GARY Y. LEUNG (Cal. Bar No. 302928)
Email: leungg@sec.gov
DOUGLAS M. MILLER (Cal. Bar No. 240398)
Email: millerdou@sec.gov
YOLANDA OCHOA (Cal. Bar No. 267993)

Attorneys for Plaintiff
Securities and Exchange Commission
Michele Wein Layne, Regional Director
Alka N. Patel, Associate Regional Director
Amy J. Longo, Regional Trial Counsel
444 S. Flower Street, Suite 900
Los Angeles, California 90071
Telephone: (323) 965-3998
Facsimile: (213) 443-1904

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Western Division

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

RALPH T. IANNELLI and ESSEX CAPITAL CORPORATION,

Defendants.

Case No. 2:18-cv-05008-FMO-AFM

PLAINTIFF SEC'S OPPOSITION TO NON-PARTY CVL'S MOTION TO INTERVENE AND FOR MODIFICATION OF THE COURT-ORDERED ASSET FREEZE (DKT. NO. 115)

Date: October 24, 2019
Time: 10:00 a.m.
Ctrm: 6D
Judge Hon. Fernando M. Olguin

I. INTRODUCTION

The equity receiver has a duty to marshal and preserve the assets of defendant Essex Capital Corporation – and all of its subsidiaries and affiliates – for the benefit of aggrieved investors and other creditors of the receivership estate. Consistent with that mandate, the receiver's investigation found evidence that: (i) non-party movant 915 Elm Avenue CVL, LLC's ("CVL") 2015 acquisition of a lumberyard was financed, in part, by a $1.5 million note that Essex had issued to the seller; and (ii) defendant Ralph Iannelli's minority stake in CVL was further paid for with at least $643,000 in Essex funds. In his August 14, 2019 second interim report to the Court, the receiver documented his findings, and advised the Court that in light of CVL's refusal to pay Essex back, the receiver anticipated pursuing an action against CVL to collect on that debt. Dkt. No. 103 at pp. 8-9.

CVL now moves to intervene, arguing that the real property on which the lumberyard is located – 915 Elm Avenue, Carpinteria, CA 93013 – should not be frozen by the Court's receivership order. The Court should deny CVL's motion. To the extent it seeks affirmative relief from the Court's order regarding permanent injunction, non-party CVL's motion violated L.R. 7-3. Second, CVL cannot intervene as a matter of right since it fails to articulate any concrete harm arising from a status quo freeze over the lumberyard property, especially in light of the fact that the property's acquisition was financed in significant part by Essex, and CVL has since disclaimed any repayment obligation to Essex. Third, judicial economy undercuts CVL's claim for permissive intervention. Finally, Section 21(g) of the Exchange Act bars intervention without consent of the Commission.

II. STATEMENT OF FACTS

"[F]ederal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws[,]" and the Ninth Circuit "has repeatedly approved imposition of a receivership in appropriate circumstances. *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th

Cir. 1980). The "primary purpose" of an equitable receivership "is the marshaling of the estate's assets for the benefit of aggrieved investors and other creditors of the receivership entities." *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 840 (5th Cir. 2019). Fundamental to the receiver's work is the reality that "[a]lthough not all investors and creditors share the same interests, it is in all their interests to maximize the value of the assets under the receivership. This is what the Receiver is charged with doing." *SEC v. Byers*, 2008 WL 5102017, at *1 (S.D.N.Y. Nov. 25, 2008) (denying non-party creditors' motion to intervene).

On December 21, 2018, the Court appointed Geoff Winkler as the Receiver for defendant Essex Capital Corporation and all of Essex's subsidiaries and affiliates. Dkt. No. 66 at § XI. This Court's appointment order vested in Winkler the full powers of an equity receiver over all of the receivership entities' assets and property "belonging to, being managed by[,] or in [their] possession of or control." *Id.* This Court further ordered Winkler "to conduct such investigation and discovery as may be necessary to locate and account for all of the assets of or managed by Defendant Essex and its subsidiaries and affiliates," and "to take such action as is necessary and appropriate to preserve and take control of and to prevent the dissipation, concealment, or disposition of any Assets." *Id.* at § XI(D) and (E).

