UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BURTON DOUGLAS MORRISS, et al., Defendants, and MORRISS HOLDINGS, LLC, Relief Defendant.	)	Case No. 4:12-cv-00080-CEJ

RECEIVER'S MOTION FOR LEAVE TO FILE SUR-REPLY TO REPLY BRIEF IN SUPPORT OF MIKE MCDANIEL'S MOTION TO INTERVENE AND REQUEST FOR INFORMATION (DKT. NO. 305)

Receiver Claire M. Schenk ("Receiver") respectfully requests leave of this Court to file a Sur-reply to the Reply Brief in Support of Mike McDaniel's Motion to Intervene and Request for Information (the "McDaniel Reply") for the reasons set forth below. A copy of the proposed Sur-reply is attached hereto as Exhibit A. A proposed order granting the Receiver leave to file the attached Sur-reply is attached hereto as Exhibit B.

The local rules of this Court provide that a matter is fully briefed upon the filing of the original motion and memorandum, a memorandum in opposition, and a reply memorandum. Additional memoranda may be filed by either party "only with leave of Court." E.D.Mo. L.R. 7-4.01(C). District courts "routinely" grant motions to file additional memoranda "when a party is 'unable to contest matters presented to the court for the first time' in the last scheduled pleading." *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (quoting *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001); *see also Fun Servs. of Kansas City, Inc. v.*

Love, No. 11-0244, 2011 WL 1843253, at *3 (W.D.Mo. May 11, 2011) (allowing non-moving party to file a sur-reply because plaintiff "raised some new arguments in her reply").

Here, Mike McDaniel ("McDaniel") presented new arguments in his reply brief. McDaniel filed his Motion to Intervene (Dkt. No. 300) and Request for Information Regarding Receiver's Motion for Sale of Preferred and Common Shares of Pollen, Inc. (Dkt. No. 301) on December 4, 2013. McDaniel's motion and memorandum did not cite or discuss legal authorities supporting McDaniel's request for intervention. On December 13, 2013, the Receiver filed her opposition to McDaniel's request for intervention (Dkt. No. 302). In her opposition, the Receiver cited to the legal standards for intervention under Federal Rule of Civil Procedure 24 and argued that McDaniel did not meet the requirements for either mandatory or permissive intervention. Receiver's argument focused primarily on the basis that McDaniel's failure to file a proof of claim with the Receiver on or before the claims bar date of May 6, 2013 precludes McDaniel from asserting an interest in the Receiver's sale of certain stock held by one of the Receivership Entities. McDaniel filed his reply on December 20, 2013 (Dkt. No. 305). For the first time, in his reply, McDaniel addresses the requirements for intervention and also asserts the position that as an investor in one of the Receivership Entities prior to the institution of this Receivership, McDaniel was not required to file a proof of claim to protect his interest.

The Receiver requests leave to file a Sur-reply to McDaniel's reply memorandum. Although McDaniel titled his original motion a "motion to intervene," McDaniel did not address the requirements of intervention in his accompanying memorandum. In fact, McDaniel did not assert any legal authority on intervention or discuss the requirements of mandatory intervention until the filing of his reply memorandum. McDaniel's filings effectively forced the Receiver to divine, and then oppose, what arguments McDaniel might have made in support of his request

for intervention, and denied the Receiver an opportunity to respond to his legal arguments by including those arguments for the first time in his reply.

For the foregoing reasons, the Receiver respectfully requests that the Court grant the Receiver leave to file a Sur-reply to the McDaniel Reply and further grant such other relief as is appropriate under the circumstances.

Dated: December 30, 2013

Respectfully Submitted,

THOMPSON COBURN LLP

By /s/ Kathleen E . Kraft

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system which will send a notice of electronic filing to all parties receiving electronic notice, including:

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BURTON DOUGLAS MORRISS, et al., Defendants, and MORRISS HOLDINGS, LLC, Relief Defendant.	)	Case No. 4:12-cv-00080-CEJ

RECEIVER'S SUR-REPLY TO
REPLY BRIEF IN SUPPORT OF MIKE MCDANIEL'S MOTION TO INTERVENE AND REQUEST FOR INFORMATION (DKT. NO. 305)

Receiver Claire M. Schenk ("Receiver") respectfully files this Sur-reply to the Reply Brief in Support of Mike McDaniel's Motion to Intervene and Request for Information (the "McDaniel Reply"), as a supplement to, and not in lieu of, the Receiver's arguments against intervention in the Receiver's Opposition to Mike McDaniel's Motion to Intervene and Request for Information (Dkt. No. 302).

