No. 20-cv-3408-G

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

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. 19-34054-SGJ11, HON. STACEY G. JERNIGAN, JUDGE PRESIDING

REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUND AND THE CRUSADER FUNDS' REPLY IN SUPPORT OF MOTION TO INTERVENE AS APPELLEES

The Redeemer Committee of the Highland Crusader Funds (the "Redeemer Committee") and Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd. and Highland Crusader Fund II, Ltd. (collectively, the "Crusader Funds," and together with the Redeemer Committee, the "Movants") submit this reply ("Reply") in support of their *Motion to Intervene as Appellees* [Dkt. 15] (the "Intervention Motion")[1] and respectfully state:

Preliminary Statement

The Bankruptcy Code and the Bankruptcy Rules permit UBS, as the holder of a disputed claim against the Debtor that is the subject of ongoing litigation, to object to Movants' claims against the Debtor, to object to the settlement between the Debtor and Movants which resolves approximately $215 million of asserted claims and the parties' rights and obligations under the Arbitration Award, and then to appeal the Bankruptcy Court's order approving that settlement. UBS's interest in the Bankruptcy Court's approval order is contingent and indirect. The Settlement Agreement's implementation would, in the event UBS ultimately holds an allowed claim in this chapter 11 case, only affect the amount of UBS's pro rata recovery from the Debtor's estate. Conversely, Movants' interest in the Settlement Agreement is direct and substantial because that agreement governs the allowance of Movants'

[1] Capitalized terms not defined in this Reply have the meanings given to such terms in the Intervention Motion.

claims and their exercise of remedies under the Arbitration Award. UBS fails to provide a compelling rationale for why an entity asserting a disputed claim can appeal a Bankruptcy Court order that resolves the claims of actual creditors, yet those creditors, who actively participated in the Bankruptcy Court hearing allowing their claims, cannot continue to participate in the same contested matter as appellees.

UBS's approach is fundamentally inconsistent with Bankruptcy Code Section 1109(b) and Bankruptcy Rule 8013(g). Thus, UBS relies on inapposite, non-bankruptcy cases. UBS also fails to explain how it will be prejudiced by Movants' intervention. Movants should be permitted to intervene as appellees because they have a direct and substantial interest in the outcome of this appeal, they participated in the Bankruptcy Court's hearing on the Settlement Agreement, and they are uniquely suited to address issues regarding their claims and the Arbitration Award.

Argument

A. Although Bankruptcy Rule 8013(g) Does Not Adopt Rule 24's Requirements for Intervention in an Adversary Proceeding, the Movants Have Satisfied the Requirements for Intervention as of Right.

UBS incorrectly asserts that intervention under Bankruptcy Rule 8013(g) should be considered under the standards applicable to Bankruptcy Rule 7024. (*See* Opp. 4-5.) If the Rules Committee had intended Bankruptcy Rule 8013(g) to adopt Federal Rule of Civil Procedure 24 ("Rule 24"), then Bankruptcy Rule 8013(g) would have said so. Bankruptcy Rule 7024 does just that, providing: "Rule 24

F.R.Civ.P. applies in adversary proceedings." Fed. R. Bankr. P. 7024. Bankruptcy Rule 7024 does not, however, apply to contested matters such as a bankruptcy court's approval of a settlement agreement pursuant to Bankruptcy Rule 9019.

UBS's argument suffers from a fundamental flaw: UBS fails to recognize the procedural differences between an adversary proceeding and a contested matter in a bankruptcy case. As the Third Circuit has observed, "any disputed matter within [a chapter 11] case is either a contested matter, which is commenced by filing a motion, or an adversary proceeding, which is commenced by filing a complaint." *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1233 (3d Cir. 1994). Bankruptcy Rule 7001 establishes which types of relief may only be sought pursuant to an adversary proceeding, and the approval of a settlement agreement under Bankruptcy Rule 9019 is not one of those matters. *See* Fed. R. Bankr. P. 7001. Any creditor or party in interest may participate in a contested matter in a chapter 11 case. *See* 11 U.S.C. § 1109(b). Movants participated fully in the Bankruptcy Court's hearing on the Settlement Agreement—counsel presented opening and closing arguments, and cross-examined UBS's expert witness.

Conversely, if the Bankruptcy Court were considering an adversary proceeding, a non-defendant creditor would have to intervene pursuant to Bankruptcy Rule 7024 in order to participate in the proceeding. Applying the criteria employed by Bankruptcy Rule 7024 to an appeal of a contested matter fails to

recognize that Movants have already participated in the Bankruptcy Court's hearing on the Debtor's motion seeking approval of the Settlement Agreement.

If, however, Bankruptcy Rule 8013(g) is to be read as incorporating Rule 24's criteria, then Movants have satisfied the standards for intervention as of right:

(i) Movants timely filed their motion for intervention;

(ii) Movants have a substantial and direct interest in the subject of the appeal because the Bankruptcy Court's order allows their claims for damages in the Debtor's chapter 11 case and provides for the implementation of remedies under the Arbitration Award;

(iii) the disposition of the appeal may impair or impede Movants' ability to protect the allowance of their claims and their contractual rights under the Settlement Agreement; and

(iv) Movants' interests are not adequately represented by the Debtor.

See Edwards v. City of Houston, 78 F.3d 983, 999 (5th Cir. 1996) (en banc) (setting forth criteria for intervention as of right under Rule 24).

UBS contends that Movants' interest is solely "economic" and insufficient to justify intervention. However, as the Fifth Circuit has explained, "an interest that is concrete, personalized, and legally protectable is sufficient to support intervention. A property interest, for example, is the most elementary type of right that Rule 24(a) is designed to protect, because it is concrete, specific to the person possessing the right,

and legally protectable." *Texas v. United States*, 805 F.3d 653, 658 (5th Cir. 2015) (internal citation and quotation marks omitted). Movants satisfy this standard because the Bankruptcy Court's order allows their claims for damages and approves the Settlement Agreement that provides for the implementation of remedies under the Arbitration Award.

In support of its position, UBS cites only cases involving two-party disputes where a decision at best might have eventually had some incidental economic effect on the proposed intervenor. *See, e.g., New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir. 1984) (intervention denied for city officials in public law action brought by public utility for contractual overcharge by gas supplier); *Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia*, No. CV G-12-304, 2014 WL 12616098, at *1 (S.D. Tex. Aug. 13, 2014) (defendant's secured creditor could not intervene in action where the security interest was not "related to the transactions that form the basis of the controversy"), *report and recommendation adopted*, No. CV G-12-304, 2015 WL 12837647 (S.D. Tex. Jan. 27, 2015). UBS cites no precedent where a proposed intervenor's interest was deemed merely "economic" when the appeal directly implicated the validity of the intervenor's claim for damages or the trial court's approval of a settlement to which the proposed intervenor was a party.

Movants also would meet the requirements of Rule 24 because the order from which UBS appeals resolved UBS's objection to the Redeemer's Claim. UBS filed that objection approximately one month before the Debtor filed its motion to approve the Settlement Agreement. *See Objection to the Proof of Claim Filed by Redeemer Committee* of *the Highland Crusader Fund* [Ch. 11 Dkt. 996][2] (the "UBS Claim Objection"). The filing of the UBS Claim Objection created a separate contested matter pursuant to Bankruptcy Rules 3007 and 9014, which was subsumed in the hearing on the Settlement Agreement. The Bankruptcy Court's order approving the Settlement Agreement overruled the UBS Claim Objection "in its entirety." *See* Settlement Approval Order at 2 [Ch. 11 Dkt. 1273]. If the Settlement Approval Order was limited to denying the UBS Claim Objection and UBS then appealed, the Redeemer Committee would have been the appellee. The fact that the order also resolved the Debtor's motion to approve the Settlement Agreement does not impair the Redeemer Committee's right to intervene. There is no sound basis to deny Movants the ability to participate in this appeal simply because (i) the Bankruptcy Court addressed the UBS Claim Objection within the context of the Debtor's motion to approve the Settlement Agreement, and (ii) UBS elected in its Statement of the Issue on Appeal to raise only the question of whether the Bankruptcy Court's approval of the Settlement Agreement was erroneous as a matter of law. *See*

[2] "Ch. 11 Dkt." refers to the Debtor's chapter 11 case.

Appellants' Amended Statement of Issue and Designation of Record on Appeal at 2 [Ch. 11 Dkt. 1484.] To prevent Movants from continuing to participate in the contested matter regarding the allowance of their claims would, at best, elevate form over substance.

B. Bankruptcy Rule 8013(g) Should Be Applied In Concert with Bankruptcy Code Section 1109(b).

The advisory committee notes to Bankruptcy Rule 8013(g) recognize that the rule is "based on" Rule 15(d) of the Federal Rules of Appellate Procedure ("Appellate Rule 15(d)"), which governs appeals from agency determinations. *See* Fed. R. Bankr. P. 8013(g) advisory committee's note to 2014 amendment. As UBS acknowledges, Appellate Rule 15(d) is governed by "the statutory design of the [underlying] act." (*See* Opp. 4 (quoting *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985)). The "underlying act" in a bankruptcy appeal is the Bankruptcy Code.

Congress has recognized the necessity for creditor participation in chapter 11 cases, and Section 1109(b) of the Bankruptcy Code provides "in unqualified terms, that any creditor ... shall have the right to be heard as a party in interest" in a chapter 11 case. S. Rep. 95-989, 95th Cong., 2d Sess. 116 (1978). As one court in this Circuit explained, Section 1109(b)'s plain language applies to a "case under Chapter 11" and "[n]othing in that provision, ... suggests that its broad right to appear and be

heard is inapplicable to proceedings held before an appellate court." *S. Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc.*, 227 B.R. 788, 792-93 (E.D. Tex. 1998).

Contrary to UBS's argument, Movants are not asserting that Section 1109(b) provides that all creditors have an absolute right to participate in any appeal arising from a contested matter in a chapter 11 case. Instead, Section 1109(b) should inform how Bankruptcy Rule 8013(g) is to be applied. In this case, Movants are creditors who engaged in good- faith negotiations with the Debtor regarding the allowance of their claims and implementation of the Arbitration Award, with the resulting agreement being memorialized in the Settlement Agreement. Movants then participated in the hearing conducted by the Bankruptcy Court on whether the Debtor should be authorized to enter into that agreement, and whether Movants' claims should be allowed in the amounts agreed upon with the Debtor. Section 1109(b) provided the statutory basis for UBS to lodge the only objection to the Settlement Agreement and file this appeal. There is nothing in that statute's text or legislative history to suggest that creditors with an actual and direct interest in a bankruptcy court's order, and who participated in the bankruptcy court's hearing, should not have the ability to continue to participate in the contested matter as parties to the appeal. *See id.* at 793 (permitting appellate intervention by party in interest that had participated in contested matter before bankruptcy court).

C. The Redeemer Committee and Crusader Funds Have a Direct and Substantial Interest in the Appeal.

UBS asserts that Movants lack a sufficient interest to participate in this appeal, because (1) the Debtor filed the Settlement Motion; and (2) Movants' interest is speculative and indirect. As demonstrated below, these arguments lack merit.

First, UBS argues that because the Debtor filed the Settlement Motion, only the Debtor should defend this appeal. (See Opp. at 7). However, as UBS recognizes, only the Debtor is authorized to file a motion seeking approval of a settlement to which it is a party. Nonetheless, Movants participated fully in the hearing, including by cross-examining UBS's witness.

Second, UBS argues that Movants' interests are not direct because their rights are contingent upon the Bankruptcy Court's order becoming a final, non-appealable order. UBS's argument is circular—the only reason Movant's rights under the settlement can be considered "contingent" is due to UBS's appeal. UBS cites no case suggesting a party cannot intervene to defend its claim for damages or its own settlement agreement. Instead, UBS relies upon cases where a proposed intervenor's interests were not directly affected by the action. (Opp. 8 & n.8 (citing *United States v. 936.71 Acres of Land, More or Less, in Brevard Cty., State of Fla.*, 418 F.2d 551, 555 (5th Cir. 1969) (denying intervention where action would give movant "nothing more than the opportunity to bargain" and collecting cases)).

D. Movants' Interest is Not Adequately Represented on Appeal and Participation as Amicus Curiae is Insufficient.

Finally, UBS contends that Movants are adequately represented by the Debtor in this appeal. However, as UBS's decisional authority provides, "[t]he requirement that an intervenor not be adequately represented by existing parties is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984) (internal quotation omitted).

The Debtor and Movants entered into the Settlement Agreement after engaging in extensive litigation and arbitration that began in June 2016. Recognizing that both parties seek to implement the Settlement Agreement, Movants' and Debtor's respective interests are not naturally aligned—a creditor generally wants to maximize its allowed claim and a debtor does not. Moreover, given the lengthy adversarial posture between the Debtor and Movants, the Debtor is not best positioned to address issues regarding Movants' claims against the Debtor and their rights under the Arbitration Award. Arguments specific to the Debtor or Movants should be addressed by those respective parties, and participating as amici is not sufficient for the reasons set forth in the Intervention Motion.[3]

[3] Although UBS does not claim any delay or prejudice would result from Movants' intervention, Movants would agree to allow UBS to exceed the applicable word count in its briefs to address unique arguments raised by the Movants.

In support of its contention that parties to a bankruptcy settlement are adequately represented on appeal by a debtor, UBS relies on a 48-year-old case involving intervention in an appeal of a settlement. *In re Sapphire S. S. Lines, Inc.*, 339 F. Supp. 119 (S.D.N.Y. 1972). Putting aside that *Sapphire* pre-dates the Bankruptcy Code by several years and the Bankruptcy Rules by over a decade, UBS mischaracterizes the decision: the district court heard argument from trade creditors' counsel and permitted the trade creditors to submit a brief on the merits of the appeal; only after that participation did the court hold that further intervention was unwarranted. *See id.* at 126. The decision in *In re Adilace Holdings, Inc.*, 548 B.R. 458, 464 (Bankr. W.D. Tex. 2016), likewise is not instructive because the bankruptcy court denied intervention in a chapter 7 contested matter where the movant sought to intervene to protect her rights in an unrelated state-court action. The remaining cases UBS cites involve non-bankruptcy matters where the proposed intervenors were not parties to a settlement approved by the trial court. *See, e.g.*, *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (en banc) (non-parties to Title VII litigation sought to challenge consent decree); *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1288 (5th Cir. 1987) (rejecting intervention by universities in lawsuit against NCAA).

Conclusion

WHEREFORE, Movants respectfully request that the Court enter an order granting Movants leave to intervene as appellees in this appeal.

Dated this 28th day of December, 2020

Respectfully submitted,

/s/ Mark A. Platt

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Counsel for the Redeemer Committee of the Highland Crusader Fund and the Crusader Funds[4]

[4] Frost Brown Todd LLC is counsel only for the Redeemer Committee and Jenner & Block, LLP is counsel to the Redeemer Committee, and for the limited purpose of this Motion, the Crusader Funds.

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Bankruptcy Procedure 8015(h)(1), I certify that this Reply complies with the type-volume limitation of Rule 8013(f)(3)(A) because this Reply contains 2,597 words, excluding the caption, signature block, and certificates. And this Reply complies with the requirements of Rule 8013(f)(2) because this Reply was prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

/s/ Mark A. Platt
Mark A. Platt

CERTIFICATE OF SERVICE

The undersigned hereby certifies, that on this 28th day of December, 2020, he caused to be served a true and correct copy of the *Redeemer Committee of the Highland Crusader Fund and the Crusader Funds' Reply in Support of Motion to Intervene as Appellees* by electronically filing it with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

/s/ Mark A. Platt
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