No. 20-cv-3408-G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE HIGHLAND CAPITAL MANAGEMENT, L.P.,
Debtor.

UBS SECURITIES LLC AND UBS AG LONDON BRANCH,
Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Appellee.

On Appeal from the United States Bankruptcy Court
for the Northern District of Texas
(No. 19-bk-34054—Hon. Stacey G. Jernigan)

APPELLANTS' OPPOSITION TO REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUND AND THE CRUSADER FUNDS' MOTION TO INTERVENE AS APPELLEES

INTRODUCTION

This is an appeal by Appellants UBS Securities LLC and UBS AG London Branch (collectively, UBS)—objecting creditors in the Appellee-Debtor's underlying chapter 11 case—from the Bankruptcy Court's approval of the Debtor's settlement of certain estate claims under Federal Rule of Bankruptcy Procedure 9019. Two parties to that settlement—the Redeemer Committee of the Highland

Crusader Fund and the Crusader Funds[1]—now move to intervene in this appeal as appellees under Rule 8013(g). As explained below, Movants do not satisfy the well-established criteria for intervention in federal litigation. The Court should deny their motion.

ARGUMENT[2]

Federal Rule of Bankruptcy Procedure 8013(g) provides that a motion to intervene in a bankruptcy appeal before a district court "must be filed within 30 days after the appeal is docketed" and "must concisely state [1] the movant's interest, [2] the grounds for intervention, [3] whether intervention was sought in the bankruptcy court, [4] why intervention is being sought at this stage of the proceeding, and [5] why participating as an amicus curiae would not be adequate."

According to Movants, intervention under Rule 8013(g) is warranted for any party who has a "'strong interest regarding the issues' on appeal and 'actively participated in litigation of these issues before the Bankruptcy Court.'" Mot. 6 (quoting *In re Samson Res. Corp.*, No. 18-cv-84, 2018 WL 4658212, at *1 n.2 (D. Del. Sept. 27, 2018)). But Movants offer only one opinion for their proposed

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[1] The Crusader Funds consist of Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd., and Highland Crusader Fund II, Ltd.

[2] Because the relevant background is set forth in Movants' motion, UBS omits any additional description of the background.

standard, and that decision offers no analysis on the intervention standard. *See In re Samson Res. Corp.*, 2018 WL 4658212, at *1 n.2.[3] So Movants cite no precedent that actually supports their sweeping interpretation of Rule 8013. And if Movants' standard were correct then creditors would have greater rights to participate in bankruptcy appeals than they have in the underlying chapter 11 case.

In fact, few courts have analyzed Rule 8013(g) since it was promulgated in 2014, but precedent and good sense point to Federal Rule of Civil Procedure 24 as providing the standard to apply. Rule 8013(g) is "based on [Federal Rule of Appellate Procedure] 15(d)," with the added requirements that it "also requires the moving party to explain why intervention is being sought at the appellate stage" and why participating as an amicus would not be adequate.[4] Other than Rule 8013(g)'s additional requirements, the language in both provisions is virtually identical. Rule 8013(g) should be interpreted in line with Federal Rule of Appellate Procedure 15(d). *Cf. United States v. Davis*, 139 S. Ct. 2319, 2329 (2019) ("[W]e normally presume that the same language in related statutes carries a consistent meaning.").

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[3] The facts in *In re Samson Resources Corp.* also made it clear that the intervenor was a proper appellee. The appeal was over a denied claim, and the intervenor was the "Settlement Trust"—an entity created under the debtors' reorganization plan with "sole authority to file, withdraw, or litigate to judgment any objections to general unsecured claims asserted against the Debtors." *Id.*

[4] Fed. R. Bankr. P. 8013(g) advisory committee's note to 2014 amendment; *see also* 10 *Collier on Bankruptcy* ¶ 8013.11 (16th ed. 2020) ("[Rule 8013](g) is modeled after [Federal Rule of Appellate Procedure] 15(d).").

The Fifth Circuit has pointed to "two considerations" that govern Federal Rule of Appellate Procedure 15(d)'s application: "first, the statutory design of the [underlying] act and second, the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24." *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985).

