UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-0087-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, LLC,

Relief Defendants.
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THE RECEIVER'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE AND TO ALLOW THE FIRST NATIONAL BANK OF ALBANY/BRECKENRIDGE TO GO FREE OF THE STAY TO ENFORCE ITS SECURITY INTEREST IN ASSETS OF QUEST ENERGY MANAGEMENT GROUP, INC. AND MOTION FOR IMMEDIATE ACCOUNTING

On September 5, 2013, non-party First National Bank of Albany/Breckenridge ("**FNB**") moved to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and for relief from the stay entered in this case (*see, e.g.*, Doc. 984 at 15) to allow it to enforce purported liens it has against collateral owned by Receivership Entity Quest Energy

Management Group, Inc. ("**Quest**") (the "**Motion**") (Doc. 1065).[1] Essentially, FNB contends it is a creditor of Quest and that Quest owes it approximately $198,250.14 from two loans secured by two of Quest's assets: real estate that houses Quest's offices and an oil and gas lease. As such, FNB seeks relief from the stay in this case so that it can enforce its rights to the collateral in proceedings outside of this Receivership.

The Court previously has denied similar efforts by other similarly-situated creditors of entities in this receivership (*see, e.g.*, Docs. 45, 88, 169, 207, 224, 231; *see also* Docs. 1040, 1064). At least one creditor's intervention was denied because it failed to demonstrate it qualified for intervention under Rule 24 of the Federal Rules of Civil Procedure merely because – like FNB – it held a security interest in Receivership property. *See* Doc. 45. Like the creditors in that instance and in other instances (*see, e.g.*, Doc. 88), here FNB has failed to substantively address all of the factors for intervention enumerated in Rule 24(a), and for this reason alone the Motion should be denied. *See* Doc. 45 at 3; Doc. 88 at 2; Doc. 169 at 2-3. More broadly, it also should be denied because, as discussed in the Securities and Exchange Commission's opposition to the Motion (*see* Doc. 1069), this Court previously held Section 21(g) of the Securities Exchange Act of 1934 precludes intervention in this case (Doc. 207). Notably, in addressing this exact issue, the Court explained that it was addressing it "to serve notice" on creditors "as to the Court's position so as to prevent any subsequent motions to intervene which require the SEC, the Receiver, and this Court to

[1] The title of the Motion also says that it is a motion for an immediate accounting, but the body of the motion never addresses that issue. In any event, the Receiver's Interim Report On Quest Energy Management Group, Inc. (the "**Quest Interim Report**") (Doc. 1054) details his findings relating to Quest and its disorganized finances, and as directed by the Court at the September 4, 2013, status conference, the Receiver will regularly update the Court on matters relating to Quest.

expend valuable time and resources resolving these motions." Doc. 207 at 3. FNB did not heed that notice. But even ignoring both FNB's failure to satisfy its burden and the absolute bar to intervention, the Motion still should be denied because FNB cannot satisfy Rule 24(a).

ARGUMENT

The purpose of appointing a receiver in an SEC enforcement action is to effect an "orderly and efficient administration of the estate." *FTC v. 3R Bancorp*, 2005 WL 497784, *3 (N.D. Ill. Feb. 23, 2005) (citing *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986)). When, as here, a creditor's only potential "injury" would be a delay in enforcing its right, intervention and lifting the receivership stay are both unwarranted. *See FTC v. Med Resorts Int'l*, 199 F.R.D. 601, 607-609 (N.D. Ill. 2001). Indeed, as the Court previously observed in denying another creditor's intervention, "The Court concludes again that allowing intervention by [a non-party creditor] in these proceedings would ***encourage other non-party creditors and investors to seek intervention*** with the attendant consequences of this Court and the parties having to engage in unnecessary and premature collateral litigation." Doc. 169 at 2. The Court also "expresse[d] its utmost confidence in the skills and ability of the Receiver to protect the financial interests of [the non-party creditor] with regard to the assets at issue." *Id*. at 2-3. FNB's Motion contains nothing that impacts any of these previous conclusions and thus it should be denied. Nevertheless, following is a more detailed analysis of relevant factors under Rule 24(a).

