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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *J-H* DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SECURITIES AND EXCHANGE
COMMISSION,

vs.

PRESTO TELECOMMUNICATIONS, INC.,
AND ALFRED LOUIS VASSALLO, JR. aka
BOBBY VASSALLO,

Plaintiff,

Defendants.

CASE NO. 04cv163-IEG(WMc)

ORDER DENYING CYNTHIA
VASSALLO'S MOTION TO
INTERVENE [DOC. NO. 825]

Cynthia Jean Vassallo ("Mrs. Vassallo"), individually and in her capacity as Trustee of the Vassallo Family Trust, moves the Court for an order allowing her to intervene in this case as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Plaintiff, the Securities and Exchange Commission ("SEC"), and the Receiver have filed oppositions. Mrs. Vassallo has filed a reply. The Court previously determined that this motion was appropriate for submission on the papers and without oral argument pursuant to Local Rule 7.1(d)(1), and the December 12, 2005 hearing was vacated. For the reasons explained below, Mrs. Vassallo's motion to intervene is DENIED.

Background

The factual and procedural history of this case is fully set forth in the Court's May 25, 2005

1 and August 15, 2005 orders granting summary adjudication as to all issues in this case. [Docket.
2 Nos. 752 and 796.] On January 27, 2004, the SEC filed a Complaint against Defendants Presto
3 Telecommunications, Inc. ("Presto") and A.L. Vassallo (aka Bobby Vassallo) ("Vassallo"). The
4 SEC alleged that Defendants violated federal securities laws by offering and selling unregistered
5 securities, and making fraudulent misrepresentations and/or omitting to state material facts. On the
6 date the Complaint was filed, the Court issued a temporary restraining order ("TRO"), ordered the
7 assets of Presto and Vassallo be frozen, appointed Thomas F. Lennon as a temporary receiver, and
8 made other related orders against Presto and Vassallo. [TRO, Docket No. 10.]

9 On March 2, 2004, following further briefing, the Court granted a preliminary injunction
10 against Vassallo and Presto. [Docket No. 52.] The Court continued the asset freeze as to Presto and
11 Vassallo, and appointed Thomas Lennon as permanent receiver of Presto. The Court also ordered
12 that "Presto and Vassallo shall pay the costs, fees and expenses of the permanent receiver incurred
13 in connection with the performance of his or her duties described in this Order" The Court
14 subsequently found it appropriate to allow for the sale of Vassallo's real property to satisfy the
15 Receiver's fees and costs [Docket No. 664], and denied Vassallo's motion for reconsideration of
16 that order [Docket No. 675].

17 As part of its May 25, 2005 order granting summary adjudication on the issue of liability,
18 the Court once again confirmed the Receiver's authority to Vassallo's real property in order to pay
19 the Receiver's fees and costs. [Docket No. 752, pp. 27-28.] On the same date, the Court also
20 issued an order approving sale procedures. [Docket No. 751.]

21 Vassallo appealed the Court's May 25, 2005 orders insofar as they confirmed the
22 Receiver's authority to sell Vassallo's real property and set forth procedures to accomplish the sale.
23 [Docket No. 761.] That appeal was consolidated with Vassallo's appeal of the original preliminary
24 injunction order. [Docket No. 775 consolidating Ninth Circuit Case Nos. 04-55698 and 05-
25 55940.] On November 2, 2005, the Ninth Circuit Court of Appeals dismissed in part and affirmed
26 in part the preliminary injunction order and order confirming Receiver's authority to sell
27
28

1 Vassallo's real property.¹

2 On August 15, 2005, the Court granted the SEC's motion for summary adjudication as to
3 the amount of disgorgement damages. [Docket No. 796.] On August 23, 2005, final judgment
4 was entered in the case. [Docket Nos. 800 and 801.] On September 14, 2005, Vassallo filed a
5 notice of appeal from the Court's entry of judgment on the merits. [Docket No. 808.] That appeal
6 remains pending.

