UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
vs.	)	Case No.: 4:12-cv-00080-CEJ
BURTON DOUGLAS MORRISS, *et al.*,	)	
Defendants,	)	

REPLY BRIEF IN SUPPORT OF MIKE MCDANIEL's MOTION TO INTERVENE AND REQUEST FOR INFORMATION

McDaniel is entitled to the relief he seeks in his motion to intervene and his request for information because (1) he has a protectable interest in the proposed sale of Pollen, Inc. shares; (2) his interest is not adequately protected by the Receiver; and (3) he cannot effectively evaluate or protect that interest without the information he seeks. His motion and request should be granted under the standards set by applicable rules, statutes, and case law.

I. MCDANIEL IS ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2).

A timely motion to intervene as of right under Fed. R. Civ. P. 24(a)(2) should be granted where the following conditions are met: (1) the intervenor has an interest in the subject matter; (2) that interest might be impaired; and (3) the interest is not adequately represented by an existing party. *Sierra Club v. Robertson*, 960 F.2d 83 (8th Cir. 1992); *Innova Specialties Inc. v. Parnell Labs. (AUST) Pty, Ltd.*, 2010 U.S. Dist. LEXIS 69006, *4 (E.D. Mo. July 12, 2010. Rule 24 must be liberally construed, and all doubts must be resolved in favor of intervention. *Sierra Club*, 960 F.2d at 86; *Smith*, 2013 U.S. Dist. LEXIS 83257, *6 (D. Neb. June 13, 2013);

Innova Specialties, 2010 U.S. Dist. LEXIS 69006, *4. McDaniel's motion to intervene meets these standards and should be granted.

The Receiver only questions McDaniel's right to intervene on two grounds: (1) that he no longer has any protectable interest in the proposed sale because he chose not to file a proof of claim by May 6; and (2) that the Receiver herself adequately represents McDaniel's interests in these proceedings. She is wrong on both counts. Interestingly, the Receiver does not dispute that McDaniel has an equity interest in Gryphon III or by extension Pollen Inc.

A. McDaniel Continues to Hold a Protectable Interest in the Proposed Sale.

The relief McDaniel currently seeks has no bearing on any "claim" he might have filed pursuant to this Court's order of March 4, 2013 (the "Order"), in which the Court set a claims bar date of May 6. (Doc. 234.) McDaniel here seeks information that would allow him to determine whether the Receiver's proposed sale of ATP's shares of Pollen, Inc. stock is in "the best interests of the estate" and for "the best price under the circumstances," as required under federal law. *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 130772, *4 (N.D. Cal. Aug. 21, 2013); 28 U.S.C. §2001(b); *see also* 28 U.S.C. §2004. If the sale does not meet those standards, he will need to consider whether to object to it to protect his ownership interest (through Gryphon) in ATP's assets, a consideration that represents a protectable interest for purposes of intervention. *See Innova Specialties*, 2010 U.S. Dist. LEXIS 69006, *6. But this consideration involves no "claim" as that term is defined in the Order.

In the Order, this Court defined "claim" (as relevant here) as "a right to payment" or "a right to ***a*** distribution from one or more of the Receivership Entities." (Order at 1-2, emphasis added.) But there is no "right to payment" or "right to ***a*** distribution" that is at issue here. The sale of Pollen stock that is the subject of McDaniel's motion and request was not proposed until

November 14, 2013. (Doc. 293.) That proposed sale, which has yet to be approved, could not have created any right to payment or any right to *any particular* distribution in favor of McDaniel that existed as of May 6. He therefore had no "claim" that could have been barred as of that date.

Although the Receiver's point here seems to be that McDaniel's interests are foreclosed because he filed no claim regarding his general ownership interest as an investor, that position is not borne out by the terms of the Order. The Order does not purport to affect McDaniel's or any investor's ownership interest in the Receivership Entities, except to the extent those interests gave rise to "a right to ***a*** distribution" as of the claims bar date. (Order at 1-2, emphasis added.) The Receiver fails to understand a distinction that is key to this analysis—the difference between an equity holder's right to receive a particular dividend or distribution that has been already been declared but not yet paid, on the one hand, and, on the other hand, his or her general equity interest and right, in theory, to receive future distributions based on that interest. The former, but not the latter, would be a "claim" under this Court's definition. Bankruptcy courts operate under an almost identical definition of "claim" in 11 U.S.C. §101(5) and routinely make this distinction. *See, e.g, Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 523-25 (5th Cir. 2004); *Hasson v. Motors Liquidation Co. GUC Trust*, 2012 U.S. Dist. LEXIS 72728, *11-12; *IDS Holding Co., LLC v. Madsen*, 292 B.R. 233, 238 (D. Conn. 2003), in which the courts recognize that a specific right to payment or distribution that has already arisen might constitute a "claim," but that an equity interest does not.