The following facts are drawn from the court-appointed equity receiver's prior reports to this Court and from contemporaneous financial account and funds transfer documentation provided by the receiver to both the SEC and non-party movant CVL during the meet-and-confer process on CVL's request to intervene:

- Defendant Iannelli and William Reyner formed CVL in 2015 to operate a lumberyard.
- CVL bought that lumberyard, in part, by having Essex issue a $1.5 million note to the seller.
- CVL financed the balance of the purchase price with loans taken from a commercial bank, and those loans were cross-defaulted against Essex's

$1.5 million note to the seller, meaning that a default of one constitutes a default of the other.

- Separately, Iannelli used $643,000 in Essex funds to pay the capital contribution that he personally owed to CVL.
- CVL nonetheless disclaims any repayment obligation to Essex.
- Both Essex's note to the seller and the commercial loans taken by CVL to buy the lumberyard are now in default.
- The real property on which the lumberyard is located – 915 Elm Avenue, Carpinteria, CA 93013 – is frozen by the Court's receivership order, which also bars CVL's commercial lender and the seller from foreclosing on the property.

Dkt. No. 103 at pp. 8-9; Dkt. No. 66 at § VI; Dkt. No. 113 at § IV; *see also* concurrently-filed Declaration of Geoff Winkler at ¶¶ 5-7, Exs. 6-14.

III. ARGUMENT

A. CVL's Substantive Request for Modification of the Asset Freeze Violates L.R. 7-3

The meet-and-confer described in CVL's moving papers addressed the question of intervention. CVL's substantive requests to remove real property from this Court's asset freeze (Dkt. No. 115 at p. 3, ln. 4) and to "clarify" the status of certain bank accounts (*id.* at ln. 5) were not the object of the parties' meet-and-confer, as conceded by CVL's own description of those discussions. *See id.* at p. 3 ("CVL contacted the Parties to meet and confer about its intervention"). CVL's violation of L.R. 7-3 is reason enough to deny its motion insofar as it seeks relief from the Court's asset freeze. *See, e.g.*, *Hoffman v. Fleetwood RV, Inc.*, 2013 WL 12114046, *1 (C.D. Cal. Nov. 25, 2013) (denying motion for summary judgment where movant failed to satisfy L.R. 7-3 and the Court's corresponding requirements in its standing order).

B. CVL Cannot Show That Mandatory Intervention Is Warranted

Under Rule 24(a)(2), the Court must permit a non-party to intervene when: (i)

their request to intervene is timely, (ii) they have an interest relating to the property or transaction that is the subject of the case, (iii) the disposition of the action may impair or impede the applicant's ability to protect the interest, and (iv) their interest is not adequately represented by the existing parties. *See* Fed. R. Civ. P. 24(a)(2); *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996). The non-party seeking intervention bears the burden of establishing all of these criteria. *In re Novatel Wireless Secs. Litig*., No. 08-cv-1689, 2014 U.S. Dist. LEXIS 85994 (S.D. Cal. June 23, 2014) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)); *see also Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). In its moving papers, CVL fails to concretely identify how its protectable rights are being or could be impaired, and for good reason. It cannot.

The receiver has uncovered evidence indicating that CVL financed its acquisition of the subject property by indebting Essex to the property's seller, and that investor funds were co-opted for use as CVL's working capital when transferred over the CVL in order to pay Iannelli's required contribution to the CVL venture. Moreover, as to the frozen property, Essex's $1.5 million note to the seller and CVL's commercial loans are defaulted, yet Section X of the Court's order regarding permanent injunction (the prosecution bar) precludes foreclosure on the subject property. CVL has not sought relief from that aspect of the Court's permanent injunction. Instead, CVL objects to the Court's asset freeze on the subject property, but during the meet-and-confer on this motion, SEC counsel asked whether CVL had any present intent to sell, transfer, hypothecate, or mortgage the property, and CVL could not answer in the affirmative. Once again, CVL cannot articulate exactly how its interests are being impaired. To the contrary, CVL's commercial loans on the frozen property are defaulted. The prosecution bar in the Court's order is precluding foreclosure by the lender. Yet CVL wants relief from the Court's asset freeze for itself while at the same time retaining the benefit of the Court's bar against self-help by CVL's creditors. The Court should reject this gamemanship. The asset freeze

appropriately maintains the status quo – in furtherance of the receivership's goal to marshal and preserve receivership assets for the benefit of defrauded investors and Essex's creditors – and CVL has not identified any impairment of its legally protectable interests.