7 On November 10, 2005, Mrs. Vassallo filed an ex parte application for an order shortening
8 time to file a motion to intervene in this case. [Docket No. 818.] The Court granted the order
9 shortening time and set a briefing schedule regarding Mrs. Vassallo's motion. [Docket No. 823.]
10 Mrs. Vassallo's motion is now fully briefed and appropriate for disposition by the Court.

11 Discussion

12 Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as a matter of
13 right² as follows:

14 [U]pon timely application anyone shall be permitted to intervene in an action: . . .
15 (2) when the applicant claims an interest relating to the property or transaction
16 which is the subject of the action and the applicant is so situated that the disposition
17 of the action may as a practical matter impair or impede the applicant's ability to
18 protect that interest, unless the applicant's interest is adequately represented by
19 existing parties.

20 An applicant for intervention as a matter of right must demonstrate the following: "(1) [the
21 applicant] has a significant protectable interest relating to the property or transaction that is the
22 subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede
23 the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties
24 may not adequately represent the applicant's interest." United States v. Alisal Water Corp., 370
25 F.3d 915, 919 (9th Cir. 2004) (quoting United States v. City of Los Angeles, 288 F.3d 391, 397 (9th
26 Cir.2002)).

27 ¹ The unpublished Memorandum disposition is not yet final. The Court notes, however, that the Ninth Circuit
28 found Vassallo waived his argument that the Court erred in holding him personally liable for the Receiver's costs by
failing to timely object to the March 1, 2004 order.

² Mrs. Vassallo seeks intervention as a matter of right under Fed. R. Civ. P. 24(a)(2), and does not argue that
she is entitled to permissive intervention pursuant to Fed. R. Civ. P. 24(b).

1 (1) Significant Protectable Property Interest

2 Mrs. Vassallo argues that she meets the first factor for intervention as a matter of right
3 under Rule 24(a)(2) because she has a legal interest in the property the Receiver seeks to sell to
4 satisfy his fees and costs. Mrs. Vassallo argues that she, as the Trustee of the Vassallo Family
5 Trust, owns the family residence and that her husband Bobby Vassallo has no legal interest in the
6 property.

7 A proposed intervenor has a “significantly protectable interest” sufficient to support
8 intervention under Rule 24(a)(2) where the interest is “protected by law and there is a relationship
9 between the legally protected interest and the plaintiff’s claims.” Alisal Water Corp., 370 F.3d at
10 319. “[R]egardless of the phase of litigation at which an interest arises, that interest must be
11 related to the underlying subject matter of the litigation.” Id. at 320.

12 Here, the interest which Mrs. Vassallo seeks to protect, her purported ownership interest³ in
13 the family residence, is not “related to the underlying subject matter of the litigation.” This is an
14 action by the SEC based upon violations of federal securities laws. The only relationship the
15 family residence has to these claims is that it is an asset that may be called upon to satisfy the
16 judgment against Vassallo, including the fees and costs of the Receiver. Mrs. Vassallo’s claim that
17 she has a property interest in the family residence has no relationship to the underlying subject
18 matter of this litigation. “A mere interest in property that may be impacted by litigation is not a
19 passport to participate in the litigation itself. To hold otherwise would create a slippery slope
20 where anyone with an interest in the property of a party to a lawsuit could bootstrap that stake into
21 an interest in the litigation itself.” Alisal Water Corp., 370 F.3d at 920 fn.3.

22 (2) Mrs. Vassallo’s Ability to Protect her Interest

23 To the extent that she does have a significantly protectable interest in the subject matter of
24 this litigation, Mrs. Vassallo argues that the disposition of this action will significantly impair her
25 ability to protect that interest. The Court, however, has already disposed of the merits of this case.

27 ³ As the Receiver points out, Mrs. Vassallo has submitted no evidence demonstrating that Mrs. Vassallo, in
28 fact, has an ownership interest in the family residence or demonstrating that Mr. Vassallo has no ownership interest in
that property. Mr. Vassallo listed the family residence as one of his “assets” on the schedule of assets he filed at the
outset of this litigation. [Docket No. 16.]

