UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Case No. 8:20-CV-325-T-35MRM

BRIAN DAVISON;
BARRY M. RYBICKI;
EQUIALT LLC;
EQUIALT FUND, LLC;
EQUIALT FUND II, LLC;
EQUIALT FUND III, LLC;
EA SIP, LLC;

Defendants, and

128 E. DAVIS BLVD, LLC, et al.,

Relief Defendants.
_____/

RECEIVER'S OPPOSITION TO MOTION TO INTERVENE TO TERMINATE INVESTOR CLAWBACK LITIGATION

Burton W. Wiand, the Court-appointed receiver over the corporate defendants and relief defendants (the "**Receiver**" and the "**Receivership**" or "**Receivership Estate**"), opposes the Motion to Intervene [Pursuant] to Federal Rule of Civil Procedure 24 to Terminate Investor Clawback Litigation (the "**Motion**") filed by Dawn and Scott Stallmo (the "**Stallmos**") because the Motion is unnecessary and frivolous. The Stallmos are two of more than 120

defendants in the Receiver's clawback action. They expressly seek to intervene in this action with the goal of terminating the Receivership. Mot. at 4 (requesting discovery to determine "whether the assets thus far marshalled … are sufficient to satisfy all the outstanding debentures without the payment of interest," and if so, asking the Court to instruct the Receiver to "liquidate all assets," "pay existing claimants," "terminate the [R]eceivership," and dismiss "all remaining actions"). The Court should deny the Motion because it is a transparent attempt by the Stallmos to avoid paying over $106,000 through forum shopping. The relief sought is unnecessary, premature, and improper.

BACKGROUND

On February 13, 2021, the Receiver filed a clawback complaint, styled *Wiand v. Adamek*, et al., Case No. 8:21-cv-00360 (M.D. Fla. 2021) (the "**Clawback Action**").[1] Along with numerous others, Dawn Stallmo is a defendant, and the Receiver is seeking the recovery of fraudulent transfers from her in the amount of $85,208 plus prejudgment interest. *Id.* CA Doc. 419 at ¶ 10. Scott Stallmo is also a defendant, and the Receiver is seeking the recovery of fraudulent transfers from him in the amount of $21,583 plus

[1] The Court's treatment of the motion to approve this filing as "moot" is a red herring because, as noted below, the Court has approved more than 100 settlements from the Clawback Action. Any implication that the Receiver lacks authority to prosecute the Clawback Action is unsupported and meritless.

prejudgment interest. *Id.* at ¶ 11. Approximately 113 defendants have settled with the Receiver for a total recovery of more than $1.7 million.

Importantly, the Stallmos had the opportunity to serve discovery on the Receiver in the Clawback Action, but they both failed to propound any and also failed to respond to the Receiver's discovery requests. They did, however, file a motion to dismiss (CA Doc. 166), which was denied (CA Doc. 350), an answer with affirmative defenses (CA Doc. 355), and an opposition to the Receiver's motion for summary judgment (CA Doc. 424). They also participated in a mediation. In other words, the Stallmos have had and continue to have their "day in court." Their failure to participate in the discovery process does not excuse their forum shopping or warrant any of the relief requested in the Motion.

ARGUMENT

The Court should deny the Motion because Section 21(g) of the Exchange Act bars intervention in SEC enforcement actions, and intervention is also not warranted under Federal Rule of Civil Procedure 24.

Section 21(g) of the Exchange Act Bars Intervention

Section 21(g) of the Exchange Act bars intervention in federal equity receiverships and their underlying enforcement actions:

> . . . no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions

> may involve common questions of fact, unless such consolidation is consented to by the Commission.

15 U.S.C. § 78u(g). "[A]fter reviewing the legislative history, and reviewing other cases that have discussed this issue," courts in this district have come "to the inescapable conclusion that Section 21(g) bars intervention." *See S.E.C. v. Nadel*, 2009 WL 3126266, at *1 (M.D. Fla. Sept. 24, 2009); *S.E.C. v. Nadel*, 2013 WL 5442272, at *2 (M.D. Fla. Sept. 27, 2013) (same); *S.E.C. v. Freedom Env't Servs., Inc.*, 2013 WL 12155837, at *2 (M.D. Fla. Feb. 1, 2013) (following *Nadel*); *see also S.E.C. v. New Day Atlanta, LLC*, 2010 WL 11440941, at *2 (N.D. Ga. Oct. 13, 2010) (determining nonparty's "effort to intervene as a matter of right [was] undercut, if not eviscerated, by Section 21(g) of the Securities Exchange Act, which embodies a strong policy against intervention by third parties in enforcement actions"); *S.E.C. v. Univ. Lab Techs., Inc.*, 2009 WL 723243, at *2 (S.D. Fla. Mar. 18, 2009) (holding intervention "cannot be allowed" "even in the absence of specific language in Section 21(g) barring intervention, and despite the differing interpretations of that provision").[2] The Court should follow the these decisions from the Middle and Southern Districts of Florida by holding that Section 21(g) bars intervention.

