

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ANGELICA CAPITAL TRUST,

Petitioner,

v.

No. 1:26-cv-00241 (GBD) (GS)

ADDICTION RECOVERY CARE LLC,
TIM ROBINSON, LELIA ROBINSON, ARC
HEALTH SYSTEMS, LLC, LONDON
VALU RITE PHARMACY, INC. (D/B/A
SOUTH CREEK DRUG), PIONEER
HEALTH GROUP LLC, SCIENCE HILL
FAMILY CARE, LLC (D/B/A PIONEER
RURAL HEALTH CLINIC, PIONEER
RURAL HEALTH CLINIC LOUISA, and
RIVERVIEW RURAL HEALTH CLINIC),
SPRINGFIELD PIONEER RURAL
HEALTH CLINIC, LLC, MILLARD
COLLEGE LLC, MAIN STREET
INDUSTRIES, LLC, SECOND CHANCE
ENTERPRISES, LLC, ROBINSON FARM,
LLC, DESTINY WORKFORCE
SOLUTIONS LLC, SHELTON ROBINSON
PROPERTIES LLC, and DOES 1-100,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF CLEAR COVE OPPORTUNITIES
FUND I LLC'S MOTION, BROUGHT BY ORDER TO SHOW CAUSE, FOR LEAVE TO
INTERVENE AND FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

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Clear Cove Opportunities Fund I LLC (“Clear Cove”), by its attorneys Vedder Price P.C., submits this memorandum of law in support of its motion, brought by order to show cause, for leave to intervene and for a temporary restraining order (“TRO”) and preliminary injunction. Clear Cove seeks to intervene as a matter of right pursuant to Federal Rule of Civil Procedure (“FRCP”) 24(a)(2) due to its interests in the subject matter of this action or, in the alternative, with the Court’s permission, pursuant to FRCP 24(b)(1). Clear Cove also seeks to preserve the existing status quo until it has been permitted to intervene and, thereafter, until such time as a judicial determination has been made as to its interest in the Restrained Funds (as defined *infra*).

PRELIMINARY STATEMENT

Intervenor Clear Cove is an investor that, *inter alia*, purchases the right to receive Employee Retention Credit (“ERC”) tax refunds from businesses that are due such ERC refunds and in need of immediate liquidity. Clear Cove purchased from Respondent Addiction Recovery Care, LLC (“ARC”) the right to receive all ERC refunds due to ARC for the first quarter of 2021 (the “Transferred Interests”). Subsequently, Clear Cove obtained from ARC a secondary interest in the ERC refunds due to ARC for the second quarter of 2021 (the “Secondary ERC Claim”), the practical effect of which is to obligate ARC to transfer to Clear Cove whichever of (a) the Transferred Interests or (b) the Secondary ERC Claim (up to the amount of the Transferred Interests) ARC first receives from the Internal Revenue Service (“IRS”).

Clear Cove recently learned that, after ARC sold the Transferred Interests and granted the Secondary ERC Claim to Clear Cove, ARC then purported to sell Clear Cove’s property—i.e., the very same ERC refunds comprising the Transferred Interests and Secondary ERC Claim—to Petitioner Angelica Capital Trust (“Angelica”). ARC is now in default on its obligations to Clear Cove and—according to Angelica—on its obligations to Angelica. Accordingly, Angelica recently obtained a preliminary injunction from this Court obligating ARC to maintain approximately

\$4.7 million in a segregated account (the “Restrained Funds”).

Clear Cove seeks to intervene to protect its interests in the Restrained Funds, which are comprised at least in part of the Transferred Interests and the Secondary ERC Claim.¹ *Second*, Clear Cove asks that the Court enter a preliminary injunction ensuring that the Restrained Funds are not disbursed until such time as Clear Cove’s interest in them has been judicially determined (Clear Cove is currently readying a complaint against ARC to be separately filed). *Finally*, Clear Cove requests that the Court enter a TRO maintaining the status quo until it can rule on Clear Cove’s requests for intervention and for a preliminary injunction.

Clear Cove is entitled to intervene as of right pursuant to FRCP 24(a)(2) because it possesses an interest in the property that is the subject of the action (i.e., the portion of the Restrained Funds comprised of the Transferred Interests and Secondary ERC Claim), and is so situated that disposing of the action would impair or impede Clear Cove’s ability to protect its interest in the Transferred Interests and/or Secondary ERC Claim. Alternatively, the Court should exercise its discretion pursuant to FRCP 24(b)(1) to permit Clear Cove to intervene.

