UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FAYE B. FEINSTEIN,

Plaintiff,

v.

Civil Action No. 11-CV-00058

BRIAN W. BENDER, *et. al.*,

Defendants.

DEFENDANTS' RESPONSE TO THE SECURITIES AND EXCHANGE COMMISSION'S CIVIL L.R. 7(h) AND 7(i) EXPEDITED NON-DISPOSITIVE MOTION FOR LEAVE TO FILE RESPONSE BRIEF

Defendants object to the Securities and Exchange Commission's ("SEC") "Motion for Leave to File Response Brief" (ECF No. 19) as procedurally improper and mistaken in its own right. The Motion should be denied, and the SEC's Response should be stricken from the record.

The SEC is not a party to this lawsuit. (Compl., ECF No. 1.) Thus, it can only intervene if it meets the Fed. R. Civ. P. 24(b)(2) requirements, and even then, only with Court permission. Tellingly, the SEC does not cite Rule 24(b)(2), much less argue that its requirements have been met. Fed. R. Civ. P. 24(c) also requires that the party seeking to intervene file a separate motion to intervene, which must "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." The SEC has failed to meet this requirement as well. As such, the SEC's Motion is procedurally improper, and the SEC has no right to file a motion of any sort -- much less a thinly-veiled "Sur-Reply" to Defendants' Motion to Dismiss -- and the SEC's Motion should therefore be denied.

Even if the SEC's Motion was procedurally proper, however, it should also be denied because the SEC's proposed Response (ECF No. 19-1) is mistaken in its own right and shows a

lack of understanding of the record in this case. The SEC argues that this Court should simply ignore the signed positions it took in the Fifth Circuit Court of Appeals because: (1) the investor defendants in *Janvey* received the payments in good faith; and (2) the "receiver [in *Janvey*] did not invoke fraudulent transfer law." (ECF No. 19-1 at 2.)

The SEC's former "distinction" makes no sense. The Receiver in this case admits "that none of the counts of the Complaint allege intentional misconduct by Defendants," and that the Receiver is pursuing Defendants for merely accepting the benefit of the transfers. (Receiver's Resp. Br. at 6, ECF No. 11.) Because the Receiver admits that Defendants did nothing wrong, *Janvey* is on point, and the SEC's *amicus* brief in *Janvey* is helpful, and particularly illuminating.

The SEC's latter "distinction" is even more puzzling and conveys the status of the *Janvey* pleadings in an out-of-context manner that renders the SEC's "clarification" nonsensical. The receiver in *Janvey* did not bring a Uniform Fraudulent Transfer Claim; but, the *Janvey* receiver's "counsel acknowledged in the district court" that the decision to not bring a UFTA claim was for a "'good reason.'" 2009 WL 6338943 at * 11; (ECF No. 15 at 3-20). The ***SEC's*** *amicus* brief goes on to explain what that "good reason" was -- namely, that pleading a UFTA claim would have been futile. *Id.* ("As demonstrated below, the receiver cannot recover the principal repayments innocent investors received from SIB as fraudulent transfers because the investors received the payments in good faith and for reasonably equivalent value."). The SEC's *amicus* brief then contains an entire section -- entitled, "The receiver could not recover the principal payments the Investor Defendants received from SIB under the UFTA because those investors received the payments for reasonably equivalent value" -- that argues that even if the receiver *had* brought a UFTA claim, that claim would have failed as a matter of law. 2009 WL 6338943 at * 13 ("The receiver cannot recover the transfers of principal to the Investor Defendants under

either [a constructive fraud or an actual fraud] theory."). Thus, while true that the *Janvey* receiver did not bring a UFTA claim, that is, at best, a distinction without a difference.

The SEC's *stated* position in *Janvey* was that the receiver could not -- under general equitable powers *or* fraudulent transfer law -- pursue "return of principal" payments. *Id.* at * 13, 19 ("The district court reasonably rejected the receiver's attempt to avoid [return of principal payments] by invoking the court's 'equity powers.' . . . [I]t is clear that if the receiver elected to pursue his claims against the Investor Defendants under fraudulent transfer law -- the accepted course for receivers in cases involving Ponzi scheme -- his claims would fail."). Thus, given the Receiver's admission in this case that she has not alleged any wrongdoing by the Benders, the SEC's brief "clarifying" its position in *Janvey* is unnecessary and procedurally improper.

WHEREFORE, Defendants respectfully request that the Court deny the SEC's Motion, and strike the proposed Response from the record.

Date: May 11, 2011.

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