IN THE UNITED STATES DISTRIC COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE ENVISION HEALTHCARE CORPORATION SECURITIES LITIGATION	)	
	)	**Case No. 3:17-cv-01112**
This Document Relates to:	)	
	)	**(Consolidated with Case Nos.**
ALL ACTIONS	)	**3:17-cv-01323 and 3:17-cv-01397)**
	)	
	)	**Judge Campbell/Frensley**

ORDER

I. INTRODUCTION

In these consolidated securities fraud cases, Plaintiffs allege, among other things, that Defendant Envision Healthcare Corporation ("Envision") engaged in misrepresentations and omissions related to its out-of-network billing practices. Docket No. 88 (Consolidated Class Action Complaint), p. 5-6. Defendants deny the allegations and moved to dismiss the Complaint. Docket Nos. 122, 123, 125, 126. The Court ruled on Defendants' Motions, and some of Plaintiffs' claims survived. Docket No. 152.

This matter is now before the Court upon a "Motion to Intervene by Putative Class Member for the Limited Purpose of Preventing Claim Expiration Under the Statute of Repose" filed by Corvex Master Fund LP and Corvex Select Equity Master Fund LP (collectively, "Corvex"). Docket No. 258. Corvex has also filed a Supporting Memorandum. Docket No. 259. Defendants have filed a Response in Opposition, and Corvex has filed a Reply. Docket Nos. 279, 285. Plaintiffs have stated that they take no position on the Motion. Docket No. 259, p. 1, n.2. For the reasons set forth below, Corvex's Motion (Docket No. 258) is GRANTED.

II. LAW AND ANALYSIS

A. Corvex's Motion to Intervene and the Applicable Statute of Repose

Corvex asserts that it is a "putative class member of the Envision class action" that claims membership in the class "by virtue of the fact that Corvex (1) purchased Envision securities during the Class Period and (2) held those securities through certain alleged disclosures, causing Corvex damages." Docket No. 259, p. 5. Corvex seeks to intervene in this matter "for the sole and limited purpose of protecting certain of [its] individual claims, as alleged in the amended class complaint (Dkt. No. 88), from expiration under the Securities Exchange Act of 1934's statute of repose." *Id.* at 1 (footnote omitted). "Corvex explicitly does *not* seek appointment as a representative plaintiff or to otherwise interpose itself into this action in any way." *Id.* at 4.

Corvex maintains that it has claims against Defendants under the Securities Exchange Act of 1934 that are subject to the Exchange Act's two-year statute of limitations, which is tolled by the pendency of a class action, but that tolling is subject to forfeiture it if files an individual action before a decision is made on class certification. *Id.* at 2. But, its claims are also subject to the Act's five-year statute of repose, which is not tolled by the pendency of a class action. *Id.* Corvex argues that if it waits until a decision is made on class certification to assert its claims, those individual claims will be "significantly curtailed, if not eliminated, by the five-year statute of repose." *Id.* at 3.

Claims under §§ 10(b) and 20(a) of the Securities Exchange Act must be filed within the earlier of "(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). Courts have interpreted this provision as imposing a two-year statute of limitations and a five-year statute of repose. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 638, 650 (2010); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*,

821 F.3d 780, 787 (6th Cir. 2016). The Supreme Court has held that, under certain circumstances, "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-53 (1974). This doctrine is known as "*American Pipe* tolling."

Under a different line of reasoning, the Supreme Court has held that *American Pipe* tolling does not apply to the statutes of repose in federal securities laws. *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017). For those class members concerned about their right to litigate on an individual basis, the Court suggested that "a simple motion to intervene . . . may well suffice" to protect class members' right to litigate their individual claims. *Id.* at 2054. While Corvex asserts that courts in some Circuits have held that *American Pipe* tolling applies to individual actions filed before or after the class certification decision, in the Sixth Circuit, when a putative class member asserts an individual claim prior to the court's decision on class certification, it forfeits *American Pipe* tolling. *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005). This is known as "*Wyser-Pratte* forfeiture." Corvex argues that "[a]s a result of the *Wyser-Pratte* rule, Corvex could not and still cannot timely file a separate action to preserve its claims against Defendants, as it could in, at minimum, the Second, Ninth and Tenth Circuits." Docket No. 259, p. 8.

