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21 **UNITED STATES BANKRUPTCY COURT**
22 **DISTRICT OF NEVADA**

23 In re:

24 FRONT SIGHT MANAGEMENT, LLC
25 Debtor.

26 FRONT SIGHT MANAGEMENT,
27 LLC, A NEVADA LIMITED
28 LIABILITY COMPANY

v.

LAS VEGAS DEVELOPMENT FUND
LLC, A NEVADA LIMITED
LIABILITY COMPANY, et al.

Case No. BK-S-22-11824-ABL
Chapter 11

Adversary Case No. 22-01116-ABL

OPPOSITION TO MOTION OF THE
OFFICIAL COMMITTEE OF
UNSECURED CREDITORS TO
INTEREVE NE UNDER BANKRUPTCY
RULE 7024

1 **MEMORANDUM OF POINTS AND AUTHORITES¹**

2 **I. OVERVIEW**

3 LVDF contends that this Court should not consider this motion until after it decides on
4 the motion to remand. If the Court grants the motion to remand, then the State Court should be
5 the court to determine if the Committee should be permitted to intervene.
6

7 As to the motion to intervene, the Official Committee of Unsecured Creditors
8 (“**Committee**”) states that it has an unconditional right to intervene. The “unconditional right to
9 intervene” has not been addressed by the Ninth Circuit. Rather, in 2001, the Bankruptcy Court
10 of the Northern District of California, determined that there is no unconditional right to intervene
11 and relied upon the Fifth Circuit’s well reasoned decision (*see* below). This Court should rely
12 upon the same.
13

14 Alternatively, the Committee argues that permissive intervention is warranted. For the
15 reasons stated below, neither mandatory nor permissive intervention is justified, and the request
16 should be denied. To the extent that the Court permits intervention, then it should limit the
17 Committee’s participation in the adversary proceeding.
18

19 **II. LEGAL ARGUMENT**

20 Bankruptcy Code section 1109(b) allows any “party in interest” – including a creditors’
21 committee – to “raise and . . . appear and be heard on any issue in a case under” chapter 11.
22 Relying on this statute and Federal Rule of Civil Procedure 24(a)(1), as an alternative, the
23 Committee argues it satisfies the requirements for permissive intervention under Rule
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27 ¹ All references to “ECF No.” are to the numbers assigned to the documents filed in the main bankruptcy case as
28 they appear on the docket maintained by the clerk of the court. All references to AECF No. are to the numbers
assigned to the documents filed in this adversary case. All references to “Section” or “§§ 101-1532” are to the
provisions of the Bankruptcy Code. All references to “FRE” are to the Federal Rules of Evidence. All references to
“FRCP” are to the Federal Rules of Civil Procedure. All references to “LR” are to the bankruptcy provisions of the
Local Rules of Practice for the District of Nevada.

1 24(b)(1)(B), which allows the Court to “permit anyone to intervene who . . . has a claim or defense
2 that shares with the main action a common question of law or fact.”

3
4 **A. The Committee Does Not Have an Unconditional Right to Intervene**

5 There is a split within the Circuits as to whether an unsecured creditors committee has an
6 unconditional right to intervene in an adversary proceeding. The Ninth Circuit has not addressed
7 this issue. LVDF contends that the Fifth Circuit’s reasoning in *Fuel Oil Supply Terminaling v.*
8 *Gulf Oil Corp.*, 762 F.2d 1283 (5th Cir. 1985) in finding no unconditional right is more
9 persuasive than the other Circuit’s reasonings which found contrary. See also, *In re Tri Valley*
10 *Growers*, No. 00-44089 J11, Adv. No. 01-4098 AJ, Adv. No. 01-4156 AJ (Bankr. N.D. Cal. Sep.
11 17, 2001); *In re Kaiser Steel Corp.*, 998 F.2d 783, 790 (10th Cir. 1993) (“Under 11 U.S.C. §
12 1109(b), a party in interest may appear and be heard on any issue in a case; however, that "does
13 not afford a right to intervene under Rule 24(a)(1), even though such 'parties in interest' enjoy
14 the general right to 'monitor' the progress of the chapter 11 case." ”); and *In re Tri Valley*
15 *Growers*, No. 00-44089 J11, Adv. No. 01-4098 AJ, Adv. No. 01-4156 AJ, at *1 (Bankr. N.D.
16 Cal. Sep. 17, 2001)² (“this court finds Fuel Oil more persuasive than Marin. Indeed, after it
17 decided Marin, the Third Circuit revisited the issue in *Phar-Mor Inc. v. Coopers Lybrand*, 22
18 F.3d 1228, 1233 (3d Cir. 1994), and discussed in depth the reasons why many courts rejected its
19 analysis in Marin, only to acknowledge that "internal operating procedures barred [the Third
20 Circuit] from overruling it." In *Phar-Mor*, the Third Circuit noted: The courts rejecting Marin
21 have advanced three reasons why Marin's interpretation of the scope of § 1109 (b) is incorrect.
22 First, Congress has consistently drawn a distinction between bankruptcy "cases" and "adversary
23 proceedings" related to them in other parts of the bankruptcy statutory scheme. Second, courts
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² The unpublished decision is attached hereto as Exhibit A.