These same considerations should govern intervention under Rule 8013(g). That approach tracks historical practice predating Rule 8013(g). *See, e.g.*, *Bernardi & Assocs. v. I. Kunick Co. (In re Delta Produce)*, No. 13-cv-701, 2013 WL 4097662, at *2 (W.D. Tex. Aug. 13, 2013) (concluding in pre-Rule 8013(g) bankruptcy appeal that Rule 24 did not apply to intervention motion, but still analyzing motion under Rule 24's standards); *Stingfree Techs. Co. v. Americ Invs. Capital Co. (In re Stingfree Techs. Co.)*, 427 B.R. 337, 346 (E.D. Pa. 2010) (analyzing and denying motion to intervene in bankruptcy appeal under Rule 24); *H & M Oil & Gas L.L.C. v. Brazos 440 Partners, L.P.*, 386 B.R. 631, 635 (W.D. Tex. 2008) (same).[5]

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[5] *See also Int'l Union, United Auto. Workers v. Scofield*, 382 U.S. 205, 209-10, 216-17 & n.10 (1965) (relying on Rule 24 and observing that "the policies underlying intervention may be applicable in appellate courts"); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004) ("Rule 15(d) does not provide standards for intervention, so appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24."); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) ("[W]e have held that intervention *in* the court of appeals is governed by the same standards as in the district court."). And although Federal Rule of Appellate Procedure 15(d) by its terms applies only to appeals from administrative agencies, the Fifth Circuit has applied it (and Rule 24's standard) to intervention in appeals generally. *See, e.g.*,

The Rule 24 standard for intervention distinguishes between intervention as of right and permissive intervention. To warrant intervention as of right, (1) the motion for intervention "must be timely"; (2) the movant "must have an interest relating to the property or transaction that is the subject of the action"; (3) the movant "must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest"; and (4) the movant's "interest must be inadequately represented by the existing parties to the suit." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (en banc) (citation omitted). "Failure to satisfy any one requirement precludes intervention of right." *Id.*

Granting permissive intervention is discretionary. Movants must show that they have a claim or defense that shares with the main action "a common question of law or fact" and that participating as an amicus would be inadequate. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.* (*NOPSI*), 732 F.2d 452, 470-71 & n.36 (5th Cir. 1984) (en banc) (citation omitted). And the Fifth Circuit has instructed that "[i]n acting on a request for permissive intervention, it is proper to consider, among other things, 'whether the intervenors' interests are adequately represented by other parties.'" *Id.* at 472.

Baker v. Wade, 769 F.2d 289, 291-92 (5th Cir. 1985) (en banc) (applying Rule 24 standard to motion to intervene in non-agency appeal), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003).

Under these standards, Movants' request for intervention should be denied.[6] *First*, Movants do not have a legally protectable interest that can support intervention because the law assigns responsibility over the settlement to the Debtor. Movants' interest in this appeal is purely economic and contingent—so it is insufficient. *Second*, Movants fail to show that the Debtor will not adequately represent any interest they have in this appeal. *Third*, participating as amicus would be more than enough to let Movants' voice be heard. Indeed, participating as amicus would be appropriate given Movants' limited participation before the Bankruptcy Court (where they filed no brief and relied entirely on the evidence and testimony submitted by the Debtor).

I. MOVANTS' INTEREST CANNOT SUPPORT INTERVENTION

To warrant intervention as of right, a movant must have a "direct, substantial, [and] legally protectable interest." *Edwards*, 78 F.3d at 1004 (citation omitted). To qualify, the interest must be one that the "*substantive* law recognizes as belonging to or being owned by" the movant. *NOPSI*, 732 F.2d at 464. But as Movants acknowledge, the Bankruptcy Code and Rules entrust the responsibility over the estate's claims and whether to settle such claims to the debtor or trustee. *See* Mot. 7 ("[S]ettlement motions in bankruptcy are made by the debtor or trustee—not the

[6] UBS does not contest that Movants' motion is timely, that this appeal may impair Movants' ability to protect their asserted interest, and that Movants have a claim or defense that shares a common question of law or fact with this appeal.

