

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

<b>SECURITIES AND</b>	§	
<b>EXCHANGE COMMISSION,</b>	§	
<b>Plaintiff</b>	§	
	§	<b>CASE NO. H-07-2211</b>
	§	
<b>DARREL T. USELTON</b>	§	
<b>AND JACK E. USELTON</b>	§	
<b>Defendants</b>	§	

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**STATE OF TEXAS' OPPOSED MOTION TO  
INTERVENE TO STAY PROCEEDINGS**

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**TO HONORABLE JUDGE KENNETH HOYT:**

Pursuant to Federal Rule of Civil Procedure 24, the State of Texas requests an order permitting intervention in the above-captioned case for the purpose of seeking a limited stay of proceedings for one year from the date of the filing of this motion, or the completion of related and ongoing criminal indictments and prosecution in the 339<sup>th</sup> District Court, Harris County, Texas, Hon. Caprice Cospers, presiding, against these same defendants for substantially the same conduct with which they are charged in the instant case.

**BACKGROUND**

On July 9, 2007, the Securities and Exchange Commission ("SEC") filed civil charges in this Court against Darrel T. Uselton and Jack E. Uselton (collectively "Useltons" or "Defendants") for alleged securities fraud violations.

Less than one week earlier, on July 3, 2007, a grand jury in Houston, Harris County, Texas, had indicted both Defendants, alleging that they had combined and conspired with others to violate New York state securities laws and Texas state securities laws. Specifically, each defendant is charged with one count of Engaging in Organized Criminal Activity-Money Laundering for violating Section 29 of the Texas State Securities Act, and one count each of Engaging in Organized Criminal Activity-Money Laundering for violating Section 352-c(6) of the General Business Law of the State of New York. *See* Exhibit A. These criminal cases have a future docket setting of September 25, 2007.

The alleged conduct and activity in the state criminal cases are virtually identical to conduct and activity alleged in the SEC's complaint. As described in the Texas Attorney General's Affidavit for Search Warrant in the criminal cases ("Texas AG Search Warrant"), which was ordered on December 5, 2006, the Useltons are alleged to have orchestrated a market manipulation scheme in which the trading volume and price of penny stock securities, including Oretch, Inc. ("ORTE"), were artificially increased

so that they could be resold at a higher price. The perpetrators of this scheme first obtained free or cheap stock. They then increased the share price and volume by using the Internet to distribute spam email to hundreds of thousands of prospective investors urging them to purchase the stock. . . . After manipulating the price of stock upward, they then sold their stock to unwitting investors on the NASDAQ over the counter market located in New York, New York. This type of scheme is referred to as a "pump and dump." . . . Additionally, intermediary businesses were used to send the spam through "hijacked" computers, further concealing the identity of the perpetrators.

*See* Exhibit B (Texas AG Search Warrant at ¶¶ 8-9); Exhibit C (July 9, 2007 Texas Attorney General News Release ("Texas Attorney General, SEC File Market Manipulation and Stock Fraud Charges Against Two Texas Residents").

The conduct alleged by the SEC in the case before this court is nearly identical to the criminal conduct alleged in the state criminal proceedings. The SEC complaint alleges that the Useltons obtained shares for little or no cost from penny stock companies, including ORTE, and sold those shares by orchestrating spam email campaigns using an array of computer “botnets” (*i.e.*, hijacked computers) that concealed the Useltons’ identity, their holdings, and their intent to sell their stock into the artificial market they created through their spamming campaigns. *See generally* SEC Complaint at ¶¶ 1-6. Likewise, the time frame of the alleged activity in both criminal and civil cases are virtually identical.

Accordingly, the SEC’s civil case, as well as the documents and witnesses necessary to prove its case, are nearly identical to those in the Texas criminal cases.

### **ARGUMENT**

Federal Rule of Civil Procedure Rule 24(a) provides a right of intervention for an applicant who can demonstrate: (1) an interest in the subject matter of the civil suit; (2) an impediment to his protection of that interest arising from the pending action; and (3) inadequate protection of that interest by the existing parties to the action. *See* 7C CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1908 (1986 & Supp. 2003).