1 have construed Rule 24 (a) (1) narrowly; these courts have been reluctant to interpret statutes to
 2 grant an unconditional right to intervene to private parties. Third, Bankruptcy Rule 7024 and its
 3 accompanying advisory committee note indicate that Congress was aware of a distinction
 4 between cases and adversary proceedings and that Congress intended to differentiate between
 5 them in the context of intervention”), *contra*, *Official Unsecured Creditors' Comm. v. Michaels*
 6 (*In re Marin Motor Oil, Inc.*), 689 F.2d 445, 453–56 (3d Cir. 1982); *Term Loan Holder Comm.*
 7 *V. Ozer Grp., L.L.C. (In re The Caldor Corp.)*, 303 F.3d 161, 175–76 (2d Cir. 2002), and *Assured*
 8 *Guaranty Corp. v Financial Oversight and Management Board for Puerto Rico*, 872 F.3d
 9 57, 59 (1st Cir. 2017).

10
 11
 12 Based upon the above and in reliance upon the Fifth Circuit and the Northern California
 13 Bankruptcy Court Decisions, the Committee does not have the absolute right to intervene.³

14 **B. Permissive Intervention Should Not be Permitted**

15 The Committee should not be permitted to intervene under FRCP 24(b) which provides:

16
 17 b) Upon timely application anyone may be permitted to intervene in an action: (1)
 18 when a statute of the United States confers a conditional right to intervene; or (2)
 19 when an applicant's claim or defense and the main action have a question of law or
 20 fact in common. . . .

21 “Even if an applicant satisfies those threshold requirements, the district court has
 22 discretion to deny permissive intervention.” *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir.

23
 24
 25 ³ The Committee does not argue that it has a right to intervene under FRCP 24(a)(2). The
 26 Committee must concede that one of the four factors under 9th Circuit Law was not met: (1) the
 27 application must be timely; (2) the applicant must have a "significantly protectable" interest
 28 relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated
 that the disposition of the act as a practical matter will impair or impede the applicant's ability to
 protect its interest; and (4) the applicant's interest must be inadequately represented by the parties
 before the court. *Northwest Forest Resource Council v. Glicknuin*, 82 F.3d 825, 836 (9th Cir.
 1996).

1 1998); see *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)
2 (providing list of discretionary factors the district court may consider in deciding whether to
3 grant permissive intervention).
4

5 The relevant additional factors include the following:

6 the nature and extent of the intervenors' interest, their standing to raise relevant
7 legal issues, the legal position they seek to advance, and its probable relation to the
8 merits of the case. The court may also consider whether changes have occurred in
9 the litigation so that intervention that was once denied should be reexamined,
10 whether the intervenors' interests are adequately represented by other parties,
11 whether intervention will prolong or unduly delay the litigation, and whether parties
12 seeking intervention will significantly contribute to full development of the
13 underlying factual issues in the suit and to the just and equitable adjudication of the
14 legal questions presented.

15 *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

16 Here, the Committee presents no evidence to support any of these factors and the request
17 for intervention should be denied. First, the Debtor removed this case, and its counsel is prepared
18 to try the case in either Bankruptcy Court or State Court. Second, the Debtor is a fiduciary of
19 the estate and has standing to proceed on such causes of action.⁴ Third, the Committee has failed
20 to show that its interests are not adequately represented by the Debtor. Fourth, the Debtor has
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27 _____
28 ⁴ The Committee has not asserted that the Debtor breached its fiduciary duty nor filed a motion
for an appointment of a Trustee.