1 The Court entered summary judgment in favor of the SEC on all of its claims, and final judgment
2 was entered several months ago. Mrs. Vassallo did not seek to intervene in the litigation of the
3 SEC's claims against her husband, even after the Court found Mr. Vassallo personally liable for
4 the Receiver's costs and fees and denied reconsideration of such order. Mrs. Vassallo did not seek
5 to intervene in the appeal of the Court's orders granting the Receiver authority to sell the family
6 residence to pay those fees. Now that final judgment has been entered on the merits, Mrs. Vassallo
7 has not demonstrated that disposition of any remaining issues in this action will impair her interest
8 in the property.

9 (3) Timeliness of the Application

10 Mrs. Vassallo argues that her motion to intervene is timely because, until now, "there was
11 really no reason for [her] to intervene." [Memorandum of Points and Authorities in Support of Ex
12 Parte Application, Docket No. 819, at p. 7.] On October 19, 2004, the Court first ordered that the
13 Receiver would be authorized to sell the Vassallo family residence to satisfy a contempt fine in the
14 event that Mr. Vassallo failed to pay the fine within 30 days thereafter. [Docket No. 664.] On
15 March 25, 2005, the Receiver filed an application seeking to confirm that he was authorized to sell
16 the Vassallo family residence in order to pay his fees and costs pursuant to the Preliminary
17 Injunction Order. [Docket No. 693.] One of the arguments raised by Mr. Vassallo in opposition to
18 the Receiver's motion was that his wife had a legal interest in the property. [Docket No. 712, pp.
19 9-10.]

20 On March 25, 2005, the Court granted the Receiver's motion, confirmed that the Receiver
21 was authorized to sell the Vassallo residence to satisfy his fees and costs. The Court also filed an
22 order setting forth the procedures to be followed for such sale. [Docket Nos. 751 and 752.] Mr.
23 Vassallo appealed the Court's March 25, 2005 orders [Docket No. 761] and the Ninth Circuit
24 Court of Appeals has disposed of that appeal.

25 Generally, post-judgment intervention is disfavored. Calvert v. Huckins, 109 F.3d 636, 638
26 (9th Cir. 1997). This case should be no exception. To the extent that Mrs. Vassallo has a
27 significantly protectable interest in the subject matter of this litigation, she had notice and ample
28 opportunity, while the merits of the case were being litigated, to request intervention. Mrs.

1 Vassallo cannot credibly argue that she has proceeded in a timely manner to attempt to preserve
2 her rights. The SEC and the Receiver would be significantly prejudiced if Mrs. Vassallo were
3 permitted to intervene and relitigate the issue of the Receiver's authority to sell the Vassallo family
4 residence. The Court decided these issues after careful consideration of several motions, and the
5 Court's orders have been the subject of appellate review. Mrs. Vassallo's request is tardy.

6 (4) Adequate Representation

7 Finally, Mrs. Vassallo argues that her interests have not been adequately represented by her
8 husband in this case. In determining the adequacy of representation, the Ninth Circuit looks to
9 three factors: (1) whether the interest of a present party is such that it will undoubtedly make all of
10 a proposed intervenor's arguments; (2) whether the present party is capable and willing to make
11 such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the
12 proceedings that other parties would neglect. Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir.
13 2003). "When an applicant for intervention and an existing party have the same ultimate objective,
14 a presumption of adequacy of representation arises." Id.

15 Here, Mrs. Vassallo offers no argument that has not already been offered by her husband, to
16 whom she is still married and with whom she still lives (along with their children). Mrs. Vassallo
17 essentially argues that because the Court has already granted summary judgment against her
18 husband, and soundly rejected all of her husband's arguments regarding the merits of this case, he
19 is not an adequate representative of her interests. Mrs. Vassallo does not explain, however, how
20 her interests and the interests of her husband are in any way divergent.

21 Conclusion

22 Mrs. Vassallo is not entitled to intervene as a matter of right in this action pursuant to Fed.
23 R. Civ. P. 24(a)(2), and her motion to intervene [Docket No. 825] is DENIED.

24 **IT IS SO ORDERED**

25 Dated: 1/6/06

26 
IRMA E. GONZALEZ
United States District Judge

27 cc: Magistrate Judge McCurine
28 Counsel of Record