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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

COMMODITY FUTURES TRADING
COMMISSION, *et al.*,

Plaintiffs,

v.

RUST RARE COIN INC., *et al.*,

Defendants;

and

ALEESHA RUST FRANKLIN, *et al.*,

Relief Defendants.

**SHARYN HEINER’S MOTION TO
INTERVENE**

Case No. 2:18-cv-00892-TC
Judge Tena Campbell

By this motion, Sharyn Heiner (“*Intervenor*”), acting on behalf of the David E. Gumbrecht Trust (the “*Trust*”), of which she is trustee, moves this Court for an order allowing her to intervene so she can file a motion for return of the Trust’s property, which is being held by the Receiver.

I. APPLICABLE LAW

Federal Rule of Civil Procedure (“*Fed. R. Civ. P.*”) 24 provides for both permissive intervention and intervention as of right. The Trust seeks to intervene as a matter of right. In order for the Court to determine whether to grant the Trust’s motion, it should ask whether “(1) the application is ‘timely’; (2) ‘the applicant claims an interest relating to the property or transaction which is the subject of the action;’ (3) the applicant’s interest ‘may as a practical matter’ be

‘impair[ed] or impede[d]’; and (4) ‘the applicant’s interest is adequately represented by existing parties.’” Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep’t of Interior, 100 F.3d 837, 840 (10th Cir. 1996) (quoting Fed. R. Civ. P. 24(a)).

The Tenth Circuit mandates a “somewhat liberal line in allowing intervention” Utah Ass’n of Cntys. v. Clinton, 255 F.3d 1246, 1249 (10th Cir. 2001) (citation omitted) (internal quotation marks omitted) and has stated that “[t]he central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention.” San Juan Cnty., Utah v. United States, 503 F.3d 1163, 1193 (10th Cir. 2007) (*en banc*).

II. ARGUMENT

(a) THE TRUST’S MOTION TO INTERVENE IS TIMELY.

The Trust has filed this motion in a timely fashion. The Trust, upon learning of the appointment of the Receiver, hired counsel. Counsel, on November 16, 2018, sent a brief email to the Receiver and his counsel, which was never returned (nor was the invited phone call made) by the Receiver or his attorneys.¹ Counsel sent another email on November 28, 2018, again to the Receiver and Joseph Covey, the Receiver’s lead counsel, explaining the Trust’s claim and asking that the Receiver not liquidate the Trust’s coins pending resolution of the Trust’s claims. Neither the Receiver nor his lawyer responded to that email either, although another lawyer at Parr Brown who has appeared on this matter, Steven Mouritsen, who was working with the Trust’s counsel on an unrelated matter, did engage with the Trust’s counsel on the Trust’s claims.

Mouritsen asked the Trust’s lawyers to provide an explanation of why they believed the Trust should receive its coins back. In response, on January 11, 2019, the Trust sent an email with a draft motion for return of property to Mouritsen. Mouritsen never responded to that email.

¹ To be clear, the Trust understands that the Receiver was busy and had any number of things to do on the 16th of November and beyond. The Trust does not suggest that the Receiver acted in bad faith or dereliction of his duties by not responding immediately to the Trust’s emails. Rather, the Trust merely is pointing out the efforts made to resolve this matter with the Receiver prior to filing this motion to explain why the Trust did not file its Motion to Intervene immediately; preferring to resolve the matter with the Receiver if possible before involving the Court.

Finally, on February 6, 2019, Joseph Covey agreed to meet with the Trust's lawyers on this matter. At that meeting, which took place the next day on February 7, 2019, the Receiver's counsel took the position that the Receiver would not return the Trust's coins absent an order from the Court requiring the Receiver to do so.

This motion is being filed less than a week after the Receiver first informed the Trust that the Receiver would not voluntarily return the Trust's property.

(b) THE TRUST HAS AN INTEREST IN PROPERTY THAT IS THE SUBJECT MATTER OF THE ACTION.

