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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 SEC'S OPPOSITION TO THEIR JOINT MOTION TO INTERVENE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Despite the Commission's inflammatory rhetoric, Intervenors are *not* criticizing the SEC or trying to frustrate its enforcement goal. Neither are Intervenors trying to replace the SEC, to get a 'complete return' on their investments, to gain priority over every other investor, to open the floodgates to hundreds of similar motions, or to modify the receivership orders. The Commission's misguided response to Intervenors' motion reveals fundamental misunderstandings about their relationship to the Defendants, Nevada's resulting trust doctrine, and Intervenors' true objective. As a result, the foundation of its objection is fatally flawed. What actually sets this case apart is the very issue the Commission ignores: *if the resulting trust theory applies to Beasley's scheme, the entire receivership estate is vulnerable*. The stakes are too high to reject Intervenors' "positive" solution. Their motion should be seen for what it is—a window opportunity to seal the lid on a can of worms before someone else opens it.

The Agreement

To grasp the import of Intervenors' motion, the Court must first understand the pivotal facts. As illustrated by the standard agreement attached to Intervenors' complaint, the pretext for the buyer-seller relationship between an investor and a defendant is always the same: *a personal injury client has settled his or her claim but can't wait for the deal to close*. In their exhibit, a January 14, 2022 purchase agreement recites the following terms pertinent to Intervenors' motion:

- Charles Brockmeier's attorney has resolved a personal injury claim from a slip-and-fall that occurred at The Mall at Robinson on January 22, 2020.
- Brockmeier expects to receive settlement proceeds totaling $280,115.00 in April 2022.
- J&J Purchasing ("J&J") purchased a $116,250.00 interest in the proceeds for $100,000.00.
- J&J will also receive $5,000.00 as an "administrative fee".

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- The purchase price was an investment by J&J, not a loan to Brockmeier.[1]
- If full payment is not timely received, $12,500 will be added to J&J's payment every month.
- If Brockmeier is deceiving J&J with a fake settlement, he's still liable for J&J's payment.
- Neither may Brockmeier receive any money from the settlement until J&J is paid in full.
- Until then, Brockmeier will hold all proceeds (including J&J's interest) in trust.
- Brockmeier will also honor the assignment of J&J's interest to another party.
- If any part of the agreement is invalid or unenforceable, it won't affect the validity or enforceability of the remainder.
- If necessary, the agreement will also be modified to carry out the parties' intent.
- The agreement constitutes the entire understanding between Brockmeier and J&J.
- It must be governed, construed, and enforced in accordance with Nevada law.

Thanks to these and other "safeguards" sprinkled throughout the agreement, Intervenors (and 1300 other investors) were duped into investing over $400 million of hard-earned money into what turned out to be a scam. The mechanics of Beasley's fraud are straightforward:

- A trusted colleague tells a potential investor about a unique opportunity to make a lot of money in short order because someone is desperate for cash.
- When the investor learns the specifics and sees the documentation looks genuine, he concludes the large return outweighs the nominal risk.
- The investor signs the necessary papers and pays the agreed price for delivery to the seller in return for the buyer assigning his interest in the settlement proceeds.
- The investor then anxiously waits for a check to arrive from the seller's attorney.

[1] Characterizing Intervenors' investments as "loans" would not alter the result. If the balance of equities favors a resulting trust, the transaction's character doesn't matter. *See Cunningham v. Brown*, 265 U.S. 1, 7 (1924).

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- If the investor receives a payment, he assumes the seller is honoring his agreement.

The ingredients of this tragic scenario combined to form a perfect storm that cries out for an equitable vehicle to protect the innocent victim's investment.

The Doctrine.

A resulting trust arises whenever someone intends to transfer property of any kind to a particular recipient but the funds are redirected to a different person without the transferor's knowledge or consent (even if the recipient acts in good faith). *In re Estate of Yool* 151 Cal.App.4th 867, 874, 60 Cal.Rptr.3d 526 (2007). The best way to see how Nevada's resulting trust doctrine applies to Intervenors' investments is to view the circumstances from *their* perspective. The centerpiece of Intervenors' motion is a unique feature of Beasley's fraud not found in the typical scheme: an *express trust provision* in the Purchase Agreement. The existence of this provision is undeniable, just as its legal effect is clear. 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). Such intent may be ***inferred*** from the circumstances. *Fidelity National Title Insurance Co. v. Schroeder* 179 Cal.App.4th 834, 847-848, 101 Cal.Rptr.3d 854 (2009). It does not apply if the ***payor*** "manifests an intention that no resulting trust should arise". (emphasis added) RESTATEMENT (SECOND) OF TRUSTS § 441. The victim's intention at the time of the ***transfer*** is what matters, not after everything is disclosed down the road. *Taylor v. Rupp*, 133 F.3d 1336, 1341 (10th Cir. 1998). The facts alleged in Intervenors' complaint meet 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 imposing a resulting trust under similar circumstances:

> [The investors] 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 the 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 the 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 12.

In any event, Intervenors' memorandum in support proved the inability to trace funds is no longer fatal. Neither has the SEC offered any proof that Intervenors won't actually be able to trace their investments after reviewing documents produced in discovery. That the PI contracts turned out to be fictitious is also irrelevant. By the time Intervenors heard about the opportunity, the

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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 contract also preserves their right to enforce legitimate claims while excluding any 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, Intervenors chose to rely on this equitable remedy in order to maximize their recovery through a pro-rata distribution that's fair to everyone. Because filing a separate suit is both risky and counter-productive, they believe that intervening in the SEC's action for the benefit of all victims is a win-win-win strategy—for the SEC, receiver, and investors alike. 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 set forth below, Intervenors hope instead 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.