1 not sought to abandon such causes of action and accordingly is the only party who, at this time,
2 has authority to pursue such actions.⁵ Fifth, by allowing intervention, the duplicity of the
3 Committee's work will cause undue delay and prolong the litigation. The underlying case has
4 been pending for over four (4) years and was prepared to go to trial in October 2022 before
5 Debtor filed bankruptcy. Sixth, the Debtor has the ability to develop any factual issues and
6 adjudicate the legal issues presented without assistance of another layer of counsel.
7

8 Conversely, the Committee is still protected and has the ability to monitor the case.
9 Moreover, if the case is resolved, a motion to approve a settlement would be filed and the
10 Committee could address its concerns at that time. At this time, there is no reason for the
11 Committee to be permitted to intervene in this case.
12

13 **III. CONCLUSION**

14 The Committee seeking to intervene does not expressly say but implicitly must contend that
15 the Debtor is unable to comply with its fiduciary obligations to the Estate and is concerned how
16 the Debtor will prosecute and/or defend such actions. However, the Committee has not yet
17 sought the appointment of a Trustee nor directly expressed such views. Until that is done, the
18 Committee should not be permitted to intervene to "protect" the Estate's interest in which the
19 Debtor has the obligation to protect. Unless this Court finds that the Committee has an
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25 ⁵ A creditors' committee may, in an appropriate case, institute an adversary proceeding against
26 third parties on behalf of the bankruptcy estate or the debtor-in-possession. *In re Spaulding*
27 *Composites Co., Inc.*, 207 B.R. 899, 903 (B.A.P. 9th Cir. 1997 ("It is well settled that in
28 appropriate situations the bankruptcy court may allow a party other than the trustee or debtor-in-
possession to pursue the estate's litigation. *Louisiana World Exposition v. Federal Ins. Co.*, 858
F.2d 233, 247-52 n. 19 (5th Cir. 1988) (and cases cited therein); *In re STN Enterprises*, 779 F.2d
901, 904 (2d Cir. 1985); *In re Curry and Sorensen, Inc.*, 57 B.R. 824, 827-29 (9th Cir. BAP
1986)")

1 unconditional right to intervene, which LVDF respectfully disagrees that it has such rights, the
2 Court should deny such request to intervene.

3
4 Dated 7-20-2022

/s/ Brian D. Shapiro, Esq.

Brian D. Shapiro, Esq.

Attorney for LVDF

CERTIFICATE OF SERVICE

On July 20, 2022, this pleading was served upon all registered user in accordance with the Court's CM/ECF service. Such registered users for this case included the parties listed below.

Dated 7-20-2022

/s/ Brian D. Shapiro, Esq.
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EXHIBIT A

No. 00-44089 J11, Adv. No. 01-4098 AJ, Adv. No. 01-4156 AJ
United States Bankruptcy Court, N.D. California

In re Tri Valley Growers

Decided Sep 17, 2001

No. 00-44089 J11, Adv. No. 01-4098 AJ, Adv. No. 01-4156 AJ.

September 17, 2001

MEMORANDUM DECISION (MOTION FOR LEAVE TO INTERVENE)

EDWARD D. JELLEN, United States Bankruptcy Judge.

A. Introduction

The Official Committee of Growers (the "Growers' Committee") has filed a motion seeking leave to intervene in this adversary proceeding. The motion is opposed by the Official Committee of Unsecured Creditors, the plaintiff herein (the "Creditors' Committee"), and by the U.S. Trustee, which appointed the Growers' Committee. The court will deny the motion.

Tri Valley Growers, the above debtor ("Tri Valley"), is a cooperative association organized to process and market fruits and vegetables delivered by its member growers. Tri Valley filed its chapter 11 petition herein on July 10, 2000.

The present adversary proceeding is a class action for declaratory relief in which the Creditors' Committee seeks a determination as to allowability and status of the creditor claims that have been filed by numerous grower-members of Tri Valley. Specifically, the complaint seeks a determination that the grower-members: (a) are not entitled to producer's liens under California Food and Agricultural Code § 54001 et. seq. because of their status as members of a cooperative, and thus, that they are not holders of secured claims against the estate herein, (b) that the grower members' right to receive a dividend out of the estate in respect of their unsecured claims is subject to certain restrictions in Tri Valley's charter, and (c) that because of such restrictions, the grower members do not have administrative priority claims arising from their postpetition deliveries of products to Tri Valley.

