IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BILLY WAYNE MCCLINTOCK individually and d/b/a MSC HOLDINGS; DIANNE ALEXANDER; MSC HOLDINGS USA, LLC; MSC HOLDINGS, INC.; and MSC GA HOLDINGS, LLC, Defendants.	:	CIVIL ACTION NO. 1:12-CV-04028-SCJ

ORDER

This matter appears before the Court on Plaintiff's Motion for Summary Judgment, Disgorgement, Prejudgment Interest, and Civil Penalties Against Defendants Alexander and McClintock (Doc. No. [46]), Receiver's Motion to Engage Retained Personnel (Doc. No. [50]), and HSBC Bank USA, National Association's and Specialized Loan Servicing LLC's Motion to Intervene and to Modify Asset Freeze Order (Doc. No. [53]). For the following reasons, Plaintiff's Motion for Summary Judgment, Disgorgement, Prejudgment Interest, and Civil Penalties Against Defendants Alexander and McClintock is **GRANTED**,

Receiver's Motion to Engage Retained Personnel is **GRANTED**, and HSBC Bank USA's and Specialized Loan Servicing LLC's Motion to Intervene and to Modify Asset Freeze Order is **GRANTED, in part, and DENIED, in part.**

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DISGORGEMENT, PREJUDGMENT INTEREST, AND CIVIL PENALTIES

A. Background[1]

Defendants Billy McClintock and Dianne Alexander were friends for many years before jointly operating a "prime-bank" Ponzi scheme. Doc. No. [46-2], p. 7, ¶ 16. At some point before 2002, McClintock informed Alexander about his investment in "the Trust," an exclusive and secretive entity started by several wealthy European families after World War II. Id. at p. 7, ¶ 17; p. 8, ¶¶ 18(c), 18(e), 18(f). The Trust allegedly owns European banks and generates money through fractional banking and sales of bank debentures. Id. at p. 8, ¶ 18(d). Investors can loan money to the Trust via renewable one-page contracts of one year and one day, with an annual interest return rate of thirty-eight percent. Id.

[1] Defendants agreed "that in connection with the Commission's motion for disgorgement and/or civil penalties . . . the allegations of the complaint shall be accepted as and deemed true by the Court." Doc. Nos. [9], p. 3; [10], p. 3. Defendants also "waive[d] the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure." Doc. Nos. [9], p. 3; [10], p. 3. The Court cites to Plaintiff's Statement of Material Facts. See Doc. No. [46-2].

at p. 8, ¶ 18(g). Each investor must pay a minimum investment amount usually consisting of $35,000 or $50,000. Id. at p. 9, ¶ 18(h).

McClintock, the purported United States National Director for the Trust, offered Alexander the opportunity to invest and serve as the United States Regional Director for the Trust; Alexander accepted McClintock's offer. Id. at p. 9, ¶ 19. Alexander claims there are three additional Regional Directors, but their identities are unknown to her. Id. at p. 10, ¶ 20. Individually and jointly from at least 2004, Defendants collected over $15 million from more than 220 investors in over twenty states, including Georgia. Id. at p. 10, ¶ 22; p. 5, ¶ 6. McClintock paid Alexander a five-percent management fee for each individual she referred when the loan matured after one year and one day. Id. at p. 11, ¶ 26. If an investor rolled over his principal into a new contract, Alexander received another five-percent fee. Id. at p. 11, ¶ 27. In addition, if a downline investor referred a new investor, Alexander and the referring investor each received a five-percent fee. Id. at p. 11, ¶ 28. In operating this scheme, Defendants acted as "brokers" in the sale of "securities." Id. at p. 5, ¶ 9.

The Trust, however, does not exist. Id. at p. 5, ¶ 7; p. 19, ¶ 59. Defendants used funds to make payments to themselves and used new investments to pay

earlier investors. Id. at p. 5, ¶ (7). As a result, Plaintiff Securities and Exchange Commission ("SEC") filed its Complaint on November 19, 2012, alleging that Defendants violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rules 10b–5(a), (b), and (c), and aided and abetted violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10(b)–5. Doc. No. [1], p. 4. On December 3, 2012, Plaintiff filed, and each Defendant signed, a Consent to Permanent Injunction and Other Relief. Doc. Nos. [9]; [10]. The Court signed an Order of Permanent Injunction and Order Continuing Freeze and Other Ancillary Relief for each Defendant on December 6, 2012. Doc. Nos. [11]; [12]. On October 31, 2014, Plaintiff filed the instant motion against both Defendants. Doc. No. [46].