The Objective.

Portraying Intervenors' motion as a tug of war over who should lead the litigation misses this central point. In reality, Intervenors' goal is precisely *opposite* the SEC's 'doom and gloom'. If their motion is granted, Intervenors will assist the Commission and receiver by representing all Ponzi victims for the limited purpose of fortifying Defendants' liability and enhancing victims' recovery while foreclosing copycat litigation. To that end, they are willing to cooperate with the receiver in exchange for using their unique property rights in a representative capacity to offset the vulnerabilities identified in their motion.

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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).[2] 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 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

[2] 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).

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doctrine and the unique solution proposed by Intervenors, the parties may even *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 a 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 *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.

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

The SEC'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, 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.

III. 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 SEC's objection to the timing of Intervenors' motion is much ado about nothing.[3] 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).

The notion that Intervenors should have filed before the receiver took control of the receivership estate is, at best, naïve. Several months of due diligence were required for Intervenors to review documentation, analyze the complexities, explore various theories and weigh possible options before finally determining their motion's impact on the competing interests involved. Ultimately, Intervenors concluded that intervening in the only case allowed to proceed will protect investors' equitable property interests while bolstering the SEC's mandate. Given their objective, granting Intervenors' motion will prejudice no one.

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[3] Paradoxically, the Commission criticizes Intervenors for 'winning the race to the courthouse' and then complains they took too long. Their opposition also fails to mention that Intervenors submitted a draft of the motion for the Commission's confidential review before conferring with the SEC's litigation counsel as a professional courtesy.

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IV. 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). A resulting trust arises whenever a person disposes of property under circumstances that imply he does not intend the person taking or holding the property to have a beneficial interest. *Rest., Trusts 2d*, § 404. The most common example is a transfer of property made to one person when the purchase price is paid by another. Id. In such event, Nevada courts impose a resulting trust in favor of the person who paid the purchase price. *Werner v. Mormon*, 85 Nev. 662, 462 P.2d 42 (1969). That currency is transferred makes no difference. *Balish v. Farnham*, 92 Nev. 133, 546 P.2d 1297 (Nev. 1976).

The unique circumstances presented here favor imposing a resulting trust on Intervenors' original investments. In each contract, the buyer agrees to pay a specific purchase price in exchange for owning a specific interest in the settlement proceeds. Before closing, the buyer assigns its interest to Intervenors in exchange for paying the agreed price to the seller. The property interest created by this exchange is explicitly subject to trust protection until all principal is returned and all profit is paid. Instead of being forwarded to the seller, however, the payment is used to meet Defendants' obligations on other contracts. Given the investment's specific purpose, technical changes in the property's form cannot override the parties' stated intent. *Waldman v. Maini*, 124 Nev. 1121, 195 P.3d 850, 858 (2008). To extinguish the resulting trust due to fraud would also defeat the equitable remedy's essential purpose.

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

The receiver was specifically appointed to control receivership assets and pursue receivership claims *only*. If Intervenors retained ownership of their investments by resulting trust, none of the funds transferred to the Receivership Defendants belong in the receivership. *In re Golden Triangle Capital, Inc*., 171 B.R. 79, 82 (B.A.P. 9th Cir. 1994). The sole decision cited by the Commission to prove Intervenors' rights will be adequately represented falls far short. In *TLC Investments*,[4] 700 of 2000 Ponzi victims sought to intervene in order to force the receiver to administer the receivership estate like a trustee in bankruptcy. Since their interests as unsecured creditors were sufficiently protected, the motion was denied. However, the court noted that the process due varies according to the *nature of the right*. Id. at 1034. (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). In the present case, Intervenors' rights are vastly superior to those of an unsecured creditor of a debtor's estate. As shown below, these rights will also be impaired if intervention is denied.

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

In characterizing Intervenors' motion as a disagreement over litigation strategy, the SEC discloses a fundamental misunderstanding of the need for intervention. The pivotal question is whether Intervenors' investments in Defendants' Ponzi scheme qualify for protection under Nevada's resulting trust doctrine. If so, the receiver *cannot* represent Intervenors' interest *unless* they consent. *Santillo*[5] is easily distinguishable on several fronts: (1) a judgment creditor sought to intervene to satisfy her state judgment lien against a receivership defendant; (2) she did not claim that denying the motion would jeopardize her property rights; (3) in order to receive more

[4] *SEC v. TLC Investments & Trade Co*., 147 F. Supp. 2d 1031 (C.D. Cal. 2013).

[5] *SEC v. Santillo*, 327 F.R.D. 49 (S.D.N.Y. 2018).

than her pro-rata share, she attempted to place her claim above all unsecured creditors; (3) granting intervention would open the floodgates for other claimants with the same objective.

In contrast, Intervenors claim special property rights in receivership assets that will be seriously impaired if their motion is denied. Intervenors have also agreed to share in a pro-rata distribution and to represent all similarly-situated investors in a manner that forecloses any race to the courthouse. Rather than seek a superior position, Intervenors thus offer an innovative solution to an ominous problem.

VII. CONCLUSION

As demonstrated here and in their initial memorandum, Intervenors meet all requirements to intervene as 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. Granting the motion will provide Intervenors a fair opportunity to present probative evidence in support of that claim. If their equitable property rights are affirmed by 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 property rights exempt from

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receivership 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 THE SEC'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

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