IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

H. THAYNE DAVIS,	:	Case No. 3:04 CV 0059
Plaintiff,	:	(Magistrate Judge Sharon L. Ovington)
vs.	:	**MEMORANDUM IN OPPOSITION TO MOTIONS TO INTERVENE [DOC. 1333], [DOC. 1335], [DOC. 1336] AND [DOC. 1337]**
LIFETIME CAPITAL, INC.,	:	
and	:	
DAVID W. SVETE,	:	
Defendants.	:	

The Receiver H. Thomas Moran, II respectfully moves the Court to deny: (1) Ernest and Jacquelyn Stormses' Request to Intervene [Doc. 1333]; (2) Nena Ellison's Request to Intervene [Doc. 1335]; (3) Jane C. Ivy-Steven's Request to Intervene [Doc. 1336]; and (4) Johnnie C. Ivy's Request to Intervene [Doc. 1337] (collectively the "Proposed Intervenors") because the Proposed Intervenors fail to meet the express requirements of FEDERAL RULE OF CIVIL PROCEDURE 24.

This Receivership is nine years old and is substantially completed. The Proposed Intervenors – disgruntled investors in several insurance policies (the "Jordan Policies") – knew of their purported interests in the proceeds of the Jordan Policies (even attempting, in various ways, to exercise their interests in those policies) years ago. The Proposed Intervenors have had

more than ample opportunity over the years to intervene and, yet, failed to do so and, therefore, cannot intervene at this late date.

I. FACTS.

1. Two weeks prior to the appointment of the Receiver in this case, a viator on the Jordan Policies died. *See* Motion [Doc. 82]. The insurer subsequently paid the Receiver the proceeds from the Jordan Policies. *Id.*

2. On September 21, 2004, the Receiver moved the Court for clarification of the status of the Jordan Policies proceeds. *See* Motion [Doc. 82].

3. Many investors in the Jordan Policies (the "Jordan Investors") objected to the Receiver retaining the proceeds of the Jordan Policies as Receivership Assets and argued that because they had vested property rights in the Jordan Policies, they were entitled to the entirety of the proceeds. *See, e.g.*, [Doc. 107, 136, 149, 150, 152, 154, 173, 296, 298].

4. After the issue was fully briefed, the Court held a January 24, 2005 hearing at which a number of interested parties appeared and submitted legal arguments. *See* Minute Order [Doc. 168].

5. Meanwhile, the Receiver continued to maintain the Receivership Estate. For instance, in 2004 and 2005, the Receiver sought and obtained financing to assure that he could continue to make premium payments to keep LifeTime's insurance policies from lapsing. *See* Order [Doc. 7]; Motion [Doc. 66]; Order [Doc. 193]. Additionally, the Receiver had obtained approximately $4,000,000.00 in matured policy proceeds, and had begun to bill Investors for policy premiums. *See* Motion [Doc. 622] at 5; 7.

6. The Court approved a claims process in January 2005. *See* Order [Doc. 167]. In December 2005, the Receiver sought approval of 600 claims. *See* Receiver's First Motion to Allow claims [Doc. 340]; Order [Doc. 446].

7. On March 16, 2006, the Court ordered the Receiver and the Jordan Investors to mediate the dispute. *See* Order [Doc. 400]. Most of the Jordan Investors reached a compromise and settlement with the Receiver whereby the Receiver agreed to pay each participating investor 62.5% of the total amount they originally invested not to exceed $2,068,000.00 in the aggregate (the "Jordan Settlement"). *See* Motion to Effectuate [Doc. 539].

8. As a result of the Jordan Settlement, on March 29, 2006, the Court denied the Receiver's motion to clarify subject to renewal if the settlement was not effectuated. *See* Order [Doc. 406].

9. After the Receiver filed a Motion to Approve Compromise and Settlement, *see* Motion [Doc. 414], the Court conducted a fairness hearing and, on April 4, 2006, approved the Jordan Settlement. *See* Order [Doc. 416].

