UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

LILY'S TRANSPORTATION CORP., BERNADINO'S BAKERY INC., HILLCREST FOODS, INC., AND RYDER TRUCK RENTAL, INC.,	)	
Petitioner-Creditors,	)	Docket No. 21-10168
v.	)	
KOFFEE KUP BAKERY, INC.	)	
Debtor.	)	

STATE OF VERMONT'S MOTION FOR LEAVE TO FILE MEMORANDUM OF LAW, AS INTERVENOR OR *AMICUS CURIAE* IN SUPPORT OF DEBTOR KOFFEE KUP

The State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., hereby informs the Court of the State's interest in this matter and requests leave to submit the attached memorandum of law, as an intervenor or alternatively as *amicus curiae*, in support of Debtor Koffee Kup Bakery Inc. This Court should grant the State's motion because the State has a significant interest to protect employees' economic well-being, and to ensure compliance with labor laws. The State's intervention will assist the timely payment of unpaid wages to Debtor's laid-off employees that Petitioner-Creditors previously agreed upon, but whose petition for involuntary bankruptcy now precludes.

BACKGROUND

On April 26, 2021, Koffee Kup Bakery, Vermont Bread Company and Superior Bakery (collectively hereafter "Koffee Kup") terminated their bakery business operations due to lack of funds. This included the termination of approximately 440 employees, the majority of which

reside in Vermont. Koffee Kup then entered into a voluntary receivership, under the jurisdiction of Vermont Superior Court, Civil Division, Judge Samuel Hoar, Docket No. 21-CV-01064 (hereafter "the Receivership Docket"). The court appointed Ronal Teplitsky, a New York accountant, to act as the Receiver in that matter (hereafter "the Receiver").

At the time of Koffee Kup's insolvency, the employees had accrued and were owed approximately $821,862.00 in combined vacation and paid time off obligations (hereafter "PTO").

However, as a result of the Receivership, Koffee Kup was deprived of its ability to pay the PTO. Thus, Koffee Kup worked with both its creditors and the Receiver in the Receivership Docket to arrange payment of certain obligations. Those creditors included the petitioners in this bankruptcy action: Lily's Transportation Corp., Bernadino's Bakery Inc., Hillcrest Foods, Inc., and Ryder Truck Rental, Inc.[1]

The mater of the employee PTO was debated extensively for weeks, with numerous hearings and opportunities to be heard. On July 14, 2021, a final hearing was held in the Receivership Docket. At that time, the parties discussed and agreed to payment of the employee PTO. All of the Petitioner-Creditors in this case expressly agreed to payment of the PTO. Judge Hoar then entered an order approving payment of the PTO, which also included additional interest ($16,437). *See* attached Entry Order and Motion, July 15, 2021, granting Koffee Kup's "Motion to Approve Receivers Payment of Urgent Payroll Deductions" [Exhibit A]. Thus, the Vermont Civil Division ordered approval of the PTO payment to the Koffee Kup employees, for $821,862, plus $16,437 in interest, for a total of $838,299.00

[1] Those creditors had all moved to intervene in the Receivership Docket and Judge Hoar allowed them to participate in hearings and state their positions without ruling on their party status.

Subsequent to that July 15th Entry Order, the Receiver attempted to pay the employee PTO of $838,299, but, according to his account, was blocked by technical difficulties with the payment processor. *See* attached email from Justin Heller, counsel for Receiver, "RE: PTO Calculations 6-17-21" [Exhibit B at 2]. As recently as August 11th, the Receiver stated that he was reprocessing the PTO and that it should be completed on August 19, 2021. Exhibit B at 2.

However, on August 16, 2021, Petitioner-Creditors filed this action, and apparently notified the Receiver. As of August 19, 2021, the Receiver stated that as a result of the filing of this bankruptcy case, he is stayed from processing the employee PTO unless the bankruptcy court modifies the stay to permit payment. Exhibit B at 1. As of the time of this filing, the employee PTO amount of $838,299 remains in the custody and control of the Receiver.

ARGUMENT

I. This Court Should Grant Intervention Under Bankruptcy Rule 2018.

Pursuant to Fed. Bank. R. 2018(b), an Attorney General is permitted to appear on behalf of consumer creditors if the court determines the appearance is in the public interest.

The Vermont Attorney General has a strong interest in this matter. The Second Circuit has recognized that an interest for intervention purposes must be "direct, substantial and legally protectable." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001).

Here, the State has an interest ensuring that labor laws are fully complied with and in protecting the "the health and well-being—both physical and *economic*—of its residents in general." *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013) (emphasis added); *see also In re Keurig Green Mountain Single-serve Coffee Antitrust Litig.*, No. 14-MD-2542 (VSB), 2021 WL 1393336, at *3 (S.D.N.Y. Apr. 13, 2021) (granting intervention to state Attorneys General to intervene in a pending multidistrict class action and holding

that states have a "*parens patriae* interest in protecting the economic well-being of their citizens.").