Argument

McDaniel does not demonstrate that he is entitled to intervene under Federal Rule of Civil Procedure 24. McDaniel's failure to file a proof of claim is conclusive as to McDaniel's purported interest in this proceeding. Furthermore, McDaniel's chosen course – to ignore the Court's claims procedures and instead seek intervention --is disfavored by other courts that have presided over equity receiverships.

A. McDaniel's Failure to File a Proof of Claim is Conclusive as to McDaniel's "Interest" in the Pollen Sale Motion

As the Receiver argued in her opposition, McDaniel's failure to file a proof of claim with the Receiver: (1) forever bars McDaniel from asserting any claim against the Receivership Entities, their estates, and their property, (2) bars McDaniel from objecting to any distribution plan proposed by the Receiver, and (3) bars McDaniel from receiving any distributions under any distribution plan implemented by the Receiver. The Receiver therefore maintains that McDaniel has no defendable interest in the Receivership Entities, the Receivership estate, or the Receivership property, including the Pollen stock (the proceeds from the sale of which would help support the Receivership activities and be available for eventual distribution to those investors who filed claims).

McDaniel takes a different approach. McDaniel does not argue that he did not receive notice of the bar date or that he should be allowed to file a tardy claim. Rather, McDaniel advances the argument that he, an investor with a general ownership interest in one of the Receivership Entities as of the institution of the Receivership, was not required to file a proof of claim because he did not consider himself to hold a "right to a distribution" from any of the Receivership Entities as of the bar date. In support of his position, McDaniel cites to bankruptcy cases that address the differences between "claims" and "equity interests" under the Bankruptcy Code. The cases McDaniel cites are inapposite. In *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508 (5th Cir. 2004) and *In re Motors Liquidation Co.*, No. 09-50026, 2012 WL 1886755 (S.D.N.Y. May 21, 2012), the courts considered whether to allow a shareholder or equity-interest holder to file a proof of claim and therefore have more priority in a potential distribution plan. Both cases focused on divining whether the shareholder's claim was truly a "claim" or an "equity security" under the Bankruptcy Code, and both courts noted the importance of the distinction under the absolute priority rule, which requires creditors' claims to be paid before equity is returned to

investors. *See Carrieri*, 393 F.3d at 521-23; *In re Motors*, 2012 WL 1886755, *2. Here, in contrast, the Court does not need to reconcile two conflicting definitions. Furthermore, there is no underlying concern with the absolute priority rule subordinating equity interests in this case. The *Carrieri* and *Motors* decisions have no application here.

McDaniel also cites *In re IDS Holding Co., LLC*, 292 B.R. 233 (Bankr. D. Conn. 2003), but *IDS Holding* is similarly inapplicable. In *IDS Holding*, the court considered whether a party had received a preferential transfer as a "creditor" with a "claim." *See* 292 B.R. 233. The court's inquiry considered the Code's definition of the word "claim." *Id*. at 237. It then held that an equity-interest holder could also have a "right to payment" and thus had a claim when considering state law, which provided that a party entitled to a distribution had the same rights as a creditor. *Id*. at 237-38. Here, instead of state law providing the meaning of the phrase "right to payment," the Court's claims bar date order provides the applicable definition.

McDaniel's purported interest in the Receivership Entities (an interest stemming from his status as an investor in one of the Receivership Entities) is encompassed in the definition of "claim" in the Court's claims bar date order. A "claim" includes a "right to a distribution from one or more of the Receivership Entities, including but not limited to a right based on an investment in or through one or more of the Receivership Entities." The proposed definition of "claim" in the claims bar date order, which the Court adopted, was intended to encompass all claims to and against the Receivership Entities, their estates, and their property, including all claims of investors based on an interest in one or more of the Receivership Entities. The Receivership's website instructed potential claimants to file a claim if they believed that the Receivership Entities may owe them money or a distribution interest, including a debt, equity or hybrid type interest. In the Court-approved Notice of Claims Bar Date sent to all known