B. Discussion

1. *Motion for Summary Judgment*

Defendants agreed to be permanently restrained and enjoined from various violations of the Securities Act, Exchange Act, and Code of Federal Regulations, to pay disgorgement of ill-gotten gains, and a civil penalty in amounts to be determined by the Court upon motion of Plaintiff, and to pay

prejudgment interest calculated from November 1, 2012, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). Doc. Nos. [9], pp. 2–3, ¶ 3; [10], pp. 2–3, ¶ 3. Defendants further agreed that they "will be precluded from arguing that [they] did not violate the federal securities laws as alleged in the complaint;" they "may not challenge the validity of this Consent or the Order of Permanent Injunction;" "the allegations of the Complaint shall be accepted as and deemed true by the Court;" and "the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure." Doc. Nos. [9], p. 3, ¶ 3; [10], p. 3, ¶ 3.

Due to Defendants' Consents, the Court finds "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a).[2] Thus, Plaintiff's Motion for Summary Judgment (Doc. No. [46]) against Defendants is granted.

[2] The Court need not elaborate further because Defendants waived entry of findings of fact and conclusions of law under Federal Rule 52. Doc. Nos. [9], p. 3; [10], p. 3.

2. *Disgorgement*

In Plaintiff's Motion for Summary Judgment, it requests that the "Court should now order Alexander to pay disgorgement in the amount of $2,197,312" and the "Court should also order McClintock to pay disgorgement in the amount of $1,649,812." Doc. No. [46], p. 3. As support for those figures, the SEC submitted sworn declarations from the Receiver, whose duties include "tracking deposits, transfers, and the movement of investor funds controlled by the Receivership Defendants." Doc. Nos. [46-7], p. 2, ¶ 4; [46-8], p. 2, ¶ 4. To accomplish that, the Receiver and his staff "investigated the movement and transfers of investor funds by [Defendants] in the various bank accounts that [they] controlled." Doc. Nos. [46-7], p. 2, ¶ 4; [46-8], p. 2, ¶ 4. The Receiver and his staff subsequently "prepared various spreadsheets detailing deposits, transfers, and use of investor funds in and out of bank accounts under the" control of Defendants, which were attached to the sworn declarations. Doc. Nos. [46-7], p. 2, ¶ 4; [46-8], p. 2, ¶ 4.

"Once a court determines that a federal securities law violation has occurred, it has broad equitable powers to fashion appropriate remedies, including ordering culpable defendants to disgorge their profits." SEC v. Miller,

744 F. Supp. 2d 1325, 1342 (N.D. Ga. 2010). "The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains." Id. "Because disgorgement is remedial and not punitive, the court's power to order disgorgement 'extends only to the amount with interest by which the defendant profited from his wrongdoing.'" Id. (quoting SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978)).

"'The SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains.'" SEC v. Merch. Capital, LLC, 486 F. App'x 93, 96 (11th Cir. 2012) (quoting SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004)). Once the SEC produces a reasonable approximation, the burden shifts to the defendant to demonstrate that the SEC's estimate is unreasonable. Id. Exactitude is not required; as long as the SEC's estimate is reasonable, "any risk of error falls on the wrongdoer whose illegal conduct created the uncertainty." Id.

> [W]here a defendant's record-keeping or lack thereof has so obscured matters that calculating the exact amount of illicit gains cannot be accomplished without incurring inordinate expense, it is well within the district court's discretion to rule that the amount of disgorgement will be the more readily measurable proceeds received from the unlawful transactions.

Calvo, 378 F.3d at 1217–18.

