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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TLC INVESTMENTS AND TRADE CO.,
TLC AMERICA, INC. dba BREA
DEVELOPMENT COMPANY, TLC
BROKERAGE, INC., dba TLC
MARKETING, TLC DEVELOPMENT, INC.,
TLC REAL PROPERTIES RLLP-1,
ERNEST F. COSSEY aka FRANK
COSSEY, GARY W. WILLIAMS, CLOUD
& ASSOCIATES CONSULTING, INC.
and THOMAS G. CLOUD,

Defendants.

CASE NO. SACV 00-960 DOC (Eex)

**NOTICE OF MOTION AND MOTION
OF APPLICANTS FOR AN ORDER
LIFTING STAY ORDER OR,
ALTERNATIVELY, GRANTING
APPLICANTS LEAVE TO INTERVENE
PURSUANT TO FRCP 24**

HEARING:

Date: April 2, 2001
Time: 8:30 a.m.
Place: Courtroom 9-D,
Hon. David O. Carter

TO THE HONORABLE DAVID O. CARTER, UNITED STATES DISTRICT JUDGE, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 2, 2001 at 8:30 a.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at the United States Courthouse, Ronald Reagan Federal Building, 411 West Fourth Street, Santa Ana, CA 92701-4516, Applicants{[1] There are now 700 Applicants who have retained this firm to seek an order lifting the Stay Order or, alternatively, granting Applicants leave to intervene. Their names are set forth on Exhibit A hereto. While Phillip and Lois Maass were represented by this firm at the hearing on March 6, 2001, they have asked to be removed from the group whom we represent. In addition, the only investors on Exhibit A who received commissions to the present knowledge of this firm are Hector Serrano and Patricia Kryder. This firm represents them only in the context of the second portion of this motion - the alternative request for leave to intervene and assert a claim against the defendants herein. If the Court grants the first request for relief from the Stay Order, the request for leave to intervene will become moot and this firm will no longer represent the interests of Mr. Serrano and Ms. Kryder. This firm has also asked Plaintiff and the Receiver for the identities of any and all brokers who received commissions from the TLC Entities so that this firm may further advise this Court.} will, and hereby do, move for an

order lifting the stay injunction entered by this Court on November 1, 2000 (the "Stay Order") and directing the Receiver to comply with Local Rule 25.8 in all respects and administer TLC's estate as a trustee would administer a bankruptcy estate under the Bankruptcy Code (including providing Applicants and all other creditor-investors with notice and an opportunity to be heard on matters affecting their claims against TLC and the administration of TLC's estate, and the appointment of a Creditor's Committee) or, alternatively, granting Applicants leave to intervene in this case pursuant to Rule 24 of the Federal Rules of Civil Procedure. Certain of the Applicants previously filed a motion to intervene in this case. In order to address certain procedural matters, the previous motion was withdrawn prior to hearing. Simply put, Applicants are being denied full notice and the opportunity to meaningfully participate in the Receiver's liquidation of TLC's estate, rights which Congress and the Local Rules have otherwise granted to them.

As required by Rule 24(c) of the Federal Rules of Civil Procedure, Applicants have annexed a copy of their proposed complaint to this Motion as Exhibit "B." The proposed complaint in intervention includes only the 589 names provided in the draft which was the subject of the ex parte application heard on March 6, 2001. The names of Mr. and Mrs. Maass have been deleted at their request. If the Court denies the first request for relief from the Stay Order but grants leave to intervene, a complaint in intervention (containing the same charging allegations) with the names of all 700 Applicants will be filed.

In accordance with Local Rule 7.4.1, on February 28, 2001, and March 1, 2001, counsel for Applicants conferred by telephone separately with counsel for all parties herein to discuss the substance of the Motion and any potential resolution. The parties were unable to reach a resolution that eliminates the necessity of a hearing on the Motion. By Order of this Court dated March 6, 2001, further compliance with Local Rule 7.4.1 was waived for purposes of this Motion, and a hearing was set on it for April 2, 2001, on the Court's normal calendar.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all pleadings, records, and papers filed in this action, and such evidence or arguments as may be presented at the Hearing.