The Court should issue Clear Cove’s requested preliminary injunction because ARC and/or Angelica may, during the pendency of Clear Cove’s forthcoming breach of contract action against ARC, reach a settlement that results in the distribution of the Restrained Funds—which include the Transferred Interests and Secondary ERC Claim and represent substantially all of ARC’s liquid assets—to Angelica, leaving Clear Cove unable to recover from ARC. The preliminary injunction would support the public interest by insuring that the Restrained Funds are appropriately

¹ FRCP 24(c)’s nominal requirement that a motion to intervene be accompanied by a pleading is satisfied where, as here, a movant’s interest in the litigation is “clearly articulated” in the accompanying document. *See, e.g., Provencher v. Bimbo Bakeries USA, Inc.*, 2023 WL 6050244, at *4 (D. Vt. Aug. 7, 2023) (“As the ... motion [to dismiss] papers clearly state [the intervenor’s] position on this litigation, the Court waives the pleading requirement for Proposed Intervenor and finds that [the intervenor] has complied with the procedural requirements of Rule 24(c).”).

distributed and would cause no prejudice to Angelica or ARC, given the already existing injunction. Finally, the Court should issue a TRO maintaining the status quo while it considers Clear Cove’s applications to intervene and for a preliminary injunction.

STATEMENT OF FACTS

On July 18, 2025, Clear Cove and ARC entered into a “True Sale Risk Participation of ERC Claim Agreement” (the “Participation Agreement,” annexed as Exhibit 1 to the accompanying Declaration of Kenneth Dettman (the “Dettman Decl.”), as amended by the “Amendment to ERC Risk Participation Agreement” on September 24, 2025 (the “Amendment,” annexed as Exhibit 3 to the Dettman Decl.). The Participation Agreement governed the sale of “Transferred Interests” by ARC to Clear Cove, which encompassed:

. . .all of [ARC’s] rights to receive any and all payments, interest, proceeds or distributions of any kind from the United States Internal Revenue Service (the “IRS”) in respect of the employee retention credits duly and timely claimed by [ARC] on account of qualified wages paid by [ARC] and identified as a “Claim for Refund” under Form 941-X *Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund* for the first quarter of 2021 filed with the IRS . . . in the aggregate amount of \$3,319,220.80 . . . as set forth in line item 27 of Part 3 thereof.

(Ex. 1, § 1(a).) Clear Cove paid to ARC the specified purchase price under the Participation Agreement on July 22, 2025. (Dettman Decl., ¶ 5.)

As part of the Participation Agreement, ARC was required to fulfill certain obligations within 60 days following entry of the Agreement. (Ex. 1, §7.) On September 24, 2025, ARC negotiated the Amendment to obtain an additional 30 days to fulfill those obligations. In consideration for Clear Cove’s forbearance, ARC granted to Clear Cove a right to receive payments, interest, proceeds, or distributions in the ERC refund due for the *second* quarter of 2021—the Secondary ERC Claim—for purposes of satisfying ARC’s obligation to forward the Q1 ERC refund if ARC first received the Q2 refund:

. . . in the event [ARC] shall receive any payment or other distribution of cash

(including IRS interest or proceeds) by check or by credit from the IRS in respect of the Secondary ERC Claim (“Secondary Distribution”), and such Secondary Distribution occurs prior to the Distribution [of the Transferred Interests], [ARC] shall be required to satisfy any and all obligations set forth herein with respect to the Distribution, Transferred Interests and Tax Refund Claim out of the proceeds [ARC] receives with respect to the Secondary Distribution.

(Ex. 3, §§ 2(d), 5.)

On or around December 2, 2025, ARC received the ERC refunds for both the first and second quarter of 2021. (Dettman Decl., ¶ 12.) However—despite the fact that nearly two months have now elapsed—ARC has never forwarded Clear Cove’s property to it. (Dettman Decl., ¶ 13.)

