

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND)	
EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	1:05-cv-1102-JDT-TAB
)	
ALANAR, INC., et al,)	
)	
Defendants,)	
)	
and)	
)	
CHURCHMEN'S INVESTMENT)	
CORPORATION, et al.,)	
)	
Relief Defendants.)	

ENTRY GRANTING MOTIONS TO INTERVENE
(Docket No. 79 and Docket No. 100—In Part)¹

On July 26, 2005, the United States Securities and Exchange Commission (“SEC”) filed a complaint in this action accusing Defendants Alanar, Inc. (“Alanar”), Guardian Services, LLC (“Guardian”), First Financial Services of Sullivan County, Inc. and The Liberty Group, Inc., among others, of “fraud in church bond issuances and a group of bond funds.” (Compl. 2.) A committee of bond investors (the “Bondholders”) and an indenture trustee for some of the bond issuances, Southern Michigan Bank and Trust (“SMBT”), both seek to intervene in the action. The Bondholders assert that “none

¹ This Entry is a matter of public record and will be made available on the court’s web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

of the existing parties represent the Bondholders [sic] interest” in the “funds presently in possession of the Paying Agents, and the hundreds of millions of dollars that will pass through the Paying Agents” (Mot. Intervene 5,6.) And SMBT seeks a “general right to intervene” in the action to voice its interest in the distribution of those funds. (Reply Supp. Mot. Intervene 2.) Both motions to intervene are fully-briefed and ripe for review.

I. BACKGROUND

On July 26, 2005, the SEC filed a complaint against more than twenty defendants, including Alanar, Guardian, First Financial Services of Sullivan County, Inc., The Liberty Group, Inc. and four members of the Reeves family (Vaughn A. Reeves, Sr., Vaughn A. Reeves, Jr., Jonathan Christopher Reeves and Joshua Craig Reeves) for securities violations. The SEC alleges that over a period of seventeen years the Defendants engaged in an unlawful “affinity” scheme that defrauded the Bondholders and other investors of \$120 million through church bond issuances and \$50 million through the sale of bond fund units. The SEC accuses the Defendants of improperly assuring investors of favorable rates of return on bond investments through individual bond offering prospectuses and other false documents. The prospectuses apparently stated that investor funds would be used to pay financing costs, to refinance existing debt, to fund various church capital improvement projects or to fund community projects. However, the funds were diverted into separate bond issuer accounts for the Reeves’ personal use (including to trade equity options and stock), and substantially depleted.

The Bondholders are a group of eight individuals who invested in the church bonds offered and sold by Alanar. They apparently have formed a bondholders committee, and now seek to intervene in this action. The Bondholders state that their committee “has been contacted by approximately forty percent (40%) of the investors (in terms of dollars invested) in the Church Bonds that are now outstanding; and it is presently in Email contact with about eighty percent (80%) of those investors. These percentages are increasing weekly.” (Mem. Supp. Mot. Intervene 5.) The Bondholders represent that the committee is preparing a website for dissemination of information related to this action, as well as working with the Receiver to gather information from fellow bondholders.

The other movant, SMBT, was one of several indenture trustees that became involved in the Defendants’ scheme pursuant to a trust indenture agreement. The indenture trustees acted as intermediaries between the bond issuers and the paying agents, generally assuring that the paying agents fulfilled their obligations to deposit all investor proceeds in a “Bond Proceeds Account” for disbursement, and deposit all payments by the issuer into a “Bond Repayment Fund” for disbursement to the investors. The trust indenture agreements required that funds “held in the Bond Repayment Fund shall be expended solely for the payment of the principal of, premium if any, and interest on the Bonds as the same mature and become due” They also required that funds be invested in “Eligible Securities.” And they stated that income generated was the property of the paying agent.

SMBT served as an indenture trustee in forty-nine offerings pursuant to trust indenture agreements entered into between it, Guardian and the bond issuers. SMBT contends, and it appears to be undisputed, that it properly attempted to carry out its obligation under the indenture to protect the interests of the issuances' bondholders. Apparently this obligation is triggered when the indenture trustee "receive[s] written notice of an event of default from Guardian." (Mot. Intervene 4.) While neither SMBT or the Bondholders has received such written notice, they have assumed, given the financial state of the funds as well as the SEC's filing of this enforcement action, that the investment accounts have entered default.

The SEC's claims against the Defendants arise under Sections 17(a), 10(b) and 15(c)(1), and Rule 10b-5, of the Securities and Exchange Act of 1934 (the "Act"), 15 U.S.C. § 77q(a). The SEC seeks to enjoin the Defendants' scheme, disgorgement plus prejudgment interest, civil penalties, an asset freeze and an accounting. It also sought the appointment of a receiver, which the court granted on December 20, 2005, when it appointed Bradley W. Skolnik (the "Receiver").