Dated: March 7, 2001

Joseph P. Busch, III
Craig H. Millet
Michael R. Williams
GIBSON, DUNN &
CRUTCHER LLP

By:

Joseph P. Busch, III
Attorneys for Applicants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Applicants are individuals who loaned collectively over \$50 million to TLC in return for a promise of repayment of the principal loaned, plus interest, pursuant to various real estate investment agreements and promissory notes. TLC represented that the sums loaned by Applicants would be used to purchase real estate, or tax liens and tax deeds related to real property, for rental, redemption, or resale at a profit. Before the loans in question were repaid in full, however,

this case was commenced, the assets of TLC (the "Assets") were frozen, and the Receiver was appointed. In addition, the Court entered an order prohibiting Applicants from taking any action against TLC to enforce their claims.

It is important to note that Applicants without question have the most at stake in this case – they poured tens of millions of dollars into TLC. No other creditor body can claim such distinction. For this reason, Applicants should be entitled to participate in some meaningful way in all significant decisions made that affect their claims and the disposition of the Assets. Yet, as a result of orders entered in this case, Applicants

- cannot sue TLC to enforce their rights and collect on their substantial claims;
- do not have the creditor protections afforded by the Bankruptcy Code notwithstanding that the Local Rules provide that the receivership should be administered according to Bankruptcy Rules as nearly as possible; {[5] The clarifications provided by the Receiver at the hearing on March 6, 2001, show movement toward such protections, but the Receiver still resists, for example, the appointment of a Creditors' Committee.}
- will not be allowed to intervene consensually in this case; and
- will not even be allowed to participate at hearings before this Court concerning the administration of TLC's estate except on prior application to the Court.

Instead, (a) property of TLC's estate in many circumstances may be sold without court review and/or without an opportunity for objection by Applicants or the implementation of auction procedures; and (b) Applicants will be forced to rely on an internet site as their primary source for information about this case. In this regard, Applicants are substantially prejudiced by the continuance of the Stay Order, and are in a materially worse position than they would be if this receivership were administered more closely in line with Local Rule 25-8. Applicants request, therefore, that the Court grant this Motion and provide Applicants with the process that they are undeniably due.

II. PROCEDURAL HISTORY OF THE CASE

A. Commencement of This Case.

On October 3, 2000, the SEC commenced this case by filing its complaint (subsequently amended) against the defendants for violations of the federal securities laws. On October 5, 2000, the Court entered a temporary restraining order enjoining certain actions by the defendants and appointed the Receiver as temporary receiver for TLC.

B. The Stay Order.

On November 1, 2000, the Court entered the Stay Order affecting TLC and the Assets. Pursuant to the Stay Order, the Receiver was appointed as the permanent receiver for TLC, with the full powers of an equity receiver. In particular, the Receiver was authorized to take possession, custody, and control of the Assets and was given power to liquidate those assets. The Receiver also was authorized to make payments and disbursements from the funds and assets he received. During the pendency of the receivership, except by leave of Court, Applicants and other creditors of TLC are enjoined from, among other things, (i) commencing or prosecuting any suit or proceeding against TLC, (ii) using self-help or other court-sanctioned method of taking possession of or creating a lien upon the Assets, and (iii) doing anything whatsoever that might interfere with the actions of the Receiver relating to the Assets.

C. The Receiver's Liquidation Plan and Sale Procedures.

On November 9, 2000, the Receiver filed his Second Report to the Court (the "Second Report"). In the Second Report, the Receiver explained that he had decided to liquidate TLC, and outlined his liquidation plan for the disposition of the Assets. With respect to sale procedures for real property, the Receiver recommended that the Court approve the following: (i) With respect to property with an average appraised value of \$1 million dollars or less (as determined by the Receiver's proposed valuation method), the Receiver would be entitled to sell such property for a gross sales price of 80% of the appraised value, or higher, without further approval by the Court; (ii) with respect to property with an average appraised value in excess of \$1 million dollars (as determined by the Receiver), the Receiver would be entitled to sell such property for a gross sales price of 80% of the appraised value, or higher, subject to Court approval on an *ex parte* basis; and (iii) if the Receiver could not obtain a sale price for a particular parcel of property

that was 80% of the appraised value, then the Receiver proposed selling such property in accordance with 28 U.S.C. § 2001 (which provides for public sale of property in possession of a receiver).