Clear Cove’s interests in ARC’s ERC refunds were publicly recorded, a fact available to anyone conducting due diligence in connection with a transaction with ARC. For example, on July 31, 2025, Mountain Association for Community Economic Development (“MACED”)—an existing ARC creditor which held a perfected security interest in ARC’s receivables dating back to 2017—filed a UCC statement reflecting MACED’s assignment to Clear Cove of MACED’s priority interests in “all currently existing and hereafter arising accounts owing or to become due to [ARC] arising from Employee Retention Tax Credit refunds” and specifically referencing the “certain Risk Participation Agreement dated as of July 18th, 2025 between [ARC] and [Clear Cove].” (Exhibit 2 to the Dettman Decl.) This UCC acknowledgment is readily available to the public online and can be retrieved and reviewed by searching for ARC’s name on the Kentucky Secretary of State website via the Article 9 UCC Search function.

Subsequent to Clear Cove’s purchase of the Transferred Interests and Secondary ERC Claim from ARC and the public recording of Clear Cove’s interest, ARC purported to sell *the very same* ERC refunds comprising the Transferred Interests and Secondary ERC Claim to Angelica. Specifically—according to Angelica’s recent filings—on November 12, 2025, Angelica entered into two agreements entitled “Contract for the Sale and Purchase of Tax Receivable” in which

ARC purported to convey to Angelica the ERC refunds owed to ARC for the first and second quarters of 2021; that is, the Transferred Interest (Q1 2021) and Secondary ERC Claim (Q2 2021) to which Clear Cove was already entitled. (*See* ECF No. 1-1 §1, and at 14; ECF No. 1-2 §1, and at 14.) On November 13, 2025, Angelica filed a UCC Financing statement recording its purported purchase of the ERC refunds comprising the Transferred Interests and Secondary ERC Claim from ARC. (ECF No. 12-8.)

As represented in Angelica’s Petition for a Temporary Restraining Order and Injunction in Aid of Arbitration (ECF No. 1), ARC received the ERC refunds comprising Clear Cove’s Transferred Interests and Secondary ERC Claim on December 2, 2025. Angelica further represents that it demanded ARC transfer the ERC refunds comprising Clear Cove’s Transferred Interests and Secondary ERC Claim to Angelica, but ARC refused. On January 12, 2026, Angelica initiated the current action and filed a petition for injunction seeking to prevent ARC, its owners, and (as amended) its subsidiaries from dissipating the ERC refunds comprising Clear Cove’s Transferred Interests and Secondary ERC Claim while Angelica engaged ARC in arbitration. On January 22, 2026, the Court entered a preliminary injunction ordering ARC to place \$4,706,872.75 (the “Restrained Funds)—all but \$1 million of its liquid assets—into a separate bank account and prohibiting ARC from transferring the Restrained Funds “during the pendency of this action without further order of this Court.” (ECF No. 64.)

Clear Cove’s interest in the Restrained Funds is actually superior to that of Angelica, since it derives from Clear Cove’s bona fide ownership of the Transferred Interests and/or and Secondary ERC Claim; by contrast, Angelica appears to possess only a fraud claim against ARC. However, the Court need not make that determination today. Instead, what is most relevant is that that Clear Cove has a bona fide interest that would be prejudiced were Clear Cove not permitted

to intervene and/or if the Restrained Funds were distributed to any party before the respective interests of all parties—including Clear Cove—have been judicially resolved.

ARGUMENT

I. Clear Cove Is Entitled to Intervene as a Matter of Right.

Under FRCP 24(a)(2), a court must permit a party to intervene who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). “To intervene as of right, a movant must: “(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.” *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 128-29 (2d Cir. 2001) (internal quotation marks and citation omitted). This is a “flexible and discretionary” test, where “courts generally look at all four factors as a whole rather than focusing narrowly on any one of the criteria.” *S&S Kings Corp. v. Westchester Fire Ins. Co.*, 2017 WL 396741, at *1 (S.D.N.Y. Jan. 27, 2017) (quoting *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 394 (S.D.N.Y. 2002)). As demonstrated below, application of each of the relevant factors confirms Clear Cove’s right to intervene in this action.