The Court has reviewed the documents submitted by the Receiver, and finds that the disgorgement requests for Defendant Alexander in the amount of $2,197,312 and for Defendant McClintock in the amount of $1,649,812 are reasonable. Defendants agreed "that the Court shall order disgorgement of ill-gotten gains" and "the amounts of the disgorgement . . . shall be determined by the Court upon motion of the Commission." Doc. Nos. [9], p. 2, ¶ 3; [10], pp. 2–3, ¶ 3.

Accordingly, the Court hereby orders Defendant Alexander to pay $2,197,312 and Defendant McClintock to pay $1,649, 812 for disgorgement of ill-gotten gains.

3. Prejudgment Interest

In Plaintiff's Motion for Summary Judgment, it requests that the "Court should now order Alexander to pay . . . prejudgment interest . . . in the amount of $117,845" and the "Court should also order McClintock to pay . . . prejudgment interest . . . in the amount of $88,482." Doc. No. [46], p. 3. As support for those figures, the SEC submitted a sworn declaration from Pat Huddleston II, Senior Trial Counsel for Plaintiff. Doc. No. [46–9]. Huddleston

used the Receiver's calculation of the disgorgement amounts to compute the prejudgment interest from the period of December 6, 2012 – the date this Court signed Orders of Permanent Injunction and Orders Continuing Freeze and Other Ancillary Relief (Doc. Nos. [11]; [12]) for both Defendants – to October 31, 2014, the last day of the month in which this motion was filed. To obtain the amounts of prejudgment interest, he used a "prejudgment interest calculator program" and attached exhibits detailing the calculations. Doc. No. [46-9], pp. 2-3, ¶¶ 3-5.

Huddleston, in compliance with the Court's December 6, 2012 Order, based the rate of interest on the Internal Revenue Code's provision for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). That statute provides, "The underpayment rate established under this section shall be the sum of – (A) the Federal short-term rate determined under subsection (b), plus (B) 3 percentage points." 26 U.S.C. § 6621(a)(2) (2012); see also SEC v. Carrillo, 325 F.3d 1268, 1271 (11th Cir. 2003) (using the same method for calculating prejudgment interest). The Federal short-term rate is determined by the Secretary "for the first month in each calendar quarter." § 6621(b)(1). That rate "shall apply during the first calendar quarter beginning after such month." § 6621(b)(2)(A).

"It is clear that whether 'prejudgment interest should be awarded on a damage recovery in a [federal securities] action is a question of fairness resting within the District Court's sound discretion.'" Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1536 (11th Cir. 1987) (quoting Wolf v. Frank, 477 F.2d 467, 479 (5th Cir. 1973)). Because a prejudgment award is compensatory rather than punitive, the district court must ensure that the award is "tempered by an assessment of the equities." Id. (internal quotations omitted).

> Where a securities law violator has enjoyed access to funds over a period of time as a result of his wrongdoing, requiring the violator to pay prejudgment interest is consistent with the equitable purpose of disgorgement . . . Prejudgment interest is based on the wrongful deprivation of an aggrieved party of its money, including depriving the victim of the opportunity to realize a fair rate of return on that money . . . In addition, in the context of Section 10(b) and Rule 10b-5 actions, a defendant's scienter is sufficient to justify an award of prejudgment interest.

SEC v. Utsick, No. 06-20975-CIV, 2009 WL 1404726, at *15 (S.D. Fla. May 19, 2009). Here, "[w]ithout prejudgment interest, the [defendants] would have benefitted from what in effect amounted to interest-free loans of the ill-gotten funds." Merch. Capital, 486 F. App'x at 97. Thus, it is not only fair, but equitable, to award prejudgment interest to Plaintiff. The Court has reviewed the

documents submitted by Huddleston and finds that the prejudgment interest requests for Defendant Alexander in the amount of $117,845 and for Defendant McClintock in the amount of $88,482 have been accurately computed, especially in light of the Court's approval of the disgorgement amounts. Defendants agreed "that the Court shall order . . . prejudgment interest" and "the amounts of the . . . prejudgment interest shall be calculated from November 1, 2012, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2)." Doc. Nos. [9], pp. 2–3, ¶ 3; [10], pp. 2–3, ¶ 3. Accordingly, the Court orders Defendant Alexander to pay $117,845 and Defendant McClintock to pay $88,482 for prejudgment interest.