settling creditors."); *see also* 11 U.S.C. § 363; Fed. R. Bankr. P. 9019(a) ("On motion by the *trustee* and after notice and a hearing, the court may approve a compromise or settlement." (emphasis added)); 7 *Collier on Bankruptcy* ¶ 1109.05[1] (16th ed. 2020) ("[T]he authority to settle a controversy that the trustee or debtor in possession has authority to bring also lies with the trustee or debtor in possession and may not be usurped by other parties."). A creditor does not have this legal right or obligation. So Movants lack the requisite interest for intervention. *See, e.g.*, *In re Waste Mgmt., Inc. Sec. Litig.*, No. 99-cv-2183, 2002 WL 35644014, at *2 (S.D. Tex. Apr. 29, 2002) (movant lacked interest for intervention in dispute involving retirement plan where "[t]he Plan's investment manager [wa]s vested with the responsibility for making the [relevant] decision").

The sole interest Movants rely on is their financial stake in the settlement agreement. Mot. 7 ("Given the Movants' economic interest . . . ."); *id.* (invoking "the [Movants'] economic interest in the implementation of the Settlement Agreement"). Yet courts have long held that "an economic interest alone is insufficient" because it does not rise to the level of a "legally protectable" interest. *NOPSI*, 732 F.2d at 466.[7]

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[7] *See also id.* at 464 ("[I]t is plain that something more than an economic interest is necessary."); *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 823 (5th Cir. 2003) (movants had "an economic interest" in arbitration award underlying case, but that interest was "not direct and substantial as required under Rule 24 and [the Fifth Circuit's] ruling in [*NOPSI*]"); *Russell v. Harris Cty.*,

Movants' interest is not "direct" either. "[T]he interest sought to be enforced must be 'a present, substantial interest as distinguished from a contingent interest or mere expectancy.'" *United States v. 936.71 Acres of Land, More or Less, in Brevard Cty.*, 418 F.2d 551, 556 (5th Cir. 1969) (citation omitted). Movants do not yet have any rights under the settlement agreement. Most of the settlement agreement's key provisions do not become effective until the "Stipulation Effective Date," which the settlement defines as "on or after the date an order of the Bankruptcy Court approving this Stipulation [under] Federal Rule of Bankruptcy Procedure 9019 and section 363 of the Bankruptcy Code becomes a final and non-appealable order." *See* Appendix to Appellants' Opp'n (Appendix) 005 (settlement agreement). The Stipulation Effective Date has not yet occurred, and whether it ever will depends on the outcome of this appeal. So as it stands, Movants do not have any "direct" interest.[8] Their asserted interest is far too contingent to support intervention.

No. 19-cv-226, 2020 WL 6784238, at *2 (S.D. Tex. Nov. 18, 2020) ("The fact that the outcome of a lawsuit may, after intervening steps, increase a proposed intervenor's financial burdens does not create a right to intervene." (citing cases)); *Cage v. Smith (In re Smith)*, 521 B.R. 767, 776 (Bankr. S.D. Tex. 2014) ("purely economic" interest alone cannot support intervention); *Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V.*, No. 12-cv-304, 2014 WL 12616098, at *1 (S.D. Tex. Aug. 13, 2014) ("Cal Dive's only 'interest' in this lawsuit is the amount of economic loss it may suffer if Malin prevails on its claims. This 'interest' is not sufficient."), *report & recommendation adopted*, 2015 WL 12837647 (S.D. Tex. Jan. 27, 2015).

[8] *See, e.g.*, *Bear Ranch, LLC v. HeartBrand Beef, Inc.*, 286 F.R.D. 313, 317 (S.D. Tex. 2012) (interest was too "indirect and speculative" to support intervention where contracts at issue "vest[ed] no rights" in movant); *Rigco, Inc. v. Rauscher*

Movants also suggest that 11 U.S.C. § 1109(b) provides them with an absolute right to intervene in this appeal because, as creditors, they have the right to be heard as parties in interest in the underlying chapter 11 case. *See* Mot. 6-7. But the very Fifth Circuit precedent that Movants rely on refutes their argument. *See Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1286 (5th Cir. 1985) ("Section 1109(b) is not the type of statute generally considered to provide an absolute right to intervene.").[9] And the Supreme Court has been skeptical of similar bootstrapping arguments under § 1109(b) by parties in interest. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) ("[W]e do not read § 1109(b)'s general provision of a right to be heard as broadly allowing a creditor to pursue substantive remedies that other Code provisions make available only to other specific parties.").