potential claimants, including McDaniel, the Receiver stated: "All persons or entities (including, without limitation, individuals, partnerships, corporations, joint ventures, estates, trusts, and governmental units) that believe they possess a potential or claimed right to payment, or **a potential claim of any nature**, against any of the Receivership Entities and believe that they are owed any money by, or **are entitled to a distribution (including distribution of a debt, equity or hybrid type interest)** from, any of the Receivership Entities must submit a Proof of Claim Form, unless otherwise expressly stated herein, regardless of whether such claim has been acknowledged by the Receiver (each a "Claimant")" (emphasis added). Considering the very broad definition of a claim, that this proceeding involves investment entities (and therefore, the pool of potential claimants is comprised primarily of investors), and that 103 of the approximately 124 investors in the Receivership Entities did file claims, McDaniel's narrow reading of the Court's claim bar date order appears to be a position assumed solely to support McDaniel's bid for intervention.

McDaniel's narrow reading of the Court's claims bar date order also contradicts the Receiver's goals and objectives in proposing a claims bar date and claims filing procedures. The Receiver proposed the establishment of a claims bar date and procedures for the filing of claims to facilitate the Receiver's identification of the nature and scope of claims against *and liabilities of* the Receivership Entities. The Receiver anticipates that she will have limited, if any, proceeds available for distribution to investors and creditors.[1] Therefore, to ensure that the available proceeds are maximized and distributed to those that hold valid claims, the Receiver sought a Court order that would assist her in finally determining the creditors and investors who desired a

[1] The Receiver's motion concerning the proposed sale of the Pollen stock is one of the many steps that the Receiver is taking to maximize proceeds that may be available for distribution to investors and creditors.

"piece of the Receivership pie." The Receiver considers the identification of all claimants that would potentially assert a right to the Receivership Entities' property, and the barring of all claims against the Receivership Entities not timely filed, as a necessary and preliminary step to the Receiver's presentation to the Court of a proposed plan and order of distribution. By deciding not to file a claim, McDaniel communicated to the Receiver his disinterest in sharing in the proceeds of the Receivership.

B. Intervention by Investors is Generally Disfavored in Government Enforcement Actions

Courts generally deny investor intervention in government enforcement actions. "Intervention has been traditionally disfavored, given courts' hesitation to allow scores of investors and other interested persons from becoming full-fledged parties to governmental enforcement actions." *Sec. & Exch. Comm'n v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 468 (S.D.N.Y. 2000) (allowing customers to intervene under Rule 24(b)(2)).[2] Indeed, the claims procedure is set up to avoid such interventions, and the claims procedure is the preferred route for investors to seek a return of their funds. *See Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt.*, 725 F.2d 584, 586 (10th Cir. 1984) (noting that "possibly numerous other persons" could also seek to intervene rather than file a claim "and become full-fledged parties to the litigation started by the government").

This proceeding is an SEC civil enforcement action. By seeking and obtaining Court-approved claims procedures and a Court-established claims bar date, the Receiver has provided investors like McDaniel with a method of presenting his claim against the Receivership Entities. McDaniel has not provided any evidence as to why he should be allowed to circumvent the

[2] The Receiver notes that McDaniel has not argued for permissive intervention in his Reply.

Court-approved route embodied in the claims procedures order and instead become a full-fledged party to this action.

Conclusion

For all the foregoing reasons, as well as those reasons set forth in the Receiver's opposition to McDaniel's motion, the Receiver respectfully requests that the Court deny McDaniel's motion.

Dated: December 30, 2013

Respectfully Submitted,

THOMPSON COBURN LLP

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EXHIBIT B

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

ORDER

This matter is before the Court on the *Motion for Leave to File Sur-Reply to Reply in Support of Mike McDaniel's Motion to Intervene and Request for Information* (the "Motion") filed by Claire M. Schenk, the court-appointed receiver (the "Receiver") for Acartha Group, LLC, MIC VII, LLC, Acartha Technology Partners, L.P. and Gryphon Investments III, LLC in this action.

Having fully considered the Motion, being duly advised as to the merits and for good cause shown,

THE COURT DOES HEREBY ORDER THAT

1. The Receiver's Motion is granted in its entirety; and

2. The Clerk of the Court shall enter Exhibit A to the Motion on the docket in this proceeding.

SO ORDERED this the ____ day of _____, 2013.

_____
THE HONORABLE CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE