UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAINT CATHARINE COLLEGE, INC. **PLAINTIFF**

v. **CIVIL ACTION NO. 3:16-CV-00113-GNS**

JOHN B. KING, JR IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE U. S. DEPARTMENT OF EDUCATION AND KATHY FEITH, IN HER INDIVIDUAL CAPACITY AS AN EMPLOYEE OF THE U.S. DEPARTMENT OF EDUCATION **DEFENDANTS**

RESPONSE BRIEF AND OBJECTION TO MOTION TO INTERVENE

Defendant Department of Education, by and through counsel of record, for its Memorandum in Support of Response to Motion to Intervene, states as follows:

Saint Catharine College, Inc. ("SCC") filed suit against the United States Department of Education ("DOE"), seeking declaratory and injunctive relief in a dispute over Title IV funds that SCC seeks from DOE. Ross, Sinclaire & Associates, LLC ("RSA") seeks to intervene in that action, based on its ownership of less than 5% of bonds issued by the City of Springfield, for which SCC was expected to be the source of repayment, and a generalized claim that the non-rated municipal bond market might be affected by SCC's suit. RSA's motion to intervene is inappropriate and must be denied. The United States has not consented to being sued by RSA, and therefore sovereign immunity precludes RSA's claim. RSA also fails to satisfy Article III of the United States Constitution, as there is no case or controversy between RSA and DOE for this

Court to address. In addition, the Sixth Circuit has held that mere creditors, such as RSA, are categorically barred from intervening in actions. Under Sixth Circuit precedent, RSA lacks the requisite significant legal interest to intervene, has failed to demonstrate that its ability to protect any interest will be impaired in the absence of intervention, and has not met its burden of showing that parties already before the Court may not adequately represent their purported interest. Intervention would also cause unnecessary delay. These factors establish that intervention, whether by right or permissive, is inappropriate in this case. Because RSA's claim is barred by sovereign immunity and fails to satisfy Article III, and because intervention is otherwise inappropriate, the Court should deny RSA's motion.

I. There Is No Subject Matter Jurisdiction for RSA's Claim

A. Sovereign Immunity Bars RSA's Intervention

RSA does not fall within the zone of interest for which Title IV, and the limited waiver of sovereign immunity for Title IV under the Administrative Procedures Act (APA), were enacted, so its claim against DOE is barred.

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

The purpose of Title IV is to assist in making available the benefits of postsecondary education to eligible students in institutions of higher education. 20 U.S.C. § 1070. Nothing in Title IV is remotely intended to protect or regulate a corporation whose business is "investment banking, securities brokerage and asset management." (R. 30-1 at 1). RSA possesses no interest

that Title IV protects or regulates. RSA has no interest in the zone of interests intended by Title IV, and the United States has not consented to be sued by any parties outside that zone of interests.

Absent an explicit statutory waiver of sovereign immunity[1], a party may not bring or maintain a suit against the United States. "It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued . . . .'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). "For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign." *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012). "A statutory cause of action is presumed to extend only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1382 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). RSA relies on the limited waiver of sovereign immunity in the Administrative Procedures Act (5 U.S.C. § 702) for subject matter jurisdiction.[2] But in the Sixth Circuit, "a party which … seeks to obtain judicial review of agency action pursuant to § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, must be able to demonstrate what the Supreme Court calls 'prudential standing.' This means that the interest

[1] "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969).

[2] RSA also cites 5 U.S.C. §§ 703 and 28 U.S.C. § 1361. 5 U.S.C. § 703 addresses only form and venue and does not establish jurisdiction. 28 U.S.C. § 1361 addresses mandamus; it does not expand the zone of interest of Title IV, and "28 U.S.C. s 1361 . . . . does not provide an independent ground for jurisdiction." *Starbuck v. City & Cty. of San Francisco*, 556 F.2d 450, 459 (9th Cir. 1977) (citing Wright, Handbook of the Law of Federal Courts, p. 84 (3d ed. 1976)). In the Sixth Circuit, for "jurisdiction under section 1361 . . . a court must find that a duty is owed to the plaintiff." *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987). DOE owed no duty, under Title IV or otherwise, to RSA.

sought to be protected must 'arguably' be within the 'zone of interests' protected or regulated by the statute in question." *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 914 (6th Cir. 2002).