On that same day, SMBT filed a complaint under Cause No. 1:05-CV-1880-JDT-TAB "in order to fulfill its obligations as indenture trustee." (*Id.* 7.) In that complaint, SMBT requests an accounting of "all of [Guardian's] activities with respect to the church bond offerings and the individual retirement accounts" (First Am. Compl. 9), and a declaration of rights and liabilities with respect to the bonds. (*Id.* 9-14.) The court subsequently stayed that case, as well as a motion to dismiss the complaint filed by the Receiver, pending its decision on the intervention motions in this action.

II. DISCUSSION

In support of their request to intervene in the instant action, the Bondholders assert that no one is representing their interests in the action, even though “the actions of the Court and the Receiver can have a profound impact on the payments of principal and interest to the Bondholders.” (Bondholder Br. Supp. Mot. Intervene 3.) And SMBT stresses its role as an indenture trustee in support of its motion, stating that it “has a contractual duty to look after the interests of the Bondholders.” (SMBT Br. Supp. Mot. Intervene 2.) Both movants believe that intervention is the best, if not only, means of protecting their interests. Therefore, they seek intervention in this action as of right pursuant to Federal Rule of Civil Procedure 24(a). They further contend that intervention is not prohibited by Section 21(g) of the Securities Exchange Act of 1934 (the “Act”).

Specifically in response to SMBT’s motion to intervene, the Receiver contends that SMBT misinterprets the trust indenture agreement, and that the agreement does not require SMBT to attempt to intervene in this case. With regard to both movants’ requests to intervene, the Receiver suggests that their intervention is barred by Section 21(g) of the Act. Finally, the Receiver argues that the movants’ intervention is not appropriate because they have not demonstrated that they are entitled to intervention as of right under Federal Rule of Civil Procedure 24(a).

A. The Trust Indenture Agreement Gives SMBT the Authority to Attempt to Intervene in This Case.

Preliminarily, in opposition to SMBT's motion to intervene, the Receiver contends that SMBT lacks a contractual relationship with the bond investors that would allow it to intervene in this action on their behalf. It argues that the trust indenture agreement entitles, but does not obligate, SMBT to intervene, as SMBT contends.

The Receiver's interpretation of the indenture agreement appears to be a bit too narrow. While arguing that the agreement limits SMBT's rights as an indenture trustee, the Receiver unwittingly highlights those provisions in the agreement that actually support SMBT's actions. For example, the Receiver points to a provision in the indenture agreement in which it is stated that "[i]n case an event of Default has occurred and is continuing of which [SMBT] has actual knowledge, [SMBT] shall be entitled to, but shall not be obligated to, exercise such of the rights and powers vested in it by this Indenture" (Indenture Agreement 11.) The Receiver suggests that this provision indicates that SMBT need not pursue intervention in this case. That may well be true. But the provision also indicates that SMBT is entitled to pursue "the rights and powers vested in it" And one such right is intervention.

The Receiver points to another provision in the indenture agreement that he contends limits SMBT's ability to collect records related to the bond issuances. That provision reads "[SMBT], in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit, and, if the Trustee shall determine to make such further inquiry or investigation, it shall be entitled to examine the books, records and premises of the Issuer, personally or by agent or attorney" (Indenture Agreement 12.) However, the court does not take this provision, even when

read most narrowly, to limit SMBT's ability to request records. Rather, the provision gives SMBT exactly that power. While the provision may suggest that access to documentation is to be given to the issuer churches, providing documents to SMBT, the indenture trustee, would be the practical equivalent of such.

Based on these provisions and others not raised by the Receiver, it is apparent that the indenture agreement grants SMBT its claimed authority for pursuing intervention in this case. Therefore, the court turns to another procedural roadblock both SMBT and the Bondholders must overcome—whether statutory law prohibits their intervention in this SEC enforcement action, as the Receiver contends.

B. Section 21(g) of the Securities and Exchange Act Does Not Bar Intervention by the Movants.

The Receiver argues that Section 21(g) of the Securities and Exchange Act explicitly bars the movants from intervening in this action. He asserts that “courts in this circuit have held that Section 21(g) . . . prohibits intervention in SEC enforcement actions without SEC consent.” (Resp. 9.) And the SEC clearly has not consented to intervention here.

Section 21(g) of the Securities and Exchange Act states that:

Notwithstanding the provisions of section 1407(a) of title 28, United States Code, or any other provision of law, 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.

15 U.S.C. § 78u(g). The Seventh Circuit Court of Appeals has not taken up the issue of whether this provision prohibits intervention in an SEC enforcement action such as the instant case,² but several district courts in this jurisdiction have. For example, in *SEC v. Wozniak*, 1993 U.S. Dist. LEXIS 1241 (N.D. Ill. Feb. 5, 1993), the court held that Section 21(g) operates as “an impenetrable wall” with regard to intervention. *Id.* at * 1. And in *SEC v. Homa*, 2000 U.S. Dist. LEXIS 14582 (N.D. Ill. Sept. 29, 2000), it was held that “the plain language of [Section 21(g)] clearly bars [the non-party]’s joining the SEC’s enforcement action as a party” *Id.* at * 7.