The Supreme Court has also recognized that, through *parens patriae* actions brought by Attorneys General, States have a protectable "quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 607 (1982). Other courts have also recognized that State Attorneys General have *parens patriae* standing to assert rights for the citizens of their state. *Bank of New York Mellon v. Walnut Place LLC*, 2011 WL 5843488, *2 (S.D.N.Y. November 18, 2011).

There can be no question here that the Petitioner-Creditors are attempting to affect the economic well-being of hundreds of Vermont employees, by stalling the payment of the employees' PTO, and worse, apparently trying to reclaim the pool of PTO money for themselves, after they agreed to paying it out.

Further, the State's interest to protect Vermont employees will be impaired. The Second Circuit has recognized that a motion to intervene is appropriate when the applicant has demonstrated that the "disposition of the action might as a practical matter impair its interest." *Brennan, supra,* 260 F.3d at 129. The State's interest and the effect on Vermont employees is not theoretical or conjectural. As a result of Petitioner-Creditors' filing last week, the employee PTO is already stalled. This is a concrete effect that has already occurred, and which will continue to impair the economic well-being of the Koffee Kup employees. Delay of money is a concrete harm. *Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279, 1331 (7th Cir.1992) ("Money today is not a full substitute for the same sum that should have been paid years [or months] ago.").

Thus, intervention by the Attorney General will uphold the public interest under Rule 2018(b).

Alternatively, if the employees are not considered "consumer creditors," then the Attorney General should be granted permissive intervention under Fed. Bank. R. 2018(a), which allows for intervention by "any interested entity" for "good cause shown." In deciding whether to permit intervention under Rule 2018(a), courts look to various factors, including: (1) whether the moving party has an economic or similar interest in the matter; (2) whether the interest of the moving party is adequately represented by the existing parties; and (3) whether the intervention will cause undue delay to the proceedings. *See e.g.*, *In re Torrez*, 132 B.R. 924, 936 (Bankr. E.D. Cal.1991); *In re City of Bridgeport*, 128 B.R. 686, 687–88 (Bankr. D. Conn. 1991). The Attorney General satisfies this test as well.

First, the Vermont Attorney General has an economic interest to protect Vermont employees. *Purdue Pharma*, 704 F.3d at 215 (states have an interest in protecting the "the health and well-being—both physical and economic—of its residents in general."); *Alfred L. Snapp*, 458 U.S. at 607.

Second, the current participation of only the Petitioner-Creditors and Koffee Kup as the Debtor is insufficient to fully protect the employees' interests. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) (noting that under Federal Rule 24 intervention, the "Rule is satisfied if the applicant shows that the representation of his interest 'may be' inadequate."). On the other hand, adequate representation can be shown if the representing party "demonstrate[s] sufficient motivation to litigate vigorously and to present all colorable contentions." *Natural Des. Def. Counsel, Inc. v. New York State Dep't. of Envtl. Conservation*, 834 F.2d 60, 62 (2d Cir. 1987).

Here, there certainly "may be" inadequate representation. While Koffee Kup and the State agree on paying the PTO, it is insufficient to say that Koffee Kup alone can adequately protect the Vermont employees, particularly since Koffee Kup itself is in a state of dissolution and is deprived of all control under the Receivership. *Roberts v. W.H. Hughes Co.*, 86 Vt. 76, 83 A. 807, 815 (1912) ("The appointment of a receiver over a corporation generally suspends all corporate action, and deprives its officers and agents of all authority over its property"). It is unclear (and unlikely) that Koffee Kup will be positioned "to litigate vigorously and present all colorable contentions" as demanded by the needs of this matter. *NRDC*, 834 F.2d at 62. Therefore, participation by the State will protect the gaps that Koffee Kup cannot cover in its current precarious position.

Third, there will be no undue delay. Petitioner-Creditors have just filed the bankruptcy petition on August 16, 2021. No hearings have been set and no substantive filings have occurred. This petition is thus in its infancy and will not be prejudiced by the timely participation of the Vermont Attorney General.

Therefore, the Attorney General meets the intervention standards of Rule 2018(a). *See also infra* at 6-8.

II. This Court Should Grant Intervention as of Right Under Federal Rule 24.

Pursuant to Fed. R. Civ. P. Rule 24(a)(2), a party moving to intervene as a matter of right must: "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that its interest is not adequately protected by the parties to the action." *Griffin v. Sheeran*, 767 Fed. Appx. 129, 132 (2d Cir. 2019). The Vermont Attorney General satisfies all four elements.

First, this request is timely filed, as the petition was just filed with no further actions being taken yet.

Second, the Vermont Attorney General has a strong interest. The courts have adopted a rather "expansive notion of the interest sufficient to invoke intervention of right." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). As noted above, the State has an interest in protecting the "the health and well-being—both physical and economic—of its residents in general." *Purdue Pharma*, 704 F.3d at 215; *Alfred L. Snapp*, 458 U.S. at 607. The petition here affects the economic well-being of hundreds of Vermont employees, by stalling the payment of the employees' PTO.