D. Approval of the Sale Procedures, as Modified.

On November 13, 2000, this Court held a hearing to consider the Second Report. On November 22, 2000, the Court entered an order (the "November 22 Order") approving the Second Report, with certain modifications. Specifically, the Court modified the proposed real property sale procedures to provide that Court approval would be required for sales of real property valued in excess of \$250,000. The Court also provided that details of individual sale transactions should be filed under seal. Under the November 22 Order, therefore, the Receiver is authorized to sell TLC's real property that is valued at \$250,000 or less without Court approval and to sell property valued in excess of \$250,000 on an *ex parte* basis, the details of which must be filed under seal.

E. The Quarterly Report and Hardship Application.

On January 31, 2001, the Receiver filed an application for an order authorizing a plan for distribution of investor funds to "hardship" cases (the "Hardship Application"). Also on January 31, 2001, the Receiver filed his Quarterly Report to the Court (the "Quarterly Report").

In the Quarterly Report, the Receiver provided an update on the status of the receivership. The Receiver explained that, as of December 31, 2000, he had 523 parcels of real property under management, along with certain other assets of TLC. Of the parcels of real property, the Receiver reported that seven had been sold and that six properties were in escrow. The Receiver also reported that the reconstruction of the financial and investor records was substantially complete.

In addition, the Receiver detailed his proposed investor claims process. Under the claims process contemplated by the Quarterly Report, distributions to investors will be made pro rata. In addition, the Receiver will make "adjustments" to the investors' respective account balances as follows:

- previous payments of interest will be treated as a return of capital and accounts reduced accordingly;
- previous payments stated as interest and credited to accounts will be reversed; and
- in the case of previous payments made for other purposes, such as payments to brokers who were also investors, such payments shall be treated as a return of capital and accounts reduced accordingly.

Moreover, the Receiver recommends that any unrecorded security interests for specific properties be disallowed summarily without considering whether the security interest was perfected under the law of the state where the property is located.

The Receiver proposes to make these adjustments and then mail account statements to the investors, who will be "invited" to communicate regarding any errors or omissions in such statements. "Proposed corrections by investors will be investigated and acted on as considered appropriate by the Receiver." "The adjusted balance will be considered as the approved investor claim amount, upon which distributions will be based." At the hearing on March 6, 2001, the Receiver clarified that his procedure would also include provisions for a Court review of objections. The Receiver reported that he hopes to make a small initial distribution to investors on their claims during the second quarter of 2001.

The Hardship Application and Quarterly Report were filed under seal as required by the November 22 Order. On February 14, 2001, this Court ordered that the Quarterly Report and the Hardship Application be unsealed and made "available" to investors. For the hearing to approve the Quarterly Report, the Court ordered that the Receiver give notice in accordance with Local Rule 25 (which sets forth notice procedures for creditors in receivership cases).

III. THE STAY ORDER SHOULD BE LIFTED

The Local Rules contemplate that receivership proceedings will be conducted in a similar fashion to bankruptcy proceedings. Applicants have not been afforded the rights that they would have in a bankruptcy proceeding. The Court

should require that the Receiver comply fully with Local Rule 25. Absent such relief, Applicants are relegated to mere silent bystanders in an action that is supposedly being prosecuted for their benefit.

In deciding whether to lift a blanket receivership stay order, such as the Stay Order, courts in the Ninth Circuit consider the following:

(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. Universal Fin., 760 F.2d 1034, 1037-38 (9th Cir. 1985) (quotations omitted). In essence, a court must "balance the interests of the Receiver and the moving party." *Id.* at 1038. Admittedly, the interests of a receiver "are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy." *Id.* The interests of Applicants strongly outweigh the Receiver's interest. In addition, unlike the moving parties in the *Universal Financial* case, Applicants are not seeking to lift the Stay Order to enforce their claims against TLC in individual court proceedings. Instead, Applicants seek relief from the Stay Order to participate in these proceedings against TLC.

