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Attorneys for Intervenors

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

MATTHEW WADE BEASLEY; BEASLEY LAW GROUP PC; JEFFREY J. JUDD; CHRISTOPHER R. HUMPHRIES; J&J CONSULTING SERVICES, INC., an Alaska Corporation; J&J CONSULTING SERVICES, INC., a Nevada Corporation; J AND J PURCHASING LLC; SHANE M. JAGER; JASON M. JONGEWARD; DENNY SEYBERT; ROLAND TANNER; LARRY JEFFERY; JASON A. JENNE; SETH JOHNSON; CHRISTOPHER M. MADSEN; RICHARD R. MADSEN; MARK A. MURPHY; CAMERON ROHNER; AND WARREN ROSEGREEN,

Defendants.

THE JUDD IRREVOCABLE TRUST; PAJ CONSULTING INC.; BJ HOLDINGS LLC; STIRLING CONSULTING, L.L.C.; CJ INVESTMENTS, LLC; JL2 INVESTMENTS, LLC; ROCKING HORSE PROPERTIES, LLC; TRIPLE THREAT BASKETBALL, LLC; ACAC LLC; ANTHONY MICHAEL ALBERTO, JR.,; and MONTY CREW LLC,

Relief Defendants.

CASE NO.: 2:22-cv-00612-CDS-EJY

PROPOSED INTERVENORS' REPLY TO RECEIVER'S OPPOSITION TO THEIR JOINT MOTION TO INTERVENE

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Charging Intervenors with a "series of mischaracterizations of law and fact" that "undermine the very purpose of the receivership" is a classic case of the pot calling the kettle black. The receiver's own litany of mischaracterizations is too long to list. Portraying Intervenors' motion as a tug of war for control of the litigation also misses the point. ***The critical question this Court must answer is whether the equitable remedy of a resulting trust applies to all investments in Defendants' Ponzi scheme.*** If so, Intervenors (and all similarly situated investors) have significant ownership rights in the same assets now held by the Receivership Estate. Though the receiver cannot assert this remedy himself, he adamantly refuses to *recognize* Intervenors' ownership rights—much less their right to intervene. If the Court is swayed by the receiver's warning of gloom and doom, Intervenors' interests will be impaired in four significant ways:

1. The receiver will be vulnerable to Nevada's *in pari delicto* defense;
2. The SEC will be limited to recovering Defendants' ill-gotten gains;
3. The assets' owners will have little say in how their recovery is distributed;[1]
4. Much of the recovery will go to the U.S. Treasury instead of the victims.

As a result of these impairments, the total amount awarded to victims could decline significantly—including Intervenors' share. Fortunately, the same rights that will be impaired if they don't intervene are the same rights that will benefit all victims if they do. As set forth below, Intervenors seek to assist the SEC and receiver by representing all Ponzi victims for the *limited purpose* of fortifying Defendants' liability, enhancing investors' recovery, and foreclosing copycat

[1] Contrary to the receiver's suggestion, Intervenors are not conjecturing about his preferred allocation method. At the recent investor meeting, Mr. Winkler announced he will use the MIMO method (which impacts how he will treat funds returned to "net losers" in the pro-rata distribution). See, e.g. *SEC v. Ralph T. Iannnelli*, Case No. 2:18-cv-05008 (CD Cal.), ECF No. 131 at 4.

litigation. Apart from meeting Rule 24's requirements, Intervenors ask the Court to grant their motion for the sake of all concerned.

I. Requiring The Commission's Consent Would Make a Mockery Of Rule 24.

The Receiver's rote reliance on Section 78's vague prohibition against "consolidating" the SEC's enforcement action with other actions without their consent belies both law and logic. Based on traditional principles of statutory construction, the vast majority of courts (including the only circuit court to rule on the subject) have found otherwise. Moreover, giving the Commission broad discretion in deciding whether to allow a particular intervention *when its own rule prohibits it* makes no sense. Since Intervenors have the right to an interlocutory appeal under 28 U.S.C. 1292(b), denying their motion without considering the merits will also add needless months of delay. *In re Cinematronics, Inc*., 916 F.2d 1444, 1446 (9th Cir. 1990). All roads lead to focusing on the actual task at hand: whether Intervenors satisfy all four elements for intervention of right under Rule 24.