The Sixth Circuit has acknowledged the "bind" that this creates for putative class members in Corvex's situation:

> We recognize that if a lawsuit asserts causes of action subject both to a statute of limitations and a statute of repose, a putative class member in our Circuit is placed in a bind: beyond the repose period, no putative class member may file an action, even if the district court has yet to rule on class certification.

. . .

> However, *Wyser-Pratte* imposes an additional hurdle: if a putative class member files a separate action between the lapse of the limitations period and of the repose period, that action is barred because of *Wyser-Pratte's* forfeiture rule. Thus, a concerned potential plaintiff must file within the limitations period or be out of luck.

Stein, 821 F.3d at 795, n.6.

Corvex argues that as the five year statute of repose "looms" on claims made in 2016 and 2017, unless Corvex intervenes in this action, its individual rights as a putative class member will be eliminated by the five-year statute of repose. Docket No. 259, p. 2-3. This will have the effect of either destroying claims that might otherwise be successful (if the Class is not certified) or rendering Corvex's opt-out rights illusory (if the Class is not ultimately certified), because the statute will have run on the individual claims. *Id.*

If class certification is denied, intervention prevents the extinguishment of Corvex's claims under the Exchange Act. If class certification is granted, intervention preserves Corvex's meaningful right to opt-out or not once it is able to assess the class remedy. Corvex argues that:

> This comports with the goals of Rule 23, Rule 24, the *American Pipe* tolling doctrine, and the PSLRA, by allowing passive class members to provide Defendants notice of individual claims without disrupting the class action, while preserving the meaningful right to act independently of the class, whether certified or not.

Docket No. 285, p. 2.

B. <u>Permissive Intervention Under Rule 24</u>

Intervention is governed by Rule 24, which states in relevant part:

> On timely motion, the court may permit anyone to intervene who:

. . .

> has a claim or defense that shares with the main action a common question of law or fact.
>
> . . .
>
> In exercising its discretion the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b).

The Court of Appeals for the Sixth Circuit has held that "[s]o long as the motion for intervention is timely and there is at least one common question of law or fact," the court should balance undue delay, prejudice to the original parties, and any other relevant factors. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). Rule 24 should be "broadly construed in favor of potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000), *quoting Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (internal quotation marks omitted).

1. <u>Timeliness</u>

Timeliness of a motion to intervene is a "threshold issue." *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011); Fed. R. Civ. P. 24(b). "An application for permissive or intervention of right must be timely." *Michigan Assoc. for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981). "If untimely, intervention must be denied." *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 582 (6th Cir. 1982). To determine whether intervention is timely, courts consider several factors, including: a) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of its interest in the case; b) the point to which the suit has progressed; c) the purpose for which intervention is sought; d) the prejudice to the original parties due to the proposed intervenor's

failure to promptly move to intervene after it knew or reasonably should have known of its interest in the case; and e) the existence of unusual circumstances weighing for or against intervention. *Michigan Assoc. for Retarded Citizens*, 657 F.2d at 105.

a) Length of Time Preceding the Application

This action commenced on August 4, 2017, with the filing of the original Complaint. Docket No. 1. The Consolidated Class Action Complaint was filed nearly six months later, on January 26, 2018. Docket No. 88. Corvex filed its Motion to Intervene three years after that, on February 26, 2021. Docket No. 258. Corvex does not address the lengthy gap between these dates, but argues that its Motion is "timely, as it is filed before the statute of repose would curtail or remove federal securities liability for misstatements made in Envision's 10-K for 2015 filed with the SEC on February 28, 2016 (and before other misstatements alleged in the Class Action after February 28, 2016)." Docket No. 259, p. 6. Additionally, Corvex asserts that "the purpose of the timeliness inquiry focuses on preventing the intervenor from derailing a lawsuit within sight of the terminal," and contends that "[t]here is no disruption, no deadlines will move, and nothing at all will change with respect to the Class Action" because it "does not intend to interfere [or even participate] in the Class Action in any way." Docket No. 285, p. 5, *quoting U.S. v. BASF-Inmont Corp.*, No. 93-1807, 1995 WL 234648, *2 (6th Cir. 1995); Docket No. 259, p. 6 (internal quotation marks omitted).

While these are all factors to be considered, none of them go to the issue of the vast length of time between when Corvex knew or should have known of its interest in this case and the date that it filed its Motion to Intervene. Corvex does not argue that it only recently learned of this action, or that it was somehow prevented from moving sooner. *See* Docket Nos. 259, 285. Even supposing that Corvex was waiting to see which, if any, claims would survive a motion to

dismiss, the Court ruled on Defendants' motion on November 19, 2019. Docket No. 152. Corvex offers the following explanation as to why it did not then move to intervene:

> As a result of the *Wyser-Pratte* rule, Corvex could not and still cannot timely file a separate action to preserve its claims against Defendants, as it could in, at minimum, the Second, Ninth and Tenth Circuits. After the Court's motion to dismiss ruling of November 19, 2019 or at any time when class certification was pending, an individual action by Corvex would have been likely deemed untimely, as both occurred more than two years after the last disclosure of October 31, 2017 alleged in the Class Complaint.

Docket No. 259, p. 8, *citing Western & Southern Life Ins. Co. v. JPMorgan Chase Bank, N.A.*, 54 F. Supp. 3d 888, 912 (S.D. Ohio 2014) (holding that plaintiff forfeited its right to *American Pipe Tolling* by filing an independent action before it was determined whether the class certification issue would be decided).

While Corvex's desire to avoid potential forfeiture of the statute of limitations tolling under the Sixth Circuit's decision in *Wyser-Pratte* explains its failure to earlier file an independent action, it does not explain why Corvex did not move to intervene sooner in the life of this lawsuit. Therefore, this factor weighs against intervention.

b) <u>Point to Which the Suit Has Progressed</u>

Defendants argue that this matter is at a "late stage of proceedings:"

> The Court ruled on Defendants' motion to dismiss over a year ago in 2019. Lead Plaintiffs have already been selected, document production is nearly complete, and class certification depositions have already occurred. The parties are currently in the middle of class certification briefing. Such an advanced procedural posture weighs against intervention.

Docket No. 279, p. 9 (citations omitted).

Corvex does not argue otherwise; rather, it contends that its intervention would have no impact on the case's progress. *See* Docket Nos. 259, 285. This goes to the other factors below;

however, it does not change the fact that this four year-old case has indeed progressed considerably. This factor weighs against intervention.

c) Purpose for Which Intervention is Sought

As discussed above, Corvex seeks to intervene in this matter "for the sole and limited purpose of protecting certain of [its] individual claims, as alleged in the amended class complaint (Dkt. No. 88), from expiration under the Securities Exchange Act of 1934's statute of repose." Docket No. 259, p. 1 (footnote omitted). Corvex argues that preservation of its claims is its only goal in intervening: "Corvex explicitly does *not* seek appointment as a representative plaintiff or to otherwise interpose itself into this action in any way." *Id.* at 4.

The Court has already discussed the interplay between the applicable statute of repose, the class certification decision in this case, and Corvex's claims. At this stage (and particularly because Corvex did not actually attach a proposed pleading) the Court cannot say whether Corvex's claims are meritorious. But, preservation of potentially valuable claims is a valid reason to seek intervention, and weighs in its favor.

d) Prejudice to the Original Parties

Corvex contends that:

> There is no prejudice or undue delay if Corvex is allowed to intervene because Corvex is not seeking to become a lead plaintiff or other representative party, is not seeking to disrupt or interfere with the Class Action in any way, and expressly seeks to retain the protections against discovery that apply to passive class members. Granting Corvex's motion will have no impact on the litigation of the Class action, including on class certification.

Docket No. 259, p. 6 (citation and footnote omitted).

Defendants disagree:

> If Corvex is permitted to intervene and file claims that are essentially duplicative of those contained in the Class Action

> Complaint (including those claims that already have been dismissed once), Defendants will be forced to re-file motions to dismiss regarding claims that are now obviously time-barred under applicable law, unnecessarily wasting the resources of both Defendants and the Court during class certification briefing and fact discovery.

Docket No. 279, p. 11.