I. FNB IS NOT ENTITLED TO INTERVENE UNDER RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

As an initial matter, in addressing Rule 24(a)[2] FNB's Motion cites no case involving either an SEC enforcement action or an equity receivership. This omission is significant because federal courts presiding over SEC enforcement actions where equity receiverships have been established typically deny motions to intervene. Concerns of efficiency, resources of all parties involved, and equity typically preclude a creditor from intervening in those cases. *See, e.g., CFTC v. Chilcott Portfolio Mgmt., Inc.*, 725 F.2d 584 (10th Cir. 1984); *SEC v. Credit Bancorp Ltd.*, 194 F.R.D. 457, 468 (S.D.N.Y. 2000).

A. FNB Has No Right To Intervene Under Rule 24(a)(1)

Rule 24(a)(1) allows intervention of right if the non-party seeking to intervene is "given an unconditional right to intervene by a federal statute ...." FNB has not and cannot identify any federal statute that confers on it an unconditional right to intervene in this case.

B. FNB Has No Right To Intervene Under Rule 24(a)(2)

To intervene under Rule 24(a)(2), FNB must establish each of the following, among other, elements: (1) it is so situated that disposition of the action as a practical matter may impair or impede its ability to protect its interest; and (2) the parties to the action will not adequately represent its interest. (Doc. 45 at 3 (citing *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1302-03 (11th Cir. 2008).) FNB cannot establish either of these requirements, and allowing intervention will unnecessarily establish a dangerous precedent.

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[2] The Motion does not seek intervention under Rule 24(b), which governs permissive intervention (the Motion only cites Rule 24(a) and claims FNB has "a right to intervene" (*see, e.g.*. Mot. at 3)). Nevertheless, FNB could not satisfy Rule 24(b) even if it did seek relief under that provision because it has no conditional right to intervene under any federal statute and its claim does not "share[] with the main action a common question of law or fact."

1. FNB Cannot Establish That Disposition Of This Action May Impair Or Impede Its Ability To Protect Its Interest In Receivership Property

FNB did not and cannot establish how disposition of this action would impair or impede its ability to protect its claimed interest in Receivership property. Courts – including this one – have held that receivership proceedings are the appropriate fora for considering creditors' interests and allow creditors to protect their interests. *See, e.g.*, Doc. 169 at 3 (finding that the third-party creditor's due process argument was premature because "the Court has yet to approve a plan for the distribution of assets" and that the creditor could "rest assured that any such plan will afford it all the process that is due under the law with regard to its claimed interest in the assets at issue consistent with the holding of [*SEC v. Elliott*, 953 F.2d 1560 (11th Cir. 1992)]."); *SEC v. Homa*, 17 Fed. App'x 441, 446 (7th Cir. 2001) (holding that the intervenor's claim "would not be impaired, because a forum is available under the Receiver's proposed claims procedure ...."). Aside from eliminating the burdensome need for each and every creditor to intervene, the receivership process and the Court's oversight of the Receiver ensure protection of FNB's and every other creditor's interests.

Although no claims process has been established to date to address Quest's creditors, Quest has only been in Receivership since May 24, 2013 (Doc. 1024), and the Receiver is still in the midst of investigating its affairs and analyzing the actual and potential value of its assets. *See generally* Quest Interim Report. Whether or not Quest and its assets are ultimately kept in this Receivership, during the time they are in Receivership they are being preserved, and in some instances improved (as discussed in the next Section), and before they

are ever removed from this Receivership, the Receiver will have to seek the Court's approval, and in turn the Court will be in position to ensure any creditors' rights are addressed in an appropriate manner. In the meantime, any delay in FNB's ability to enforce any rights it may have in Receivership property does not entitle it to intervene in this case. *See Med Resorts Int'l*, 199 F.R.D. at 607-09.