A. Applicants will Suffer Substantial Injury if the Stay Order is not Lifted.

The proposition that creditors of a company in a receivership should be allowed to meaningfully participate in such a proceeding should not be a controversial one. In fact, in *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600 (9th Cir. 1978), the Ninth Circuit recognized that creditors under such circumstances have a right to participate in receivership proceedings. *See id.* at 609 ("Although the trial court did not allow intervention by the creditors at various preliminary stages of the proceedings as it perhaps should have . . ."). Although the *Lincoln Thrift* court refused to transfer a receivership proceeding to a bankruptcy court, as requested by certain creditors, the court noted that the trial court had appointed *amicus curiae* to represent the creditors in the receivership proceedings, had provided notice to creditors of the proposed liquidation, and had conducted a full hearing on the issue of liquidation. *Id.*

Moreover, this Court's own Local Rules contemplate that creditors in receivership proceedings will receive notice and opportunity to be heard on certain matters affecting the administration of a receivership. Specifically, Local Rule 25.7 provides that permanent receivers shall give notice by mail to all known creditors of the time and place for hearing of the following:

- petitions for the payment of dividends to creditors;
- petitions for the confirmation of sales of property;
- reports of the receiver;
- applications for instructions concerning administration of the estate;
- applications for discharge of the receiver; and
- applications for fees and expenses of the receiver.

Furthermore, Local Rule 25.8 provides that, "[e]xcept as otherwise ordered by the Court, a receiver shall administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy."

As the Ninth Circuit Court of Appeals explained in *Lincoln Thrift*:

There are sound policy reasons for allowing liquidation to take place only in a court of bankruptcy. Perhaps the most relevant reason is that the Bankruptcy [Code] allows the formation of a creditors' committee [even] in liquidation proceedings. . . . The Bankruptcy [Code] also provides for notice to the creditors or their committee of all sales of property and provides the opportunity for a hearing on the issue of whether a sale should be had. In addition, the Bankruptcy [Code] provides an established system for equitable distribution of the assets to creditors.

Id. at 605-06. {[6] The Ninth Circuit cautioned that district courts "should, at an early stage in the liquidation, set forth in express terms the justification for retaining its equity jurisdiction, indicating why the exercise of its jurisdiction is preferable to a liquidation in bankruptcy court." 577 F.2d at 609.} But this does not mean that this Receivership must be placed in bankruptcy; rather, this decision stands for the proposition adopted by Local Rule 25.8 – the protections afforded to creditors in a bankruptcy proceeding should be those adopted in a receivership.

B. The Receiver Has Had an Adequate Opportunity to Investigate and Understand TLC, but the Receivership Proceedings are Not at an Advanced Stage.

The receivership here has been in existence for approximately five months. As the Receiver admits in the Quarterly Report, the Assets are under his control, and the reconstruction of financial and investor records is substantially complete. The Receiver, however, has not yet liquidated substantial amounts of the Assets, and initial distributions have not yet been made to investors. Thus, it does not appear that the receivership is nearing completion. Although the Receiver has had an adequate opportunity to investigate and understand TLC, this proceeding is not so far advanced that the receivership can be said to be nearly completed. Accordingly, this is an ideal time to lift the Stay Order and allow Applicants or their representatives to participate herein.

IV. IN THE ALTERNATIVE, APPLICANTS SHOULD BE GRANTED LEAVE TO INTERVENE IN THIS CASE

A. Applicants Have a Right to Intervene.

If the Court declines to lift the Stay Order, Applicants request that they be granted leave to intervene. The Federal Rules of Civil Procedure provide a mechanism through which third parties may intervene in a lawsuit to protect their rights. Fed. R. Civ. P. 24. Under Rule 24, there are two types of intervention –intervention as a matter of right and permissive intervention. The requirements for intervention as of right are as follows:

Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). Although an applicant has the burden of establishing his right to intervene, courts must construe Rule 24 liberally; any doubts regarding the propriety of intervention must be construed in favor of the applicant. *See Yorkshire v. IRS*, 26 F.3d 942 (9th Cir. 1994); 7C Charles Alan Wright, et al., *Federal Practice and Procedure*, § 1904 (2d ed. 1982); 6 Moore's *Federal Practice*, § 24.03 (3d ed. 2000). "A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995). A liberal approach also prevents future litigation over related issues and gives an interested party the opportunity to present its views. *Id.*

Although, in the present case, there is not an applicable statute conferring an unconditional right to intervene, Applicants may still intervene as a matter of right pursuant to Rule 24(a)(2) because they have an interest affected by the SEC's action against TLC. The Ninth Circuit has adopted a four-part test for determining whether a party should be permitted to intervene under 24(a)(2):

(1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter impair or impede its ability to protect that interest; and (4) the applicants interest is not adequately represented by existing parties.