Alternatively, intervention may be permitted by the courts under Rule 24(b)(2) “when an applicant’s claim or defense and the main action have a question of law or fact in common.” FED. R. CIV. P. 24(b)(2). Significantly, several federal circuit courts of appeal have instructed that Rule 24 is to be broadly applied in favor of intervention in case of doubt. *See, e.g., Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6<sup>th</sup> Cir. 2000); *United States v. Union Elec. Co.*, 64 F.3d

1152, 1158 (9<sup>th</sup> Cir 1995). *See generally* MOORE'S FEDERAL PRACTICE § 24.03[1] & [2] (3d ed. 2003).

In the instant case, intervention by the State of Texas is appropriate under both cited provisions for the limited purpose of protecting the impending trial of the criminal indictments against the defendants in this action.

The State of Texas has a direct and substantial interest in the subject matter of the instant civil suit, which substantially parallels the facts of the criminal cases that the State of Texas is currently prosecuting. Specifically, the State of Texas has a “discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter.” *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988). In *Chestman*, the Second Circuit held that the District Court had not abused its discretion in permitting intervention by the government under either Rule 24(a) or (b) under similar circumstances.

The disposition of the civil suit may impair the State of Texas' ability to protect its interest. As a result of the filing of the civil action, those charged in the pending indictment gain an opportunity to benefit from discovery in the context of the civil case that they would be prohibited from obtaining under the Texas Code of Criminal Procedure. The discovery obtained in the civil forum and the State of Texas' right to prevent the premature disclosure of evidence would be irretrievably lost if the civil suit proceeds.

Additionally, the State of Texas' interest in enforcing its criminal laws cannot be protected adequately by the existing parties in the civil case. The private parties cannot represent the government's interest with respect to the investigation and enforcement of Texas state criminal statutes. The State of Texas alone is in the position of being directly harmed by

civil discovery and depositions, and, if intervention to permit the State of Texas to seek a limited stay is not granted, that interest will be completely unprotected and the testimony of potential witnesses will be revealed when civil discovery takes place. For the foregoing reasons, the State of Texas requests that it be granted intervention as a matter of right in the above-captioned case for the purpose of obtaining a limited stay.

Alternatively, and in the absence of a right to intervention, the State of Texas requests that the court exercise its sound discretion to permit it to intervene under Rule 24(b) of the Federal Rules of Civil Procedure. *See In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) (Department of Justice granted permissive intervention in private civil case to seek protection of privileged law enforcement materials). Rule 24(b) grants the court discretion to permit intervention when there is: (1) a timely motion, (2) a common question of law or fact and (3) a basis for jurisdiction independent of diversity of citizenship. *See MOORE'S FEDERAL PRACTICE*, §24.11 (3d ed. 2003); *Bureerong v. Uvawas*, 167 F.R.D. 83, 86 (C.D. Cal. 1996). In exercising its discretion whether to permit intervention, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. FED R. CIV. P. 24(b).

This motion is being timely filed immediately after the defendants' answers are due, and the court's jurisdiction is not based upon diversity of citizenship. Finally, there are common issues of fact and law in the above-captioned case and in the ongoing criminal indictment (attached hereto as Exhibit A). A limited stay of this case will not prejudice the rights of any of the original parties. In fact, the parties to this case will benefit. Plaintiffs will benefit from the requested stay because the resolution of the criminal case will likely reduce the scope of discovery and simplify the issues in the civil case. Also, the defendants will be relieved of the

necessity of concurrently defending a civil lawsuit and a criminal action and, thus, will not be required to divert resources that may be necessary for the defense of the criminal cases. *See White v. Mapco Gas Products Inc.*, 116 F.R.D. 498, 501-03 (E.D. Ark. 1987).

Counsel for plaintiff, the Securities and Exchange Commission, have advised the State of Texas that they do not oppose the limited stay of the civil proceedings. Counsel for both defendants, Dan Cogdell, has advised the State of Texas that he is opposed to the limited stay of the civil proceedings.

The State of Texas has a strong interest in maintaining the integrity of the criminal process, which will be subverted unless the court allows intervention in the present action. Under the controlling standards, the State of Texas has a right to limited intervention under Rule 24(a) or, in the alternative, permissive intervention under Rule 24(b) is warranted.

THEREFORE, in light of the government's strong interest in the subject matter of the above-captioned case as well as the absence of prejudice to the parties thereto, the State of Texas requests that it be granted intervention in this case for the purpose of moving for a limited stay of the proceedings.

Respectfully submitted,

/s/

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