II. There Is Nothing Untimely About Intervenors' Motion.

Rule 24 traditionally receives liberal construction in favor of applicants for intervention. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir.1998). With that in mind, the receiver's complaint about the timeliness of Intervenors' motion is much ado about nothing. A motion's timeliness is determined "in light of all the circumstances." *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010). An application is not deemed untimely merely because of the passage of time. Instead, "the important question concerns actual proceedings of substance on the merits." 6 Moore's Federal Practice § 24.21 [1], at 83-84 (3d ed. 2008).

In the present case, several months of due diligence were required for Intervenors to review the documentation, to analyze the complexities, to explore the various theories, and to weigh the possible options before determining the motion's impact on the competing interests involved. As

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detailed in their supporting memorandum, intervening in the only case allowed to proceed will protect every investor's interest without impeding the SEC's mandate. Because other victims are now aware of the resulting trust theory, this Court should grant Intervenors' motion without delay.

III. Intervenors' Equitable Right to Protect Their Investments By Resulting Trusts Are 'Significantly Protectable' Interests In This Ponzi Litigation.

Because there's no consensus about the type of interest needed to intervene, courts apply the policy behind the requirement to the particular facts. C. Wright, Law of Federal Courts 370 (3rd ed. 1976); *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 850 (10th Cir. 1981). An interest is 'significantly protectable' if it is recognized at law and relates to the claims at issue. *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir.1993). Since Intervenors' motion is driven by the express trust provision, this element raises two questions: (1) Are Intervenors' claims to protection under Nevada's resulting trust doctrine significantly protectable interests? (2) If so, how do their interests relate to the claims at issue? The answer to both begins by recognizing the inherently equitable nature of a resulting trust.

In cases as diverse as copyright, employee benefits and environmental law, SCOTUS has repeatedly insisted on distinguishing legal and equitable remedies.[2] The equitable remedies and related doctrines that survive today form a system with three interlocking components: (1) remedies (e.g. resulting trusts); (2) managerial devices (e.g. claim aggregation); and (3) constraints (e.g. equitable defenses). Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 533-34 (2016). These components are particularly useful in circumstances (like here) crying out for a remedy that either compels or restrains specific action. Id.

[2] *See, e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) (copyright); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (environmental law); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) (patent); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (employee benefits).

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Because these components can be costly or abused, the American equitable system also includes natural checks and balances: equitable remedies require managerial devices; both equitable remedies and managerial devices require constraints. Id. This functional view of equitable relief captures policy differences overlooked in a binary view that detaches legal from equitable remedies (e.g., monetary vs. non-monetary remedies, specific vs. substitutionary remedies, property vs. liability rules). It also frees the court to 'balance the equities' between public and private interests. *FTC v. World Wide Factors, Ltd*., 882 F.2d 344, 347 (9th Cir.1989). To that end, Rule 24 attempts to accommodate two competing policies: efficiently administrating legal disputes by resolving all related issues in one lawsuit without it becoming unnecessarily complex, unwieldy or prolonged. *United States v. Pitney Bowes, Inc*., 25 F.3d 66, 69 (2d Cir. 1994).

Intervenors' motion provides a prime example of how to strike this delicate balance. On one hand, recognizing Nevada's resulting trust doctrine will trump all other issues; on the other hand, aggregating the resulting trust claims for equitable representation will avoid "wreaking havoc" on the SEC's action. A purchase-money resulting trust is an equitable remedy designed to implement what the law *assumes* to be the intentions of a putative trustor. *In re Estate of Hock*, 655 P.2d 1111, 1114 (Utah 1982). The resulting trust carries out the *inferred* intent of the parties. *Fidelity National Title Insurance Co. v. Schroeder* 179 Cal.App.4th 834, 847-848, 101 Cal.Rptr.3d 854 (2009). A resulting trust will not arise if the *payor* does not manifest an intention to create one. RESTATEMENT (SECOND) OF TRUSTS § 441. The payor's intent at the time of *transfer* is key, not later down the road. *Taylor v. Rupp*, 133 F.3d 1336, 1341 (10th Cir. 1998). Intervenors' complaint meets all of these conditions:

- At the time Intervenors invested in the Ponzi scheme, they believed the PI contracts were legitimate.