4. Civil Penalties

In Plaintiff's Motion for Summary Judgment, it did not request specific amounts for civil penalties against Defendants. Doc. No. [46]. However, Defendants agreed that the civil penalties "shall be determined by the Court upon motion of the Commission" in their Consents to Permanent Injunction. Doc. Nos. [9], p. 2, ¶ 3; [10], pp. 2–3, ¶ 3. In Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment, Plaintiff requested "that this Court

order Alexander and McClintock to each pay a statutory civil penalty in an amount determined by the Court to be appropriate." Doc. No. [46-1], p. 20.

Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act—with nearly identical language—allow the SEC to seek civil penalties imposed by the Court. The Exchange Act provides,

> Whenever it shall appear to the Commission that any person has violated any provision of this chapter, [or] the rules or regulations thereunder, . . . the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

15 U.S.C. § 78u(d)(3)(A) (2012).[3] To determine the amount of the penalty, the Act outlines three tiers based on the nature of the violation. Under the first tier, "[f]or *each violation*, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person." § 78u(d)(3)(B)(i) (emphasis added). The second tier goes further: "Notwithstanding clause (i), the amount of penalty for *each such violation* shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person . . . if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless

[3] Due to the nearly identical language of the relevant statutes, only the Exchange Act will be quoted to avoid redundancy.

disregard of a regulatory requirement." § 78u(d)(3)(B)(ii) (emphasis added). For the third tier, the Act states:

> Notwithstanding clauses (i) and (ii), the amount of penalty for *each such violation* shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person . . . if – (aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and (bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

§ 78u(d)(3)(B)(iii) (emphasis added).

"Civil penalties are intended to punish the individual wrongdoer and to deter him and others from future securities violations." SEC v. Monterosso, 756 F.3d 1326, 1338 (11th Cir. 2010). The "Commission need only make 'a proper showing' that a violation has occurred and a penalty is warranted." SEC v. Warren, 534 F.3d 1368, 1370 (11th Cir. 2008). Although the statute leaves the amount to be imposed to the discretion of the district judge, "courts consider numerous factors, including the egregiousness of the violation, the isolated or repeated nature of the violations, the degree of scienter involved, whether the defendant concealed his trading, and the deterrent effect given the defendant's financial worth." Miller, 744 F. Supp. 2d at 1344; see also SEC v. Sargent, 329 F.3d

34, 42 (1st Cir. 2003). The Act also authorizes penalties for "each violation," so "courts are empowered to multiply the statutory penalty amount by the number of statutes the defendant violated, and many do." Miller, 744 F. Supp. 2d at 1345.

The Court finds that, at the very least, Defendants' violations of the Securities Act and the Securities Exchange Act place them in the third tier for civil penalties. Through their Consents, they admitted that their violations involved fraud or deceit. The fraudulent offering of securities in the nonexistent "Trust" resulted in substantial losses and created a significant risk of substantial losses to investors. Defendants operated their scheme from 2004 until 2012, and raised at least $15 million from more than 220 investors. In light of the longevity of the fraud, the number of investors defrauded, and the substantial losses incurred, Defendants are squarely within the third tier of civil penalties.

However, as to the amount each Defendant must pay, the Court would like further briefing from Plaintiff. Accordingly, the Court hereby orders Plaintiff to file separate, written briefs with the proposed final amount of civil penalties as to each Defendant and the reasons therefor. Plaintiff should address a statutory multiplier for "each violation" and address the factors discussed in Miller and Sargent for each Defendant.[4] Plaintiff's briefs should be no longer than ten pages

[4] Any proposed civil penalty should include the required adjustment for inflation. See 17 C.F.R. §§ 201.1002-04.

each and are due no later than 5:00 PM on September 22, 2015.