2 One federal court in Georgia has held that Section 21(g) "does not represent an impenetrable wall to intervention," but, unlike the proposed intervenors here, the intervenor in that case also satisfied the requirements of Rule 24. *S.E.C. v. Torchia*, 2016 WL 7423189, at *3 (N.D. Ga. July 1, 2016).

In addition, discovery is not warranted because the value of the Receivership Estate is public information. On January 20, 2023, the Receiver filed a claims determination motion, which explained that creditors (primarily defrauded investors) have submitted 1,877 claims alleging losses of more than **$180 million**. Doc. 781 at 7 (pending and recommending approval of claims totaling $150 million). According to the Receiver's last Interim Report, the net balance of all Receivership accounts as of December 31, 2022, was **$78,572,229.30**. Doc. 793, Ex. 2 (Standardized Fund Accounting Report).[3] While the Receiver has recommended that certain claims be limited and/or denied, the amount of all submitted claims is more than $100 million greater than the cash currently in the Receivership Estate. The Receiver anticipates other recoveries through litigation and the liquidation of real estate, but the receipt of additional money is not guaranteed until funds are deposited into Receivership accounts. For example, a large settlement with several law firms is pending, but it must first clear multiple procedural and substantive hurdles. *See* Docs. 760, 787. The Receivership also has significant real estate holdings, but interest rates are rising, and the Receiver cannot predict future prices.

3 As demonstrated by the linked files, these and other documents are available on the Receiver's website. The hyperbolic complaints on pages 7 and 8 of the Motion are baseless. While the Standardized Fund Accounting Report does not include non-cash assets like unsold real estate, the Receiver cannot and will not predict the value of those assets, given rising interest rates and other disruptions to real estate markets.

Given current, public information regarding the Receivership Estate, the Motion is unnecessary, unfounded, and premature. The Receiver will file his next Interim Report on or about April 30, 2023.

No Intervention as a Matter of Right under Rule 24(a)

Even under Rule 24, "[i]ntervention by private parties in SEC litigation has generally not been granted." *Freedom Env't Servs.*, 2013 WL 12155837 at *2 (collecting cases). In order to be entitled to intervene as a matter of right under Rule 24(a), intervenors must establish: (1) their application is timely; (2) they have an interest relating to the property or transaction that is the subject of the action; (3) they are so situated that disposition of the action as a practical matter may impair or impede their ability to protect their interest; and (4) the parties to the action will not adequately represent their interest. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir.1989) (citing *Athens Lumber Co. v. FEC*, 690 F.2d 1364, 1366 (11th Cir.1982)). The movant has the burden to show that each of these four elements are met. *See C.F.T.C. v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984).

"Failure to satisfy even one of [Rule 24(a)'s] requirements is sufficient to warrant denial of a motion to intervene as a matter of right."[4] *Id.*

With respect to the first prong of Rule 24(a), the application is untimely because it challenges a motion and lawsuit filed over two years ago. Even assuming the intervenors have standing to request that this Court authorize discovery or terminate the Clawback Action (which they do not), the Receiver has already obtained approximately 113 settlements worth over $1.7 million from EquiAlt investors who received false profits. The Receiver also obtained numerous pre-suit settlements without the need for litigation. The settling parties should not be punished for amicably resolving the Receiver's claims, which is the implication and ultimate outcome of the intervenors' objective. The investors are not jointly and severally liable for their receipt of false profits; they are only liable for the transfers for which they are the transferee. One investor's repayment of a false profit does not in any way reduce another's liability, and that principle extends to all sources of recovery that comprise the Receivership Estate. Allowing intervention with the goal of terminating the

[4] Permissive intervention is possible "on timely motion" under Rule 24(b) when the intervenor "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). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Permissive intervention is improper here for the same reasons as mandatory intervention. It would, among other negative consequences, waste Receivership resources, prejudice settling defendants, and reward the proposed intervenors for ignoring the discovery process in the Clawback Action.

Clawback Action under the guise of "limited discovery" would retroactively prejudice other defendants who have acted, in good faith, based on information available at the time.