- The PI Contracts explicitly acknowledged the parties' intent to protect Intervenors' investments by express trusts until they received all 'interest in the Proceeds'
- For purposes of Intervenors' motion, the inclusion of an Express Trust provision in each PI Contract provides sufficient grounds for assuming the parties' mutual intent
- Neither did Intervenors manifest an intention that no resulting trust should arise
- While the unnamed victims who actually received Intervenors' investments may have also been unaware of the scheme, none gave present or valuable consideration in exchange for the payment.

Moreover, the individual serving as Defendants' intermediary claims his own ignorance of the scheme at that time. Nearly a century ago, the Supreme Court conceded that the balance of equities favor applying the resulting trust doctrine under similar circumstances:

> They could have followed the money wherever they could trace it and have asserted possession of it on the ground that there was a resulting trust in their favor, or they could have established a lien for what was due them in any particular fund of which he had made it a part. These things they could do without violating any statutory rule against preference in bankruptcy, because they then would have been endeavoring to get their own money, and not money in the estate of the bankrupt.

Cunningham v. Brown, 265 U.S. 1, 11 (1924). Equally important, the court concluded Cunningham's investment was exempt from Ponzi's bankruptcy estate. Id. The only problem was his ability to "follow the money." However, even *Cunningham* acknowledged the tracing rule is no impediment if all customers are treated equally. 265 U.S. at 13. Even if a victim's funds were commingled with the fraudster's, the Court would attribute any withdrawals to the wrongdoer's lawful and honest use so the victim could "identify what remained as his res and assert his right to it by way of an equitable lien on the whole fund, or a proper pro rata share of it." Id. at 426.

In any event, Intervenors' initial memorandum proves that the inability to trace funds is no longer fatal to a resulting trust. Neither has the SEC offered any proof that Intervenors won't actually be able to trace their investments after reviewing relevant documents. That the PI contracts

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turned out to be fictitious is also irrelevant. By the time Intervenors heard about the opportunity, the Defendants had applied a thick veneer of legitimacy over the whole package. The very inclusion of an express trust provision, in fact, was designed to elicit their trust in order to open their wallets. The PI contract also preserves their right to enforce legitimate claims while excluding parole evidence that contradicts the parties' intent. In short, Intervenors' trust protection will never *expire* because the settlement funds simply do not exist.

Since all roads lead to a resulting trust, the only real question is how Nevada's theory will impact existing claims. Here is where the receiver paints a chaotic picture that is antithetical to the public's interest in deterring securities fraud. However, Intervenors do not pretend their claims are unique from all others, do not seek to prioritize them above every other claim, and do not hope to maximize their recovery at everyone else's expense. As clarified in their motion and complaint, Intervenors seek to *further* this enforcement action by using their significantly protectable interests to bolster the SEC's and receiver's efforts without opening the floodgates of private litigation.

Key to their plan is the Court's equitable jurisdiction. Federal equitable principles continue to govern the availability of equitable relief in cases arising under state law. *Guaranty Trust Co. v. York*, 326 U.S. 99, 104-05 (1945). Once invoked, "the scope of a district court's equitable powers [] is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte–Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15(1971).[3] This broad discretion also includes the right to *narrow* the scope of intervention in order to balance the equities in a particular case. For example, school districts in a highly-publicized racial segregation case were granted intervention for two limited purposes: "(a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; and (b) To review any plan or plans for the desegregation of the

[3] This court's authority to appoint the receiver, for example, derives from its equitable power to fashion such relief—not from the securities laws. *See*, *S.E.C. v. Wencke*, 622 F.2d 1363 (9th Cir. 1980).

so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them." *Milliken v. Bradley Allen Park Public Schools*, 418 U.S. 717, 731 (1974). However, they were not permitted to "assert any claim or defense previously adjudicated by the court" or to "reopen any question or issue which has previously been decided by the court." Id.