Pierce Refsnes, Inc., 110 F.R.D. 180, 184 (N.D. Tex. 1986) ("an 'interest' in the overall amount of funds available in [a] bankruptcy estate is [not] a legally protectable and direct interest"); *see also Ross v. Marshall*, 456 F.3d 442, 443 (5th Cir. 2006) ("By definition, an interest is not direct when it is contingent on the outcome of a subsequent lawsuit.").

[9] Although *Fuel Oil* addressed the issue in the context of a creditor's right to intervene in an adversary proceeding within a bankruptcy case, its logic applies with equal force to intervention on appeal.

II. MOVANTS' INTEREST IS ADEQUATELY REPRESENTED

Rule 24's intervention standard also requires Movants to show that their interest is inadequately represented by the current parties to the appeal, *see, e.g.*, *Edwards*, 78 F.3d at 1004-05, which Movants cannot do.[10]

A "presumption of adequate representation arises" if a movant has "the same ultimate objective as a party to the lawsuit." *Edwards*, 78 F.3d at 1005. The movant must show "adversity of interest, collusion, or nonfeasance on the part of the existing party" to rebut that presumption. *Id.*[11] Movants and the Debtor have the same ultimate objective in this appeal—to obtain an affirmance of the Bankruptcy Court's approval order. The Debtor pursued the same underlying goal as Movants before the Bankruptcy Court when it sought approval of the settlement agreement and briefed the dispute over the settlement. The Debtor's representation is thus

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[10] This requirement applies to both intervention as of right and permissive intervention. *See NOPSI*, 732 F.2d at 472 ("In acting on a request for permissive intervention, it is proper to consider, among other things, 'whether the intervenors' interests are adequately represented by other parties' and whether they 'will significantly contribute to full development of the underlying factual issues in the suit.'" (citation omitted)).

[11] Mere *differences* in interests cannot rebut the presumption (though Movants do not identify any differences). *See Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1288 (5th Cir. 1987) (rejecting argument that movants should be permitted to intervene because they had "a stronger interest in the litigation" and had "defenses" that were unavailable to the defendants); *In re Adilace Holdings, Inc.*, 548 B.R. 458, 464 (Bankr. W.D. Tex. 2016) (denying intervention where trustee "adequately represent[ed]" movant's interests as an unsecured creditor, despite their "divergent interests" generally).

presumed to be adequate. *See, e.g.*, *NOPSI*, 732 F.2d at 472-73; *In re Sapphire S. S. Lines, Inc.*, 339 F. Supp. 119, 126 (S.D.N.Y. 1972) (denying motion to intervene on appeal by parties to trustee's settlement of claim because trustee was "fully capable of representing . . . the interests of all who support the proposed compromise"). And Movants have offered no argument to rebut the presumption.

There is also no indication that Movants "intend to make any contribution to development of the relevant facts in the suit which [the Debtor] will not make, or that [Movants] are in any respect in a better position to do so than [the Debtor]." *NOPSI*, 732 F.2d at 473. Indeed, Movants' participation in the dispute before the Bankruptcy Court was limited to appearing at the settlement hearing, where they relied entirely on the Debtor's witness and evidence. So "this is not a suit in which no existing party has voiced [Movants] concerns," nor is this "a suit in which it is clear that [Movants] will make a more vigorous presentation of arguments than existing parties." *Bush v. Viterna*, 740 F.2d 350, 357 (5th Cir. 1984). Movants are adequately represented by the Debtor. Intervention is neither necessary nor appropriate.

