

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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

**RECEIVER’S OPPOSITION TO MIKE MCDANIEL’S MOTION TO INTERVENE AND  
REQUEST FOR INFORMATION REGARDING RECEIVER’S MOTION FOR SALE  
OF PREFERRED AND COMMON SHARES OF POLLEN, INC.**

Receiver Claire M. Schenk (“Receiver”) respectfully opposes Mike McDaniel’s Motion to Intervene, responds to his Request for Information Regarding Receiver’s Motion for Sale of Preferred and Common Shares of Pollen, Inc. (the “Motion”), and requests that the Court deny the Motion in its entirety for the reasons set forth below.

**I. Background**

On January 17, 2012, the United States Securities and Exchange Commission (the “SEC”) filed its *Complaint for Injunctive and Other Relief* (the “Complaint”) against Burton Douglas Morriss (“Morriss”), Acartha Group, LLC (“Acartha”), Acartha Technology Partners, L.P. (“ATP”), MIC VII, LLC (“MIC”), Gryphon Investments III, LLC (“Gryphon” and together with Acartha, ATP and MIC, the “Receivership Entities”) and Morriss Holdings, LLC (“Morriss

Holdings)<sup>1</sup> in this Court as Case No. 4:12-cv-00080-CEJ (the “SEC Case”). *See* Complaint (Dkt. No. 1). In the Complaint and other papers filed by the SEC on January 17, 2012, the SEC alleged various securities laws violations by the SEC Defendants. Also, on January 17, 2012, the SEC moved for, and the Court granted, the immediate appointment of a receiver over the Receivership Entities (Dkt. No. 16).

The SEC Case is a complex proceeding. To date, over 300 pleadings have been filed with the Court. Recently, Defendant Morris, the former controlling party for each of the Receivership entities, consented to the entry of a judgment of permanent injunction and other relief against him (Dkt. No. 275) and pleaded guilty to criminal charges in a separate proceeding (Case No. 4:13-CR-341-RWS, Dkt. No. 8). Defendant Morriss is expected to be sentenced soon in connection with the charges brought against him in the criminal case.

In parallel with the SEC Case, the Receiver has been administering and managing the business affairs, funds, assets, choses in action and other property of the Receivership Entities. Also, as directed in the Order Appointing Receiver, the Receiver has been marshalling and safeguarding the assets of the Receivership Entities and taking such actions as have been necessary for the protection of investors. *See* Order Appointing Receiver (Dkt. No. 16).

The Receiver has kept the Court and interested parties informed of her activities via the filing of periodic status reports with the Court and the posting of such reports on the Receiver’s website. The last such report was filed on October 31, 2013. In March of 2013, the Receiver obtained Court approval of a procedure for filing and evaluating claims against the Receivership (Dkt Nos. 234, 278). Following the expiration of the claims bar date in May 2013, the Receiver

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<sup>1</sup> Morriss, Acartha, ATP, MIC, Gryphon, and Morriss Holdings are collectively referred to as the “SEC Defendants.”

has been engaged in reviewing original and supplemental proofs of claim filed by investors and creditors, with the goal of determining the extent of all liabilities against the Receivership for potential payment through a plan of distribution subject to approval by the Court. The Receiver also obtained Court approval for the distribution of specified sums to investors in special purpose entities established by the Receivership Entities (Dkt. Nos. 139, 262) and for the sale of Receivership property (Dkt. No. 103).

On November 14, 2013, in connection with her duties under the Order Appointing Receiver, the Receiver filed her Motion for Sale of Preferred and Common Shares of Pollen, Inc. (Dkt. Nos. 293, 294) (the “Sale Motion”), seeking Court authorization to sell the Receivership’s 1,656,299 shares of Series A Preferred Stock (the “Preferred Stock”) and 31,764 shares of Series B Common Stock (the “Common Stock”) in Pollen, Inc. (together, the “Shares”) to Pollen, Inc. (“Pollen”).<sup>2</sup>

McDaniel now seeks to intervene in this proceeding for the purpose of obtaining confidential information, which is potentially available from Pollen, regarding the Receiver’s proposed sale of the Shares and potentially objecting to the Sale Motion. McDaniel’s request is comprised of three short filings: an entry of appearance (Dkt. No. 296), an unsupported motion to intervene (Dkt. No. 300), and a request for information regarding the Sale Motion (Dkt. No. 301).<sup>3</sup> Because McDaniel has failed to offer a reasonable supporting rationale for his motion to intervene or in support of his request for confidential information, McDaniel is not entitled to

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<sup>2</sup> On November 27, 2013, the Receiver filed a supplemental memorandum with the Court, requesting that the Court hold the Sale Motion in abeyance (Dkt. No. 299).