2. FNB Cannot Establish The Receiver Will Not Adequately Represent Its Claimed Interest In Receivership Property

FNB similarly did not and cannot establish how the Receiver will not adequately represent its interest. FNB's only relevant assertions are a concern "on whether the operating permit to operate the oil and gas leases ... may not be renewed thereby jeopardizing the Bank's collateral" and a conclusory statement that the Receiver "has not attempted to ... preserve the assets that are collateral for the notes due the Bank." Mot. at 3. Both of these assertions are wrong. As explained in the Quest Interim Report, the renewal of Quest's Operator's License – which is necessary for Quest to conduct oil and gas operations – had been denied by the Texas Railroad Commission because of Paul and Jeff Downey's failure to comply with regulatory requirements before the Receiver's appointment. Quest Interim Rpt. at 6, 7-8. The interim report explained the Receiver's efforts to reverse the denial, that two of the four underlying violations had been resolved, and that the remaining two violations were close to being resolved. *Id.* Since the filing of that report, the remaining two violations have been resolved, and Quest's Operator's License has been renewed. *See* Sept. 18, 2013, T. Poe (Texas Railroad Commission representative) email to J. Hicks *et al.* (explaining that Quest's P-5 Operator's License has been renewed), attached as **Exhibit A**.

With respect to FNB's assertion that the Receiver "has not attempted to ... preserve the assets that are collateral for the notes due the Bank," FNB provides no specifics whatsoever and this alone requires denial of the Motion. The SEC's and a receiver's adequate representation of all parties is presumed and must be rebutted by a proposed intervenor. *See CFTC v. Eustace*, 2005 WL 2862945, *2 (E.D. Pa. Oct. 31, 2005) ("[O]nce a receiver has been appointed, and the parties seeking relief or intervention have the same goal, i.e., protection of investors, there is a presumption that the receiver will adequately represent all parties. In that case, the parties seeking relief were unable to rebut the presumption that the receiver's representation would adequately represent their interests."); *Ruthardt v. U.S.*, 303 F.3d 375, 386 (1st Cir. 2002) ("Adequacy is presumed, although rebuttably so, where a government agency is the representative party."). FNB's conclusory (and inaccurate) assertion does not rebut this presumption. In any event, the Quest Interim Report and the Receiver's discussion at the September 4th status conference establish the opposite: the Receiver is diligently working to preserve all of Quest's assets.

In *SEC v. Byers*, the court was presented with similar circumstances as here and denied intervention, finding that the attempted intervenors failed to show that the SEC and federal receiver would not adequately represent their interests:

> The Proposed Intervenors have not shown that the Receiver and SEC are not adequately representing their interests in this case. The position of the Proposed Intervenors is no different from that of the other creditors and victims in this case, and, as set forth in my Prior Decision,
>
> > [a]s a practical matter, it does not make sense to allow individual victims and creditors to intervene as parties. There are allegedly 1,400 victims who invested in approximately sixty securities offerings that raised more than $250 million. There are dozens of creditors with divergent claims and

> interests. There is a complex web of some 120 Wextrust entities and affiliates operating throughout the world. In these circumstances, it would not be efficient or effective to permit individual creditors to intervene as parties.

2009 WL 212780, *1 (S.D.N.Y. Jan. 30, 2009).

FNB has not provided any reason (let alone a cognizable one) for why its interest as a creditor somehow deserves special treatment allowing it to bypass the receivership process. Quest has been in Receivership only for approximately four months, and the Receiver is working to promptly determine how to proceed with Quest and its assets. While doing so, the Receiver is preserving and maintaining those assets, and in many instances he is improving them. For example, as discussed above the Receiver was able to reverse the denial of Quest's Operator's License, and he also has been able to increase Quest's oil production. *See* Quest Interim Rpt. at 12-13. FNB has not submitted any contrary evidence. In short, the Receiver, as discussed below in Section II.1., should be provided with time to investigate Quest's assets without interference from creditors, and irrespective of what ultimately the Receiver recommends to the Court with respect to Quest and its assets, the assets are currently being maintained and preserved by the Receiver, and the Court will be in position to ensure that all creditors applicable rights are recognized and addressed.

3. Intervention Would Unnecessarily Set A Dangerous Precedent

FNB, like other creditors, claims it holds notes and an interest in certain Receivership assets collateralizing the notes, but it has provided no cognizable reason to single it out for special treatment from the large group of creditors left in the wake of Nadel's scheme. Allowing FNB to intervene in this action would set a dangerous precedent, especially because it has not demonstrated any basis for intervening and disrupting this receivership's

ongoing efforts. FNB's intevention, like other creditors' intervention efforts before it, would undermine the efficient administration of this receivership and divert resources and the Receiver's efforts from activities intended to benefit the entire Receivership estate. FNB's interests, like those of all other creditors, are being adequately protected by the Receiver (and the Court).