Because McDaniel's interest here is in the nature of a general ownership interest, not a right to receive any particular distribution that has already been declared or accrued, it cannot be

deemed a barred "claim." The claims bar date is thus irrelevant to the relief McDaniel seeks, and his motion should be granted.

B. McDaniel's Interests Are Not Adequately Protected by the Receiver.

As is true in general of motions to intervene, the intervenor bears a "***minimal burden***" in showing that his interests are not adequately represented by the current parties to the case. *Sierra Club*, 960 F.2d at 85-85; *Smith*, 2013 U.S. Dist. LEXIS 83257, *8; *Innova Specialties*, 2010 U.S. Dist. LEXIS 69006, *8. In determining whether those interests are represented, the Court must compare them to those of the current parties: if those interests are different, even though ostensibly directed at a common goal, intervention is warranted. *Sierra Club*, 960 F.2d at 86; *Innova Specialties* 2010 U.S. Dist. LEXIS 69006, *8.

McDaniel's motion, again, meets these standards. Indeed, to suggest that the Receiver adequately represents McDaniel's interests in this case is almost laughable. Under the sale the Receiver proposes, McDaniel's interests in the Pollen stock would be entirely defeated: he would receive none of the proceeds of that sale, and the asset would be gone. (McDaniel Decl., ¶¶2-3.) This disparity in interest is made even clearer by the Receiver's resistance to providing McDaniel with the very information that would allow him to assess the merits of the sale. In any event, the Receiver only purports to represent the overall interests of investors in the Receivership Entities as a group, not the unique interests of any individual investor. McDaniel is entitled to intervene to protect any interests he, and others similarly situated, have that diverge from those of the group as a whole. *See Sierra Club*, 960 F.2d at 86; *Smith*, 2013 U.S. Dist. LEXIS 83257, **8-10.[1]

[1] The Receiver makes no argument against permissive intervention other than the argument that McDaniel failed to file a proof of claim. For the reasons discussed above, that consideration is irrelevant and should not defeat any basis for intervention under Rule 24(b).

II. AS A PARTY TO THE CASE, MCDANIEL WILL BEENTITLED TO THE INFORMATION HE SEEKS REGARDING THE PROPOSED SALE OF POLLEN SHARES.

As stated in McDaniel's request for information, he cannot assess the propriety of the proposed sale of ATP's Pollen shares without access to the redacted information the Receiver submitted to the Court. (McDaniel's Request, Doc. 301, ¶¶ 5-7.) When McDaniel's motion to intervene is granted, as it must be based on the standards discussed above, he will be a party to this case and will have all rights attendant to that position, including his right to review documents submitted to the Court and the right to request documents through discovery. *See* Fed. R. Civ. P., Rules 5(a)(1), 26(b)(1), and 34(a).

Although the Receiver asserts here (without evidentiary support) that she has a private, contractual obligation not to disclose this information to McDaniel, she cites no restriction on this Court's power or obligation to order the information disclosed to another party to the case, and cites no rule that would prevent McDaniel from obtaining the information in discovery (with an appropriate protective order under Rule 26(e), if necessary). Even in the motion the Receiver filed seeking leave to submit a redacted version of this information with the Court, she cited no basis for withholding the information from interested parties, as opposed to the general public. (Doc. 291.) Indeed, she claimed in that motion, at paragraph 4, that her motivation in filing the document was to provide more information to the investors whose interests she is charged with protecting. McDaniel is an investor with an interest in this case, and should be made a party through intervention. He is entitled to the information he seeks in order to protect that interest.

CONCLUSION

For the reasons discussed above, McDaniel respectfully asks that this Court grant his motion to intervene and order the Receiver to provide him with all information, unredacted, that she submitted to the Court in support of the proposed sale of ATP's shares of Pollen, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing on December 20, 2013 with the Clerk of the Court using the CM/ECF system, which will send notification to the following:

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