The motion is governed by Fed.R.Civ.P. 24, which applies in adversary proceedings via Fed.R.Bankr.P. 7024.

B. Intervention of Right

Fed.R.Civ. p. 24 (a) provides:

(a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Growers' Committee contends that it is entitled to intervene as a matter of right under both subsections of Fed.R.Civ.P. 24 (a).

As to Fed.R.Civ.P. 24 (a)(1), the Growers' Committee argues that Bankruptcy Code § 1109 (b) is a statute that confers upon it the unconditional right to intervene. Bankruptcy Code § 1109 (b) provides as follows:

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

In Matter of Marin Oil, Inc., 689 F.2d 445 (3d Cir. 1982), the Third Circuit held that "case" within the meaning of § 1109 (b) included adversary proceedings, and thus, that creditors' committees have an unqualified right to intervene in all proceedings being litigated in a particular bankruptcy case. This holding, if good law, would entitle the Growers' Committee to intervene herein without regard to any of the circumstances present here that would dictate against intervention.

In Fuel Oil Supply and Terminaling v. Gulf Oil Corp., 762 F.2d 1283 (5th Cir. 1985), however, the Fifth Circuit was faced with the same issue, and reached the opposite conclusion, holding that Bankruptcy Code § 1109 (b) did not confer upon creditors' committees the absolute right to intervene in adversary proceedings, and that courts should consider the factors specified in Fed.R.Civ.P. 24 (a) (2) when faced with a motion by a creditors' committee to intervene in an adversary proceeding. See also In re Thompson, 965 F.2d 1136, 1142 n. 8 (1st Cir. 1992).

In reaching its conclusion, the court in Fuel Oil noted that "courts have been hesitant to find unconditional statutory rights of intervention", and when they do, the right is generally conferred on the United States or a regulatory commission. Fuel Oil, 762 F.2d at 1286. The court also stated that the applicable procedural rules governing both intervention and the rights of creditors committees to initiate adversary proceedings supported its conclusion. Id. at 1286-87.

This court finds Fuel Oil more persuasive than Marin. Indeed, after it decided Marin, the Third Circuit revisited the issue in Phar-Mor Inc. v. Coopers Lybrand, 22 F.3d 1228, 1233 (3d Cir. 1994), and discussed in depth the reasons why many courts rejected its analysis in Marin, only to acknowledge that "internal operating procedures barred [the Third Circuit] from overruling it." In Phar-Mor, the Third Circuit noted:

The courts rejecting Marin have advanced three reasons why Marin's interpretation of the scope of § 1109 (b) is incorrect. First, Congress has consistently drawn a distinction between bankruptcy "cases" and "adversary proceedings" related to them in other parts of the bankruptcy statutory scheme. Second, courts have construed Rule 24 (a) (1) narrowly; these courts have been reluctant to interpret statutes to grant an unconditional right to intervene to private parties. Third, Bankruptcy Rule 7024 and its accompanying advisory committee note indicate that Congress was aware of a distinction between cases and adversary proceedings and that Congress intended to differentiate between them in the context of intervention.

According to the courts critical of Marin, these legislative and judicial developments indicate that Congress was aware of the distinction between adversary proceedings and cases, and deliberately did not extend the right to intervene to adversary proceedings. These courts believe that Congress intended that motions to intervene under § 1109 (b) would be controlled by Rule 24 (a) (2) rather than Rule 24 (a) (1).

Id. at 1232-33.

For the reasons stated in Fuel Oil and in Phar-Mor's discussion of the reasons courts have declined to follow Marin, this court holds that Bankruptcy Code § 1109 (b) does not provide creditors' committees with the absolute right to intervene in all adversary proceedings.

The next issue, then, is whether Fed.R.Civ. p. 24 (a) (2) provides the Growers' Committee with the right to intervene. To prevail, the Growers' Committee must show the following: (1) the application must be timely; (2) the applicant must have a "significantly protectable" interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the act as a practical matter will impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court. See Northwest Forest Resource Council v. Glicknuin, 82 F.3d 825, 836 (9th Cir. 1996).