A. Clear Cove’s Motion to Intervene Is Timely.

Clear Cove’s motion is timely. Under FRCP 24(a)(2), timeliness is a “threshold” requirement that must be evaluated in light of all the circumstances. *Tachiona*, 186 F. Supp. 2d at 394. Courts in this Circuit consider four factors in this analysis: “(a) the length of time the applicant knew or should have known of his interest before making the motion; (b) prejudice to existing parties resulting from the applicant’s delay; (c) prejudice to applicant if the motion is denied; and (d) presence of unusual circumstances militating for or against a finding of timeliness.” *Hartford*

Fire Ins. Co. v. Mitlof, 193 F.R.D. 154, 159-60 (S.D.N.Y. 2000) (citation and internal quotation marks omitted). “Timeliness is a matter within the sound discretion of the trial court.” *Id.* (citation omitted). Each factor confirms that the Motion to Intervene is timely.

First, Clear Cove acted promptly. The current action, which threatens to impair Clear Cove’s rights, was only filed on January 12, 2026 and Clear Cove did not learn of its existence until well over a week later. Courts consistently find motions timely when, as here, they are filed “at an early stage in the litigation, prior to any substantive motions or active discovery.” *True Return Sys. LLC v. Compound Protocol*, 2023 WL 6211815, at *3 (S.D.N.Y. Sept. 25, 2023).

Second, for the same reasons, there is no prejudice to the existing parties. Clear Cove seeks only to obtain the benefit of the preliminary injunction that the Court has *already* ordered, and no discovery has yet taken place.² *See S&S Kings*, 2017 WL 396741, at *2 (finding motion to intervene timely where discovery had not yet begun).

Third, denying intervention would prejudice Clear Cove. Clear Cove is the rightful owner of the portion of the Restrained Funds comprised of the Transferred Interests and/or Secondary ERC Claim and denying intervention would prevent Clear Cove from participating in the adjudication of the distribution of its own asset. *See Schaghticoke Tribal Nation v. Norton*, 2006 WL 1752384, at *8 (D. Conn. June 14, 2006) (timeliness satisfied where denial would prejudice applicant’s ability to protect its interests).

Fourth, no unusual circumstances counsel against intervention. Clear Cove’s prompt motion—filed within days of the Court entering the preliminary injunction—easily meets the

² Clear Cove understands that Angelica has requested some limited discovery related to the distribution of Restrained Funds in violation of the Court’s preliminary injunction, including a production of bank records and the depositions of Mr. Tim Robinson and Ms. Jessica Burke. (ECF No. 66.) To the extent that the Court orders ARC to comply with these requests, Clear Cove respectfully request that it be permitted to participate as well.

timeliness requirement of FRCP 24(a)(2).

B. Clear Cove Is Interested in the Subject Matter of the Action.

Clear Cove satisfies the second requirement of FRCP 24(a)(2) because it has a “direct, substantial, and legally protectable” interest in the subject matter of this action. *See Brennan*, 260 F.3d at 129 (internal quotation marks and citations omitted). The Court’s injunction prohibits ARC from transferring the Restrained Funds to any party, ostensibly to permit Angelica time to arbitrate its contracts with ARC. But Clear Cove purchased the Transferred Interests on July 18, 2025 and received the Secondary ERC Claim on September 24, 2025, each long before Angelica signed its agreements with ARC. Any settlement or other resolution of the dispute between ARC and Angelica which results in the release of the Restrained Funds to Angelica (or any other party) could irreparably deprive Clear Cove from recovering the Transferred Interests and/or Secondary ERC Claim owed to it. Clear Cove’s entitlement to the Transferred Interests and/or Secondary ERC Claim is independently sufficient to meet this second element. *See First Data Merchant Services, LLC v. MM Development Co.*, 2020 WL 2215457, at *2 (S.D.N.Y. May 6, 2020) (finding creditors’ interest on collateral assets under defaulted promissory notes satisfied the creditors’ interest relating to a dispute of the debtor’s funds). Clear Cove’s interests in this case are neither remote nor speculative. They are central to the claims Angelica seeks to litigate. FRCP 24(a)(2) therefore entitles Clear Cove to intervene.