C. CVL Cannot Show That Permissive Intervention Is Warranted

Rule 24(b)(1)(B) states that the court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The Ninth Circuit has held that courts have the discretion to permit intervention under this rule if three conditions are met: "(1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common." *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989) (citations omitted); see also Fed. R. Civ. P. 24(b)(1)(B). In determining whether to exercise its discretion, a court may also consider whether the proposed intervenor's interests are adequately represented by other parties, the legal position the intervenor seeks to advance and its probable relation to the merits of the case, whether intervention will prolong or unduly delay the litigation, and whether the intervenor will significantly contribute to full development of the underlying factual issues. *See Spangler v. Pasadena City Bd. of Educ*., 552 F.2d 1326, 1329 (9th Cir. 1977).

Permitting intervention in this government enforcement action will unduly prolong this litigation. The Court has already entered judgments against all of the defendants charged by the SEC with violating the federal securities laws. While the Court has retained jurisdiction to supervise its equity receivership, should the receiver seek and obtain court approval to file an action against CVL, *see* Dkt. No. 103 at pp. 8-9, CVL would be accorded a right to respond as a defendant in any separate action brought by the receiver. There is no practical reason to allow permissive intervention here, in a case in which final judgments have been entered against both securities law

defendants.

D. Section 21(g) of the Exchange Act Bars Intervention Without the SEC's Consent

Finally, CVL is barred from intervening as a party under Section 21(g) of the Exchange Act. That provision states that, unless the SEC consents, "no action for equitable relief instituted by the [SEC] pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the [SEC], even though such other actions may involve common questions of fact." 15 U.S.C § 78u(g). Several courts have held that Section 21(g) bars intervention in SEC actions. *See, e.g., SEC v. Egan*, 821 F. Supp. 1274, 1275 (N.D. Ill. 1993); *SEC v. Homa*, 2000 WL 1468726, at *2 (N.D. Ill. Sept. 29, 2000); *SEC v. Qualified Pensions*, 1998 WL 29496, at *3 (D.D.C. Jan. 16, 1998); *SEC v. Wozniak*, 1993 WL 34702, at *1 (N.D. Ill. Feb. 8, 1993). These cases rely on dicta in *Parklane Hosiery v. Shore*, where the Supreme Court stated that "the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired," citing Section 21(g). 439 U.S. 322, 332 n.17 (1979). While other courts have held that Section 21(g) only bars consolidation, not intervention, the Ninth Circuit has never directly addressed this issue. *See SEC v. Flight Trans. Corp.*, 699 F.2d 943, 949 (8th Cir. 1983) (absence of the word "intervention" from text of statute led to opposite conclusion); *see generally, SEC v. ABS Fund, LLC,* 2013 WL 3752119 (S.D. Cal. 2013) (explaining variation among courts and finding no Ninth Circuit precedent). In this case, the Court should find that Congress intended for Section 21(g) to bar CVL's intervention in this matter.

Dated: October 2, 2019

/s/ Gary Y. Leung
GARY Y. LEUNG
Attorney for Plaintiff
Securities and Exchange Commission

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On October 2, 2019, I caused to be served the document entitled **PLAINTIFF SEC'S OPPOSITION TO NON-PARTY CVL'S MOTION TO INTERVENE AND FOR MODIFICATION OF THE COURT-ORDERED ASSET FREEZE (DKT. NO. 115)** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: October 2, 2019

/s/ Gary Y. Leung
GARY Y. LEUNG

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SEC v. Iannelli, et al.
United States District Court—Central District of California
Case No. 18-cv-005008-FMO

SERVICE LIST

Steven J. Olson
J. Jorge deNeve
Kyle Grossman
solson@omm.com
jdeneve@omm.com
kgrossman@omm.com
O'Melveny & Myers LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
Counsel for Defendants

Joshua A. del Castillo
Allen Matkins Leck Gamble Mallory & Natsis LLP
865 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-2543
jdelcastillo@allenmatkins.com
Counsel for Court-appointed Receiver Geoff Winkler

A. Barry Cappello
David L. Cousineau
Cappello & Noel LLP
831 State Street
Santa Barbara, CA 93101
abc@cappellonoel.com
dcousineau@cappellonoel.com
Counsel for Non-Party Movant CVL