SEC v. Navin, 166 F.R.D. 435 (N.D. Cal. 1995).

1. The Motion to Intervene is Timely.

Courts examine three factors in determining whether a motion to intervene is timely: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason and length of the delay. *See FDIC v. United States*, 1996 U.S. Dist. LEXIS 6971 (D. Or. 1996) (citing *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990)). "It is generally noted that the concept of timeliness is a flexible one." *Blake v. Pallan*, 554 F.2d 947, 952 (9th Cir. 1977) (citations omitted). An applicant does not have to make a motion to intervene immediately, rather the critical inquiry is whether the rights of any existing parties will be prejudiced. *Cf. Navin*, 166 F.R.D. at 439.

This Motion to intervene is timely. The complaint was filed on October 4, 2000, and this case is still in the early stages of litigation. More importantly, intervention will not result in prejudice to the SEC, the defendants, or the Receiver. Applicants' interests lie in the maximization of the recovery on their claims against TLC, and they will not obstruct or burden any claims or defenses that the SEC or the defendants may have. In fact, Applicants propose to assert many of the same claims alleged by the SEC, thereby creating many common factual and legal issues. In addition, there is no reason to believe that Applicants' presence in this case will unduly complicate the litigation.

2. Applicants Have an Interest in this Case.

Although the United States Supreme Court and other courts have not established a clear definition for the type of interest that is required for intervention of right, the Ninth Circuit has implicitly rejected the notion that Rule 24(a)(2) requires a "specific legal or equitable interest." *Blake*, 554 F.2d at 952. "The 'interest test' is primarily a practical guide to dispose of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *FDIC v. United States*, 1996 U.S. Dist. LEXIS 6971 at *8 (D. Or. 1996) (quoting *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967)). Although an applicant cannot rely on an interest that is wholly remote and speculative, the interest may be contingent upon the outcome of the litigation. *See SEC v. Flight Transp. Corp.*, 699 F.2d 943, 948 (8th Cir. 1983) (the possibility that the applicants' interests in the company's assets may be foreclosed by the actions of the receiver gave them a sufficient interest to intervene in the action), *vacated on other grounds, Fryar v. Abbell*, 492 U.S. 914 (1989).

In addition, an applicant need not assert an identical interest as the one protected by the statute upon which the lawsuit is premised – in this case, the federal securities laws. It is enough that the applicant assert an interest protectable under any law as long as there is a "relationship between the legally protected interest and the claims at issue." *See FDIC v. United States*, 1996 U.S. Dist. LEXIS 6971 at *8 (beneficiaries had a sufficient interest protectable under contract law to intervene although they could not bring an action for wrongful levy).

In a factual scenario similar to the present case, a district court in the Northern District of California determined that individual investors had a sufficient interest to intervene in an SEC enforcement action where a receiver had been appointed to manage the assets. *See Navin*, 166 F.R.D. at 440. In *Navin*, the SEC filed a complaint against several individuals and a corporation alleging violation of federal securities laws in connection with the sale of bus shelters containing advertising space. An investor brought a motion to intervene on behalf of herself and other similarly situated investors alleging that she had an interest in the assets currently being managed by the receiver. The district court concluded that the investors had an interest in the action by virtue of the risk that they could lose most of their investment if they were not allowed to intervene. *Id.* at 948. The court rejected the argument advanced by the SEC that the presence of the receiver, who had an alleged identical interest of maximizing recovery on the assets, prevented applicants from establishing this prong. *See id.*

Likewise, the presence of the receiver in the present case does not prevent Applicants from establishing an interest in the litigation. As demonstrated in *Navin*, a party whose investment may be affected by resolution of a lawsuit clearly has an interest in that lawsuit. Applicants are the "victims" of the alleged fraud in the present case and are facing the same scenario as the applicants in *Navin*. The Receiver is affecting their potential recovery on their investments through his management and sale of the Assets. If these individuals are unable to intervene, they will be forced to stand idly by while the Receiver alone decides on a plan for the liquidation of TLC's assets – whether the plan calls for a full return on their investment or recoupment of a substantially lesser amount. The possibility that the present liquidation plan might result in the latter highlights the need for intervention in the present case.

