

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CIVIL ACTION NO. 20-cv-00325-MSS-AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, BARRY RYBICKI,
EQUIALT et al.,

Defendants.

**SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO MOTION
TO COMPEL RECEIVER TO BRING CLAIMS AGAINST MOVANTS IN
THIS DISTRICT**

Plaintiff Securities and Exchange Commission (the "Commission") hereby responds to the February 5, 2021 Motion to Compel Receiver to Bring Claims Against Movants in this District (DE 263), filed by non-parties Paul Wassgren, DLA Piper LLP, and Fox Rothschild LLP (the "non-parties.")

INTERVENTION

Although the Commission took no position on the non-parties' request for a limited appearance before the Court (DE. 262), the Commission does object to the extent the non-parties request goes beyond a limited appearance and attempts to intervene in this action or through the back door. Section 21(g) of the Exchange Act provides in pertinent part that:

. . . no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

Federal courts have held that Section 21(g) operates as an “impenetrable wall” to a third party intervening in a Commission enforcement action absent the Commission’s consent. *SEC v. Wozniak*, No. 92 C 4691, 1993 WL 34702 at *1 (N.D. Ill. Feb. 8, 1993) (denying motion to intervene by investor who asserted he was a victim of the fraud alleged in the Commission’s complaint because the Commission would not consent). The United States Supreme Court has also acknowledged Section 21(g)’s barrier to those trying to insert private claims into Commission enforcement actions. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 n. 17 (1979) (allowing private plaintiff to employ offensive collateral estoppel without having joined prior Commission lawsuit involving similar facts, because pursuant to Section 21(g) “the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired”) (citing *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2nd Cir. 1972)).

Other courts have followed suit. For example, in *SEC v. Homa*, 2000 WL 1468726, (N.D. Ill Sept. 29, 2000), *aff’d* 17 Fed. Appx. 441 (7th Cir. 2001) (unpublished), the district court denied a motion to intervene by one of the defendant’s creditors. The court found that “the language of Section 21(g) is plain

and unambiguous,” and that language “clearly bars [the creditor] joining the SEC’s enforcement action as a party.” *Id.* at *2. *See also SEC v. Cogley*, No. 98CV802, 2001 WL 1842476 at *3-*4 (S.D. Ohio March 21, 2001) (denying bankruptcy trustee’s motion to intervene in enforcement action and finding that “after reviewing the legislative history, and reviewing other cases that have discussed this issue, this Court comes to the inescapable conclusion that Section 21(g) bars intervention”). Indeed, Section 21(g)’s prohibition is broad enough to prohibit defendants from bringing their own claims in Commission actions, even when they arise from the same or similar facts. *SEC v. Thrasher*, No. 92 CIV 6987 (JFK), 1995 WL 456402 at *3 (S.D.N.Y Aug. 2, 1995) (Section 21(g) bars defendant’s third-party claims); *SEC v. Egan*, 821 F. Supp. 1274, 1275 (N.D. Ill. 1274) (same).

Courts hesitate to mash together these different types of litigation because Congress has charged the Commission with the statutory responsibility of enforcing the federal securities laws. *See, e.g., Official Committee of Unsecured Creditors of Worldcom, Inc., v. SEC*, 467 F.3d 73, 82 (2nd Cir. 2006). To that end, Congress has afforded the Commission considerable discretion in how to carry out that mandate. *Id.*

Here, no matters relating to Wassgren, DLA Piper, or Fox Rothschild are pending in this Commission enforcement action. Moreover, granting intervention to the non-parties would likely encourage other parties the Receiver has sued to

do the same, and the Receiver and the Commission might soon be entangled in multiple collateral disputes as each group of intervening defendants and their respective lawyers tried to impose their own preferences on this case. Due to the near-certainty of undue delay, complexity and confusion that would result were intervention permitted, the Commission objects to the non-parties' request to the extent they seek to intervene in this action.

MOTION TO COMPEL

As to the substance of the Motion to Compel, the Commission joins in the Receiver's response that the non-parties have presented no legal or equitable reason as to why the Receiver's choice of forum should be second guessed by this Court. The non-parties' defenses and arguments are currently before the California courts who can decide their merit. Thus, there is no equitable reason for Court to preemptively move the case to this forum.

Moreover, when the Court appointed the Receiver, it specifically gave the Receiver the authority to institute legal actions as the Receiver deemed necessary. (DE 11). Pursuant to this authority, the Receiver has filed his case against the non-parties as he has deemed necessary, in the forum he deemed appropriate. Nothing in the Court's Order Appointing Receiver, or other legal precedent, provides an avenue for parties sued pursuant to the Receiver's Court granted authority to compel such cases to this forum. Indeed, to condone such actions would certainly

impede the Receiver from efficiently performing his duties and be contrary to the Receiver's right to the forum of his choice.

For these, and the reasons set forth by the Receiver in his opposition motion, the non-parties' motion to compel should be summarily denied.

Respectfully submitted,

February 19, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2021, I electronically filed the foregoing Response with the Clerk of the Court using CM/ECF, which will send a notice of such filing to all counsel of record.