II. FNB'S REQUEST TO LIFT THE STAY SHOULD BE DENIED

Even assuming *arguendo* FNB was not barred from intervening by the federal securities laws and had satisfied its burden of establishing entitlement to intervene, its request to lift the stay so that it can enforce its claimed rights directly against certain Quest assets should be denied for the same reasons for denying intervention in the first place. It also should be denied because (1) the Receiver's interest in protecting the Receivership estate for the benefit of all creditors far outweighs FNB's individual interests and (2) the Receiver is entitled to marshal and investigate Quest's assets without interference from claimed creditors. *See SEC v. Wencke*, 742 F.2d 1230, 1232 (9th Cir. 1984); *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005) ("A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant.") (citing *SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985)); *3R Bancorp*, 2005 WL 497784 at *2 ("[R]elief from a receivership stay should only be granted if the moving party's interests outweigh the interests of the receiver." (citing *Wencke*)); *U.S. v. Petters*, 2008 WL 5234527, *4 (D. Minn. Dec. 12, 2008) ("[F]irst, the receiver must be given full opportunity to marshal the assets of the receivership estate and then preserve them.").

In *Petters*, the court identified several factors which favored a denial of motions to lift the stay: (1) denial would preserve the status quo; (2) the receiver had "dutifully identified, managed, and preserved the assets for the *best interests of all* (creditors, claimants, and victims alike);" and (3) the court was not persuaded that the intervenors would suffer substantial injury if the stay was not lifted. *Id*. (emphasis added). Here, FNB's request to lift the stay fails for these same reasons.

A. Preserving The Status Quo And Preserving Assets For The Best Interest Of All

"[T]he receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of a movant's claim." *Petters*, 2008 WL 5234527 at *3-*4 (citations omitted); *see Univ. Fin.*, 760 F.2d at 1038 (refusing to lift receivership stay when it would disturb the status quo and when lifting the stay "would result in a multiplicity of actions in different forums, and would increase litigation costs for all parties while diminishing the size of the receivership estate"); *SEC v. Byers*, 592 F. Supp. 2d 532, 537 (S.D. N.Y. 2008) (denying motion to lift stay: "The Receiver is charged with protecting the investors as a whole, and thus the best way to maintain the status quo is to permit him to carry on with his investigation."); *Med Resorts*, 199 F.R.D. at 607 ("The stay maintains the status quo. It has done precisely that for the last seven months. Rather than decrease the value of [the third parties'] interests, the stay ensures that the value of those interests wil be maintained."). FNB has offered no evidence (or even argument) that preserving the property as part of the Receivership estate will not maintain the status quo.

B. No Substantial Injury

FNB also has not demonstrated that it would suffer any substantial, cognizable injury if the stay continues. FNB's only arguable, potential injury is that it – like every other creditor, including many suffering financial hardship – must wait until it can enforce any right it has. When a creditor's only potential "injury" would be a delay in enforcing its right, intervention and lifting the receivership stay are both unwarranted. *See Med Resorts Int'l*, 199 F.R.D. at 609.

CONCLUSION

FNB's Motion already disrupted the Receiver's efforts and required expenditure of limited resources. Allowing FNB to proceed with an action to enforce its claimed rights to Receivership property would require the Receiver to spend more time and effort defending litigation, which would further disrupt the Receiver's on-going investigation and marshaling of Quest's assets. It would also set a dangerous precedent that inevitably would spur many other creditors to follow. The Receiver, who is "charged with protecting" the hundreds of investors who Nadel defrauded and other creditors, should be permitted to continue his investigation into Quest and marshaling of Quest assets and to maintain the status quo for all creditors. As noted above, although the Receiver understands the hardship caused by Nadel's scheme, many creditors are suffering that hardship, and FNB has not identified any basis for allowing its intervention and the substantive relief that it seeks.

For all of the above reasons, the Receiver respectfully requests the Court deny the Motion to Intervene and to Allow the First National Bank of Albany/Breckenridge to Go

Free of the Stay to Enforce its Security Interest in Assets of Quest Energy Management, Group, Inc., and Motion for Immediate Accounting (Doc. 1065).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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