

FILED

MAR 03 2020

CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
of the
REPUBLIC OF THE MARSHALL ISLANDS

<p>PETER KRAVITZ, AS THE LITIGATION TRUSTEE FOR THE AEGEAN LITIGATION TRUST,</p> <p>Plaintiff,</p> <p>vs.</p> <p>OILTANK ENGINEERING & CONSULTING LTD.,</p> <p>Defendant.</p>	<p>CIVIL ACTION NO. 2019-109</p> <p>ORDER DENYING MOTION TO INTERVENE</p>
---	--

TO: Daniel J. Saval (Daniel.Saval@kobrekim.com) and Arsima Muller, Counsel for Plaintiff, Peter Kravitz, ss the Litigation Trustee for the Aegean Litigation Trust
David I. Miller (david.miller@gtlaw.com) and David M. Strauss, counsel for Maria Giogaki, proposed intervenor, as the sole shareholder of Defendant Oiltank Engineering & Consulting Ltd.

INTRODUCTION

On February 14, 2020, this matter came before the Court on the Motion to Intervene filed by proposed intervenor Maria Giogaki ("Ms. Giogaki"). The Court denies the Motion to Intervene, for three reasons, any one of which is sufficient. First, the Motion to Intervene is untimely. Second, granting the Motion to Intervene would prejudice plaintiff Peter Kravitz, as the Litigation Trustee for the Aegean Litigation Trust, ("Plaintiff"). Third, Ms. Giogaki's interest

as the sole shareholder of defendant Oiltank Engineering & Consulting Ltd. ("OTE") can be adequately represented by OTE.

PROCEDURAL AND FACTUAL BACKGROUND

The Aegean Litigation Trust, for which Plaintiff Kravitz is the Litigation Trustee, was formed to pursue Aegean's claims following entry of a March 29, 2019 order by the United States Bankruptcy Court for the Southern District of New York in connection with Aegean's bankruptcy filing in the United States. Complaint, at 1. The claims are brought for the benefit of Aegean's creditors. Complaint, at 3.

To this end, Plaintiff Kravitz, on August 6, 2019, filed in this Court the Plaintiff's Verified Complaint and accompanying motion for a temporary restraining order, preliminary injunction, and appointment of a receiver. In the Complaint, Plaintiff alleges that Aegean Marine Petroleum Network, Inc. ("AMPNI") and its subsidiaries (collectively, "Aegean") suffered substantial losses (US \$318 million) as a result of frauds orchestrated by Mr. Melisanidis and his associates through his beneficial control of defendant OTE.¹ That is, Mr. Melisanidis used OTE to misappropriate funds from Aegean and to divert them to other entities for the sole benefit of Mr. Melisanidis and his family and associates. Complaint, at 8-15. The Plaintiff sought the temporary restraining order, preliminary injunction, and appointment of a receiver to recover the funds.

¹Defendant OTE is a corporation organized under the laws of the Marshall Islands. Its registered agent is The Trust Company of the Marshall Islands, Inc., Trust Company Complex, Ajeltake Road, Ajeltake Island, Majuro, Republic of the Marshall Islands, MH 96960 ("TCMI"). OTE's last known email address is central@oiltankco.com. Complaint, at 5.

On August 8, 2019, the Court granted Plaintiffs *ex parte* request for a temporary restraining order and appointed Christopher Kennedy as the interim receiver for OTE (the "Receiver") (the "TRO Order").

On August 9, 2019, both the Complaint and the TRO Order were duly served on OTE, through its registered agent, the TCMI, who confirmed receipt of the same in a Confirmation of Receipt of Documents.² Further, the Plaintiff sent courtesy copies of the Complaint and TRO Order on August 20, 2019, to Marc Kerger, a Luxembourg attorney who represents OTE in ongoing civil proceedings against OTE and others in Luxembourg (the "Luxembourg Action").³

Upon his appointment, the Receiver also took further steps to confirm notice to OTE of the proceedings before this Court, including by: (i) promptly contacting the last known registered owner of OTE, Aimilios Vrachyepedis ("Mr. Vrachyepedis"), on August 9, 2019;⁴ (ii) instructing OTE's registered agent, TCMI, to continue to serve papers on OTE's contact on file with TCMI⁵ (which TCMI has confirmed that it did);⁶ (iii) reaching out to OTE's contacts on file with TCMI,

²See Declaration of Daniel J. Saval ("Saval Dec."), Ex. 3. Pursuant to the Marshall Islands Rules of Civil Procedure ("MIRCP") and the Republic of the Marshall Islands Business Corporations Act ("BCA"), service upon a corporation is accomplished through service on its registered agent. MIRCP 4(e)(2)(c); BCA § 20(1). OTE's registered agent is TCMI. See Ex. 2.