C. Clear Cove’s Interests Will Be Impaired by the Disposition of the Action.

Clear Cove also meets FRCP 24(a)(2)’s third requirement because disposition of this action in its absence, would “as a practical matter impair or impede” its ability to protect its interests. Fed. R. Civ. P. 24(a)(2). The Second Circuit has emphasized that a proposed intervenor need not *prove* certainty of harm; it is enough to show that the action’s disposition “might” impair its interests. *Brennan*, 260 F.3d at 129 (citation omitted). It has further recognized that the *stare*

decisis effect of a court’s decision is sufficient to demonstrate impairment of an interest sufficient to support a motion to intervene. *See N.Y. Public Interest Research Grp., Inc. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 351 (2d Cir. 1975) (“the possible *stare decisis* effect of an adverse decision” provides a sufficient direct interest for the purposes of FRCP 24(a)(2)); *Oneida Indian Nation of Wis. v. New York*, 732 F.2d 261, 265 (2d Cir. 1984) (remanding to permit intervention due to the “substantial likelihood that the claims and interests of the proposed intervenors concerning the disputed lands may be adversely affected at least by principles of *stare decisis*, arising out of the final judgment to be entered in this case” (citation omitted)).

As described above, the possibility of a settlement between Angelica and Respondents that results in the release of substantially all of Respondents’ liquid assets to Angelica is precisely the type of impairment FRCP 24 is designed to prevent. If this Court were to release the injunction preventing the distribution of the Restrained Funds, for any reason other than distribution to Clear Cove, that order would directly impact Clear Cove’s ability to obtain the Transferred Interests and/or Secondary ERC Claim it acquired from ARC in July and September of 2025. Instead, the Restrained Funds should remain enjoined until the Court determines the validity of Angelica and Clear Cove’s ownership interests in the Restrained Funds and determines the extent to which the Restrained Funds are comprised of the Transferred Interests and Secondary ERC Claim. *S&S Kings*, 2017 WL 396741, at *2 (S.D.N.Y. Jan. 27, 2017) (finding that an intervenor has a recognizable interest that may be impaired by an action where its liability will be determined in the proceeding, or where a judgment may bind or have a preclusive effect against the intervenor).

Because Angelica’s claims implicate Clear Cove and because judicial determinations in this action would have significant legal and practical consequences for Clear Cove, FRCP 24(a)(2)’s impairment requirement is satisfied.

D. Clear Cove's Interests Are Not Adequately Represented by the Existing Parties.

Clear Cove's burden to show that its interests are not adequately represented by the existing parties is "minimal"; a proposed intervenor need only show that representation of its interests "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). The ERC refunds comprising the Transferred Interests and Secondary ERC Claim that Clear Cove acquired from ARC are the same ERC refunds that ARC later fraudulently purported to sell to Angelica. Accordingly, Clear Cove is adverse to Angelica and the Respondents, each of whom claim a complete interest in the Restrained Funds including the portion comprised of the Transferred Interests and Secondary ERC Claim. Without intervention, Clear Cove's interest in the Restrained Funds (through its ownership of the Transferred Interests and Secondary ERC Claim) will be entirely unprotected, and the entirety of those Restrained Funds will be subject to dispersal to Angelica. *See U.S.P.S. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) (intervenor's interests not adequately represented where the existing parties may have different "ultimate objective[s]").

II. Alternatively, the Court Should Exercise its Discretion to Permit Clear Cove to Intervene.

In the alternative, even if the Court finds that Clear Cove has not established that it is entitled to intervene as a matter of right, the Court should grant it permission to intervene as a matter of discretion pursuant to FRCP 24(b)(1). FRCP 24(b)(1) provides, in relevant part, that intervention is permissible when an applicant, "[o]n timely motion, ... has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). It is well-settled that, in interpreting FRCP 24(b), the words "claim or defense" should be read in a broad manner and not in a "technical sense," *see Brooks v. Flagg Bros., Inc.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974), and that a district court has "broad discretion" to determine whether intervention is appropriate under FRCP 24(b), *see Rosenshein v. Kleban*, 918 F. Supp. 98, 106 (S.D.N.Y. 1996);

Sackman v. Liggett Grp., Inc., 167 F.R.D. 6, 22 (E.D.N.Y. 1996). Permissive intervention “is to be liberally construed.” *Olin Corp. v. Lamorak Ins. Co.*, 325 F.R.D. 85, 87 (S.D.N.Y. 2018) (internal quotation marks and citation omitted).