In contrast, a number of district courts, including at least one in this jurisdiction, have found that Section 21(g) does not automatically preclude a non-party from intervening in an SEC enforcement action. See *SEC v. Heartland Group, Inc.*, 2003 U.S. Dist. LEXIS 3666 (N.D. Ill. Mar. 11, 2003); *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 457 (S.D.N.Y. 2000); *SEC v. Prudential Sec. Inc.*, 171 F.R.D. 1 (D.D.C. 1997). *Heartland Group*, for example, distinguishes *Wozniak* and *Homa* by finding that in both cases “would-be intervenors attempted to recover from the very defendants the SEC was suing.” *Id.* at *9. In *Heartland*, however, the intervenor did not seek to sue the

² The only appeals court decision addressing this issue appears to be *SEC v. Flight Transp. Corp.*, 699 F.2d 943 (8th Cir. 1983). In that case, the Eighth Circuit reversed a lower court’s denial of a motion to intervene, holding that a creditor with an unliquidated claim in the company charged in an SEC enforcement action could intervene. The Court noted that section 21(g) “does not say that no one may intervene in action brought by the SEC It does not mention Fed. R. Civ. P. 24, nor does Rule 24 contain any clause giving special privileges to the SEC.” *Id.* at 950. Instead, the court found that “the purpose of this subsection is simply to exempt the [SEC] from the compulsory consolidation and coordination provisions applicable to multidistrict litigation.” *Id.*

defendant in the enforcement action, but, instead, sought to protect its interest in property that was subject to the enforcement action. *Id.* Such is the case here.

This court is in agreement with the rationale of the above cases allowing intervention in certain SEC enforcement actions. The cases are instructive, as is the statute itself, which states nothing about prohibiting intervention under Federal Rule of Civil Procedure 24. Therefore, Section 21(g) will not bar the movants from intervening in this action. Whether Federal Rule of Civil Procedure 24 allows them to intervene, however, is a separate question.

C. The Bondholders are Entitled to Intervention as of Right under Federal Rule of Civil Procedure 24(a).

The Receiver contends that the movants have not demonstrated that they are entitled to intervention as of right under Federal Rule of Civil Procedure 24(a). Rule 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). A party seeking to intervene as of right must establish (1) that the application is timely; (2) that the party has an interest in the property or transaction that is the subject of the lawsuit; (3) that disposition of the action will impair the party's ability

to protect that interest; and (4) that the interest is not adequately represented by the existing parties to the lawsuit. *United States v. City of Chi.*, 798 F.2d 969, 972 (7th Cir. 1986). “Failure to satisfy any one of these requirements is sufficient grounds to deny [the motion to intervene.]” *Id.* “Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors.” *U.S. ex rel. McGough v. Covington Techs.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (quoting *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986)).

SMBT argues in favor of intervention by stating that it “can satisfy all four elements” necessary to intervene in the action under Rule 24(a). The Bondholders, while not addressing each Rule 24(a) element separately, contend that they “meet the requirements of Rule 24(a) because they seek to further the interest of the Bondholders . . . and represent a group that has a sufficient interest in the funds presently in the possession of the Paying Agents . . . all of which is part of the subject matter of this litigation and may be impaired.” (Br. Supp. Mot. Intervene 6.)

Turning to the four Rule 24(a) factors, first, the Receiver does not dispute that the movants timely filed their motions to intervene, and the court agrees based on the record before it. *See, e.g., Nissei Sangyo Am. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994) (“potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly”). Nor does the Receiver dispute that the movants have an interest in this action, and again, the court agrees. Although the “interest required by Rule 24(a)(2) has never been defined with particular precision,” the would-be intervenor’s interest must be a

“direct, significant, legally protectable one. . . . something more than a mere ‘betting’ interest, but less than a property right” *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380-81 (7th Cir. 1995). In determining the alleged interest, the proposed intervenor need only claim an interest relating to the suit; the fact that its claim ultimately may fail should not affect its status as an intervenor. *Am. Nat’l Bank & Trust Co. v. Bailey*, 750 F.2d 577, 585 (7th Cir. 1984). Here, the Bondholders claim their interest in the property or transaction that is the subject of the SEC action is “substantial funds belonging to the Bondholders under the Trust Indentures for the payment of principal and interest due to the Bondholders.” (Br. Supp. Mot. Intervene 3.) And SMBT claims its interest is fulfilling its “duties under the trust indentures.” (Br. Supp. Mot. Intervene 8.) These interests, as stated, directly relate to the case at hand.

