation proposal has merit. Rather, it appears that there may be a genuine danger that this Motion amounts to little more than a continuation of the original fraudulent scheme. See generally Wencke II, 783 F.2d at 1373.

IV. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court deny Kryder's Motion.

Dated: February 12, 2001

<SIGNED>

MARIANNE WISNER
Attorney for Plaintiff
Securities and Exchange Commission

DECLARATION OF MARIANNE WISNER

I, Marianne Wisner, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am the attorney representing Plaintiff Securities and Exchange Commission ("Commission") in this action. I have personal knowledge of the following facts, and, if called as a witness, could and would testify competently thereto.
2. Attached hereto as Exhibit 1 is a true and correct copy of three letters addressed to investors from Defendant Cloud And Associates Consulting, Inc., Janice Engele, and Eagle Planning the Commission received from an investor and the Receiver in the course of this litigation.
2. On or about September 18, 2000, IRS-CID and FBI agents informed the Commission's staff that they had seized and secured various documents and other tangible things ("Seized Materials") pursuant to search warrants. The IRS-CID and FBI agents invited the Commission's staff to review the Seized Materials.
2. On September 18, 2000, the Commission's staff reviewed the Seized Materials and made copies of certain documents. A true and correct copy of a TLC Entities sales agent list, one of the Seized Materials, is attached hereto as Exhibit 2.
2. On or about October 11, 2000, the Securities and Exchange Commission took the deposition of defendant Thomas G. Cloud. Attached hereto is a true and correct copy of an excerpt of that deposition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Los Angeles, California on February 12, 2001.

<SIGNED>

Marianne Wisner