3. If Applicants are not Permitted to Intervene, Disposition of this Matter May, as a Practical Matter, Impair and Impede Their Ability to Protect Their Interests.

As illustrated above, the Receiver's decisions regarding the sale and management of the Assets may affect Applicants' ability to recoup the funds that they loaned to TLC or any possible damages that they could recover in a lawsuit. Therefore, the disposition of this case without Applicants may impair or impede their interest in the Assets.

There are two important aspects of this part of the intervention test. First, the applicants need only show that absent intervention, the SEC action *may* impair their interests. *See* Fed. R. Civ. P. 24(a)(3); *FDIC v. United States*, 1996 U.S. Dist. LEXIS 6971 at *3-4. Second, courts focus on the practical effect of the disposition in the applicant's absence. *See Navin*, 166 F.R.D. at 440.

This latter aspect is extremely important in the present case. Although, in theory, this Court appointed the Receiver to manage the Assets on behalf of all potential "victims" of defendants' actions, the practical effect of allowing the disposition to proceed without letting the "victims" voice their desires is twofold. First, the "victims" lose the right to notice and an opportunity to be heard in connection with the disposition of the Assets. An investor or creditor's due process rights weigh heavily in favor of affording them a right to be heard prior to both the sale of their property and settlement of the lawsuit. *See SEC v. American Principals Holding, Inc.*, 962 F.2d 1402, 1407 (11th Cir. 1992). Second, the victims may lose a substantial amount of the money that they loaned TLC. This Court has precluded Applicants from filing their own claims against TLC. Because TLC is likely insolvent, Applicants will not be able to collect monies still owed them after the conclusion of this proceeding. Thus, resolution of this disposition is likely to impair or impede the Applicants' interests. {[7] In *SEC v. Flight Transportation Corp.* 699 F.2d 943, the Eighth Circuit recognized the quandry such an order put creditors in -- if prohibited from intervening, the creditors would have no voice in the proceeding and would be enjoined from bringing their own suit to protect their interests. *Id.* at 947-948. }

4. Applicants' Interests Are not Adequately Represented by the Receiver or the SEC.

Courts consider three factors in determining whether an applicant's rights are adequately represented by an existing party. Specifically, courts look at (1) whether the interests of the present party are such that it will undoubtedly make all of the arguments the intervenor would make; (2) whether the present party is capable of and willing to make such arguments; and (3) whether the intervenor would offer a necessary element to the proceedings that the other parties would neglect. *See Forest Conservation Council*, 66 F.3d at 1498-99; *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The applicant's burden of establishing inadequate representation is minimal. *See Trobovich v. United Mine Workers of Am.*, 404 U.S. 528, 539 (1972) (explaining that a party meets its burden of showing inadequate representation if representation of his or her interest "may be" inadequate); *United States v. Stingfellow*, 783 F.2d 821, 827 (9th Cir. 1986), *vacated on other grounds by Stingfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987).

Although there is a presumption of adequate representation if an existing party has the same objective as the applicant, the objectives of the SEC and the Receiver in the present case are divergent somewhat from those of Applicants. *See Forest Conservation Council*, 66 F.3d at 1499. The SEC is charged with the protection of the public at large, not just the economic concerns of the victims in the present case. *Cf. id.* The primary goal of the SEC is to prosecute securities violations. *See SEC v. Flight Transp. Corp.*, 699 F.2d at 948 (holding that the interests of the SEC and individual investors are sufficiently disparate to warrant intervention).

Likewise, the Receiver's objective is different from that of Applicants. The Receiver has proposed the immediate liquidation of the Assets pursuant to certain sale procedures, as described above. Applicants do not agree with the secretive sale procedures proposed by the Receiver. Thus, the Receiver does not adequately represent the interests of Applicants. Accordingly, Applicants should be permitted to intervene in this action under Rule 24(a)(2).