The third Rule 24(a) intervention factor is whether disposition of the action without the movants as parties will impair their ability to protect their interests in the litigation. This element is easily satisfied in light of the finding that the movants certainly have an interest sufficient to satisfy Rule 24(a). A chance exists that a decision in this litigation might impact that ultimate interest, and as such supports intervention.

Finally, as for inadequacy of representation, the proposed intervenor’s burden is “minimal.” *FTC v. Med Resorts Int’l, Inc.*, 199 F.R.D. 601, 606 (N.D. Ill. 2001). “The movant need only show that the representation of his interests may be inadequate.” *Id.* (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.1 (1972)). Here, based on the movants’ submissions, the court finds that they have met the minimal burden of showing that the Receiver’s representation may be inadequate to protect their

interests. See *Trbovich*, 404 U.S. at 538 n.10. The SEC's primary goal is to protect the public by preventing further securities violations. The Receiver is concerned with marshaling and protecting assets for the benefit of all concerned parties, not just the Bondholders or SMBT. While the movants' interests may not be adverse to those of the SEC or the Receiver, they are sufficiently "disparate" to warrant intervention. See *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 870 (8th Cir. 1977). Indeed, it might even be said that the movants have a heightened interest over that of the SEC or the Receiver.

Accordingly, this Court finds that the Bondholders may intervene in this action as of right under Federal Rule of Civil Procedure 24(a) because they have shown that disposition of the case without their inclusion as parties will impair their abilities to protect their articulated interests and that the Receiver and SEC will not adequately protect those interests. With respect to SMBT however, the court notes the pendency of the Receiver's Motion to Remove Indenture Trustee (Docket No. 152). Should the court grant this motion, the interests of SMBT in this matter would diminish drastically. Accordingly, SMBT will be allowed to intervene solely for the purpose of addressing the removal motion. If SMBT is not removed, the court will consider whether more extensive intervention ought to be allowed.

The court is reluctant to extend the purview of this litigation to include other potential intervenors whose interests at this stage of the litigation are more limited. See, e.g., *SEC v. TLC Invs. & Trade Co.*, 147 F. Supp. 2d 1031, 1043 (C.D. Cal. 2001) (in

disallowing intervention by seven hundred individual plaintiffs, the court held that intervention would interfere with the “relatively quick schedule” established in the case and that a trial involving seven hundred individual claims would be “much more extensive” than an SEC enforcement trial); *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972) (in disallowing intervention in three out of forty-five counts brought by the SEC to assert claims against seven out of forty-four defendants, the court held that while it may be more efficient to allow private parties to join in SEC enforcement actions, in the case before it the “complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues”). However, the court believes that in the particular motions at issue here, the Bondholders have made an adequate showing to allow their intervention under Rule 24(a), and that SMBT should be allowed to intervene for the limited purpose indicated.

III. CONCLUSION

For the reasons stated above, the court **GRANTS** the Bondholders’ Motion to Intervene (Docket No. 79) and **GRANTS** in part SMBT’s Motion to Intervene (Docket No. 100). The Bondholders are permitted to intervene for the following purposes: (1) to file appearances in this proceeding and obtain copies of pleadings, and (2) to file motions and responses to pleadings that other parties may file when issues arise that affect them. SMBT is permitted to intervene solely to address the motion for its removal as indenture trustee (Docket No. 152) for the present. The court believes that this right

of intervention is in the best interest of all parties while limiting the amount of pleadings and filings in the future.

ALL OF WHICH IS ENTERED this 27th day of June 2006.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a cursive 'D' and 'T', positioned above a horizontal line.

John Daniel Tinder, Judge
United States District Court

Electronic copies to:

Cassandra Amy Becker
United States Securities & Exchange Commission
beckerc@sec.gov

Peter S. French
Lewis & Kappes
pfrench@lewis-kappes.com

Hannah Kaufman
Lewis & Kappes
hkaufman@lewis-kappes.com

H. James Maxwell
hjmesq@kc.rr.com

Mark J. R. Merkle
Krieg Devault
mmerkle@kdlegal.com

David I. Rubin
Stewart & Irwin
drubin@silegal.com

Michael Joseph Rusnak
Stewart & Irwin
mrusnak@stewart-irwin.com

John Joseph Sikora Jr.
United States Securities & Exchange Commission

sikoraj@sec.gov

Bradley W. Skolnik
Stewart & Irwin
bskolnik@stewart-irwin.com

Copies Mailed to:

Vaugh A. Reeves Sr.
2122 Lakeview Drive
Sullivan, IN 47882

Vaugh A. Reeves Jr.
900 Hillside Drive
Sullivan, IN 47882

Jonathan Christopher Reeves
302 West Washington Street
Sullivan, IN 47882

Joshua Craig Reeves
330 West Washington Street
Sullivan, IN 47882