IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SID MILLER, on behalf of himself and others similarly situated, *Plaintiff*, *v.* TOM VILSACK, in his official capacity as SECRETARY OF AGRICULATURE, *Defendant*.	Civil Action No. 4:21-cv-595-O

DEFENDANT'S RESPONSE TO
LEE PERRY'S MOTION TO INTERVENE

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INTRODUCTION

Lee Perry, who asserts that his mineral and land rights have been stolen from him, moves under Federal Rule of Civil Procedure 24 to intervene in this action concerning USDA programs for socially disadvantaged farmers and ranchers. However, Mr. Perry has failed to file "a pleading that sets out the claim or defense for which intervention is sought," as required by that Rule. Fed. R. Civ. P. 24(c). He has also failed to carry his burden to show either that he is entitled to intervene as of right under Rule 24(a) or that the Court should permit him to intervene under Rule 24(b). This Court should deny Mr. Perry's motion to join this action because he has not met the requirements of Rule 24, and because his intervention would delay these proceedings and prejudice the parties by forcing them to address his unrelated claims.

BACKGROUND

Defendants have set forth the background of this matter in previous filings. *See* ECF Nos. 10, 27, 28, 49. Herein, Defendants include the background most pertinent to the instant motion and respectfully refer the Court to Defendants' previous filings for additional background as necessary.

On March 11, 2021, the President signed into law the American Rescue Plan Act of 2021 ("ARPA"), providing $1.9 trillion in economic stimulus. *See* H.R. 1319, 117th Cong. (2021). Among that $1.9 trillion, Congress appropriated funds to pay up to 120 percent of certain direct or guaranteed USDA farm loans held by "socially disadvantaged farmers or ranchers" ("SDFRs") outstanding as of January 1, 2021. *See id.* § 1005. Congress also appropriated $1.1 billion to provide training and technical assistance to SDFRs, among other socially disadvantaged groups ("SDGs"); to provide grants and loans to improve land access for SDFRs, among other SDGs; to fund one or more equity commissions to address racial equity issues within the USDA; to provide additional financial assistance to SDFRs, among other SDGs, who the Secretary of Agriculture determines have suffered prior discrimination by the USDA; and to provide funding for research, education, scholarships, and internships at

minority-serving colleges and universities. *See id.* § 1006.[1]

For purposes of Sections 1005 and 1006, Congress gave the term "socially disadvantaged farmer or rancher" the same meaning as in Section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, codified at 7 U.S.C. § 2279(a). *See id.* §§ 1005(b)(3), 1006(c)(2)-(3). That provision defines an SDFR as "a farmer or rancher who is a member of a socially disadvantaged group," 7 U.S.C. § 2279(a)(5); *see also id.* § 1006(c)(2), which is further defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities," *id.* § 2279(a)(6).

On April 26, 2021, Plaintiff, Sid Miller, on behalf of himself and others similarly situated, filed this putative class action, challenging the USDA's interpretation of "socially disadvantaged groups" for purposes of Sections 1005 and 1006 of ARPA, as well as certain other statutory provisions that use that term. Amended Compl., ECF No. 11.[2] Plaintiffs allege that they are farmers and ranchers who identify as white. *Id.* ¶¶ 19-23. They claim that the USDA's interpretation of SDGs excludes them from USDA benefits and programs for SDFRs "on account of their race," *id.* ¶ 24, and that this exclusion violates the U.S. Constitution and Title VI of the Civil Rights Act of 1964, *see id.* ¶¶ 26-30 (Claim 1). They also claim, in the alternative, that if not unconstitutional, then the USDA's interpretation "violates the clear and unambiguous text of 7 U.S.C. § 2279(a)(6), by excluding white ethnic groups that have been subjected to racial and ethnic prejudice." *Id.* ¶ 33 (Claim 2). Lastly, they claim that the term "socially disadvantaged group" must be construed "to include individuals who have any discernable trace of minority ancestry." *Id.* ¶ 34 (Claim 3).

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[1] Those include Historically Black Colleges and Universities ("HBCUs"), Native American tribally-controlled colleges and universities ("1994 Institutions"), certain Alaska Native and Native Hawaiian serving institutions, certain Hispanic serving institutions, and insular area institutions located in the U.S. territories. *See id.* § 1006(b)(4)(A)-(E).

[2] Plaintiffs filed an amended complaint on June 2, 2021, adding additional plaintiffs to this matter.