³See Saval Dec. Exs. 13, 14.

⁴See Saval Dec. Ex. 22 at 4, Appx. 13, at 2-4. As set forth in the Declaration of Peter Kravitz, accompanying the Complaint, at, 14, on July 21, 2015, Mr. Vrachyepedis was registered as the owner of all the issued share capital of OTE.

⁵See Saval Dec. Ex. 22 at 3, Appx. 8.

⁶TCMI confirmed that it sent all filings served on OTE to the Spyros Fokas Law Offices in Greece, OTE's contact on file with TCMI, on August 8, 2019, August 25, 2019, September 25, 2019, October 1, 2019, and October 10, 2019. See Saval Dec. Exs. 8, 9, 10, 11, 12.

Ms. Betty Koumbiadou⁷ and Mr. Spyros Fokas,⁸ both of whom denied ever providing any services to OTE despite substantial indication to the contrary; and (iv) reaching out to other persons believed to have some connection to OTE at such time the connections became known to the Receiver in the course of his investigation.⁹ Despite the Receiver's multiple attempts to contact Mr. Vrachyepedis, OTE's last known owner, he rebuffed all such attempts.¹⁰

On August 21, 2019, the Court issued an Order Granting Preliminary Injunction and Appointing Receiver ("Preliminary Injunction Order"). On the following day, August 22, 2019, one of the Court's bailiffs served on the Preliminary Injunction on the TCMI, which on that same day confirmed in writing receipt.

Notwithstanding service of the above referenced pleadings and papers, OTE did not timely appear or defend.

Forty-six days after Plaintiff Karvitz served the Complaint on defendant OTE, he on September 24, 2019, filed Plaintiff's Request for Entry of Default with a proposed Clerk's Entry of Default, which was executed and filed that same day. At the same time, Plaintiff filed Plaintiff's Motion for Default Judgment.

On the following day, September 25, 2019, the Court scheduled a conference on the Plaintiff Motion for Default Judgment. Notice of the conference was sent to the Plaintiff's

⁷See Saval Dec. Ex. 22, Appxs. 5, 5A. Ms. Koumbiadou signed corporate documents on behalf of at least 32 Aegean entities.

⁸See Saval Dec. Ex. 22 at 3, Appxs. 6, 7. Mr. Fokas has acted as a director, general counsel and corporate secretary of Aegean.

⁹See Saval Dec. Ex. 22 at 4.

¹⁰See Dec. Ex. 22 at 4, Appx. 13.

counsel and, through TCMI, to OTE. Counsel for Plaintiff appeared at the conference; however, OTE did not. Further to the conference, on October 9, 2019, the Plaintiff's counsel submitted a proposed Default Judgment. Later that day, the Court issued the Default Judgment and served a copy on Plaintiff's counsel and, through TCMI, on OTE.

Not until October 16, 2019, did Ms. Giogaki file her Motion to Intervene, and on November 25, 2019, the required Memorandum of Law in Support ("MOL") (together "Motion to Intervene"). On December 9, 2019, the Plaintiff filed his Opposition to Motion to Intervene, and on December 16, 2019, Ms. Giogaki filed her Reply Memorandum.

LEGAL STANDARD

The legal standard for intervention is set forth in MIRCPC, Rule 24. Rule 24, in relevant part, provides as follows:

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the moving party's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a national or local government officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

DISCUSSION

A. MIRC, Rule 24(a): Intervention as of Right

Rule 24(a) provides in relevant part as follows:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

* * *

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the moving party's ability to protect its interest, unless existing parties adequately represent that interest.