In determining whether to permit intervention under FRCP 24(b), “courts generally consider the same factors that are relevant as of right under FRCP 24(a)(2).” *Olin Corp.*, 325 F.R.D. at 87 (citations omitted). “However, ‘[t]he principal guide in deciding whether to grant permissive intervention is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.’” *Id.* (quoting *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994)); see *Bionpharma Inc. v. CoreRx, Inc.*, 2022 WL 580767, at *5 (S.D.N.Y. Feb. 24, 2022).

Accordingly, permissive intervention is warranted here. Clear Cove meets the permissive intervention standard for the same reasons that justify its intervention as of right, detailed above. See *Jakubik v. Schmirer*, 2013 WL 3465857, at *2 (S.D.N.Y. July 9, 2013) (“The requirement of [FRCP 24(b)] is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” (quoting *Trbovich*, 404 U.S. at 538 n.10 (1972))). Permitting Clear Cove to intervene at this early stage would neither delay this case nor prejudice any of the parties.

Finally, permitting Clear Cove to intervene will “significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.” *U.S.P.S.*, 579 F.2d at 191-92 (internal quotation marks and citation omitted). As described above, Clear Cove and Angelica each have competing claims to the Restrained Funds. Permitting Clear Cove to intervene will significantly contribute to the development of the legal and factual issues in this case, including the nature of the claims (i.e.,

contract or tort) that can be asserted by Clear Cove and/or Angelica against ARC and the full scope of ARC's conduct giving rise to those claims. *See Miller v. Silbermann*, 832 F. Supp. 663, 674 (S.D.N.Y. 1993) (granting motion for permissive intervention where, *inter alia*, the "knowledge and concern" of the proposed intervenors "will greatly contribute to the Court's understanding of this case").

III. The Court Should Issue A Preliminary Injunction Enjoining the Distribution of the Restrained Funds Until Clear Cove's Ownership Interest Has Been Adjudicated.

This Court has authority pursuant to Fed. R. Civ. P. 65 to issue a TRO and other injunctive relief. A party is entitled to preliminary injunctive relief upon a showing of "(1) a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [petitioner's] favor; (2) a likelihood of irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the [petitioner's] favor; and (4) that the public interest would not be disserved by the issuance of an injunction." *Thales Avionics Inc. v. L3 Techs., Inc.*, 719 F. Supp. 3d 337, 344-45 (S.D.N.Y. 2024). As discussed below, these requirements are easily met here.

A. Clear Cove Has a Strong Likelihood of Success on the Merits of Its Claims in the Imminent Breach of Contract Action.

Clear Cove is likely to succeed on the merits of its breach of contract claims against ARC, which will be the subject of a forthcoming action. Clear Cove purchased the Transferred Interests pursuant to the terms of the Participation Agreement and Amendment, paying ARC the agreed consideration. ARC received the Transferred Interests, but instead of transmitting them to Clear Cove as the Agreements require, ARC kept the Transferred Interests for itself. *See ACI Design Build Contractors Inc. v. Loadholt*, 605 S.W.3d 515, 519 (Tex. App. 2020) (The elements of a breach of contract claim are: "(1) the existence of a valid contract between the parties; (2) performance (or excuse) by the party asserting the claim; (3) breach of the terms of the contract

by another party; and (4) damages resulting from the breach.”) (citing *C.W. 100 Louis Henna, Ltd. v. El Chico Restaurants of Texas, L.P.*, 295 S.W.3d 748, 752 (Tex. App. 2009)).³

B. Absent the Requested Injunctive Relief, Clear Cove Faces a Substantial Risk of Irreparable Harm in that Its Assets Might Be Transferred and Not Recoverable.

Clear Cove will suffer irreparable harm unless this Court grants a preliminary injunction while Clear Cove’s interest in the Restrained Funds is adjudicated. This Court previously granted a virtually identical application by Petitioner based on evidence that ARC has minimal liquid assets and is on the brink of insolvency: “Petitioner has demonstrated that it will suffer irreparable harm absent a preliminary injunction freezing certain liquid assets in Respondents’ possession because Respondents are ‘on the brink of insolvency.’ See *CRP/Extell Parcel I, L.P. v. Cuomo*, 394 F. App’x 779 (2d Cir. 2010) (citing *Brenntag Int’l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249-50 (2d Cir. 1999)).” (ECF No. 64, at 2.)