<sup>3</sup> Significantly, McDaniel has not opposed the Receiver’s request to file the unredacted expert report submitted in connection with the Sale Motion under seal, or the Court’s entry of an order granting such relief.

intervene in this proceeding or obtain an unredacted copy of the expert report filed by the Receiver in support of the Sale Motion. McDaniel should not be afforded any relief from the Court based upon the authority outlined below.

## **II. Opposition**

### **A. McDaniel is not entitled to intervene as a matter of right in this proceeding.**

Under Federal Rule of Civil Procedure 24(a), a person may intervene as a matter of right in a proceeding if: (1) the application is timely; (2) the would-be intervenor has an interest relating to the subject matter of the main action; (3) the would-be intervenor's interest is at least potentially impaired by the disposition of the action in his or her absence; and (4) the interest is not already adequately represented by one of the existing parties to the action. *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Services, Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984); *see S.E.C. v. Homa*, 17 F. App. 441, 445 (7th Cir. 2001). The would-be intervenor bears the burden of showing that each of these requirements is satisfied. Failure to satisfy any of the four requirements is fatal to the motion. *See id.*

McDaniel does not satisfy the requirements for intervention under Rule 24(a) for two reasons.<sup>4</sup> First, McDaniel does not have an interest relating to the subject matter of the Sale Motion, *i.e.*, the property proposed to be sold by the Receiver. McDaniel asserts in his Motion that he owns an interest in Gryphon. However, McDaniel did not file a proof of claim on the basis of his interest in Gryphon (or any other interest) with the Receiver.

Pursuant to the Claims Bar Date Order entered by the Court on March 4, 2013, any interest in or claim against the Receivership Entities that McDaniel may have held and could

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<sup>4</sup> Although McDaniel titles the Motion as a "motion to intervene," McDaniel fails to recite or address the standards for intervention in his memorandum supporting the Motion.

have asserted is now barred. *See* Order on Motion to Establish Claims Bar Date, Approve Manner and Form of Notice of Claims Bar Date and Approve Process for Submitting Claims (Dkt. No. 234):

Any Claimant who is required to submit a Proof of Claim, but fails to do so in a timely manner or in the proper form, (a) shall be forever barred, estopped, and enjoined to the fullest extent allowed by applicable law from asserting, in any manner, such Claim against the Receiver, the Receivership Entities and their respective estates or property, (b) shall not be permitted to object to any distribution plan proposed by the Receiver on account of such Claim, (c) shall be denied any distributions under any distribution plan implemented by the Receiver on account of such Claim, and (d) shall not receive any further notices on account of such Claim. Further, the Receivership Entities and their respective property or estates will be discharged from any and all indebtedness or liability with respect to such Claim.

The Claims Bar Date Order required all Claimants, including those individuals who claimed a right to a distribution based on an investment in or through one or more of the Receivership Entities, to file a Claim on or before May 6, 2013 (the “Bar Date”).

The Receiver provided notice of the Bar Date as follows:

1. On March 6, 2013, the Receiver updated the Receivership website to include a page entitled “Claims Information,”<sup>5</sup> which contains detailed information about the Bar Date and the process for submitting proofs of claim, a link to the Claims Bar Date Order, a link to the approved Bar Date Notice, and a fillable copy of the Proof of Claim Form.

2. On March 15, 2013 and again on March 29, 2013, the St. Louis Post-Dispatch ran the approved notice for publication as Ad #1740512-00. On March 19, 2013 and again on April 2, 2013, the Star-Ledger (Newark) ran the notice as Legal Ad #0003560042. *See* Receiver’s Fifth Interim Status Report (Dkt. No. 255).

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<sup>5</sup> See [http://www.thompsoncoburn.com/news-and-information/acartha-receivership-information/claims\\_information.aspx](http://www.thompsoncoburn.com/news-and-information/acartha-receivership-information/claims_information.aspx).

3. Between March 27, 2013 and March 29, 2013, the Receiver mailed 480 hard-copy Bar Date Notices and Proof of Claim Forms to 366 separate individuals and/or entities. Between these same dates, the Receiver also electronically mailed portable document format (PDF) copies of the Bar Date Notice and Proof of Claim Form to 103 electronic mail addresses.

The Receiver served McDaniel with the Bar Date Notice and Proof of Claim Form as required under the Claims Bar Date Order by regular mail on March 27, 2013 to McDaniel's last known street address. **Exhibit A**, Declaration of Kathleen E. Kraft.