On June 21, 2021, Lee Perry filed a motion to intervene in this action. *See* Mot. to Intervene (hereinafter "Perry Mot."), ECF No. 43. Mr. Perry identifies himself as a joint venture auditor whose prior suit alleging a conspiracy among federal agencies, state agencies, and private companies to steal Black-owned land and mineral rights was dismissed with prejudice. *See* Perry Mot. ¶¶ 4, 6; *Perry v. Christian*, 846 F. App'x 279 (5th Cir. 2021). Mr. Perry's motion asks this Court to deny Plaintiffs' requests for relief and dismiss Plaintiffs' claims. *See* Perry Mot. at 3, ¶¶ A-D.

ARGUMENT

Mr. Perry's motion to intervene should be denied. He has failed to meet the threshold requirements of Rule 24(c), because he has failed to set out the claim or defense for which he seeks to intervene. This alone is reason to deny his motion. But even putting this defect aside, Mr. Perry has shown neither that he is entitled to intervene as of right under Rule 24(a) nor that he should be permitted to intervene under Rule 24(b).

With respect to intervention as of right, Mr. Perry has identified no right to intervene given to him by statute, and he has established no protectable interest that will be impaired by the disposition of this action. He has not alleged that he possesses a loan eligible for Section 1005's repayment program, or otherwise has any concrete stake in this dispute. In any case, he has done nothing to rebut the presumption that the Government will adequately defend any interest he might have in the outcome of this litigation. Mr. Perry cannot meet the requirements for intervention as of right.

With respect to permissive intervention, Mr. Perry states no claim or defense that shares a common question of law or fact with the main action. And even if he could, multiple discretionary factors argue against permissive intervention. Mr. Perry has not shown that he has any cognizable interest inadequately represented by Defendant; has not demonstrated that he will contribute to the development of factual issues in this case; and would likely delay these proceedings, diverting parties

from addressing the main action to dealing with his unrelated arguments. Defendant therefore respectfully requests that the Court exercise its discretion to deny Mr. Perry permissive intervention.

I. Standard Of Review

"Federal Rule of Civil Procedure 24(a) permits a party to seek intervention as of right while Rule 24(b) allows a party to seek permissive intervention." *DeOtte v. Azar*, 332 F.R.D. 173, 178 (N.D. Tex. 2019) (citing Fed. R. Civ. P. 24).[3] For both forms of intervention, a motion to intervene must be timely filed, *see* Fed. R. Civ. P. 24(a), (b)(1); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977), and the motion "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought," Fed. R. Civ. P. 24(c)(1). The movant bears the burden of establishing that intervention is appropriate. *See Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016).

For intervention as of right, in addition to establishing timeliness, the movant must show "an unconditional right to intervene by a federal statute," Fed. R. Civ. P. 24(a)(1), or alternatively must satisfy the following elements under Rule 24(a)(2): (1) he "must have an interest relating to the property or transaction which is the subject of the action;" (2) he "must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and" (3) his "interest must be inadequately represented by the existing parties to the suit." *DeOtte*, 332 F.R.D. at 178. "Failure to satisfy [any] one requirement precludes intervention of right." *Id.*

For permissive intervention, after evaluating the timeliness of the motion to intervene, and absent "a conditional right to intervene by federal statute," Fed. R. Civ. P. 24(b)(1)(A), courts engage in a two-step process to determine whether a movant should be permitted to intervene." *DOH Oil Co. v. QEP Res., Inc.*, 2019 WL 3816290, at *5 (W.D. Tex. May 20, 2019). "First, the court must decide

[3] Hereinafter, all alterations, citations, omissions, quotations, and subsequent history are omitted unless otherwise indicated.

whether the movant's claim or defense and the main action share a common question of law or fact." *Id.* "Second, the court … determines whether intervention 'will unduly delay or prejudice the adjudication of the original parties.'" *Id.* (citing Fed. R. Civ. P. 24(b)). Permissive intervention "is wholly discretionary with the district court even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *DeOtte*, 332 F.R.D. at 185. In exercising this discretion, courts may appropriately consider "whether the intervenor's interests are adequately represented by other parties and whether the[] [intervenor] will significantly contribute to full development of the underlying factual issues in the suit." *Brackeen v. Zinke*, 2018 WL 10561984, at *5 (N.D. Tex. June 1, 2018).

