

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF SOUTH CAROLINA
 GREENVILLE DIVISION

UNITED STATES OF AMERICA)	CR No. 6:19-239
v.)	
)	
SCOTT A. KOHN FUTURE INCOME)	MOTION TO CLARIFY
PAYMENTS, LLC)	OR IN THE ALTERNATIVE
JOSEPH P. HIPPI)	PARTIALLY LIFT STAY ORDER
KRAIG S. AIKEN)	AND MEMORANDUM IN
DAVID N. KENNEALLY)	SUPPORT
)	
Defendants.)	
_____)	
)	
IN RE RECEIVER FOR SCOTT)	
A KOHN AND FUTURE INCOME)	C.A. No. 6:19-cv-01112-BHH
PAYMENTS, LLC, JOSEPH P. HIPPI)	
KRAIG S. AIKEN AND DAVID N.)	
KENNEALLY)	

PRELIMINARY STATEMENT

On March 12, 2019, a federal grand jury in South Carolina indicted Scott Kohn and Future Income Payments, LLC (“FIP”) on charges of mail and wire fraud stemming from FIP’s fraudulent investment products. On April 15, 2019, this Court entered an Order (the “Receivership Order”) appointing a Federal Receiver “vested with full and exclusive power, duty and authority to administer and manage the business affairs, funds, assets, choses in action and any other property of the FIP Receivership Entities, marshal and safeguard all of the assets of the FIP Receivership Entities, and take whatever actions are necessary for the protection of the United States and investors.” This Court amended that Order on April 30, 2019 to add alter egos of FIP as new Receivership entities and again on July 18, 2019 after a Superseding Indictment.

While the Order empowers the Receiver to bring causes of action against numerous individuals and entities, there are those that may be beyond the reach of the Receiver. Several such lawsuits have been filed across the country by private attorneys in an effort to recover funds for the victims of Scott Kohn and FIP. However, some of those defendants are using the stay provisions of the Receiver Order in an effort to thwart those actions and recovery sought. In so far as a recovery for the individuals in the private lawsuits will benefit the pool of victims in the Receiver actions, the Movants submit that the Receiver will consent to an Order clarifying that the stay imposed in the Receiver case does not apply to the private lawsuits if the terms set forth herein are in place.

The undersigned represents approximately 398 individuals and families (“Movants”) across the country who collectively have suffered tens of millions of dollars of damages relating to them being placed into retirement planning vehicles by various individuals and entities where the FIP Ponzi scheme was a component of that retirement planning. Movants have sued these various wrongdoers.

In July of 2018, the undersigned and co-counsel began filing cases around the country seeking to recover damages on behalf of the Movants relating to these flawed retirement planning schemes. A list of filed cases is attached as **Exhibit A**. Movants have sued many individuals and entities throughout the country; however, some defendants not named specifically in the Receiver Order are seeking to use this Court’s Order as a shield to liability and as an effort to delay justice.

Movants are seeking limited, but important relief from this Court, and are asking this Court to clarify that the Receivership Order does not operate to stay these matters

where Movants agree to be bound by the agreement described herein with the Receiver. Therefore, Movants respectfully ask the Court to partially lift the stay as it relates to Movants' cases as long as Movants agree to be bound by the agreement between Movants and the Receiver described herein.

There are compelling reasons to grant this relief. Regardless of how tireless or effective the work of the Receiver is in these matters; it is not the only method to return as much recovery as possible to the individual Movants. The Receiver is currently seeking to disgorge from all individuals and entities commissions received related to the sale of FIP, and recover other monies related to the operations of FIP and the related FIP entities. However, that amount, once recovered and finally distributed will be much less than Movants total damages in their individual cases. The litigation that the Movants are engaged in is the best path forward for recovery for the Movants. Currently, the undersigned has been successful in recovering over Five million dollars in settlements through this litigation to return to various Movants.

Most Movants are retired, or at retirement age. Almost all Movants have lost either a large, or total amount of their life savings. They have been significantly injured by the actions of various wrongdoers across the country. Civil litigation is an important remedy, in addition to any success that the Receiver may achieve, to recover Movants' losses. Also, recovery for Movants in some of their individual cases may make them ineligible to recover in a Court ordered distribution because there is a possibility that they will be made whole. Therefore, from a mathematical perspective, there is a possibility that exists for a larger corpus for the remaining victims to be distributed by the Receiver if certain Movants are made whole through other mechanisms.