As MIRC, Rule 24(a), is the same or substantially similar to Rule 24(a) under both United States federal and state rules of civil procedure, this Court can look to United States federal and state court decisions that interpret and apply MIRC, Rule 24(a).¹¹

With respect rule 24(a), the United States Ninth Circuit Court of Appeals applies a four-part test under Rule 24(a), which it construes liberally in favor of potential intervenors.

We apply a four-part test under Rule 24(a): (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest

¹¹*Kabua v. Kabua, et al.*, 1 MILR 96, 104 (1988) ("MIRCivP Rule 19 mirrors Rule 19 of Federal Rules of Civil Procedure and as such MIRCivP Rule 19 carries the construction placed upon it by the Federal Courts.")

relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

In general, we construe Rule 24(a) liberally in favor of potential intervenors. In addition to mandating broad construction, our review is guided primarily by practical considerations, not technical distinctions.

Southwest Center for Biological Diversity v. Berg ("Berg"), 268 F.3d 810, 817-8 (9th Cir. 2001) (citations and additional punctuation omitted). The party seeking to intervene bears the burden of showing that all the requirements for intervention have been met. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (citing *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). The Court finds that Ms. Giogaki has not established parts (1) and (4) of the four-part test (i.e., timeliness and lack of adequate representation).

1. Was Ms. Giogaki's Motion Timely?

In determining whether a motion to intervene is timely, courts evaluate three factors: (i) the stage of proceeding at which applicant seeks to intervene; (ii) the reason for and length of delay; and (iii) prejudice to other parties by allowing intervention. *See United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). The Court finds that these factors weigh against Ms. Giogaki's Motion to Intervene.

First, with respect to the stage of the proceedings, the Court concludes Ms. Giogaki's Motion to Intervene was untimely. Although Ms. Giogaki asserted her "motion to intervene [was] timely, having been made [October 16, 2019], . . . before any litigation had taken place, other than the receiver's ex parte application" (*see* MOL, at 7), this is not correct. The Court issued its Default Judgment in the case on October 9, 2019, two weeks after the Plaintiff filed his

September 24, 2019 Motion for a Default Judgment. The Default Judgment was a final judgment: this case was concluded on October 9. For her part, Ms. Giogaki did not file her Motion to Intervene until October 16, 2019, and did not file the required Memorandum of Law in Support ("MOL") on November 25, 2019, 46 days after the case was concluded. Not only were Ms. Giogaki's Motion to Intervene and MOL untimely, but in terms of the stage of the proceedings they were filed too late — i.e., Ms. Giogaki filed her motion after the Court had issued its Default Judgment.

Second, evaluating the reason for and length of the delay, the Court also finds Ms. Giogaki's Motion to Intervene was untimely.

On one hand, Ms. Giogaki claims that the Receiver's October 7, 2019 letter to her was the first time she learned that there was an action pending in the Marshall Islands and that a receiver had been preliminarily appointed. *See* Declaration of Maria Giogaki, filed November 25, 2019, ¶ 4. Ms. Giogaki's claim was incorporated into the MOL at pages 3-4 and 7-8. However, after the Court hearing on February 14, 2020, counsel for Ms. Giogaki filed a February 23, 2020 letter, explaining that a September 24, 2019 engagement letter indicates that Ms. Giogaki had notice of the Marshall Islands proceedings by that date. At a February 28, 2020, teleconference regarding the letter, Ms. Giogaki's counsel clarified that when she signed the engagement letter a few days after September 24, she did not realize the engagement was for this action.

At any rate, the Court files shows that from August 9, 2019, defendant OTE received copies of the documents filed by the Plaintiff and issued by the Court through OTE's agent for

service of process, the TCMI.¹² The TCMI in turn forwarded all the documents served upon it to OTE's contact on file with TCMI, Spyros Fokas Law Office in Greece.¹³ Assuming, Ms. Giogaki, as she claims, is, and since 2017 was, the sole shareholder of OTE, then she had the authority to determine who would be OTE's contact with the TCMI. However, Ms. Giogaki has offered no evidence that TCMI failed timely to forward court documents served upon it to OTE's designated contact. Ms. Giogaki has not demonstrated why she should not be bound by the notice TCMI forwarded to her agents.