II. RECEIVER'S MOTION TO ENGAGE RETAINED PERSONNEL

The Court first issued an order appointing Receiver on February 11, 2013. Doc. No. [19]. On June 9, 2014, the Court issued another order reappointing the Receiver. Doc. No. [42]. If the Receiver seeks to engage retained personnel, he must file a motion with the Court. Id. at p. 26, ¶ 58. As part of the Receiver's general powers and duties, he can "engage and employ persons in his discretion to assist him in carrying out his duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, securities traders, registered representatives, financial or business advisers, liquidating agents, real estate agents, forensic experts, brokers, traders or auctioneers." Id. at p. 5, ¶ 7(F). The Receiver filed the present motion seeking authorization to engage two professionals—Thomas A. Buckoff, Ph.D., CPA/CFF, CFE and Alan Perry, J.D.—to assist him in prosecuting fraudulent transfer claims in a separate action also pending before this Court.

The Court has reviewed the qualifications of Dr. Buckoff and Mr. Perry and the proposed terms of their engagement in this case. Having considered the professionals' experience in the areas of the applicable law, the undersigned finds that the hourly rates of $250 for Dr. Buckoff and $300 for Mr. Perry are reasonable and appropriate in the Atlanta market.

Accordingly, the Court hereby authorizes the Receiver to engage both Mr. Perry and Dr. Buckoff as retained personnel under the terms presented.

III. HSBC'S AND SLS'S MOTION TO INTERVENE AND TO MODIFY ASSET FREEZE ORDER

A. Background[5]

On or about October 6, 2003, Defendant Alexander obtained a mortgage loan to purchase real property located on Lake Lanier in Cumming, Georgia. Doc. No. [53-1], p. 3. To secure the loan, Alexander executed a note and security deed, which granted the original holder title to the property with power of sale. Id. The security deed was subsequently assigned to HSBC Bank USA, National Association ("HSBC") and recorded on February 6, 2015. Id. Alexander has not made payment on the loan since November 2012. Id. at 4. Specialized Loan Servicing LLC ("SLS"), the servicer of the loan, is responsible for proceeding with efforts to recover on the defaulted loan, including foreclosure by HSBC to satisfy the loan. Id. Due to the Court's December 6, 2012 Order of Permanent Injunction as to Defendant Dianne Alexander and Order Continuing Freeze and Other Ancillary Relief (Doc. No. [11]), HSBC and SLS have been unable to proceed with foreclosure. Doc. No. [53-1], p. 5. As a result, on July 8, 2015, HSBC and SLS filed this Motion for Leave to Intervene and to Modify the Asset Freeze Order to

[5] The Court cites to the facts as stated in the proposed intervenors' brief in support of their motion. Doc. No. [53-1].

Permit Foreclosure on Real Property Collateral. They seek relief from the Asset Freeze Order to permit foreclosure and to allow application of the proceeds to Alexander's loan. Doc. No. [53], p. 2–3.

B. Discussion

1. Intervention of Right

HSBC and SLS rely on Federal Rules of Civil Procedure 24(a) and 24(b) to intervene in the present action. Doc. No. [53-1], p. 7. Intervention of right is granted on timely motion to anyone 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).

> In order for a party to intervene as a matter of right under Rule 24(a), it must establish: (1) the application to intervene is timely; (2) the party has an interest relating to the property or transaction which is the subject of the action; (3) the party is situated so that disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) the party's interest is represented inadequately by the existing parties to the suit.

Angel Flight of Ga., Inc. v. Angel Flight Am., Inc., 272 F. App'x 817, 819 (11th Cir. 2008); see also Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1250 (11th Cir. 2002). Because proposed intervenors have a secured interest in the Lake

Lanier property, they clearly satisfy the second element. However, "[i]f [the motion to intervene] is untimely, intervention must be denied." NAACP v. New York, 413 U.S. 345, 365 (1973).

> Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed in review.

Id. Therefore, this Court must first determine whether HSBC and SLS timely filed their motion.

i. Timeliness

When assessing timeliness, a district court must consider four factors:

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Angel Flight, 272 F. App'x at 819 (citing United States v. Jefferson Cty., 720 F.2d 1511, 1516 (11th Cir. 1983)).