Movants have focused their litigation efforts on various defendants who are not specifically named in this Court's Order (although they are potentially covered by the Stay provision); however, in some earlier actions, Movants sued two defendants, Melanie Schulze Miller, and MJSM LLC for their roles in these schemes. In its Amended Order dated April 30, 2019, this Court added those two parties to the Receivership action as alter egos of FIP. Movants have since dismissed these two parties from all litigation.

Currently, Movants are not pursuing any entity or individual who is specifically named in the Receivership Order. However, some defendants maintain that because these matters are somehow related, there is a stay that should be imposed. This has caused courts to stay these matters. See **Exhibit B**.

The undersigned has discussed these issues with Walt Tollison, counsel for the Receiver, and has reached an understanding, subject to this Court's approval, where Movants' cases would not be in conflict with the work of the Receiver. This agreement with the Receiver relates to all cases that Movants are pursuing, or will pursue, and it is agreed that the Receiver has a priority interest relating to any "Assets" including real or personal property, cash or other assets ("Assets") that could or would otherwise be subject to a recovery by Plaintiffs/Victims in their respective civil cases. If allowed to proceed by this Court, Movants will not attempt to settle or collect a judgment regarding the Assets of any individual or entity covered by the Receivership Order without acknowledging and satisfying the Receiver's priority interest and holding that interest in escrow, if applicable. Movants will work with the Receiver on a case by case basis if the Assets of any individual or entity subject to the Receivership Order are at issue in

Movants' litigation. The Receiver acknowledges that errors and omissions, liability insurance, or other applicable insurance coverage for any defendant would not be subject to this agreement.

The Receiver has indicated through counsel that the Receiver does not believe that Movants continuing to pursue their litigation cases would have a negative impact on the Receivership, as long as this agreement to preserve and assign a priority interest in the recovery of Assets of financial agents/entities subject to the Order is a continuing obligation. This obligation would end when the Receiver achieves a resolution against a covered individual or entity. (e.g. If the Receiver settled his claw back claim against a defendant, then the Movants can pursue recovery of Assets of that particular Defendant and the stay provision would no longer apply.)

Therefore, Movants are seeking limited, but important relief from this Court, and ask this Court to clarify that the Receivership Order does not operate to stay these matters where Movants agree to be bound by the agreement described herein with the Receiver. In the alternative, Movants ask the Court to partially lift the stay as it relates to Movants' cases as long as they agree to be bound by the agreement between Movants and the Receiver described herein.

Movants respectfully request that this Court permit them to intervene in this case pursuant to FRCP 24. The Movants have a significant stake in the outcome of this matter, and their individual proceedings that certain defendants who are not named in the Receiver Order are attempting to stay. Intervention, and the relief requested, is essential to protecting the interests of Movants, and will not burden or delay the efforts

of the Receiver. Movants have consulted with the Receiver, and the Receiver does not object to this motion.

ARGUMENT

I. Movants should be granted leave to intervene

The Movants timely request to intervene should be granted because they cannot protect their stake in the outcome of their cases while certain defendants are using the Receiver Order as a mechanism to stay litigation. Additionally, the Receiver Action, from a practical view point, would not allow for a full recovery on behalf of Movants.

Intervention is governed by Rule 24 of the FRCP; section (a) of Rule 24 provides for mandatory intervention, and section (b) allows for permissive intervention. The Movants should be permitted to intervene under either (or both) Rule 24(a)(2) and/or Rule 24(b)(1)(B). Here, the Receiver has indicated that he offers no objection to Movants motion to intervene.

A. The Movants meet the test for intervention as of right under Rule 24(a)(2).

The Rule 24(a)(2) inquiry “is a flexible one, which focuses on the particular facts and circumstances surrounding each application...[and] intervention of right must be measured by a practical rather than technical yardstick.” *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (citation omitted). Rule 24(a)(2), “Intervention of Right,” requires the court to allow intervention when, upon timely application, ... 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 ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

The district court's denial of the intervention motion for failure to meet these requirements will only be disturbed if an abuse of discretion is found. *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir.1976); *Aluminum Co. v. Utilities Comm. of State of N.C.*, 713 F.2d 1024, 1025, n. 1 (4th Cir.1983); *Southern Christian Leadership v. Kelley*, 747 F.2d 777, 779 (D.C.Cir.1984).

Here, the Movants motion is timely. The receivership is only months old; however, the litigation that Movants have been involved in is over one year old. Certain defendants, who are not named in the Receiver Order, are seeking to use the Order as a delay tactic in litigation against Movants across the Country.