Additionally, the Plaintiff sent courtesy copies of the Complaint and TRO Order on August 20, 2019, to Marc Kerger, a Luxembourg attorney who represents OTE in ongoing civil proceedings against OTE and others in Luxembourg.¹⁴

Third, the Plaintiff's efforts to preserve the assets of OTE for the benefit of Aegean entities would be prejudiced by allowing Ms. Giogaki's untimely intervention. The Plaintiff followed the law and secured a default judgment against OTE. The Plaintiff had no duty to notify Ms. Giogaki of this action. OTE is bound by the judgment subject to an MIRCP, Rule 60(b), motion to set the judgment aside. The Plaintiff would be prejudiced if the Court allowed Ms. Giogaki to intervene and challenge the Default Judgment because she had not received "timely" notice of the action. The Plaintiff would be forced to expend more time and money litigating this action, as witnesses' memories fade over time.

¹²Pursuant to the MIRCP and the BCA, service upon a corporation is accomplished through service on its registered agent. MIRCP 4(e)(2)(c); BCA § 20(1). OTE's registered agent is TCMI.

¹³See Saval Dec., Exs. 8, 9, 10, 11, 12, filed December 9, 2019.

¹⁴See Saval Dec. Exs. 13, 14.

For the above reasons, the Court finds that some time before September 24, 2019, Ms. Giogaki or someone acting on her behalf knew about the litigation in the Marshall Islands and had access to the court filings. Ms. Giogaki and OTE had time to enter appearances and defend before the Default Judgment was entered on October 9, 2019. They simply slept on their rights.

2. Can an Existing Party Adequately Represent Ms. Giogaki's Interest?

Not only was Ms. Giogaki's Motion to Intervene untimely in terms of stage and duration, but defendant OTE, can adequately represent her rights as OTE's sole shareholder. As the Plaintiff's counsel explained at both the hearing for the Preliminary Injunction and hearing on the Motion to Intervene, nothing in the Preliminary Injunction Order prohibits OTE from hiring counsel and defending itself in any proceedings anywhere in the world. Further, the Receiver does not have the authority to dictate how and under what terms OTE defends itself. This is how the Court interprets the Preliminary Injunction Order and the Default Judgment. OTE can hire counsel to file a Rule 60(b) motion.

3. Does Ms. Giogaki Have a Protectable Interest and May the Disposition of the Action Impair Ms. Giogaki's Ability to Protect Her Interest?

Because the Court has found that the Motion to Intervene is untimely and that defendant OTE can adequately represent Ms. Giogaki's interest in this case, the Court need not address the questions of (i) Ms. Giogaki having a protectable interest or (ii) the disposition of this action impairing Ms. Giogaki's ability to protect her interest. As the sole shareholder of OTE, she can direct OTE to defend itself and her interest.

B. MIRCP, Rule 24(b): Permissive Intervention

Under Rule 24(b),

"[a]n applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) *its motion is timely*; and (3) the court has an independent basis for jurisdiction over the applicant's claims.

Even if an applicant satisfies those threshold requirements, the [court] has discretion to deny permissive intervention. In exercising its discretion, the district court must consider whether intervention will unduly delay the main action or will *unfairly prejudice the existing parties*."

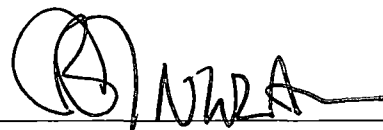
See Donnelly v. Glickman, 159 F.3d 405, 412 (C.A.9 (Cal.), 1998) (citations omitted) (emphasis added).

These requirements and considerations weigh against Ms. Giogaki's Motion to Intervene. As explained above, the Court finds (i) that the Motion to Intervene was not timely and (ii) granting the motion would prejudice the Plaintiff. The Court need not look further.

CONCLUSION

For the above reasons, the Court denies Ms. Giogaki's Motion to Intervene. Further, the Court confirms that nothing in the Preliminary Injunction Order or the Default Judgment prohibits OTE from hiring counsel and defending itself in any proceedings anywhere in the world. The Receiver does not have the authority to dictate how and under what terms OTE defends itself.

Ordered and Entered: March 3, 2020.

A handwritten signature in black ink, appearing to read 'C. Ingram', written over a horizontal line.

Carl B. Ingram
Chief Justice, High Court