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

SECURITIES AND EXCHANGE COMMISSION	:	**CIVIL ACTION**
v.	:	
DALE J. LANGE, FRANK G. LEPORE, MARK F. LEPORE PHILIP S. PORTOGHESE, STUART W. PORTOGHESE, STEPHEN P. PORTOGHESE, and TIMOTHY L. GARNER	:	**No. 97-6018**

MEMORANDUM ORDER

Presently before the court is the Motion of Peter Dau, Leilani Witt, Birkelbach Investment Securities, Inc. and Carl Birkelbach to Intervene as of Right Pursuant to Fed. R. Civ. P. 24(a)(2) in this insider trading case brought by the Securities and Exchange Commission ("SEC") against individuals associated with Cephalon, a publicly traded corporation listed on the NASDAQ. The SEC charged that defendants engaged in insider trading on seven days in April, May and June of 1995. The action was resolved with the entry of consent judgments against all defendants which provided for disgorgement and civil penalties. Disgorgement in the amount of $85,185.00 was paid into the registry of the court.

A prior class action predicated on the making of material misleading statements was filed by persons trading in Cephalon stock between June 1995 and June 1996, during which period the average daily trading volume was 823,071 shares. That action clearly encompassed numerous persons who would not have been injured by the insider trading underlying the instant enforcement action. It was settled in July 1999. In May 1999, the movants brought a separate action pursuant to § 20A of the Exchange Act against defendants in this action and others including Cephalon.[1] Movants allege that they sold Cephalon stock short in the weeks preceding the public announcement of the results of certain drug studies on June 12, 1995.[2]

Movants seek to intervene as of right to claim $33,161 of the disgorged funds to satisfy consent judgments obtained in their litigation. One consent judgment is for $28,055 against defendant Lange. The other is against defendant Garner for $5,106. These are the precise amounts which had been disgorged by these defendants respectively in the above action and execution on the consent judgments held by movants was expressly limited by the settlement agreement to the disgorged funds.

The SEC opposes the request to intervene on the grounds that intervention is statutorily barred by § 21(g) of the Exchange Act, see 15 U.S.C. § 78u(g), and that movants fail to satisfy the requirements for intervention as of right.

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[1] Movants opted out of the class settlement.

[2] Movants allege that they sold Cephalon shares prior to June 12, 1995 on the same days defendants purchased Cephalon shares. After the June 12, 1995 announcement, the price of Cephalon increased dramatically which resulted in the liquidation of movants’s short positions.

Section § 21(g) provides:

> Notwithstanding the provisions of section 1407(a) of Title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

15 U.S.C. § 78u(g).

It appears that the import of this section is to prohibit consolidation of private and regulatory actions but not necessarily intervention by parties with an appropriate interest in an action brought by the SEC. See SEC v. Flight Transportation Corp., 699 F.2d 943, 950 (8th Cir. 1993); SEC v. TLC Investments and Trade Co., 147 F. Supp. 2d 1031, 1040 (C.D. Cal. 2001); SEC v. Prudential Securities, Inc., 171 F.R.D. 1, 3 (D.D.C. 1997). But see SEC v. Homa, 2000 U.S. Dist. LEXIS 14582, *6 (N.D. Ill. Sept. 29, 2000) (§ 21(g) bars intervention); SEC v. Egan, 821 F. Supp. 1274, 1276 (N.D. Ill. 1993) (same).

Rule 24(a)(2) provides that upon timely application, an individual may intervene in an action when he claims an interest relating to the subject of the action and is so situated that the disposition of the action may impair or impede his ability to protect that interest, unless the interest is adequately represented by an existing party.

To intervene as of right, a party must have a "significantly protectable" interest at stake. Donaldson v.

United States, 400 U.S. 517, 531 (1971). The movant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene. See Harris v. Pernsley, 820 F.2d 592, 601 (3d Cir.), cert. denied, 484 U.S. 947 (1987). A mere economic interest in the outcome of litigation is insufficient. See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995); United States v. Alacan Aluminum, 25 F.3d 1174, 1185 (3d Cir. 1994); New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984) (movants must have interest recognized by substantive law). That a lawsuit may impede a third party's right to recover in a separate suit ordinarily does not create a right to intervene. See Hawaii-Pacific Venture Capital Corp. v. Rothbard, 564 F.2d 1343, 1346 (9th Cir. 1977).

Movants identify no legal entitlement to funds disgorged pursuant to the judgment obtained by the SEC in this action. Movants suggest that a legally protectable interest in the disgorged funds can be discerned from § 20A of the Exchange Act, 15 U.S.C. § 78t-1(a), which provides that:

> Any person who violates any provision of the Act or rules or regulations thereunder by purchasing or selling while in possession of material, non-public information shall be liable . . . to any person who, contemporaneously . . . has purchased . . . or sold . . . securities of the same class,

and § 20A(b)(2), 15 U.S.C. § 78t-1(b)(2), which provides that:

> The total amount of damages imposed against any person under subsection (a) shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 21(d) of this Act relating to the same transaction or transactions.

Contrary to movants’ suggestion, § 20A(b)(2) plainly does not itself create any right but rather acts as a limitation on any recovery on the underlying right of action created by § 20A(a). The statutory language on which movants rely actually makes clear that funds disgorged in an action by the SEC under § 21 are off-limits to a party with a cause of action arising under § 20A.

What appears is that movants attempted to contrive a "right" to the disgorged funds that they do not have. The disgorging malefactors have no right to determine how their ill-gotten disgorged funds will be distributed and they cannot convey any such right in a settlement agreement in another case which requires them to pay nothing to satisfy the claims against them but rather expressly limits satisfaction to the disgorged funds.

To accept movants' position would effectively permit the conversion of a collaborative judgment on a § 20A claim into a legal stake in funds disgorged in a § 21A enforcement action, and what would have been at most a small pro rata share into a significant share of those funds. It would encourage in similar circumstances non-adversarial cases where a defendant is given a strong incentive to settle with plaintiffs whose claims, or proofs of loss, may be weak for amounts not coincidentally the same as those already disgorged and collectible only against those funds, thereby converting a weak claim into a superior stake in funds to which they would otherwise have no claim.

The fundamental purpose of disgorgement is not to compensate securities fraud victims but to deny the violator his ill-gotten gains. See United States v. Fischback Corp., 133 F.3d 170, 175 (2d Cir. 1997). The appropriate disposition of such funds is committed to the discretion of the courts based on equitable considerations. See SEC v. Drexel Burnham Lambert, Inc., 956 F. Supp. 503, 507 (S.D.N.Y. 1997).

Disgorgement was achieved with public funds by the efforts of the SEC. That it may now be infeasible to identify all injured investors and effect a proportionate distribution is not a fortuity which legally or equitably entitles movants to forty percent of the disgorged funds to satisfy one hundred percent of their claimed loss on another cause of action.

ACCORDINGLY, this day of March, 2002, upon consideration of the movant's Motion to Intervene (Doc. #13) and the objection of plaintiff thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.