UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS, et al.,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC., et al.,

Relief Defendants.
_____/

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO STRIKE DACCACHE PLAINTIFFS' NOTICE OF OBJECTION TO ANY SETTLEMENT BETWEEN QUIROS AND THE RECEIVER WHICH INCLUDES A BAR ORDER

I. Introduction

The Daccache plaintiffs make three main arguments in their Response (DE 466) to the Securities and Exchange Commission's Motion to Strike their Notice of Objection. None are persuasive. First, they trumpet their substantial interest in a settlement between Defendant Ariel Quiros and the Court-appointed Receiver that would contain a bar order on actions against Quiros. They repeatedly gloss over the fact that *there is no such settlement* before the Court, and there may never be. They have not cited a single case for the remarkable argument that a potential interest in a theoretical settlement allows them to make general filings in a case in which they have never moved to intervene, let alone received Court permission. Their argument that they can use Court's crowded docket to file an objection before any settlement is finalized as a negotiating tactic is absurd and borders on misuse of Court resources.

Second, the Daccache plaintiffs argue they don't need to move to intervene because the

Commission did not object to their filings in connection with the Raymond James settlement. They ignore entirely that we explained in our Motion to Strike that we did not object at that time because the Daccache plaintiffs had a limited interest in the Raymond James settlement *after the settlement was finalized*. This limited interest in one settlement that is no longer before the Court did not give them the right to make any filing they want in this case. The Daccache plaintiffs also do not address the fact that they will have an opportunity to object if the Receiver presents a settlement with Quiros to the Court that provides for a bar order.[1]

Third, the cases the Daccache plaintiffs cite in arguing Section 21(g) of the Securities Exchange Act of 1934 does not bar intervention are distinguishable, and ignore the fact that the Daccache plaintiffs have not moved to intervene. For all those reasons and those cited in our Motion to Strike (DE 461), the Court should strike the Daccache plaintiffs' Notice of Objection.

II. The Daccache Plaintiffs' Purported Interest

While making much of their interest in an actual settlement between the Receiver and Quiros that would contain a bar order on other actions against Quiros, the Daccache plaintiffs are forced to admit there is no such settlement, and acknowledge their real interest is in the *prospect* that Quiros and the Receiver *may* reach a settlement that includes a bar order. Response at 5. They then incredibly claim that it is perfectly acceptable for them to file an objection to any such settlement *before* it is reached because they "wish to put the parties on notice that the Daccache Plaintiffs will object to a bar order." They cite no legal support or any other rationale that would allow them to use a Commission enforcement action or the Court's docket as a negotiating ploy.

[1] The Daccache plaintiffs falsely claim the Commission has moved to strike the Notice of Objection because the Commission takes a different position than they do on a proposed bar order. Had the Daccache plaintiffs properly conferred with the Commission prior to filing the Notice, they would know that is not true. The Commission did not take any position on the proposed bar order in the Raymond James settlement or the prior settlement between the Receiver and Citibank, and would take no position on any proposed bar order on actions against Quiros.

If their true point was to let the Receiver and Quiros know they will object to any bar order, a telephone call or letter would equally suffice to "put the parties on notice," without having to crowd the Court's docket in a case in which they have no standing to make general filings.

Furthermore, the Daccache plaintiffs have not cited any legal backing for the proposition that they can make filings in a Commission enforcement action without moving to intervene. In a desperate search for such rationale, they take inapplicable dicta from two cases in which the only issue before the court was whether the moving party could intervene, not whether they could make a filing without first receiving court permission to intervene.

First, they erroneously claim that *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 457 (S.D.N.Y. 2000) stands for the proposition that an interested party may be heard without moving to intervene. Response at 3. However, they misstate that court's holding as well as the context of the language they quote. The *Credit Bancorp* court never concluded that a non-party to a Commission enforcement action could file papers without moving to intervene. The language the Daccache plaintiffs quote from the case was the court musing what might happen if it did not allow the movants in the case to intervene – nothing more. The only issue before the *Credit Bancorp* judge was whether to allow the creditors there to intervene to assert an interest in securities and proceeds of securities transactions. Thus, *Credit Bancorp* lends no support to the Daccache plaintiffs' position.