The proposed intervenors claim that SLS learned of this action after June 12, 2014, the date of the letter notifying Alexander of her default. Doc. No. [53–1], p. 4. However, the proposed intervenors did not specify when they learned of this action and did not file the instant motion until July 8, 2015—almost one year later. Based on emails Receiver attached to his motion, the Court finds that the proposed intervenors were given sufficient notice such that they knew or should have known of this action before June 12, 2014. Doc. Nos. [57-1], [57-2], [57-3]. Furthermore, Plaintiff filed its Motion for Summary Judgment on October 31, 2014, more than eight months before HSBC and SLS filed their Motion to Intervene. Doc. No. [46]. If the Court were to grant this motion, proposed intervenors' undue delay would prejudice the existing parties at this late stage of litigation. Prolonging the suit due to third parties' delayed action would unfairly prejudice the existing parties. In addition, allowing intervention and granting the requested relief in full would force Receiver to sell property that is currently being held to increase the size of the receivership estate for the benefit of the victims of Alexander's fraud.

This is not to say that the Court does not sympathize with the costs proposed intervenors continue to incur. In 2014, HSBC alleges that, through its servicer SLS, it paid $4,342.69 for property taxes and $3,475.92 for property insurance to preserve the collateral property. Doc. No. [53–1], p . 4. They argue

that the "sole efforts to protect the Property are being undertaken by HSBC/SLS, who continue to incur expenses to preserve the Property." Doc. No. [60], p. 4. The Court agrees that HSBC and SLS should not continue to pay these expenses for property they cannot foreclose upon. To provide some form of relief, the Court will modify the Asset Freeze Order (Doc. No. [11]).

Finally, the Court finds no unusual circumstance that militates against the determination that the application is untimely. Any prejudice to HSBC and SLS is insufficient to overcome the other factors when considering the totality of the circumstances. Thus, the Court holds that the Motion to Intervene is untimely.

ii. Protecting proposed intervenors' property interest

Even if the present motion were timely, proposed intervenors do not satisfy the third and fourth elements, which require the parties to be "situated so that disposition of the action, as a practical matter, may impede or impair [their] ability to protect that interest; and . . . the part[ies'] interest is represented inadequately by the existing parties to the suit." Angel Flight, 272 F. App'x at 819.

These two elements are similarly concerned with protecting the proposed intervenors' interest relating to the underlying property. However, that concern is unwarranted in this case. The proposed intervenors have an undisputed secured interest in the property. Disposition of the present action will not

undermine that interest or prevent proposed intervenors from attempting to recover the balance on their loan. Moreover, the Receiver, not the proposed intervenors, is responsible for managing and preserving the property. As part of the Receiver's duties, he must "manage, control, operate and maintain the Receivership Estate and hold in his possession, custody, and control all Receivership Assets, pending further Order of this Court." Doc. No. [42], p. 5, ¶ 7(C). In addition, the Receiver must "take such action as necessary and appropriate for the preservation of Receivership Assets and Recoverable Assets or to prevent the dissipation or concealment of Receivership Assets and/or Recoverable Assets." Id. at p. 5, ¶ 7(G). Thus, the Receiver can adequately represent the proposed intervenors' interest. In an effort to further ensure that the proposed intervenors' interest is protected, the Court will modify the Asset Freeze Order (Doc. No. [11]). But the proposed intervenors fail to satisfy the requirements for intervention as of right under Federal Rule 24(a).

2. ***Permissive Intervention***

Likewise, intervention is not possible under Rule 24(b)'s permissive intervention standard. Permissive intervention may be granted on timely motion to a party that "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2). Not only is the Motion to Intervene untimely, there is no "common question of law or fact" that would

allow intervention. Fed. R. Civ. P. 24(b)(1)(B). In SEC v. Callahan, 2 F. Supp. 3d 427, 438 (E.D.N.Y. 2014), a factually similar case also involving an underlying Ponzi scheme, the court clearly stated, "[The bank] wishes to intervene to pursue its rights in and to its collateral, but that issue is wholly separate from this civil securities fraud action that has been brought by the SEC."