10. In mid-2006, the Receiver sold the LifeTime Portfolio. *See* Order [Doc. 471].

11. On July 25, 2006, the Receiver moved to effectuate the Jordan Settlement. *See* Motion [Doc. 539].

12. As of November 7, 2007, the Court had approved over 2,500 claims. *See* Second Motion for Approval [Doc. 841] at 11. The Receiver sought approval of fifty-five claims in November 2007 and later sought approval of the remaining 175 claims. *See* Tenth Motion [Doc. 813]; Eleventh Motion [Doc. 872]; Twelfth Motion [Doc. 905]; Thirteenth Motion [Doc. 1065]; Fourteenth Motion [Doc. 1110]; Motion to Disallow Claims [Doc. 1111]; and Motion to Disallow Claims of Jordan Investors [Doc. 1112].

13. On October 26, 2007, the Receiver moved the Court for instructions regarding those Jordan Investors who had refused to participate in the Jordan Settlement (the "Remaining Jordan Investors"). *See* Motion [Doc. 833]. The Receiver represented that he had escrowed a portion of the Jordan Settlement for Remaining Jordan Investors. *Id.* Importantly, the Receiver notified the Court that he had been in contact – either by telephone, mail or through a representative – with each Remaining Jordan Investor. *Id.* As of October 26, 2007, two Remaining Jordan Investors had not returned claim forms and eleven had returned forms but refused to execute a release. *Id.*

14. The Receiver continued to maintain the Receivership. Prior to February 2008, the Receiver paid off a loan necessary to fund premiums; (2) settled litigation with another entity that had financed premium payments; (3) funded the Jordan Settlement; (4) refunded premium payments to LifeTime Investors; and (5) approved $10,000,000.00 in distributions to LifeTime Investors. *See* Motion [Doc. 622] at 9; Order [Doc. 669]. In late February 2008, the Court approved the disbursement of an additional 2,000,000.00 to approved Investors. *See* Order [Doc. 892].

15. The Receiver subsequently recovered approximately $2,500,000.00 more in assets. *See* Motion – Canadian Funds [Doc. 936]; Motion [Doc. 937]; Motion – U.S. Bank [Doc. 938]. Correspondingly, in March 2009, the Court approved a distribution of $2,500,000.00. *See* Order [Doc. 1026]. And, in June 2009, the Court allowed the Receiver to distribute an additional $1,250,000.00. *See* Order [Doc. 1038].

16. On December 9, 2009, the Court granted the Receiver's motion for instructions noting that six Remaining Jordan Investors – or their next-of-kin or beneficiaries – refused or failed to deliver the requisite release despite the Receiver's multiple efforts. *See* Order [Doc.

1079]. Therefore, the Court authorized the Receiver to send a final notice to the Remaining Jordan Investors or their next-of-kin stating that the claims process was at an end, and requesting that the Remaining Jordan Investors complete claim forms and execute a release. *Id.* The notice authorized by the Court warned the Remaining Jordan Investors that Court would disallow their claims to the proceeds of the Jordan Policies if they did not return the requisite documents. *Id.* The Court further authorized the Receiver to file a motion to disallow the Remaining Jordan Investor claims if they failed to comply with the final notice. *Id.*

17. On March 30, 2010, the Receiver filed a motion to disallow the Remaining Jordan Investors' claims. *See* Motion [Doc. 1112]. Five Remaining Jordan Investors refused to sign a release. *Id.* The Receiver observed that several Remaining Jordan Investors, apparently on the advice of the same agent, had sent letters to the Court complaining that the settlement was inequitable, and noting that that they had been advised not to sign the releases. *Id.* at 8.