II. Mr. Perry Has Not Carried His Burden To Intervene Under Rule 24.

Mr. Perry has not set out a claim or defense for which he seeks to intervene, as required by Rule 24(c), and the Court should deny his motion for failing to meet this mandatory threshold requirement. Mr. Perry appears to refer to conclusory claims about stolen land and mineral rights from prior litigation against USDA, *see* Perry Mot. ¶¶ 4, 7, but does not actually seek any relief against Defendants, *see id.* at 3, ¶¶A-D. Nor could he, since those claims were already dismissed with prejudice in his prior suit. *See Perry*, 846 F. App'x at 279. He has not alleged that the USDA is doing anything unlawful with respect to ARPA; on the contrary, he seeks to prevent Plaintiffs from obtaining their requested relief. *See* Perry Mot. at 3, ¶¶A-D. Yet, he raises no specific cross-claim or defense against Plaintiffs. Indeed, there is no defense Mr. Perry could raise in this case, because Plaintiffs' requested relief would not require him to do, or prohibit him from doing, anything. *See* Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 274 (2020) (explaining that "a 'defense' is a particular type of legal argument that the targets of a claim assert to explain why the court should not grant relief against them"). In failing to set out a claim or defense for which he seeks to intervene, Mr. Perry's motion fails to meet the requirements of Rule 24(c). The Court should deny his motion for this reason. *See, e.g., Westridge v. Poydras Properties, Inc.*, 1995

WL 120081, at *1 (E.D. La. Mar. 20, 1995) (denying motions to intervene for, *inter alia*, failure to comply with Rule 24(c)); *DOH Oil Co.*, 2019 WL 3816290, at *5 (same). Moreover, even if Mr. Perry had complied with Rule 24(c), he has not shown either that he is entitled to intervene as of right or that permissive intervention is appropriate.

A. Mr. Perry Has Not Shown that He Is Entitled to Intervene as a Matter of Right.

Mr. Perry has not shown that he has a right to intervene by statute. He claims that 28 U.S.C. § 2403 provides grounds for his intervention. *See* Perry Mot. at 1. However, that statutory provision only permits intervention by the United States and by individual states in cases questioning the constitutionality of statutes, and does not contemplate intervention by private parties. *See* 28 U.S.C. § 2403(a) ("[T]he court . . . shall permit the United States to intervene."); 28 U.S.C. § 2403(b) ([T]he court . . . shall permit the State to intervene."). Lacking a statutory right to intervene, Mr. Perry must meet the requirements under Rule 24(a)(2). He does not. Mr. Perry has not demonstrated a protectable interest that will be affected by the disposition of this action. Nor has he shown that any such interest would be inadequately represented by Defendant.

1. Mr. Perry has not shown that he has a protectable interest related to the subject of this action or that any such interest may be affected by disposition of this action.

Mr. Perry has not alleged a sufficient interest related to this action under Rule 24(a)(2). Such an interest must be "concrete, personalized, . . . legally protectable," and "direct." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). And it must "go[] beyond a generalized preference that the case come out a certain way." *Id.* But such a general preference is all that Mr. Perry has alleged. He does not claim that he possesses a loan eligible for assistance under Section 1005 of ARPA, or has any other personal stake in the programs of Sections 1005 or 1006. He thus has no protectable interest by virtue of being "subject to the regulations at issue" or a "beneficiary of the regulations at issue" in this action. *DeOtte*, 332 F.R.D. at 182. Rather, his motion expresses his disagreement with Plaintiffs' legal theories

and his belief in the constitutionality of ARPA's debt payment program. *See* Perry Mot. at 3, ¶¶ B, D. Mr. Perry's mere preference regarding the outcome of this case is not "concrete, personalized, . . . legally protectable," or "direct." *Texas*, 805 F.3d at 657. It is not a sufficient interest for intervention under Rule 24(a)(2). And since Mr. Perry has not identified a protectable interest, he has also failed to meet his burden of showing that disposition of this action may impair his ability to protect such an interest. Each of these defects is an independent reason to deny intervention as of right. *See DeOtte*, 332 F.R.D. at 178 ("Failure to satisfy [any] one requirement precludes intervention of right.").

2. Mr. Perry has not shown that any protectable interest would be inadequately represented by Defendant.

Even if Mr. Perry could establish a sufficient interest that will be affected by the disposition of this action, he has not shown that any such interest would be inadequately represented by Defendant. Although the burden to show inadequate representation has been characterized as "minimal," "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Id.* at 185. Indeed, the Fifth Circuit "has created two presumptions of adequate representation that [would-be] intervenors must overcome in appropriate cases." *Id.* First, if "the would-be intervenor has the same ultimate objective as a party to the lawsuit," then "the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." *Id.* Second, "when the putative representative is a governmental body," the would-be intervenor must show "that its interest is in fact different from that of the governmental entity and that the interest will not be represented by it." *Id.* Both of these presumptions apply here.