Consistent with the Court's flexible powers, Intervenors suggest two ways to prevent their limited participation from disrupting the SEC's enforcement. First, at the appropriate time, the Court may certify their restitution claim for class treatment and appoint Intervenors to represent all victims pursuant to FRCP 23(b)(2). If the Court grants leave to assert class allegations in an amended complaint, the receiver's case management concerns will be alleviated because (1) the bar for certifying an injunctive relief class is much lower (2) prior notice of the putative class action is not required and (3) absent class members do not have the right to opt out. As a result, copycat litigation in other jurisdictions (and additional interventions in this case) will be foreclosed. Once counsel appreciates the serious problem posed by Nevada's resulting trust doctrine and the unique solution proposed by Intervenors, the parties may be willing to stipulate to class certification in order to block further interruptions and eliminate the risk of appeal. (However, the receiver may still claim that Rule 23's due process requirements will extend the resolution of SEC's enforcement action.)

Alternatively, the Court could exercise its general equitable powers to aggregate all resulting trust claims informally under Intervenors' representative leadership. In such case, Intervenors would be charged with performing their limited role with the best interest of all victims in mind. The Court's order would also prohibit any separate litigation or 'follow up' interventions asserting the resulting trust theory. This option applies Intervenors' equitable claim to all similarly-situated victims without opening the floodgates of litigation or extending the SEC's action due to Rule 23's procedural requirements. Aggregate representation also removes any objection to

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permissive intervention based on undue delay, complexity or confusion. *SEC v. Everest Mgmt. Corp*., 475 F.2d 1236, 1240 (2d Cir. 1972). Both options replace the perceived conflict between public and private interests with an alliance that ensures all concerned will be treated with fundamental fairness. If deemed helpful, counsel for Intervenors will gladly address any questions or concerns the Court may have about their proposal at a hearing set for that purpose before ruling on the motion.

IV. Given the Unique Nature of a Resulting Trust, It Is *Impossible* For the Receiver to Adequately Represent Intervenors' Interests In This Litigation.

If Intervenors have alleged plausible facts to impose a resulting trust on their investments, the receiver simply lacks authority to pursue Intervenors' claims without their consent. On June 3, 2022, the Court appointed Mr. Winkler to serve as receiver for the estates of the J&J Receivership Defendants, the assets of the Beasley IOLTA, and the assets of the Individual Receivership Defendants (collectively, the "Receivership Estate"). (ECF No. 88). Additional defendants were added to the Receivership Estate on July 28, 2022. (ECF No. 207). His stated powers include managing, controlling, operating and maintaining the Receivership Estate; holding Receivership Property in his possession, custody and control; and pursuing, resisting and defending all suits, actions, claims and demands which may be brought by or asserted against the Receivership Estate.

Since Intervenors retain equitable ownership of their investments by resulting trust, none of the funds transferred to the Receivership Defendants became their "assets" for purposes of the receivership. *In re Golden Triangle Capital, Inc*., 171 B.R. 79, 82 (B.A.P. 9th Cir. 1994) ("[A] resulting trust cannot be part of the debtor's estate"). Since he has no power over property that doesn't belong to the debtor, the receiver *cannot* adequately represent Intervenors' ownership interest in the Receivership Estate. Neither is he *willing* to do so.

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V. The Impairment of Intervenors' Rights Extends Beyond Personal Preferences.