With respect to the second prong, the proposed intervenors have no interest in the Receivership Estate and therefore lack standing. Because they received false profits and are thus profiteers, the Stallmos did not file a claim in the claims process. As such, they have no standing to object to anyone's claim determination or potential distribution, even if all claimants hypothetically recover 100% of their principal investment amounts. For example, in *S.E.C. v. Nadel*, 2012 WL 12910648, at *2 (M.D. Fla. Feb. 10, 2012), several nonparties attempted to object to a motion to approve a settlement, but the court determined that most of them lacked standing because they failed to file claims in the claims process. *Id.* One individual and his trust did file claims, but – exactly like the proposed intervenors – they were defendants in the receiver's clawback lawsuit. *Id.* As alleged profiteers, the Court determined that the individual and his trust lacked standing to challenge the proposed settlement. *Id.* (holding objectors "lack[ed] standing because they allegedly received false profits and consequently are not creditors of the [r]eceivership estate and are not otherwise entitled to distributions from it."); *see also C.F.T.C. v. Oasis Int'l Grp., Ltd.*, 2022 WL 1136571, at *2 (M.D. Fla. Apr. 18, 2022) ([T]o the extent the non-parties are attempting to intervene in this case and request injunctive

or any other relief, they are without standing to do so."). While the proposed intervenors have an interest in any money they might have to pay because of the lawsuit against them, that interest is insufficient under Rule 24(b)(2), and as explained below, they can protect their interest by litigating and defending the Receiver's claims in the Clawback Action.

With respect to the third prong, the size and/or distribution of the Receivership Estate will have no impact on the proposed intervenors. Their liability to the Receiver is derived from their receipt of fraudulent transfers. Florida Statutes § 726.109(2) limits recoveries of fraudulent transfers to "the amount necessary to satisfy the creditor's claim," but as mentioned above, liability is not joint and several among all the defendants in the Clawback Action. The Receiver sued the intervenors for over $106,000 because they received transfers in that amount, which is "the amount necessary to satisfy the creditor's claim." *Id.* Their liability for that amount is not dependent on the other parties to the lawsuit, the outcome of the proposed law firm settlement, the sale of any real property, or the size of the Receivership Estate.

With respect to the fourth prong, the proposed intervenors can protect their interests by litigating the Receiver's claims in the Clawback Action. These defendants chose not to propound any discovery in that case. To allow them discovery in this case now would reward them for failing to appropriately defend the action in which they are named as parties. They have asserted

certain affirmative defenses in the Clawback Action that will be adjudicated in that matter. The Stallmos bizarrely claim that "the 'Clawback Action' defendants want their day in court as to whether equity demands that the 'Clawback Defendants' should be made to payback their interest," but they are already in court. They have filed a motion to dismiss and an answer with affirmative defenses, opposed a summary judgment motion, and participated in a mediation. Trial is scheduled for June 2023. Because the proposed intervenors are forum shopping, intervention is not necessary.

All Remaining Arguments Should be Made in the Clawback Action

Pages 8 though 14 of the Motion contain a lengthy diatribe about Ponzi schemes, the Ponzi presumption, insolvency, and profitability, but any argument concerning those issues should be presented in the Clawback Action. While this Court should not litigate substantive matters potentially at issue in another case, several issues deserve clarification here. First, some Ponzi schemes produce profits, but no Ponzi scheme produces legitimate profits:

> It is no answer that some or for that matter all of Phillips's profit may have come from "legitimate" trades made by the corporations. They were not legitimate. The money used for the trades came from investors gulled by fraudulent representations. Phillips was one of those investors, and it may seem "only fair" that he should be entitled to the profits on trades made with his money. That would be true as between him and Douglas or Douglas's corporations. It is not true as between him and either the creditors of or the other investors in the corporations. He should not be permitted to benefit from a fraud at their expense merely because he was not himself to blame for the fraud. All he is being asked to do is to return the net profits of his investment—the difference between what he put in at the beginning and what he had at the end.

Scholes v. Lehmann, 56 F.3d 750, 757–58 (7th Cir. 1995). The Stallmos are in the exact same position as the defendant is *Scholes*. *Cf. Wiand v. Lee,* 753 F.3d 1194, 1202 (11th Cir. 2014) ("Although Nadel conducted trading activity, he did not make legitimate investments."). The amounts recovered to date and still to be recovered also include millions of dollars in litigation income, which has partially filled the hole in the Receivership's books and records. In any event, the illegitimacy of the scheme should be litigated in the Clawback Action, where it is already the subject of a motion for summary judgment by the Receiver as well as expert testimony in support of the motion.

Second, the Stallmos ask the Court to terminate the Receivership if the assets in the Receivership Estate "are sufficient to satisfy all of the outstanding debentures without the payment of interest" (Mot. at 3 (emphasis added)), but then argue there was no Ponzi scheme because the entities were allegedly profitable and not insolvent (*id.* at 8-14). The promise of high interest payments, however, is a key element of Ponzi schemes. *See, e.g., Lee*, 753 F.3d at 1201 ("A Ponzi scheme uses the principal investments of newer investors, who are promised large returns, to pay older investors what appear to be high returns, but which are in reality a return of their own principal or that of other investors."). Even if the Receiver recovers 100% of all approved, claimed principal investment amounts, he will never be able to satisfy all unpaid

interest claims. As such, this was a Ponzi scheme. In any event, these arguments belong in the Clawback Action.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion. It is unnecessary, premature, and wrong in material respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 8, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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