Both Mr. Perry and Defendant have the same end goal: to oppose and seek to deny Plaintiffs' requested relief. Mr. Perry has not made any claim of, much less shown, adversity of interest, collusion, or nonfeasance on the part of Defendant, or "demonstrated any reason to think the federal government will not zealously defend its own laws." *Brackeen*, 2018 WL 10561984, at *4. He has therefore not overcome the presumption that Defendant will adequately represent any interest he

might have in this litigation. *See, e.g., Haspel & Davis Milling & Planting Co. v. Bd. Of Levee Commissioners of The Orleans Levee Dist. & State Of Louisiana*, 493 F.3d 570, 579 (5th Cir. 2007) (upholding denial of intervention on basis of presumption where would-be intervenor did not carry his burden). For this additional reason, then, Mr. Perry is not entitled to intervene in this action as of right under Rule 24(a).

B. Mr. Perry Has Not Shown that Permissive Intervention Is Appropriate.

Nor has Mr. Perry shown that he should be permitted to intervene under Rule 24(b). He identifies no statute giving him a conditional right to intervene and no claim or defense sharing a common question of law or fact with the main action. And even if Mr. Perry could show such a claim, this Court should still deny permissive intervention. Mr. Perry's presence in this action would unduly delay adjudication, he has given no indication that he can contribute to the development of factual issues in the main action, and his general interest in the constitutionality of USDA's programs is already adequately represented by Defendant.

1. Mr. Perry has not shown a claim or defense that shares a common question of law or fact with the main action.

Mr. Perry fails to show that he has a claim or defense that shares a common factual or legal question with this action, because he fails to show that he has any cognizable claim or defense at all. The words "claim or defense" in the context of Rule 24(b)(2) "'manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.'" *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (quoting *Diamond v. Charles,* 476 U.S. 54, 76–77 (1986) (O'Connor, J., concurring in part and concurring in judgment)). Or, in other words, an "actual, present interest that would permit [the movant] to sue or be sued by [the parties] in an action sharing common questions of law or fact with those at issue in th[e] litigation." *Diamond*, 476 U.S. at 77 (O'Connor, J., concurring). As explained above, Mr. Perry has set out no claim or defense in this sense. He possesses no defense in this case, and has no authority to raise defenses on the Government's behalf. He "has

no 'claim' because [he] is not suing any of the litigants." *DeOtte*, 332 F.R.D. at 186. Without a claim or defense against the current litigants, Mr. Perry has "no grounds for permissive intervention." *Id.*

2. Multiple discretionary factors argue against permissive intervention.

This Court should in any case exercise its discretion to deny permissive intervention. This is not an instance where by allowing intervention "no one would be hurt and the greater justice could be attained." *DeOtte*, 332 F.R.D. at 178. Rather, intervention here "could . . . hinder the ability of the Court to efficiently resolve the matter currently before it." *DOH Oil Co.*, 2019 WL 3816290, at *5. With no cognizable interest in this action and no claim, Mr. Perry would likely "unduly delay [and] prejudice the adjudication of the original parties' rights" by diverting time and resources to address his unrelated arguments. Fed. R. Civ. P. 24(b)(3); *see also DeOtte*, 332 F.R.D. 173 at 186–87 (denying permissive intervention where "some delay would ensue due to the further briefing that would be required for the parties to respond to [the would-be intervenor's] opposition brief").

Additional factors also counsel against permitting Mr. Perry to intervene. First, he has not shown that any interest he might have in this action will be inadequately represented by Defendant. *See Brackeen*, 2018 WL 10561984, at *5 (denying permissive intervention, in part, because the proposed intervenor had not demonstrated inadequate representation). Second, he has given no indication that he "will contribute to full development of the underlying factual issues in the suit." *Brackeen*, 2018 WL 10561984, at *5 (denying permissive intervention, in part, because of this consideration). On the contrary, Mr. Perry's motion contains conclusory statements that seem largely to reiterate the content of a prior suit alleging a wide-ranging conspiracy among governmental and private entities, which was dismissed with prejudice. *See Perry*, 846 F. App'x at 279. Mr. Perry has also provided no reason to believe that he would contribute to the resolution of the constitutional and statutory claims in this suit. Indeed, since Mr. Perry lacks "an interest in the current suit, there is a high likelihood that [his] presence in the suit would only serve to confuse the issues." *DOH Oil Co.*, 2019 WL 3816290, at *5.

Thus, even if Mr. Perry had a claim or defense sharing a factual or legal question with the main action, multiple discretionary factors all counsel against permissive intervention. Mr. Perry should not be permitted to further tax the limited resources of this Court and the current litigants.[4]

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court deny Mr. Perry's motion to intervene.

Date: July 12, 2021

Respectfully submitted,

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[4] Mr. Perry filed a similar motion to intervene in another case challenging Section 1005. *See* Mot. to Interevene by Lee Perry, *Faust v. Vilsack*, No. 21-548 (E.D. Wis.), ECF No. 38.

Certificate of Service

On July 12, 2021, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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