The Court agrees that Defendants should not have to re-file their motion to dismiss on claims that have already been addressed by the Court. As mentioned above, Corvex did not file a proposed Complaint; indeed, it is not clear that Corvex ever will file individual claims. *See* Docket No. 259, p. 9. Instead, Corvex asserts that it incorporates the Consolidated Class Action Complaint by reference. *Id.* at 4, *citing* Docket No. 88. If Corvex does assert individual claims, Defendants will of course incur a burden in responding to them. Presumably, it would not be a great burden to Defendants to respond once again to claims it has already contested. Additionally, any such burden is slight compared to the harm to Corvex of having its claims forever extinguished.

As to whether Corvex's claims are, as Defendants argue, "obviously time-barred," the question of whether the claims of a proposed intervenor are meritorious or would be successful is not before the Court on a motion to intervene. The precise question presented here is whether there will be prejudice to the original parties due to the proposed intervenor's failure to promptly move to intervene after it knew or reasonably should have known of its interest in the case. *Michigan Assoc. for Retarded Citizens*, 657 F.2d at 105. Because it does not appear that Corvex's intervention would affect the original Parties in any way, this factor weighs in favor of intervention.

e) Unusual Circumstances

Neither Corvex nor Defendants have identified any unusual circumstances that bear on the issue of timeliness, and the Court is not aware of any. This factor is therefore neutral as to the propriety of intervention.

Having assessed all of the relevant factors and weighed their relative importance and impact, the Court finds that Corvex's Motion is timely.

2. Common Question of Law or Fact

Corvex contends that this factor is easily satisfied here:

> Corvex is a member of the asserted class, and thus its claims necessarily share common questions of law and fact with those of the class; Corvex's federal securities claims arise out of the same misconduct (misrepresentations and omissions) alleged in the Class Complaint.

Docket No. 259, p. 5.

Defendants argue that because Corvex did not submit a proposed pleading, "neither the parties nor the Court can adequately determine whether Corvex actually has a 'claim or defense that shares with the main action a common question of law or fact[,]' as required by Rule 24." Docket No. 279, p. 4. Defendants maintain that "Corvex does not even attempt to, for example, plead, argue, or prove that it is in fact a putative class member." *Id.*

This last point is not strictly true: Corvex does argue that it is "a class member by virtue of the fact that Corvex (1) purchased Envision securities during the Class Period and (2) held those securities through certain alleged disclosures, causing Corvex damages." Docket No. 259, p. 5. As to the details of Corvex's claims, Corvex maintains that they are identical to those contained in the Consolidated Class Complaint, which Corvex incorporates by reference. *Id.* at

4. That being the case, Corvex's claims could not have more in common with the claims in this action. This factor is satisfied.

3. Undue Delay

Because Corvex does not intend to take any action (other than intervening), the Court does not perceive any undue delay associated with intervention, and this factor weighs in favor.

4. Prejudice to the Original Parties

As discussed above, it appears unlikely that intervention will cause prejudice to the original Parties. This factor weighs in favor of intervention.

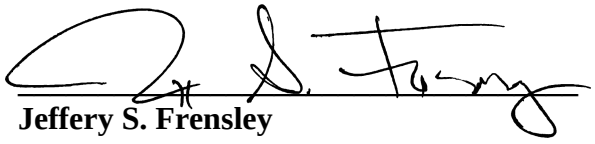
5. Other Relevant Factors

Neither Defendants nor Corvex have identified any other relevant factors. While Defendants do characterize Corvex's failure to attach a proposed pleading as "not a mere technical defect," the Sixth Circuit has declined to deny a motion to intervene on the basis of failure to satisfy the requirement to attach a proposed pleading. *See League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018) ("We take[] a lenient approach to the requirements of Rule 24(c),") (internal quotation marks omitted; alteration in original). In light of the Sixth Circuit's directive that Rule 24 should be "broadly construed in favor of potential intervenors," the Court will not deny the Motion on that basis alone. *Stupak-Thrall v. Glickman*, 226 F.3d at 472.

III. CONCLUSION

For the foregoing reasons, Corvex's Motion (Docket No. 258) is GRANTED.

IT IS SO ORDERED.



Jeffery S. Frensley
United States Magistrate Judge