18. On June 25, 2010, four Remaining Jordan Investors – Robert Burgess, Rudy Sotelo, Proposed Intervenors Ernest and Jacquelyn Storms, and Irene F. Ivy (through the Proposed Intervenors, Johnnie Ivy, Jane Ivy-Stevens and Nena Ellison) – sent substantially the same letter to the Court. *See* Correspondence [Doc. 1141, 1142, 1143 and 1144]. Proposed Intervenors noted that they had claimed prior to January 24, 2005, that they possessed vested rights in the Jordan Policies proceeds. *See, e.g.,* Correspondence [Doc. 1143]. They further acknowledged that they were aware, as of January 24, 2005, that the Court had not ever determined the ownership of the Jordan Policies proceeds. *Id.* Proposed Intervenors stated that they could not be forced to accept the settlement and that the "Court should rule on our claim and acknowledge our vested rights. . . ." *Id.*

19. From August 4-10, 2010, the same Remaining Jordan Investors, including the Proposed Intervenors, submitted further correspondence to the Court. *See* Correspondence [Doc. 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, and 1156]. They sought permission to attend a scheduled August 23, 2010 fairness hearing by telephone and further continued to assert a property right in the Jordan Policies proceeds.

20. The Court held a hearing on August 23, 2010. *See* Minute Entry [Doc. 1162].

21. Subsequently, on November 10, 2011, the Court granted the Receiver's motion to disallow claims. *See* Order [Doc. 1207]. The Court rejected the Remaining Jordan Investors' claims that it was required to address the "ownership issues related to the Jordan Policies." *Id.* at 9. The Court held that, to challenge ownership of receivership property, the Remaining Jordan Investors were required to intervene. *Id.* The Court further noted that the Remaining Jordan Investors had never attempted to intervene. *Id.*

22. Proposed Intervenors (the Stormses and Nena Ellison on behalf of Irene Ivy) appealed the Court's order. *See* Notices [Doc. 1210 and 1212].[1]

23. On September 12, 2012, the Sixth Circuit affirmed the Court's order disallowing the Stormses' claims to the Jordan settlement proceeds. *See* Order [Doc. 1305].

24. On March 18, 2013, over six months after the Sixth Circuit affirmed the Court, the Proposed Intervenors moved to intervene.

II. ARGUMENTS AND AUTHORITIES.

A. THE PROPOSED INTERVENORS ARE NOT ENTITLED TO INTERVENTION AS A MATTER OF RIGHT.

1. The Proposed Intervenors cannot meet the elements necessary to establish intervention as of right.

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[1] The Sixth Circuit dismissed the Ellison appeal. *See* Order [Doc. 1262].

To show that they are entitled to intervene as a matter of right pursuant to Rule 24(a), Proposed Intervenors must show that: 1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir.1999)). "[T]he failure to satisfy any one of the elements will defeat intervention under the Rule." *Id.* (citation omitted).

Because the Proposed Intervenors cannot establish the first element – timeliness – they are not entitled to intervene.

2. Proposed Intervenors did not timely file their Motions to Intervene.

Timeliness is the "threshold" issue. *Blount-Hill*, 636 F.3d at 284. To ascertain whether a request to intervene of right is timely, courts consider several factors:

> 1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention.

Id. Courts should consider all of the circumstances in deciding whether a motion to intervene is timely. *Stupak-Thrall v. Gickman*, 226 F.3d 467, 475 (6th Cir. 2000) (noting that the "propriety of intervention in any given case [] must be measured under 'all the circumstances' of that *particular* case." (emphasis in the original) (quoting *NAACP v. New York*, 413 U.S. 345, 366 (1994))). In conducting a timeliness inquiry, the Receivership Court must consider each element of the timeliness analysis and factually support its conclusions. *Clarke v. Baptist Mem. Healthcare Corp.*, 427 F. Appx. 431, 436-37 (6th Cir. 2011).

a. The Receivership has substantially progressed.

Although the Receivership has not yet gone to final judgment, the advanced state to which the case has unequivocally progressed militates against allowing intervention. At this point, the Receiver has already completed most significant Receivership matters. For instance, since the inception of the Receivership, the Receiver has marshaled matured policy proceeds and obtained additional assets for distribution to investors, has sold the LifeTime Portfolio, has instituted a claims procedure, and has distributed almost all of the available Receivership funds to the LifeTime Investors. In fact, very little undistributed funds remain. Meanwhile the Receiver has continued to defend the Receivership in pending litigation.