Accordingly, the Court ordered Respondents to “place \$4,706,872.75 in a separate bank account, segregated from the \$1,000,000 reserved for daily operating expenses,” and enjoined Respondents from “transfer[ing], caus[ing] to be transferred, or tak[ing] any action to transfer the \$4,706,872.75 out of the segregated bank account during the pendency of this action without further order of this Court.” (ECF No. 64, at 3.) There is real and substantial risk that ARC will try to resolve its dispute with Angelica by transferring to Angelica the Restrained Funds, including Clear Cove’s Transferred Interests. By the time Clear Cove has an enforceable judgment against ARC, Clear Cove’s property will be gone or dissipated.

It is true that “As a general matter, because monetary injury can be estimated and

³ See Participation Agreement, § 17. These black letter elements are the same in all jurisdictions, including Florida and New York. See *R. Plants, Inc. v. Dome Enters., Inc.*, 221 So. 3d 752, 754 (Fla. Dist. Ct. App. 2017); *Flomenbaum v. New York Univ.*, 71 A.D.3d 80, 91 (1st Dep’t 2009).

compensated, the likelihood of such injury usually does not constitute irreparable harm.” *Brenntag Int’l Chems, Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). However, an “exception” to this “monetary loss” rule has been recognized “where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.” *Id.* at 249-50. “[C]ourts have excepted from the general rule regarding monetary injury situations involving obligations owed by insolvents.” *Id.* at 249. Accordingly, courts will find a risk of irreparable harm “where the party that might ultimately be ordered to pay the monetary damages is insolvent or facing imminent bankruptcy or is in a perilous financial state.” *WestLB AG v. BAC Fla. Bank*, 2012 WL 3135825, at *5 (S.D.N.Y. Aug. 2, 2012) (citation omitted).

Here—as the Court has already recognized—there is a substantial risk of ARC dissipating Clear Cove’s funds if not restrained. Moreover, ARC has now been exposed as having perpetrated fraud in attempting to sell Clear Cove’s property—the Transferred Interests and Secondary ERC Claim—to another investor. Clear Cove’s imminent litigation against ARC will take months at a minimum to resolve. In the interim, there is significant risk that ARC will use Clear Cove’s property for some other purpose, including as a means to settle the instant action with Angelica.

Moreover, the irreparable harm to Clear Cove is even more acute than the typical case of an imminently insolvent debtor. Clear Cove is not simply a potential creditor in bankruptcy; rather, Clear Cove bought the Transferred Interests and subsequently acquired the Secondary ERC Claim in the course of a true sale transaction. Accordingly, in the event of ARC’s bankruptcy, the ERC refunds comprising the Transferred Interests and Secondary ERC Claim would not even be property of the bankruptcy estate. *See, e.g., In re Dryden Advisory Grp., LLC*, 534 B.R. 612, 626-27 (Bankr. M.D. Pa. 2015) (accounts receivable sold pre-petition do not constitute estate property);

In re R&J Pizza Corp., 2014 WL 12973408 (Bankr. E.D.N.Y. Oct. 14, 2014), (finding proceeds of a receivable sold prepetition were a true sale and ordering the proceeds held by the debtor be turned over to the owner); *In re Florian*, 233 B.R. 25 (Bankr. D. Conn. 1999) (holding that while the insurance policy was property of the estate, the proceeds of the policy were not property of the estate and were for the benefit of the equipment lessor who owned the equipment and ordering the proceeds plus interest turned over to the lessor); *In re Computrex, Inc.*, 403 F.3d 807 (6th Cir. 2005) (finding that the Debtor's possession of the money was only a bailment, and therefore the money was never property of the estate); *In re CMC Telecom, Inc.*, 383 B.R. 52 (Bankr. E.D. Mich. 2008) (holding that CMC Telecom did not have an equitable interest in the funds and they were not property of the debtor's estate, as the provider was obligated to remit the funds to the original providers of the funds; and ordering that the funds be turned over to the providers, notwithstanding that they had been commingled in the debtor's general accounts). Thus, if ARC uses Clear Cove's Transferred Interests or Secondary ERC Claim before declaring bankruptcy, including by improperly transferring some or all of those Transferred Interests or Secondary ERC Claim to Angelica, Clear Cove will be deprived of its rights to full recovery.