Furthermore, "[i]n 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)(3). "[C]ase law is clear that if an intervenor attempts to introduce collateral issues in a proceeding, a court may be justified in denying a motion to intervene based on undue delay or prejudice." Callahan, 2 F. Supp. 3d at 438 (internal quotations omitted). Again, Plaintiff filed its Motion for Summary Judgment more than eight months before HSBC and SLS filed their Motion to Intervene. Granting the proposed intervenors' motion in full would prejudice the existing parties given the stage of this litigation. Accordingly, the Court denies HSBC's and SLS's Motion to Intervene under permissive intervention.

3. Modification of Asset Freeze Order

Although the Court denies HSBC's and SLS's Motion to Intervene, the parties "request the modification to the Asset Freeze Order regardless of whether this Court grants the request to intervene." Doc. No. [60], p. 3. HSBC and SLS

seek relief from the Court's December 6, 2012 Order (Doc. No. [11]) to permit foreclosure on Alexander's Lake Lanier property and to allow application of the proceeds to Alexander's loan. Doc. No. [53], p. 2.

The "broad discretion district courts have in this realm" allows them to "freeze assets in order to preserve funds while a party seeks an equitable remedy such as disgorgement." SEC v. Lauer, 478 F. App'x 550, 554 (11th Cir. 2012). "The jurisdiction of a court to freeze assets and to modify such orders to permit sales arise from the same authority." SEC v. Smith, No. 10-CV-457 (GLS/DRH), 2011 WL 9528138, at *2 (N.D.NY. Feb. 1, 2011). Here, the "sole efforts to protect the Property are being undertaken by HSBC/SLS, who continue to incur expenses to preserve the Property." Doc. No. [60], p. 4. HSBC and SLS have allegedly expended $4,342.69 for property taxes and $3,475.92 for property insurance in order to preserve the collateral property. Doc. No. [53-1], p . 4. The Court finds that this places an undue burden on HSBC and SLS.

Although HSBC and SLS are unfairly burdened, foreclosure is not justified. Foreclosure may severely decrease the value of the asset, thereby reducing the recovery amount available for victims of the Ponzi scheme. The Callahan court, in denying the bank's motion to intervene, reasoned that "the Receiver needs to be able to determine whether a more lucrative sale of the Property . . . is possible, thereby maximizing the funds that will be available for the Investors." 2 F. Supp.

3d at 439. "[I]f the value of an asset is at risk of dissipation so that funds available to investors could be diminished in the event the [party] obtains a judgment here, the Court may act to prevent such dissipation." Smith, 2011 WL 9528138, at *2. In Smith, the court required that assets be maintained without dissipation of their value, similar to what this Court instructed in the Order Appointing Receiver. See Doc. No. [42], p. 5, ¶ 7(G). The court stated that "[i]t appears in the best interests of both the investors and [the defendant] that if the property can be maintained for the foreseeable future without sale such that the equity interest in the property will not be diminished, the property should be maintained and its sale denied." Smith, 2011 WL 9528138, at *4.

The Court will not modify its asset freeze order to allow foreclosure on the subject property, but the Court does order Receiver, beginning on October 1, 2015, to pay the property taxes and property insurance until the asset is sold. There is an inherent tension between preserving assets to compensate victims of fraud and the need to foreclose on a home to preserve HSBC's and SLC's monetary interest in the property. But the Court believes that shifting the payment of taxes and insurance to the Receiver at this time is sufficient to overcome this tension for the foreseeable future.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment, Disgorgement, Prejudgment Interest, and Civil Penalties Against Defendants Alexander and McClintock (Doc. No. [46]) is **GRANTED**. Receiver's Motion to Engage Retained Personnel (Doc. No. [50]) is **GRANTED**. HSBC Bank USA, National Association's and Specialized Loan Servicing LLC's Motion to Intervene and to Modify Asset Freeze Order (Doc. No. [56]) is **GRANTED, in part, and DENIED, in part**.

Plaintiff Securities and Exchange Commission is **ORDERED** to file separate, written briefs with the proposed final amount of civil penalties as to each Defendant and the reasons therefor no later than 5:00 PM on September 22, 2015.

IT IS SO ORDERED, this 14th day of September, 2015.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE