

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

COMMODITY FUTURES TRADING COMMISSION	:	CIVIL ACTION
	:	
v.	:	
	:	
PAUL M. EUSTACE, et al.	:	NO. 05-2973
	:	

MEMORANDUM

Baylson, J.

October 31, 2005

This case concerns an alleged fraud caused by the Defendants in which numerous investors lost over \$200,000,000. On June 23, 2005, this Court entered a Statutory Restraining Order (“SRO”) appointing a temporary receiver for Defendant Philadelphia Alternative Asset Management Co., LLC (“PAAMCO”) and its “partners, affiliates or subsidiaries or related entities of the Defendants” with full powers of an equity receiver.

On September 19, 2005, this Court signed and entered a Consent Order making the receiver’s appointment permanent. This Consent Order enumerated the known entities that were subject to the receivership, including a number of other funds that are clearly related to or affiliates of PAAMCO, and including specifically the Philadelphia Alternative Asset Fund Ltd. (the “Offshore Fund” sometimes referred to as the “Cayman Fund”).

Presently before the Court are two motions that relate to the Offshore Fund. The first is a Emergency Motion of Receiver, C. Clark Hodgson, Jr., for an Order Requesting the Grand Court of the Cayman Islands to Grant Comity to This Court's Order of September 19, 2005; and secondly, a Motion of Certain Entities, specifically BNP Paribas Security Services, CITCO

Global Custody, N.V., Banque Privee Edmond de Rothschild Europe and SG Private Bank SA (collectively “Petitioners”), to Intervene in this action and in opposition to the Receiver’s Motion for Comity, and a Cross-Motion to Modify the September 16, 2005 Consent Order.

The Court held an unrecorded telephone conference with counsel to schedule an evidentiary hearing and argument, which has taken place on October 31, 2005. This Court has acted promptly in view of the fact that a hearing is scheduled in the Cayman Islands on November 1, 2005 on certain proceedings initiated in the courts of the Cayman Islands by Petitioners for appointment of a liquidator of the Offshore Fund.

The October 31, 2005 hearing concerned a number of topics, including:

- (1) What interests are represented by the Petitioners;
- (2) To what extent do the Petitioners’ interests overlap with the interests of the Receiver;
- (3) To what extent are the interests of the Petitioners inconsistent with the interests of the Receiver;
- (4) Why have Petitioners instituted proceedings in the Cayman Islands, or stated differently, what can the Cayman Islands court accomplish that this Court cannot accomplish;
- (5) Are there any advantages to bankruptcy proceedings in the Cayman Islands versus the proceedings that would take place in this Court through the efforts of the Plaintiff, Commodity Futures Trading Commission, and the Receiver;
- (6) What is the relationship between the Offshore Fund to the other funds controlled by or affiliated with Defendants;
- (7) Are there any assets of the Offshore Fund or any of the other affiliated funds

actually located in the Cayman Islands;

(8) What is the impact of the proceedings in this Court and the Cayman Islands on the eventual recovery to investors, considering costs, expenses, attorneys fees and the prospects of maximum recovery of funds for eventual return to the investors?

Petitioners first claim they should not be bound by the Consent Order because they had inadequate notice and would have opposed its entry. However, the Court gave full opportunity to Petitioners at today's hearing to demonstrate that the Order was improper, but rejects their arguments as unfounded factually and legally.

The first legal issue which this Court must address is whether to allow the Petitioners to intervene. Rule 24(a), F. R. Civ. P., governs intervention of right and the Third Circuit has stated the test as follows:

We have held that a litigant seeking intervention as of right under Rule 24(a)(2) must establish 1) a timely application for leave to intervene, 2) a sufficient interest in the underlying litigation, 3) a threat that the interest will be impaired or affected by the disposition of the underlying action, and 4) that the existing parties to the action do not adequately represent the prospective intervenor's interests.

Liberty Mutual Ins. Co. v. Treesdale, Inc., 419 F.3d 216, 220 (3d Cir. 2005) (citing Kleissler v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998)).

Judge Padova of this Court recently described the burden of showing inadequate representation in Bradburn Parent/Teacher Store, Inc. v. 3M, 2004 WL 2900810 (E.D. Pa. 2004) as follows:

This burden is satisfied by a showing that: (1) although the movant's interests are similar to those of one of the parties, they diverge sufficiently that the existing party cannot devote proper attention to the movant's interests; (2) there is collusion between

the existing parties; or (3) the representative party is not diligently prosecuting its suit.

Id. at *5 (citing United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1185 n.15 (3d Cir. 1994)).

Turning to the issue of permissive intervention under Rule 24(b), F. R. Civ. P., which calls for the District Court to exercise its discretion, in this case the Court finds that although the effort to intervene is timely, the Petitioners have not shown at this time that it is necessary or appropriate, and particularly that the presence of the Petitioners in this case would necessarily, or even probably, increase the return of assets to the investors – which is the sole purpose of this litigation.

Concerning the Petitioners' attack on the Receiver, the Court finds that the decision of Judge Carter in SEC v. TLC Investments & Trade Co., 147 F. Supp. 2d 1031 (C.D. Cal. 2001) is particularly instructive where the court reviews a request by a group of investors to require the receiver to administer the receivership as a trustee would administer a bankruptcy estate under the bankruptcy code. Alternatively, intervention was sought. Although recognizing that the appointment of a receiver is perhaps unusual, if not extraordinary, the court in that case, also looking to the protection of allegedly defrauded investors as the prime focus of the lawsuit, found that once a receiver has been appointed, and the parties seeking relief or intervention have the same goal, i.e., protection of investors, there is a presumption that the receiver will adequately represent all parties. In that case, the parties seeking relief were unable to rebut the presumption that the receiver's representation would adequately represent their interests.

One of the leading cases on the appointment of a receiver is Commodity Futures Trading Commission v. Comvest Trading Corp., 481 F. Supp. 438 (D. Mass. 1979), which although

refusing the appointment of a receiver under facts that are not germane to this case, appropriately states the relevant law and the test, and thoroughly recognized the power of a District Court sitting in equity to fashion appropriate relief to enforce the requirements of remedial statutes such as the statute under which this Court has so far acted in this case, the Commodity Exchange Act, 7 U.S.C. § 1 et seq.

I. Findings of Fact

- A. This Court has jurisdiction over the parties and the subject matter of this case.
- B. Venue is appropriate in this Court.
- C. The Receiver appointed by this Court is acting appropriately at this time under the relevant statute and this Court's Orders.
- D. The Offshore Fund is an affiliate of Defendants and is controlled by Defendants.
- E. All of the assets of the Offshore Fund are located in the United States.
- F. There are no assets of the Offshore Fund located in the Cayman Islands.
- G. The interests of the Petitioners can be adequately represented by the Receiver.
- H. Petitioners have no evidence that the Receiver has a conflict of interest.

II. Conclusions of Law

- A. This Court has full jurisdiction and authority to issue Orders and remedies that will protect all investors in the Offshore Fund.
- B. The sole purpose of this litigation is to protect the investors in any and all funds related or affiliated to Defendants, including the Offshore Fund.
- C. The Receiver is adequately representing the interests of the Petitioners and all investors in the Offshore Fund.

D. Petitioners are not entitled to intervention as a right.

E. There is no sound reason for this Court to exercise its discretion by allowing intervention by the Petitioners at this time.

An appropriate Order follows.

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ORDER

AND NOW, this 31st day of October, 2005, after a hearing, it is hereby ORDERED that the Movants BNP Paribas Security Services, CITCO Global Custody N.V., Banque Privee Edmond de Rothschild Europe, SG Private Bank SA'S Motion for Leave to Intervene, Opposition to Receiver's 10/18/05 Emergency Motion, and Cross Motion to Modify the 9/16/05 Consent Order Appointing C. Clark Hodgson, Jr. as Receiver (Doc. No. 62) is DENIED, without prejudice.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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