B. In the Alternative, Applicants have a Permissive Right to Intervene in this Case.

A party not entitled to intervene as of right, may still be allowed to intervene under subsection (b) of Rule 24, governing permissive intervention. Rule 24(b) allows a party to intervene if the applicant shows independent grounds for jurisdiction, makes a timely motion, and has questions of law or fact in common with the main action. *See Fed.*

Rule Civ. Proc. 24(b); *see also San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1100 (N.D. Cal. 1999). As previously discussed, this Motion is timely because the case is still early in the litigation process, and the parties will not be prejudiced by allowing intervention. Therefore, only the requirements of jurisdiction and common questions are discussed below.

1. The Federal Securities Laws Provide an Independent Basis for Jurisdiction over Applicants' Proposed Claims.

This Court has an independent ground for jurisdiction because Applicants' proposed complaint presents a federal question. Specifically, Applicants allege violations of § 12(a)(2) of the Securities Act of 1933 and § 10 of the Securities Exchange Act of 1934. Because their proposed Complaint is premised upon federal law, this Court has jurisdiction over the proposed action under 28 U.S.C. § 1331.

2. Applicants' Proposed Complaint Has Questions of Law and Fact In Common With The SEC's Complaint.

The allegations presented in Applicants' proposed complaint stem from the same set of operative facts as those relevant to the SEC enforcement action. In order to obtain relief, Applicants must establish that the defendants engaged in wrongful conduct in the sale of a security. As a result, Applicants will rely on the same or similar evidence and legal arguments set forth by the SEC.

3. Intervention Will Not Unduly Delay or Prejudice the Adjudication of Rights of the SEC or the Defendants.

Federal Rule of Civil Procedure 24(b) makes it clear that the courts have discretion in deciding whether to allow permissive intervention in a particular case. Rule 24(b) states that "in exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. Rule Civ. Proc. 24(b).

In the present case, allowing Applicants to intervene will not unduly delay or prejudice the adjudication of the rights of the SEC or the defendants. The SEC and Applicants both aim to establish that the defendants violated federal securities laws. Although Applicants add something new to this litigation in that they have an interest in protecting their individual economic position, their goals are not in conflict with the SEC and will not hamper the SEC's position. Further, the litigation is still in the early stages, and there is no reason to believe that intervention will affect the rights of the defendants.

C. Applicants May Properly Intervene in this Case Despite the SEC's Refusal to Consent.

There is a split among authorities as to whether a party may properly intervene in an SEC enforcement action. The disagreement among the authorities lies in the construction of § 21(g) of the Securities Exchange Act of 1934, which reads:

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 only court within the Ninth Circuit that has considered the issue recently allowed intervention in an SEC enforcement action despite SEC opposition to intervention. *See SEC v. Navin*, 166 F.R.D. 435 (N.D. Cal. 1995).

Moreover, the *Navin* court cited with approval an Eighth Circuit decision rejecting the argument that § 21(g) bars intervention. *See Navin*, 166 F.R.D. at 440 (following the reasoning set forth in *SEC v. Flight Transportation*, 699 F.2d 943, 948 (8th Cir. 1993) regarding impairment of an applicant's interest). In *Flight Transportation*, the Eighth Circuit rejected the view that § 21(g) bars "intervention as a matter of right in [SEC] claims." *See id.*; *see also SEC v. Credit Bancorp*, 194 F.R.D. 457, 465 (S.D.N.Y. 2000); *SEC v. Prudential Secs.*, 171 F.R.D. 1, 4 (D.D.C. 1997); *but see SEC*

v. Homa, 2000 U.S. Dist. LEXIS 14582 *7 (N.D. Ill. 2000); *SEC v. Qualified Pensions*, 1998 U.S. Dist. LEXIS 942 (D.D.C. 1998) (denying applicants' motion to intervene because they were already plaintiffs in a related California action). Although the *Navin* court did not discuss § 21(g), its approval of *Flight Transportation's* treatment of intervention and its decision to grant intervention despite SEC opposition, suggest § 21(g) is not a bar. Accordingly, Applicants should be allowed to intervene in this case.

V. CONCLUSION

For the reasons set forth above, Applicants respectfully request that this Court grant this Motion, and lift the Stay Order and direct that the Receiver comply with Local Rule 25.8 in all respects in the administration of the receivership estate.

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