

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

v.

**CASE NO. 8:09-cv-87-T-26TBM**

**ARTHUR NADEL,  
SCOOP CAPITAL, LLC,  
SCOOP MANAGEMENT, INC.**

**Defendants,**

**SCOOP REAL ESTATE, L.P.,  
VALHALLA INVESTMENT PARTNERS, L.P.,  
VALHALLA MANAGEMENT, INC.,  
VICTORY IRA FUND, LTD,  
VICTORY FUND, LTD,  
VIKING IRA FUND, LLC,  
VIKING FUND, LLC, AND  
VIKING MANAGEMENT**

**Relief Defendants.**

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**PLAINTIFF'S RESPONSE TO NON-PARTY FIRST NATIONAL BANK  
OF ALBANY'S MOTION TO INTERVENE**

**I. Introduction**

Largely for reasons this Court has set forth in prior orders concerning the motions of other non-parties in this action, Plaintiff Securities and Exchange Commission opposes the Motion of First National Bank of Albany to Intervene (DE 1065). First, as the Court held previously, it lacks jurisdiction over a motion to intervene in the Quest Energy Management portion of the Receivership because of the appeal of the former principals of Quest of the Court's order expanding the Receivership over Quest (DE 1040). Second, as this Court previously held under very similar circumstances, Section 21(g) of the Securities Exchange Act of 1934 ("Exchange

Act”) is a bar to the Bank’s intervention here (DE 207). Finally, as the Receiver’s response to the instant motion explains in more detail, the motion does not establish the necessary grounds for intervention under Federal Rule of Civil Procedure 24.

## **II. Lack Of Jurisdiction**

In the Eleventh Circuit, “the filing of a notice of appeal divests the district court of jurisdiction over the aspects of the case involved in the appeal.” *United States v. Tovar-Rico*, 61 F.3d 1529, 1532 (11th Cir. 1995) (holding District Court was divested of jurisdiction to try defendant while government’s appeal of District Court’s motion to suppress evidence was pending). Put another way, “it is the general rule of this Circuit that the filing of a timely and sufficient notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal.” *Shewchun v. United States*, 797 F.2d 941, 942 (11th Cir. 1986) (per curiam) (affirming trial court ruling it could not rule on a defendant’s motion to correct his criminal sentence while the defendant was appealing his sentence). *See also Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Ass’n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990) (while a case is on appeal “the district court retains only the authority to act in aid of the appeal, to correct clerical mistakes or to aid in the execution of a judgment that has not been superseded”).

Here, the Bank’s motion directly impacts “matters at issue in the appeal.” The Bank seeks to intervene to take action against an asset of the Quest Energy Management portion of the Receivership. The relief the Bank seeks would necessarily affect the rights and holdings of Quest, as well as other creditors of that company. It is the ownership, holdings and assets of Quest that are at issue in the pending appeal of the former principals of Quest of the Court’s

order expanding the Receivership over the company. Thus, the Bank's motion directly impacts "matters at issue in the appeal."<sup>1</sup>

In fact, Quest's former principals filed a very similar motion to intervene and for an immediate accounting after they had appealed the order expanding the Receivership over the company (DE 1039). The Court denied that motion, holding it did not have jurisdiction to entertain it because of the pending appeal (DE 1040). The result should be the same here, and the Court should deny the Bank's motion because it does not have jurisdiction over it at this time.

### **III. Exchange Act Section 21(g)**

Exchange Act Section 21(g) provides in pertinent part that:

. . . 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.

As discussed in earlier responses to attempts by other creditors to intervene in this action, although the language of the statute does not mention intervention, some federal courts have held that, nonetheless, the statute operates as an "impenetrable wall" to a third party intervening in a Commission enforcement action absent the Commission's consent. *See, e.g., SEC v. Wozniak*, No. 92 C 4691, 1993 WL 34702 at \*1 (N.D. Ill. Feb. 8, 1993) (denying motion to intervene by investor who asserted he was a victim of the fraud alleged in the Commission's complaint because the Commission would not consent).

This Court eventually agreed in ruling on a motion filed by one of many creditors of the Receivership estate to intervene to prosecute a foreclosure action (DE 207). There, the Court

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<sup>1</sup> In response to the Receiver's motion to dismiss the appeal for lack of jurisdiction, the Eleventh Circuit recently determined it would carry the jurisdictional question with the rest of the appeal and declined to dismiss it (DE 1068).

agreed with the majority of cases holding Section 21(g) bars intervention without Commission consent, and held the statute acted as an “impenetrable barrier” to that creditor’s intervention in this case (DE 207 at 2-3).

The circumstances are similar here. As with the creditor in the prior instance, the Bank is attempting to intervene to take action against an asset of the Receivership. The Bank did not even address Section 21(g) in its motion, and the Commission does not consent to the Bank’s intervention. The result should be the same as in the prior instance. If the Court decides it has jurisdiction over the motion and considers its merits, it should deny the Bank’s motion based on Exchange Act Section 21(g).

**IV. Intervention Under Federal Rule 24**

The Commission believes intervention is also not appropriate under Rule 24 of the Federal Rules of Civil Procedure for a variety of reasons the Receiver intends to address in his response to this motion. The Commission will defer to the Receiver’s response on this issue.

For all these reasons, the Commission asks the Court to deny the Banks’ motion to intervene in this matter.

Date: September 19, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 19, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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