McDaniel did not file a proof of claim. Therefore, McDaniel is forever barred from asserting any claim against the Receivership Entities, their estates, and their property stemming from his investment in Gryphon. He also is barred from objecting to any distribution plan proposed by the Receiver on account of his investment in Gryphon and from receiving any distributions under any distribution plan implemented by the Receiver. In sum, McDaniel no longer has any defensible interest in the Receivership Entities, the Receivership estate, or the Receivership property, including the Pollen stock.

Second, because McDaniel has no defensible interest in and to the assets of the Receivership and any distribution coming from the Receivership, McDaniel has no interest that is potentially impaired if the Court considers and rules on the Sale Motion in the absence of McDaniel's ability to obtain the confidential, nonpublic information that the Receiver redacted from the Report or object to the Sale Motion. McDaniel has nothing to gain or lose by intervening because he has no right to any distribution from the Receivership estate.

Third, even if McDaniel still had an interest to be affected by the Sale Motion, such interest already is adequately represented by one of the existing parties to the action -- the Receiver. The Court charged the Receiver with marshalling and safeguarding all of the assets of

the Receivership Entities and taking whatever actions are necessary for the protection of investors, among other things. Order Appointing Receiver (Dkt. No. 16; Jan. 17, 2012). As stated in the filing of the Sale Motion, the Receiver believes that the consummation of the sale of the Shares to Pollen is the best interests of the Receivership estate, and by extension, the investors and creditors of the Receivership Entities. The sale of the Shares will increase the liquid assets of the Receivership estate, maximize the possibility of a distribution to investors, and help fund the Receivership's pursuit of recoveries against third-parties. It also will reduce the cost to the Receivership estate of managing and monitoring the investment in Pollen.

B. McDaniel is not entitled to intervene permissively in this proceeding.

Even if a would-be intervenor cannot satisfy the requirement for intervention as a matter of right, the court has discretion to grant permissive intervention if (1) the motion is timely; (2) the would-be intervenor shows independent jurisdictional grounds; and (3) the would-be intervenor's claim or defense and the main action share common questions of law or fact. Fed. R. Civ. P. 24(b); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158–59, 1170 n. 9 (8th Cir. 1995); *W. Agric. Ins. Co. v. Wilson Excavating, Inc.*, 4:10CV3151, 2011 WL 666246 (D. Neb. Feb. 12, 2011); *see Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1009 (8th Cir. 2007). In exercising its discretion, the court must consider whether permissive intervention will unduly delay or prejudice the adjudication of the original parties' rights. *South Dakota v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003).

McDaniel is not entitled to permissive intervention. Because McDaniel did not file a proof of claim with the Receiver, McDaniel is barred from asserting any claim against the Receiver, the Receivership Entities, their estate, or their property that could have been asserted through the claims bar process. This includes any claim that McDaniel could assert in

connection with the Receiver's Sale Motion. Without an interest to defend or standing to defend it, McDaniel's participation in this proceeding will only delay and prejudice the continuation of this Receivership and the Receiver's execution of her duties under the Order Appointing Receiver.

C. McDaniel's request for a copy of the unreacted expert report cannot be accomplished through intervention.

Furthermore, even if the Court permits McDaniel to intervene, such an action does not entitle McDaniel to obtain a copy of the unredacted expert report filed by the Receiver in connection with the Sale Motion. The unredacted expert report (the "Report") relies on and cites to confidential financial and other non-public information concerning Pollen. Pollen has not authorized the Receiver to disclose this information, other than in a sealed filing with the Court. Furthermore, the Receiver is bound by the confidentiality provisions of Section 3.4 of the Pollen Investor Rights Agreement. McDaniel was advised of the Receiver's obligations under the Investor Rights Agreement regarding the disclosure of Pollen's confidential information in her response to McDaniel's November 15, 2013 letter. A true and accurate copy of the November 20, 2013 response letter is attached hereto as **Exhibit B**. In that same response letter, the Receiver directed McDaniel to Pollen's counsel to discuss McDaniel's request for confidential information and provided contact information. Apparently, McDaniel did not take the Receiver's advice, but instead chose to file this Motion. Since the Receiver is not at liberty to publish Pollen's confidential information, McDaniel's request should be denied.

**III. Conclusion**

For all the foregoing reasons, the Receiver respectfully requests that the Court deny McDaniel's motion for intervention in this proceeding and request for a copy of the unredacted Report filed by the Receiver in connection with the Receiver's Sale Motion.