Here, the Growers' Committee cannot make such a showing. As to the second factor, the Growers' Committee, as distinguished from the growers who filed claims, does not have any property interests at stake. See Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508, 1512 (11th Cir. 1996). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n. 1 (1992). As to the third factor, this court has held that the Growers' Committee does not even have standing to bind any grower-claimants as to the "allowance, disallowance, amount, priority, or status (secured or unsecured) of their individual claims," the very matters that are at issue herein. See Decision on Motion to Dismiss, filed June 26, 2001 in Official Committee of Growers v. Tri Valley Growers, Adv. Proc. 01-4076 AJ herein, attachment, p. 2.

As to the fourth factor, this court has found by its Amended Order Approving Maintenance of Class Action; Findings of Fact and Conclusions of Law, entered herein August 14 2001, that the growers are adequately represented by the class representatives herein. See paragraphs 9-12. The court has considered the applicable factors, see, e.g., Blake v. Pallan, 554 F.2d 947, 954-55 (9th Cir. 1977),¹ and concluded that whatever interest the Growers' Committee has in the outcome of this litigation will be adequately protected by the class representatives, who, unlike the the Growers' Committee, are the real parties in interest, the parties with money at stake, and the parties with standing to litigate the issues that have been raised.

¹ In Blake, the Ninth Circuit stated that when evaluating the adequacy of representation, the court should consider: (1) whether the interests of the existing party and the intervenor are sufficiently similar that the existing party would undoubtedly make the same legal arguments as the intervenor; (2) whether the existing party is capable and willing to make such arguments, and (3) whether the intervenor would add some necessary element not covered by the existing parties to the proceedings.

The court therefore holds that the Growers' Committee is not entitled to intervene pursuant to Fed.R.Civ. p. 24 (a) (2). See, e.g., In re Chalk Line Mfg., Inc., 184 B.R. 828, 833 (Bankr. N.D. Ala. 1995), In re Heck's Properties, Inc., 151 B.R. 739, 749 (S.D.W.Va. 1992) (denying equity committee's motion to intervene in action alleging injury to corporate debtor, because debtor in possession's prosecution of action adequately protected

stockholders' interests); In re CVC Inc., 106 B.R. 478, 480 (Bankr. N.D. Ohio 1989) (holding that no inadequate representation existed justifying creditors' committee intervention under Rule 24 (a) (2) in debtor in possession's action against individual creditor).

C. Permissive Intervention

Fed.R.Civ.P. 24 (b) provides, in relevant part:

(b) Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

A bankruptcy court has broad discretion to grant or deny motions for permissive intervention. Orange County v. Air California, 799 F.2d 535, 539 (9th Cir. 1986), cert. denied 480 U.S. 946 (1987). Even if the Growers' Committee could prove it meets all of Rule 24 (b) (2)'s threshold requirements, the Court retains the discretion to deny permissive intervention. Donnelly v. Glickman, (9th Cir. 1998) (citing Orange County, 799 F.2d at 159 F.3d 405, 412 (9th Cir. 1998) (citing Orange County, 799 F.2d at 539)). In exercising its discretion, the Court may consider other relevant factors.

These relevant factors include the nature and extent of the intervenors' interest; their standing to raise relevant legal issues; the legal position they seek to advance, and its probable relation to the merits of the case; whether the intervenors' interests are adequately represented by other parties; whether intervention will prolong or unduly delay the litigation; and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977).

Here, the court's consideration of the relevant factors leads it to conclude that intervention should be denied. The court has already mentioned that the Growers' Committee lacks standing to bind any claimants as to the allowance or status of their claims. It has also noted that the grower-claimants are already and adequately represented by the class representatives, and do not require an additional representative, especially one that has suffered no injury. The added expense to the estate also dictates against intervention.

Moreover, the U.S. Trustee appointed the Growers' Committee to negotiate a plan and "not . . . to engage in any litigation nor to defend any litigation concerning its individual members." Transcript of November 22, 2001 hearing at 34:24-35:10. The court will deny the Growers' Committee's motion for permissive intervention under Fed.R.Civ.P. 24 (b).

D. Conclusion

For the above reasons, the court will issue its order denying the motion of the Growers' Committee to intervene under Fed.R.Civ.P. 24 (a) and (b).

PROOF OF SERVICE

I, the undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Northern District of California at Oakland, hereby certify:

That I, in the performance of my duties as such clerk, served a copy of the foregoing document entitled Memorandum Decision (Motion for Leave to Intervene) by depositing it in the regular United States mail at Oakland, California, on the date shown below, in a sealed envelope bearing sufficient postage, addressed as listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct.

 casetext