The other case the Daccache plaintiffs cite in support of their right to file the Notice of Objection is *SEC v. Flight Transport Corp.*, 699 F.2d 943 (8th Cir. 1983). They illogically try to analogize their situation – an interest in a hypothetical settlement between Quiros and the Receiver – with the *Flight Transport* creditors' real interest in funds the government was holding. In *Flight Transport*, the court granted two creditors who had leased jets to a defendant

company permission to intervene to assert their interest in *actual* proceeds the government held – the only proceeds available to satisfy the creditors' interest in a breached lease agreement. There was nothing speculative or imaginary about the creditors' interest, unlike the situation with the Daccache plaintiffs. Thus, neither case supports the Daccache plaintiffs' argument that they can file an objection to a hypothetical future event without first moving to intervene.

III. The Daccache Plaintiffs Need To Move To Intervene

The Daccache plaintiffs also assert their Notice of Objection is valid because the Commission did not object to them making filings in connection with the Raymond James settlement. They fail entirely to address our Motion to Strike, in which we explained the reason for that – the Daccache plaintiffs were a part of the Raymond James settlement, which they and the Receiver chose to seek approval of from this Court. The Daccache plaintiffs had to make filings in connection with the Raymond James settlement to divide the $25 million in attorneys' fees the settlement provided for, particularly when the Court expressed skepticism about whether that was an appropriate amount. Not allowing them to file papers under that circumstance would not have made sense.

But the Daccache plaintiffs' filings in connection with the Raymond James settlement were limited to their interest in the settlement, just as any filings in connection with a proposed bar order that is actually presented to the Court would be limited to that issue. Those scenarios do not translate into a general right to file papers in a Commission enforcement action without moving to intervene under Rule 24 as discussed in Section II above.

IV. Section 21(g) Of The Exchange Act

The Daccache plaintiffs are correct that a minority of courts have held that Exchange Act Section 21(g) does not automatically bar intervention by a private party in a Commission

enforcement action. However, a majority of courts have held the statute 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); *SEC v. Homa*, No. 99 C 6895, 2000 WL 1468726 at *2 (N.D. Ill Sept. 29, 2000), *aff'd* 17 Fed. Appx. 441 (7th Cir. 2001) (unpublished) ("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"); *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"); *SEC v. Benger*, No. 09 C 0676, 2010 WL 724416 at *8-*11 (N.D. Ill. Feb. 23, 2010) (intervention by non-party in SEC enforcement action barred where the intervention concerned issues peripheral to the enforcement action and would result in the consolidation or coordination with other cases).

The cases the Daccache plaintiffs cite are largely distinguishable. For example, *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) has nothing to do with Section 21(g). The only issue before the court was whether it should quash an investigative subpoena the Commission issued before filing a case. Section 21(g) was neither applicable nor discussed in the ruling. The Daccache plaintiffs seize on *dicta* from the court that a corporate employee might at some hypothetical future date be able to assert his own attorney-client privilege and attempt to turn that into a wholesale rejection of Section 21(g). But Section 21(g) was not discussed in or relevant to the *Dresser* opinion.

Similarly, the decision in *SEC v. Prudential Sec., Inc.*, 171 F.R.D. 1 (D.D.C. 1997) did not turn on the application of Section 21(g), but whether investors could intervene under Rule 24. The court ruled they could not. The majority of cases on the issue have held Commission consent to intervene is required under Section 21(g). This instance is an example of why. The Daccache plaintiffs are not the only group that would be affected by any proposed order barring future actions against Quiros. If every party potentially affected by such a bar order started filing notices of their positions now, before any proposed bar order even exists, it would create chaos on the Court's docket. This is precisely the situation Section 21(g) is intended to address. Section 21(g) is most certainly applicable here.

V. Conclusion

For all the reasons cited in our Motion to Strike and this reply, the Court should strike the Daccache plaintiffs' Notice of Objection.

Respectfully submitted,

March 22, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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