This is not a case involving a mere lapse of time. The Receiver and the Receivership Court have already substantially completed the tasks necessary to close the Receivership Estate. The Receiver has not instituted any new actions in years. This matter has progressed well past the point where intervention should be allowed. Therefore, this factor weighs against the Proposed Intervenors.

b. Proposed Intervenors failed to timely intervene when they knew that the litigation would affect their interests.

Under this prong of the timeliness analysis, "[a] party must have been aware of the risk that his interest *may* be affected by litigation." *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 583 (6th Cir. 1982) (emphasis added). "When a party had knowledge of all the facts . . . and failed to raise the issue when first presented with an opportunity to do so, subsequent intervention is untimely." *United States v. Ritchie Special Credit Invests., Ltd.*, 620 F.3d 824, 834 (8th Cir. 2010).

The question is when Proposed Intervenors knew, or should have known, that the Court would not determine the ownership of the Jordan Policies. The record is clear: the issue of

ownership of the proceeds of the Jordan Policies was presented to the Court in 2004 and the Court declined to decide the issue (after the interested parties reached a compromise and settlement) in 2006. Proposed Intervenors' own 2010 correspondence proves that they were well aware of their purported interests in the Jordan Policies in 2004-2005 and, importantly, knew that a vast majority of the Jordan Investors had settled with the Receiver and were paid long ago. Crucially, the Proposed Intervenors knew in 2006 that the Receivership Court had denied requests to determine the ownership issue. This was "the most significant event," that should have prompted Proposed Intervenors to intervene. *Blount-Hill*, 636 F.3d at 285. Yet, Proposed Intervenors did nothing for four years – they did not seek to intervene, they did not appeal the Court's order.[2] The Receiver's motion to disallow any further claims to the Jordan settlement proceeds prompted objections from the Proposed Intervenors in July 2010. Even then, other than objecting, Proposed Intervenors did not seek to intervene.[3]

The Sixth Circuit noted that the Court "did not abuse its discretion in disallowing the Stormses' claim to the settlement proceeds for their failure to intervene or otherwise timely assert their interest in the Jordan proceeds." Order [Doc. 1305] at 4. Key to the appellate court's decision was that "the issue of the ownership of the Jordan proceeds arose in 2004," the issue was extensively briefed and orally argued, the case went to mediation, over the next four years,

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[2] They apparently knew how to lodge an appeal since they challenged the Court's order disallowing their claims in the settlement proceeds.

[3] That Proposed Intervenors are acting pro se is inconsequential. The lenient treatment generally accorded to pro se litigants has limits." *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996). Thus, pro se litigants must comply with the Federal Rules of Civil Procedure and substantive law. *Felts v. Cleveland Housing Auth.*, 821 F. Supp. 2d 968, 970 (E.D. Tenn. 2011). "Where, for example, a pro se litigant fails to comply with an easily understood court-imposed deadline, there is no basis for treating that party more generously than a represented litigant." *Pilgrim*, 92 F.3d at 416.

the Receiver distributed the settlement proceeds to over 200 claimants, and the remaining Jordan Investors never timely objected to the settlement agreement or appealed the district court's decision not to decide the issue of who owned the Jordan Policies proceeds. *Id.* at 4. The appellate court's opinion regarding the untimeliness of the Stormses' challenge to the disposition of the Jordan settlement proceeds is equally applicable to the issue now before the Court. If Proposed Intervenors were not timely in seeking to challenge the settlement agreement, they are likewise untimely in seeking to intervene to reopen the Jordan Policies ownership issue.[4]

Here, Proposed Intervenors can scarcely claim that they were unaware of the Receivership proceedings or that the Court declined to determine their property interests in the Jordan Policies in 2006. Not until almost seven years later did the Proposed Intervenors move to intervene. This factor weighs heavily against the Proposed Intervenors.

c. Allowing Proposed Intervenors to untimely intervene would prejudice the Receivership.