The Trust has an interest in property that is the subject matter of this lawsuit. The Receiver, acting pursuant to the Court's Order Appointing Receiver ([ECF No. 22](#)), has cancelled the check that represented Rust Rare Coin's retail coin shop's payment for coins that the Trust sold to the retail coin shop. The Receiver, despite refusing to pay for the coins, also refused to return the coins to the Trust. And, despite the fact that the Trust requested that the Receiver not sell the Trust's coins, the Trust learned for the first time during the February 7, 2019, meeting that the Receiver may already have sold the coins or may have commingled them with other coins. The Trust's ability to get back its coins or to be paid the negotiated amount for its coins, which it specifically asked the Receiver to set aside more than two months ago, is affected by this lawsuit; specifically, the Receiver's actions pursuant to the Order Appointing the Receiver.

To the extent any party might argue that the subject matter of this lawsuit is the Rust Rare Coin Silver Pool fraud, and not the Receiver's refusal to pay for or return the Trust's coins, the Tenth Circuit has addressed this argument: "The interest of the intervenor is not measured by the particular issue before the court but instead measured by whether the interest the intervenor claims is related to the property that is the subject of the action." [Clinton, 255 F.3d at 1252](#). The Trust's claim to the coins that the Receiver is holding as part of the receivership estate qualifies. [See e.g., SEC v. Roger S. Bliss, 2:15-cv-98, D.E. 95](#).

(c) THE TRUST HAS AN INTEREST THAT WOULD BE IMPAIRED IF IT WERE NOT ALLOWED TO INTERVENE.

"To satisfy this element of the intervention test, a would-be intervenor must show only that

impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.” [Clinton, 255 F.3d at 1253](#) (citation omitted) (internal quotation marks omitted). Here, the Trust’s interests would be impaired if it is not allowed to intervene. The Receiver refuses to return the Trust’s property, or to pay for it. Rather, the Receiver proposes to treat the trust as a general unsecured creditor and acknowledges that as such there is no chance that the Trust will receive full payment for the value of its coins.

(d) NO OTHER PARTY WILL ADEQUATELY REPRESENT THE TRUST’S INTERESTS.

Where a would-be intervenor meets the first three elements, the Court must allow the intervenor to intervene “unless existing parties adequately represent [the Trust’s] interest.” Here, there are no such parties.

Not only does the Receiver not represent the Trust’s interests, but the Order Appointing Receiver does not direct the Receiver to act to the Trust’s benefit. Rather, the Court’s order directs the Receiver to take steps to “prevent irreparable loss, damage, or injury to *Silver Pool investors or other investors* in any investment opportunity operated by any Receivership Defendant.” [ECF No. 22 at p. 13 ¶ 29\(d\)](#). The Receiver has taken the position that the Trust is not an investor, but a creditor of the receivership estate. Notwithstanding that the Order allows the Receiver to petition the Court for approval to pay debts incurred by the Receivership Defendants prior to the date the Order was entered (*id.* at ¶ 29(k)), the Receiver has refused to do so.

Neither the Receiver nor any other party presently in the case will adequately represent the Trust’s interest in not having its coins taken without being paid for them.

(e) THE TRUST SEEKS NARROW RELIEF THAT WILL NOT SUBSTANTIALLY DELAY THE LITIGATION.

Finally, the Trust does not seek to intervene in a manner that will substantially delay this litigation or burden the parties to it. The Trust seeks only to file a motion for return of property, which is ready to be filed.² That motion seeks only to have the Court order the Receiver to return

² At the direction of the Clerk of the Court, a copy of that motion was not appended hereto as an exhibit.

the Trust's property, which will not cause any harm (other than perhaps taking away an unwarranted windfall) any party to this litigation, any investor in the Silver Pool or any other investment opportunity, or anyone else. This is a simple issue that the Court can decide after receiving briefing from the Receiver and a reply from the Trust. The Trust does not seek to become involved in the case in any broader sense other than to file its motion and have that motion decided.

III. CONCLUSION

For the foregoing reasons, the Trust asks the Court to grant its motion to intervene to allow the Trust to file its motion for return of property and to fully litigate the issues therein to the point at which the Court has made a decision on the Trust's Motion for Return of Property.

DATED: February 13, 2019

SMITH WASHBURN, LLP

/s/ D. Loren Washburn

Attorneys for Intervenor Sharyn Heiner

CERTIFICATE OF SERVICE BY CM/ECF

I hereby certify that service of the above **SHARYN HEINER'S MOTION TO INTERVENE** was electronically filed with the Clerk of the Court through the CM/ECF system on February 13, 2019, which sent notice of the electronic filing to all counsel of record.

/s/ Jacob L. Fannesbeck