In characterizing Intervenors' motion as a disagreement over litigation strategy, the receiver manages only to underscore a fundamental misunderstanding of the need for intervention. As demonstrated above, the pivotal question raised by this motion is whether Intervenors' investments in Defendants' Ponzi scheme qualify for protection under Nevada's resulting trust doctrine. If so, Intervenors have retained important property interests in their Ponzi investments that are not subject to the receivership estate. Neither may the receiver represent Intervenors' interest without their consent. That Intervenors' interests will be significantly impaired under these circumstances is hard to deny. The receiver's only supporting case, *SEC v. Am. Pension Servs., Inc.*,[4] is easily distinguished. After rejecting the notion that intervention requires SEC consent, the court analyzed the merits under Rule 24(a). The movants claimed the receiver's liquidation plan impaired their interests by forcing them to liquidate their IRAs for deposit in the receivership estate. They also complained there weren't enough due process protections to ensure they would be heard. In denying the motion, the court explained their interests weren't 'impaired' just because they disagreed with the receiver's plan. The record also told a different story. First, movants' prior objections to the initial plan had caused the receiver to clarify issues regarding loss allocation, financial penalties, and applicable exemptions. Second, other comments and arguments raised over several months had caused the receiver to submit an amended plan. The court subsequently allowed another claimant to intervene under different circumstances.[5]

None of *Am. Pension Servs*' indicia is present here. The receiver has not formulated a proposed liquidation plan; the court has not established due process protections to ensure Intervenors have an opportunity to be heard; no alterations to the proposed plan have been made in response to comments or arguments raised over several months. More importantly, the nature

[4] Case No. 2:14-cv-00309-RJS-DBP, (D. Utah, Jan. 20, 2015).
[5] Case No. 2:14-cv-00309-RJS-DBP, (D. Utah, June 7, 2016).

of Intervenors' purported interest is actually exempt from the receivership estate. Contrary to the receiver's suggestion, *In re Technical Land, Inc.*[6] *supports* Intervenors' position:

> A receivership is an equitable proceeding designed to preserve and protect property for the benefit of all of the parties who may hold interests in it. It places the possession in the receivership court, granting that court exclusive jurisdiction to deal with the property. [] ***This is not the same as a resulting trust, in which the party with legal title to a property is deemed to hold that title in trust for the party who furnished the consideration for its purchase.*** (citation omitted) (emphasis added)

The receiver also dismisses his vulnerability to the *in pari delicto* defense by relying on California's rule. As shown in Intervenors' motion, *Nevada's* rule may require a different result. Because he assumes Intervenors' interests conflict with his mandate, the receiver is also *unwilling* to protect them. The message gleaned from Mr. Winkler's response to Intervenors' motion couldn't be clearer—he will not acknowledge the theory's legitimacy or give Intervenors a voice in proceedings short of a court order. Mr. Winkler's opposition suggests he isn't satisfied with *impairing* Intervenors' significantly protectable property interests—he's determined to *eliminate* them.

VI. CONCLUSION

As demonstrated here and in their initial memorandum, Intervenors meet all requirements to intervene as limited purpose plaintiffs under FRCP 24(a) or to intervene by permission of this Court pursuant to FRCP 24(b). For purposes of their motion, the Court must "accept the movant's motions and pleadings as true, to the extent they are non-conclusory and well-pleaded." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). Intervenors allege their investments in Defendants' Ponzi scheme qualify for protection under Nevada's resulting trust doctrine. Only granting their motion will provide Intervenors a fair opportunity to present probative evidence in support of that claim. If their equitable property rights are affirmed by

[6] *Jarvis v Technical Land, Inc.*, 172 B.R. 429, fn. 6 (D.C. June 1, 1994)

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declaratory judgment, Intervenors stand ready to cooperate with the SEC and receiver in a supportive role that *furthers*—rather than impedes—the enforcement's efficient and effective conclusion. Denying Intervenors' motion, on the other hand, will invite counsel for other victims to assert the resulting trust theory through parallel litigation that could stall—if not derail—the progress already achieved.

DATED this 26th day of September, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of Jolley Urga Woodbury & Holthus and that on this 26th day of September, 2022, I caused the document entitled **PROPOSED INTERVENORS' REPLY TO RECEIVER'S OPPOSITION TO THEIR JOINT MOTION TO INTERVENE** to be served on the parties in this action via the Court's CM/ECF System.

/s/ Linda Schone
An employee of JOLLEY URGA WOODBURY & HOLTHUS