Dated: December 13, 2013

Respectfully Submitted,

THOMPSON COBURN LLP

By /s/ Kathleen E. Kraft

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Brian A. Lamping, #61054MO  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 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:

John R. Ashcroft, Esq.  
Ashcroft Hanaway LLC  
222 South Central Ave., Suite 110  
St. Louis, Missouri 63105  
*Counsel for Defendant Burton Douglas Morriss*

Robert K. Levenson  
Brian T. James  
Securities and Exchange Commission  
801 Bricknell Avenue, Suite 1800  
Miami, Florida 33131  
*Attorneys for Plaintiff*

David S. Corwin  
Sher Corwin LLC  
190 Carondelet Plaza  
Suite 1100  
St. Louis, MO 63105  
*Attorney for Mike McDaniel*

I further certify that on December 13, 2013, I served a courtesy copy of the foregoing on the following party by electronic mail:

Edward V. Wilson  
Husch Blackwell  
4801 Main Street, Suite 1000  
Kansas City, MO 64112  
edward.wilson@huschblackwell.com

/s/ Kathleen E. Kraft

**EXHIBIT A**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

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

**DECLARATION OF KATHLEEN E. KRAFT  
IN SUPPORT OF  
RECEIVER’S OPPOSITION TO MIKE MCDANIEL’S MOTION TO INTERVENE AND  
REQUEST FOR INFORMATION REGARDING RECEIVER’S MOTION FOR SALE  
OF PREFERRED AND COMMON SHARES OF POLLEN, INC.**

I, Kathleen E. Kraft, declare under oath as follows:

1. I am an individual over twenty-one years of age.
2. I am an associate with Thompson Coburn LLP.
3. I caused notice of the Claims Bar Date to be served upon all known potential Claimants by electronic mail or regular mail.
4. Between March 27, 2013 and March 29, 2013, I caused to be mailed 480 hard-copy Bar Date Notices and Proof of Claim Forms to 366 separate individuals and/or entities.
5. On March 27, 2013, I caused to be mailed a copy of the Bar Date Notice and Proof of Claim Form to Michael McDaniel at Mr. McDaniel’s last known address, 660 Newport Center Drive, Suite 1200, Newport Beach, California 92660, via U.S. Mail, first-class, postage prepaid (the “McDaniel Mailing”).

6. The McDaniel Mailing was not returned undeliverable by the United States Post Office.

7. Between April 1, 2013 and May 6, 2013, the Receiver received 226 proofs of claim.

8. The Receiver did not receive a Proof of Claim Form from Mr. McDaniel.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 13<sup>th</sup> day of December, 2013, in Washington, D.C.



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Kathleen E. Kraft



Kathleen E. Kraft

P 202.585.6922

F 202.508.1035

kkraft@thompsoncoburn.com

November 20, 2013

# Exhibit B

**VIA ELECTRONIC & FIRST CLASS MAIL**

David S. Corwin, Esq.  
Sher Corwin Winters  
190 Carondelet Plaza, Suite 1100  
St. Louis, MO 63105  
Email: dcorwin@scwstl.com

**Re: Securities & Exchange Commission v. Morriss, et al.  
No. 4:12-cv-00080-CEJ**

Dear Mr. Corwin:

Steve Higgins forwarded me your letter dated November 15, 2013 concerning the above-referenced case.

As the Receiver stated in her motion, the consummation of the sale of the Receivership's shares to Pollen, Inc. (Pollen) is in the best interests of the Receivership estate. The proposed sale will increase the liquid assets of the Receivership estate, maximize the possibility of a distribution to investors who filed claims, help fund the Receivership's pursuit of recoveries against third-parties, and reduce the cost to the Receivership estate of managing and monitoring the investment. The Receiver believes that a timely sale of the Pollen shares as proposed in the motion will be best for the Receivership estate, and as such, is not inclined to withdraw her motion.

In any event, the Receiver is unclear what Mr. McDaniel hopes to accomplish through an objection to the Receiver's motion. Mr. McDaniel's failure to file a proof of claim with the Receiver bars him from participating in a distribution under any distribution plan implemented by the Receiver, including a distribution on account of the liquidation of the Receivership estate's interest in Pollen.

David S. Corwin, Esq.

November 20, 2013

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You also requested that the Receiver provide you access to the Receiver's expert's unredacted report and other information provided by Pollen. The Receiver has been advised by Pollen's counsel that this information is subject to Section 3.4 of the Pollen Investor Rights Agreement, and therefore is not authorized to disclose the requested information to you. However, you may contact Pollen's counsel, Edward Wilson of Husch Blackwell LLP (816.983.8371), to discuss your request.

Very truly yours,

Thompson Coburn LLP

A handwritten signature in black ink, appearing to read "kcraft", written in a cursive style.

By

Kathleen E. Kraft

cc: Claire Schenk, Receiver  
Stephen Higgins, Esq.