In the absence of consent to suit, there is no jurisdiction for RSA's claim against DOE, an agency of the United States, and sovereign immunity bars RSA's attempt to assert this claim.

B. RSA's Claim Fails to Satisfy Article III

RSA fails to satisfy the minimum requirement of Article III: to establish that their asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm of which they complain. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 45-46 (1976) (citations omitted).

The series of multiple, tenuous steps RSA claims as the basis of its suit illustrates how remote its claimed harm is. RSA is "a full-service investment banking, securities brokerage and asset management firm." (R. 30-1 at 1). RSA is concerned about its speculative investment in a bond issue. (R. 30-1 at 2). RSA holds around $1,150,000 in bonds issued by the City of Springfield, Kentucky (R. 30-1 at 2). The outstanding bond issue totals $23,305,000. (*Id.*). RSA anticipated that SCC's revenue stream would provide the source of payment on the $23,305,000 in outstanding debt. (*Id.*). RSA's $1,150,000 stake is less than 5% of the outstanding $23,305,000 in debt related to that bond issue. RSA does not quantify that single bond issue in the context of other debts currently owed by SCC. Yet RSA asserts that in the absence of an injunction affecting what is claimed to be at stake in SCC's suit against DOE, "a default on $23,305,000 in bonds is threatened, and the health of the non-rated municipal bond market in which RSA heavily participates is jeopardized …. The ability of RSA to secure needed funding for numerous other institutions in Kentucky is severely threatened … it harms the

citizens of Kentucky, Kentucky's economy and the quality of higher learning throughout Kentucky." (R. 30-1 at 2).

But the injunctive relief sought by SCC - which is coextensive with that sought by RSA - can be presently quantified as whatever might be paid from a maximum of $346,041 in submissions[3], which pales in comparison to the $23,305,000 at stake in this single bond issue.

[3] SCC complains of six submissions for student financial aid, describing them as follows:

1) On April 16, 2015, SCC submitted $253,288. (R. 1 at #52.). $247,788 of that was paid on May 19, 2015 (*Id.* at #55). The originally unpaid $5,500 was resubmitted as part of submission #6, and was paid in full. The unpaid amount on Submission 1 then became zero.

2) On May 21, 2015, SCC submitted $601,384. (*Id*. at #59.). $66,752 and $38,770 of that was paid, and another $510,839 of that was paid on June 10, 2015 (*Id.* at #61-62, 64). No unpaid amount remained. (The overpayment was netted in Submission 3 which included some resubmissions from Submission 2.) The unpaid amount on Submission 2 then became zero.

3) On July 7, 2015, SCC submitted $613,183. (*Id*. at #79). That amount was paid in full on August 11, 2015 (*Id*. at #82). The unpaid amount on Submission 3 then became zero.

4) On September 3, 2015, SCC submitted $805,184. (*Id*. at #84.). That full amount was paid in full on September 23, 2015 (*Id.* at #87). The unpaid amount on Submission 4 then became zero.

5) On October 9, 2015, SCC claims to have submitted $741,415. (*Id.* at #89.) (This figure was disputed in mediation and remains undocumented.) SCC states that $558,777 of that was paid on October 29, 2015 (*Id.* at #92), at which point the claimed unpaid amount for Submission 5 became $182,638.

6) On November 18, 2015 SCC submitted $869,375 (*Id.* at #108), and this was resubmitted on January 15, 2016. (*Id.* at #122). SCC states that $320,293 of that amount was paid on February 11, 2016 (*Id.* at #123), at which point the claimed unpaid amount for Submission 6 became $549,082. (That $549,082 plus the $182,638 from Submission 5 leaves $731,720 in dispute.)

Submissions 1-4 have been paid in full, per SCC's complaint. SCC's complaint in February alleged that $731,720 remained unpaid on submissions 5 and 6. $385,679 has been paid on claims in those two submissions subsequent to the filing of the complaint. That leaves $346,041 that SCC claims remains unpaid. This figure includes sums for requests DOE asserts cannot be paid for reasons including that they were duplicate requests, were untimely filed, or for which the documentation submitted by SCC does not support finding that the student is eligible for the payment request. Therefore $346,041 is the maximum possible amount in controversy between SCC and DOE to which the duplicative injunctive relief sought by RSA could apply.

This $346,041 maximum pales even further in comparison to SCC's overall indebtedness, and is insignificant in the whole of the "non-rated municipal bond market" RSA cites.

RSA's claim that they are a creditor for $1.15 million of a $23.305 million bond issue does not mean that RSA has any direct interest in the $346,041 sought in SCC's submissions, nor does RSA allege that there is any basis to assume any likelihood that any of that amount that may be paid to SCC would in turn be paid to RSA as opposed to employees or staff of SCC, SCC's vendors, SCC's other creditors (secured or otherwise), taxes, or any other recipient besides RSA. RSA's citation of a remote and tenuous chain of facts that do not end in any likelihood of RSA obtaining any benefit from this litigation does not constitute a claim or controversy between itself and DOE that passes muster under Article III. Where speculative inferences are necessary to connect an injury to the challenged actions of a defendant, and the complaint suggests no substantial likelihood that victory in the suit would result in a putative party receiving the benefit they desire, a federal court, properly cognizant of the Article III limitation upon its jurisdiction, must require more before proceeding to the merits. *Simon*, 426 U.S. at 45-46. There is no Article III case or controversy between RSA and DOE, so RSA is not a proper intervenor.

II. RSA's Proposed Intervention Is Improper under Rule 24

Under Rule 24(a), "a proposed intervenor must establish the following four elements: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest." *United States v. Michigan*, 424 F.3d 438 (citing *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999)). "The proposed intervenor must prove each of the four factors; failure to meet one of the criteria will require that

the motion to intervene be denied." *Id.*, quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). RSA fails to meet three of the four criteria, as it has no substantial legal interest in this case, there is no showing that any interest of RSA will be impaired without intervention, and RSA has no interest that is not adequately represented by other parties.

A. RSA Has No Substantial Legal Interest in This Case

1. Intervention Is Disallowed for Mere Creditors in the Sixth Circuit, as Elsewhere

RSA seeks to intervene on the basis that SCC is the expected source of payment on bonds issued by the City of Springfield, Kentucky, and that RSA holds less than 5% of this outstanding indebtedness. (R. 30-1 at 2, 3). The Sixth Circuit, like other circuits, holds that mere creditors are inappropriate intervenors. "[A] putative intervenor does not possess the requisite interest where its 'primary interest' in the litigation is to preserve a party's financial viability in order to protect the intervenor's own economic interests in the party's continued solvency. Thus, an applicant is not due intervention as a matter of right where the applicant seeks only to protect the assets of a party to the litigation in order to ensure that its own contingent claims to those assets remain valuable in the future." *Reliastar Life Insurance Company v. MKP Investments*, 565 F. Appx. 369, 372 (6th Cir. 2014) (citing *Blount–Hill v. Bd. of Educ. of Ohio*, 195 F. Appx. 482, 486 (6th Cir. 2006), *United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir. 2001), *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008–09 (8th Cir. 2007) and *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 62–63 (5th Cir. 1987)).

"At bottom, Rule 24(a) does not entitle creditors to intervene in unrelated litigation merely to protect the assets of those who owe them debts..." *Reliastar Life*, 565 F. Appx. at 373 (citing *United States v. Alisal Water Corp.*, 370 F.3d 915, 920 n.3 (9th Cir. 2004). "Stretching Rule 24(a) to apply to ... circumstances here would permit intervention as a matter of course by

even a contingent creditor of almost any defendant ... which would broadly extend the right of intervention to anyone who 'might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit.'" *Id*. (quoting *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009)). In the Sixth Circuit, those floodgates are rightfully closed tight.

Another reason for precluding mere creditors from intervening is that often, as here, a party will have many creditors (RSA itself holds less than 5% of a single bond issue), and allowing one creditor to intervene may allow that creditor to gain an advantage over other creditors. Throwing the door open to all creditors would make litigation extremely unwieldy, inefficient, and potentially unfair to other creditors; it is reasonable to exclude all creditors, as they will always have other recourse against the appropriate party (the debtor) elsewhere.

In any event, in the Sixth Circuit, as in other circuits, creditors are precluded from intervening, and that principle alone is a basis on which RSA's motion should be denied.

2. RSA's Claimed Interest Is Too Attenuated to Constitute a Significant Legal Interest

In the Sixth Circuit, "the proposed intervenors must show 'a direct, significant legally protectable interest' in the subject matter of the litigation, sufficient 'to make it a real party in interest in the transaction which is the subject of the proceeding.'" *Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414, 418 (E.D. Ky. 2015), quoting *United States v. Detroit Int'l Bridge Co*., 7 F.3d 497, 501 (6th Cir. 1993), and *Providence Baptist Church v. Hillandale Committee, Ltd*., 425 F.3d 309, 317 (6th Cir. 2005). "Thus, the 'inquiry into the substantiality of the claimed interest is necessarily fact-specific.'" *Id*., quoting *Michigan State AFL–CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

RSA has no direct interest in the subject matter of this litigation. DOE owes SCC some, all, or none of the maximum $346,041 remaining of the contested, denied submissions (R. 1 at

#52-55, 59-64, 79-82, 84-87, 89-92, 108-123). If some or all of that amount were ultimately deemed payable, some or all of that sum might go to the City of Springfield, and then to bondholders; but, possibly, none of that sum might ultimately find its way to the bondholders, because it is entirely likely that some or all of that amount might to go employees, vendors, taxes, other creditors, or any number of other entities. RSA enunciates no claim or right to any of what is at issue in this litigation. RSA has never had any direct relationship, transactional or otherwise, with DOE or the subject matter of this litigation, and RSA's claimed interest is too distant, attenuated and speculative to make it an appropriate intervenor.

B. RSA Has Not Demonstrated That Its Ability to Protect Any Interest Will Be Impaired in the Absence of Intervention

"An applicant for intervention fails to meet his burden of demonstrating inadequate representation when no collusion is shown between the representatives and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (citations omitted). RSA has not attempted to articulate any collusion between SCC and DOE, and the record is devoid of any indication of such. SCC does not have or represent any interest adverse to RSA; in fact, RSA seeks relief identical to relief sought by SCC.[4]

[4] In relation to this third prong, RSA claims that it "owns approximately $1,150,000 in bonds issued for SCC, which are effectively unmarketable due to DoE's illegal conduct, and RSA is a substantial participant in the municipal bond market in Kentucky that is being adversely affected by DoE's continuing illegal conduct. In addition, DoE's illegal conduct is threatening a default in more than $23,305,000 in bonds issued by the City, which were underwritten by RSA." (R. 30-1 at 6). None of this has any factual bearing or relevance to whether or not SCC is or is not entitled to some or all of its denied submissions, which is what is at issue in this lawsuit.

C. There Is No Showing that the Parties Already Before the Court May Not Adequately Represent the Proposed Intervenor's Interest

In the Sixth Circuit, "the applicant for intervention bears the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). "This requires 'overcom[ing] the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit ... have the same ultimate objective.'" *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (quoting *Wade v. Goldschmidt*, 673 F.2d 182, 186 n. 7 (7th Cir. 1982)). RSA has not overcome the presumption of adequate representation, nor satisfied its burden of demonstrating inadequate representation, nor differentiated SCC's ultimate objective from RSA's. RSA has the same ultimate objective as SCC: an injunction directing DOE to handle SCC's submissions in a certain manner. (R. 30-2 at 6.) "[W]hile the respective interests do not need to be 'wholly' adverse in order to support intervention, they must at least be different." *Reliastar Life*, 565 F. Appx. at 374 (citation omitted). RSA's interests in this lawsuit are not different than SCC's. A desire to litigate the case differently would not suffice either. "A mere disagreement over litigation strategy ... does not, in and of itself, establish inadequacy of representation." *Bradley*, 828 F.2d at 1192.

III. Unnecessary Delay Makes Intervention, Permissive or by Right, Inappropriate

"Justice delayed is justice denied," SCC has told this Court (R. 20 at 15); SCC has also claimed that this dispute "continues to do irreparable harm." (R. 6-1 at 7; see also R. 20 at 12). DOE also opposes unnecessary delay in this matter. Allowing RSA to intervene would cause unnecessary delay.

"[I]n addition to the four factors derived from the federal rule itself, 'judicial economy is a relevant consideration in deciding a motion for ... intervention.'" *Horrigan v. Thompson*, 145 F.3d 1331 (Table), 1998 WL 246008 (6th Cir. 1998) (quoting *Venegas v. Skaggs*, 867 F.2d 527,

531 (9th Cir. 1989), *aff'd sub nom. Venegas v. Mitchell*, 495 U.S. 82 (1990)). Undue delay is a reason to deny permissive intervention. *Penick v. Columbus Ed. Ass'n*, 574 F.2d 889, 890 (6th Cir. 1978). If RSA is allowed to intervene, there is no question that judicial economy would be negatively impacted.

> It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. **Additional parties always take additional time**. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.

Usery v. Brandel, 87 F.R.D. 670, 678 (W.D. Mich. 1980) (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F.Supp. 972, 973 (D.Mass. 1943) (emphasis added).

As mentioned previously, mere creditors are not allowed to intervene; one reason for that bright line rule, in addition to creditors having no substantial legal interest in a case, is illustrated by a recent case from the Eastern District:

> This could open the floodgates of litigation, delaying cases and hindering judicial economy. In this case alone, if the Court allows the proposed intervenors to intervene, what would have prevented any other Kentucky taxpayer from seeking intervention in this same suit? On what basis could the Court prevent any number of other taxpayers from also seeking to become part of this particular lawsuit?

Ark Encounter, LLC v. Stewart, 311 F.R.D. 414, 422 (E.D. Ky. 2015).

If parties could intervene merely because they are creditors or taxpayers, the disruption to orderly, timely litigation would be complicated not only by the multiplicity of issues and motions, but by the multiplicity of parties as well.

The potential that an intervenor might file more claims, amend pleadings further, and inject additional issues, coupled with conclusions that a proposed intervenor lacks a substantial

legal interest in the lawsuit, and that the proposed intervenor is adequately represented by existing parties, is a sufficient analysis of the relevant criteria required by Rule 24(b), and an appropriate basis on which to deny intervention. *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007). All of those conclusions are justified in the present case and permissive intervention should be denied.

IV. Permissive Intervention Is Inappropriate for Similar Reasons

RSA seeks the same remedy as SCC: injunctive relief regarding SCC's submissions.[5] If RSA's intent is to simply litigate the same issue as SCC (DOE's handling of SCC's submissions) and to seek the same remedy (injunctive relief compelling payments to SCC), then RSA's participation would cause unnecessary delay as discussed above, and its failure to overcome the presumption of adequate representation by SCC should preclude its intervention; "while the respective interests do not need to be 'wholly' adverse in order to support intervention, they must at least be different." *Reliastar Life*, 565 F. Appx. at 374 (citation omitted). "Where the proposed intervenor merely underlines issues of law already raised by the primary parties, permissive intervention is rarely appropriate." *United States v. Am. Inst. of Real Estate Appraisers of Nat. Ass'n of Realtors*, 442 F. Supp. 1072, 1083 (N.D. Ill. 1977).

[5] If RSA is pursuing broader claims or remedies based on its "interests in the bond market in Kentucky" (R. 30-1 at 6) and its claim that "Kentucky citizens are deprived of reasonable certainty in conducting business, and local communities are deprived of the ability to obtain financing for critical projects or needed costs savings" (R. 30-1 at 7), it is bringing a generalized grievance that does not warrant exercise of jurisdiction, and sets itself outside of the class of persons who may invoke the courts' decisional and remedial powers, *Warth v. Seldin*, 422 U.S. 490, 499 (1975); further, "pure economic expectancy is not a legally protected interest for purposes of intervention." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 143 F. App'x 751, 753 (9th Cir. 2005). If intervention is sought for remedies unavailable as a matter of law - such as an overbroad injunction directed at DOE's interaction with parties other than RSA - permissive intervention should be denied. *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6th Cir. 1982).

RSA's attempt to intervene is similar to that in *National Collegiate Athletic Ass'n v. Corbett*, 296 F.R.D. 342301 (M.D. Pa. 2013), in which a state senator sought to insert himself and his claimed interests into litigation between the NCAA and the Commonwealth of Pennsylvania in the wake of the Jerry Sandusky abuse scandal. There, the court denied permissive intervention on grounds applicable to this case: the proposed intervenor's interests are aligned with those of an existing party; that another party is capable of adequately representing those interests; the proposed intervenor will add nothing of value to the proceedings; and the proposed intervention would add to costs and delay. *Id*. at 350.

V. RSA's Intervention Will Be Moot if DOE's Motion to Dismiss Is Granted

"[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (citations omitted). RSA complains of actions involving DOE and SCC. RSA has no direct claim against DOE. RSA is not within the zone of interests contemplated by Title IV. DOE has not consented to suit by RSA. RSA has no case or controversy with DOE. If DOE's motion to dismiss is granted, RSA has no basis on which to continue its suit. The Court need not decide RSA's motion to intervene before addressing DOE's motion to dismiss, because RSA's motion becomes moot if the motion to dismiss is granted.

VI. Conclusion

Because the United States has not consented to being sued by RSA, and therefore sovereign immunity precludes RSA's claim; because RSA fails to satisfy Article III of the United States Constitution, as there is no case or controversy between RSA and DOE for this Court to address; because the Sixth Circuit has held that mere creditors, such as RSA, are

categorically barred from intervening in actions; because RSA lacks the requisite significant legal interest to intervene, has failed to demonstrate that its ability to protect any interest will be impaired in the absence of intervention, and has not met its burden of showing that parties already before the court may not adequately represent their purported interest; and because intervention would also cause unnecessary delay, RSA's proposed intervention is inappropriate in this case, and the United States objects to RSA's motion to intervene and moves this Court to deny RSA's motion.

A proposed Order is hereto attached.

Respectfully submitted,

JOHN E. KUHN, JR.
United States Attorney

/s/ Jason Snyder
Jason Snyder
Michael D. Ekman
Assistant United States Attorneys
717 W. Broadway
Louisville, Kentucky 40202
(502) 582-6993 / (502) 625-7110 (fax)
jason.snyder@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Jeffrey K. Phillips
Steptoe & Johnson, PLLC
One Paragon Center
2525 Harrodsburg Rd
Suite 300
Lexington, KY 40504

Adam T. Goebel
Lindsey L. Howard
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

/s/ Jason Snyder
Jason Snyder
Michael D. Ekman
Assistant United States Attorneys
717 W. Broadway
Louisville, Kentucky 40202
(502) 582-6993 / (502) 625-7110 (fax)
jason.snyder@usdoj.gov