Additionally, some Movants were litigating cases that listed Melanie Schulze Miller and MSJM LLC, two parties identified in the Receiver Order, as party defendants. On September 30, 2019, Movants dismissed Melanie Schulze Miller and MSJM LLC from all cases without prejudice. Therefore, this motion is timely.

B. The Movants clearly have an interest in the property at issue.

“To demonstrate an interest relating to the property or subject matter of the litigation sufficient to support intervention of right, the applicant must have a ‘direct, substantial, legally protectable interest in the proceedings’.” *Edwards*, 78 F.3d at 1004 (quoting *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.) (“UGPLC”), cert. denied, 469 U.S. 1019 (1984)). The interest test “is primarily a practical guide to disposing of lawsuits by involving as many apparently

concerned persons as is compatible with efficiency and due process.” *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994).

Here, the Movants are individuals and families across the country who collectively have suffered tens of millions of dollars of damages relating to them being placed into retirement planning vehicles by various individuals and entities where the FIP Ponzi scheme was a component of that retirement planning by various wrongdoers.

Movants clearly have an interest in the subject matter of this litigation.

C. Disposition of this matter in this Court will impair and impede the Movants’ ability to protect their interests.

The Movants also must be permitted to intervene in order to protect their interests. Here, certain defendants not specifically named in the Receiver Order are using the Order as a mechanism to prevent Movants from protecting their interests in other forums. Movants are actively engaged in litigation around the country in order to seek compensation for the injuries they have suffered. These defendants are using the Receiver Order as a means to delay justice to Movants. Therefore, without intervention in this matter, Movants will suffer harm as these cases will continue to be stayed.

D. The Movants’ interests are not adequately represented by the existing parties.

The Movants should be permitted to intervene as of right because the Receiver Action would not allow for a full recovery to Movants, which may only be achieved by allowing Movants to continue their litigation outside of the Receiver Action. The Supreme Court has held that the adequacy of representation requirement “is satisfied if the applicant shows that representation of his interest may be inadequate; and the

burden of making that showing should be treated as minimal.” *Edwards*, 78 F.3d at 1005 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630 n.10).

While Movants are in support of the work that the Receiver is doing in this action, the Movants are situated differently, and are seeking substantially different relief than the relief that the Receiver is seeking.

As stated herein, the Receiver is currently seeking to disgorge from individuals and entities commissions received related to the sale of FIP products, and recover other monies related to the operations of FIP and the related FIP entities. However, that amount once distributed to all the victims will be much less than Movants total damages in their individual cases that they are pursuing.

The litigation that the Movants are engaged in seeks to obtain damages from individuals and entities that are not necessarily subject to the Receiver Order. One of the main defendants in this litigation is Shurwest LLC, an entity that is in no way currently subject to the Receiver Order. However, Shurwest LLC is using that Order as a tool to delay the Movants’ litigation across the country in every action that Shurwest has been named as a defendant. Movants are being harmed by this delay. As the cases are stayed, witnesses move, memories fade, documents are not preserved, and Movants are left without the retirement income they saved over the years. This is a substantial prejudice to Movants, and the Receiver is not tasked with recovering monies related to Shurwest’s role or other defendants’ roles in these cases that movants are pursuing.

F. Alternatively, the Movants should be permitted to intervene under Rule 24(b).

In the alternative, the Movants request permissive intervention, which is permitted by Rule 24 when an applicant's claim and the main action share a common question of law or fact. "Permissive intervention lies within the discretion of the Court and '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'." *Huron Envtl. Activist League v. EPA*, 917 F. Supp. 34, 43 (D. D.C. 1996) (quoting FRCP 24(b)). The Movants submit that permissive intervention is warranted here. As explained above, the Receiver Action does not allow for a full recovery to Movants, which may only be achieved by allowing Movants to continue their litigation outside of the Receiver Action. Moreover, permitting the Movants to intervene will not cause needless inefficiencies and delay in the adjudication of the underlying Receiver Action. Here, the Movants seek to vindicate a discrete right: the right to have their claims adjudicated as outlined herein.

For these reasons, the Movants respectfully request intervention under Rule 24(b).

CONCLUSION

For the reasons set forth herein, Movants respectfully requests that this Court:

1. Grant Movants Motion to Intervene;
2. Clarify that the Receiver Order does not operate to stay these matters where Movants agree to be bound by the agreement described herein with the Receiver;
3. In the alternative, order a partial lifting of the stay regarding Movants' cases as long as Movants agree to be bound by the agreement described herein with the Receiver; and,

4. Grant such other relief as this Court deems just and proper.

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