III. LETTING MOVANTS PARTICIPATE AS AMICUS IS MORE THAN ADEQUATE AND IS COMMENSURATE WITH THEIR PARTICIPATION BEFORE THE BANKRUPTCY COURT

Rule 8013(g) requires Movants to also show that "participating as an amicus curiae would not be adequate." According to Movants, amicus status would be

"inappropriate" here because (1) "amici do not have standing to appeal"; (2) amicus briefs are limited to half the length of the parties' principal briefs;[12] and (3) "amici must obtain court permission to file a reply brief or to participate in oral argument." Mot. 8. None of these reasons holds up to scrutiny—and none warrants granting Movants intervenor status.

Movants' inability as amicus to appeal the Court's resolution of this appeal is irrelevant because their interest is adequately represented by the Debtor, who *can* appeal. Indeed, there is no indication that the Debtor would abandon its defense of the settlement agreement and approval order if this Court were to reverse the Bankruptcy Court. And as the party tasked with responsibility over the estate's assets and with seeking approval of settlements, the Debtor is the proper appellant to litigate such an appeal in any case. *See* 7 *Collier on Bankruptcy* ¶ 1109.05[1].

Nor do Movants' quibbles with the restrictions on an amicus brief suggest that amicus status would be inadequate here. Indeed, Movants were content to file *no* brief in the Bankruptcy Court and to let the Debtor run the show, so their sudden need to file a full-length appellee brief rings hollow.[13] So too for Movants' reliance

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[12] So Movants would be limited to 15 pages or 6,500 words. *See* Fed. R. Bankr. P. 8017(a)(5), 8015(a)(7).

[13] This also means that Movants likely forfeited pursuing an appeal if the Bankruptcy Court had *rejected* the settlement agreement. *See, e.g.*, *Hard-Mire Rest. Holdings, LLC v. JH Zidell PC (In re Hard-Mire Rest. Holdings, LLC)*, 619 B.R. 165, 172 (N.D. Tex. 2020) ("The rule requiring litigants to properly present and brief

on an amicus's inability to file a reply brief without leave of Court. Movants seek to intervene as *appellees*—which do not have a right to file a reply brief. *See* Fed. R. Bankr. P. 8014(c) ("*The appellant* may file a brief in reply to the appellee's brief." (emphasis added)). And Movants could seek leave to participate if the Court were to schedule oral argument, but their asserted need to participate seems dubious. Movants tout that they "[p]articipated in the Settlement Motion Hearing in the Bankruptcy Court," Mot. 8, but the extent of their participation there confirms that participating as amicus here is more than sufficient. Indeed, Movants introduced no evidence and called no witnesses at the hearing. *See* Appendix 319-20 (Oct. 20, 2020 Settlement Hr'g Tr.).

Participating as an amicus here is commensurate with Movants' participation before the Bankruptcy Court. And as the Fifth Circuit has observed, where "the intervenor merely underlines issues of law already raised by the primary parties" and "presents no new questions," he "can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." *Bush*, 740 F.2d at 359 (citation omitted). *Cf.* Appendix 094 (Oct. 20, 2020 Settlement Hr'g Tr.) (Movants' counsel: "On behalf of the Crusader Funds and the Redeemer Committee, Your Honor, I join in [Debtor's counsel's] objection."); Appendix 144

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the grounds for claims, defenses, or objections has long been recognized." (citation omitted)).

(Movants' counsel foregoing questioning a witness because she had no "examination that's not duplicative of [Debtor's counsel]").

CONCLUSION

The Court should deny the Redeemer Committee of the Highland Crusader Fund and Crusader Funds' motion to intervene as appellees.

Dated: December 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Bankruptcy Procedure 8015(h)(1), I certify that this motion complies with the type-volume limitation of Rule 8013(f)(3)(A) because this motion contains 3,337 words, excluding the caption, signature block, and certificates. And this motion complies with the requirements of Rule 8013(f)(2) because this motion was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Sarah Tomkowiak
Sarah Tomkowiak

CERTIFICATE OF SERVICE

I certify that this document was filed electronically through the Court's ECF system, which will notify all registered participants as identified on the Notice of Electronic Filing.

Dated: December 21, 2020

/s/ Sarah Tomkowiak
Sarah Tomkowiak