C. The Balance of Hardships and Equities Weighs in Favor of Clear Cove.

The balance of hardships and equities here also weighs in favor of granting provisional relief to Clear Cove. When evaluating the balance of equities, the Court must consider the "relative prejudice to each party accruing from a grant or denial of the requested relief." *Barbes Rest. Inc. v. ASRR Suzer 218 LLC*, 140 A.D. 3d 430, 432 (1st Dep't. 2016). The court should grant the provisional relief when it "would 'maintain the status quo [pending a hearing on the merits] and prevent the dissipation of property that could render a judgment ineffectual.'" *Id.*

Here, neither ARC nor Angelica has a colorable claim to the portion of the Restrained Funds comprised of the Transferred Interests and/or Secondary ERC Claim. As publicly recorded,

it is Clear Cove—not ARC or Angelica—which owns the Transferred Interests and Secondary ERC Claim. There is no equity in ARC dissipating Clear Cove’s property (including to Angelica, who has no right to the Transferred Interests or Secondary ERC Claim) before Clear Cove can obtain and enforce a judgment. Accordingly, the equities favor granting provisional relief to preserve the status quo, until all parties have an opportunity to adjudicate their interests in the Restrained Funds.

D. The Public Interest Favors the Issuance of an Injunction.

When considering the interest of the public in connection with potential injunctive relief, the Court need only “confirm that granting injunctive relief would not disserve the public interest.” *Rex Med. L.P. v. Angiotech Pharms. (US), Inc.*, 754 F. Supp. 2d 616, 626 (S.D.N.Y. 2010). Here, the provisional relief sought is in the public interest. There is a strong public interest “in seeing that parties oblige by their contractual obligations and are not allowed to skirt such obligations at another’s expense.” *Id.* The public interest also is served when rightful ownership is clarified, future unauthorized access to Plaintiff’s property is deterred, and other similar actors may be deterred “from engaging in the type of unlawful conduct at issue here.” *LawClick LLC v. Reagan*, 2021 WL 724920, at *5 (E.D.N.Y. Jan. 26, 2021), *report and recommendation adopted*, 2021 WL 722413 (E.D.N.Y. Feb. 24, 2021). In addition, Clear Cove’s interests do not even conflict with potential creditors in bankruptcy because the Transferred Interests and Secondary ERC Claim are not property of any future bankruptcy estate. *See supra.*

IV. The Court Should Issue A TRO Enjoining the Distribution of the Restrained Funds Until it Has Adjudicated Clear Cove’s Intervention and the Preliminary Injunction.

The same standards governing the entry of a preliminary injunction govern the issuance of a TRO. *See Helio Logistics, Inc. v. Mehta*, 2023 WL 1517687, at *2 (S.D.N.Y. Feb. 3, 2023) (applying “same standards” to preliminary injunction and TRO). Accordingly, the arguments in

Section III, *supra*, apply with equal force to the Court's issuance of a TRO: (1) Clear Cove is likely to succeed on its forthcoming breach of contract claim against ARC; (2) without the issuance of a TRO, ARC and Angelica may be greatly motivated to settle their dispute and dismiss the action prior to the issuance of Clear Cove's requested preliminary injunction in order to deny Clear Cove its chance to recover its Transferred Interests and/or Secondary ERC Claim wrongfully retained by ARC; (3) the balance of equities weighs in favor of retaining the status quo; and (4) the public interest favors distributing the Transferred Interests and/or Secondary ERC Claim to its rightful owner (Clear Cove). Therefore, the Court should enjoin the distribution of the Retained Funds to any party until it has ruled on Clear Cove's intervention and requested preliminary injunction.

CONCLUSION

For the forgoing reasons, Clear Cove respectfully requests that this Court: (1) grant its motion to intervene in this litigation either as of right pursuant to FRCP 24(a)(2) or, in the alternative, by permission pursuant to FRCP 24(b)(1); (2) enter a preliminary injunction enjoining the distribution of the Restrained Funds during the pendency of Clear Cove’s forthcoming breach of contract action against ARC, pursuant to FRCP 65; and (3) enter a TRO while the Court considers Clear Cove’s requested intervention and the preliminary injunction, and grant such other and further relief as may be deemed appropriate in the interests of justice.

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Respectfully submitted,
VEDDER PRICE P.C.

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