Third, the State's interest to protect Vermont employees will be impaired. *See supra* at 4.

Fourth and last, the current participation of only the Petitioner-Creditors and Koffee Kup as the Debtor is insufficient to fully protect the employees' interests. *See supra* at 5-6.

III. Alternatively, this Court Should Grant Permissive Intervention.

If the Court decides that the Vermont Attorney General is not entitled to intervention as a matter of right, the Court has discretion to grant permissive intervention. Fed. R. Civ. P. 24(b). Permissive intervention is warranted because it will neither delay nor prejudice the rights of the parties. The State's intervention will help ensure that laid-off workers are timely paid their outstanding wages.

Courts have recognized that a timely application to intervene is permitted when the moving party has a claim or defense that shares a common question of law or fact with the main action. *Building and Realty Inst. of Westchester and Putnam Counties, Inc. v. New York*, Slip op. *5, No. 19-CV- 11285 (KMK), No. 20-CV-634 (KMK), 2020 WL 5658703

(S.D.N.Y. 2020). The Second Circuit directs that courts consider substantially the same factors whether the claim for intervention is of right, under Rule 24(a)(2), or permissive, under Rule 24(b)(1)(B). *R. Best Produce, Inc., v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 240 (2d Cir. 2006). Courts have recognized that the rule related to permissive intervention "is to be liberally construed." *Olin Corp. v. Lamorak Ins. Co.*, 325 F.R.D. 85, 87 (S.D.N.Y. 2018). The Second Circuit has also directed that the "principal guide in deciding whether to grant permissive intervention is 'whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994).

As set forth above, the Vermont Attorney General believes it satisfies the elements for intervention as of right. However, this Court may also allow permissive participation. Such participation will not unduly delay or prejudice the parties. As explained above, this petition is in its infancy and the State's interest involves a narrow and solvable issue. Further, the employee PTO question is an issue of fact and law "in common" with "the main action"—e.g., how to distribute the remaining funds of Koffee Kup among the creditors owed. Fed. R. Civ. P. 24(b)(2). Lastly, the Vermont Attorney General is intervening solely to assist with a ministerial act of paying the PTO—an issue that has already been litigated and resolved in the Receivership Docket, and, but-for a mere technical glitch, should have and would have been paid and done by now. Exhibit B. This limited issue will not overtake the remainder of the main action; but it should be and can be addressed quickly and firstly.

IV. If the Court Does Not Grant Intervention, then the State's Filing Should be Accepted as an *Amicus Curiae.*

If the Court does not grant intervention, then the Vermont Attorney General asks that the Court deem it an *amicus curiae* and accept the State's filing and position. States are permitted to participate as *amicus curiae*, as of right, in state and federal appellate cases. Vt. R. App. P. 29(a); Fed. R. App. P. 29(a); U.S. Sup. Ct. R. 37(4). Courts also have authority to allow amicus participation at the trial court level. *See e.g., Jin v. Ministry of State Security*, 557 F.Supp.2d 131, 136 (D. D.C. 2008) ("District courts have inherent authority to appoint or deny amici which is derived from Rule 29 of the Federal Rules of Appellate Procedure.").

As noted above, the Vermont Attorney General has a strong interest in protecting the "the health and well-being—both physical and *economic*—of its residents in general." *Purdue Pharma*, 704 F.3d at 215 (emphasis added); *see also In re Keurig Green Mountain*, 2021 WL 1393336, at *3 (states have a "*parens patriae* interest in protecting the economic well-being of their citizens.").

The Attorney General's unique position of enforcing state laws and protecting the economic well-being of Vermont employees will benefit this Court's review of the matter. *U.S. v. Hunter*, 1998 WL 372552, at *1 (D. Vt. 1998) ("[a]n amicus brief should normally be allowed when . . . the amicus has unique information or perspective that can help the court."). Again, the State only plans to participate for this limited issue of resolving the employee PTO.

CONCLUSION

For the foregoing reasons, the Vermont Attorney General's request to intervene in these proceedings should be granted or, alternatively, the State should be deemed an *amicus curiae*. Concurrent with this filing, the Vermont Attorney General also files its principal

memorandum on the issue of employee PTO, and asks that it be accepted consistent with the Court's ruling on this request for leave to intervene.

COMPLIANCE WITH LOCAL RULE 9013-1

Pursuant to Vt. LBR 9013-1(b), the undersigned attorney contacted counsel for all parties to obtain agreement on the relief requested and represents that as of the time of this filing: (1) Debtor Koffee Kup consented to this request and payment of the PTO; (2) the Petitioner-Creditors did not respond to the State's request (but they did receive and acknowledge it).

Dated: August 27, 2021

Respectfully submitted,

STATE OF VERMONT

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by: /s/ *Justin E. Kolber*

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CERTIFICATE OF SERVICE

This is to certify that on August 27, 2021, I served a copy of the foregoing *Motion for Intervention/Amicus* via electronic mail to all parties as follows:

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