Proposed Intervenors' delay in seeking to intervene as soon as they knew that the Court would not determine their property interests in the Jordan Policies resulted in the Receiver distributing the Jordan Policies proceeds to the settlors. Moreover, in November 2011 when the Court disallowed the Proposed Intervenors' claims in the Jordan settlement, the Court had approved the distribution of a vast majority of the Receivership Assets to LifeTime Investors. At that point, the vast majority of the Receivership Assets had already been distributed. While the Receiver has continued to pay the expenses of maintaining the Receivership, very little remains to be done.

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[4] Inexplicably, the Intervenors failed to act in a timely fashion even after the Sixth Circuit issued the opinion on which they now rely. Instead, they waited another six months to file their pleadings. Although the action is currently stayed, the Proposed Intervenors' delay is symptomatic of their continued laissez-faire attitude.

Allowing the Proposed Intervenors to intervene now would result in yet more expense and delay to the Receivership Estate and the Lifetime Investors that should have been, and would have been, avoided had the Proposed Intervenors acted timely. Though Proposed Intervenors had more than ample opportunity to assert their claims years ago, they waited until the Receivership was entering its final stages before instituting any action – which included filing and losing an appeal in the Sixth Circuit Court of Appeals.

Finally, in a receivership proceeding, the district court has "broad powers and wide discretion" to fashion relief. *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001). As the Sixth Circuit Court of Appeals affirmed, the Proposed Intervenors were given ample opportunity to be heard on their claims and received due process over the years with regard to the claims they allege. Given the status of the receivership, the length of time and numerous opportunities the proposed intervenors had to pursue their claims and the need to wind the receivership down rather than having it linger on for a number of years, the Proposed Intervenors' motion should be denied.

Therefore, the prejudice to the Receivership far outweighs any prejudice to the Proposed Intervenors.

d. The existence of unusual circumstances militate against intervention.

The unique circumstances of the case – its duration and complexity including the established extensive claims procedures – weigh against allowing intervention. The Receivership involved almost 3000 investors and has spanned over nine years. The Receiver was required to decipher the tangled web of business entities David Svete used to drain Investor funds from LifeTime, and to spend considerable time and effort to track LifeTime's assets. The Receiver and the Court have spent countless hours to marshal funds and distribute them to bilked

Investors. Moreover, the Receiver and the Court attempted to assure that the Proposed Intervenors' rights were protected and that they received their share of the proceeds of the Jordan Policies.

Because the Proposed Intervenors' requests to intervene are clearly untimely, they cannot establish any of the factors necessary to establish a right to intervene. Consequently, the Court must deny their requests.

B. PROPOSED INTERVENORS ARE NOT ENTITLED TO PERMISSIVELY INTERVENE.

1. The request to intervene was untimely.

Like Rule 24(a), FEDERAL RULE OF CIVIL PROCEDURE 24(b) requires that a motion seeking permissive intervention be timely filed. *Blount-Hill*, 636 F.3d at 287. The arguments regarding the untimeliness of Proposed Intervenors' Motions for intervention as of right apply equally, if not more so, to whether they are entitled to permissive intervention. Because their attempts to intervene come far too late, they are not entitled to permissive intervention.

III. CONCLUSION.

WHEREFORE, premises considered, the Receiver H. Thomas Moran, II respectfully prays that the Court deny: (1) Ernest and Jacquelyn Storms' Request to Intervene [Doc. 1333]; (2) Nena Ellison's Request to Intervene [Doc. 1335]; (3) Jane C. Ivy-Steven's Request to Intervene [Doc. 1336]; and (4) Johnnie C. Ivy's Request to Intervene [Doc. 1337] together with costs and fees and any other relief to which he is entitled.

Respectfully submitted:

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CERTIFICATE OF SERVICE

This is to certify that on the **29th** day of **March, 2013** a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and that a true and correct copy of the foregoing document was electronically mailed to the following:

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By: *<u>/s/ Joseph C. Oehlers</u>*
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