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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

vs.

BETTYE JAN BAKER ADAIR,

Plaintiff,

Defendants.

CASE NO. 09cv0254 JM(AJB)

ORDER GRANTING MOTION TO INTERVENE; ORDER RE: DISTRIBUTION OF INTERPLEADED FUNDS; AND REFERRAL TO MAGISTRATE JUDGE

A group of defrauded investors (the “Proposed Intervenors”), specially appearing as representatives of a class of investors (the “Plaintiff Class”), move to intervene in this interpleader action and to stay or dismiss certain claims. The United States does not oppose the motion to intervene to the extent Interpleaded Funds are directly traceable to fraud victims or, alternatively, to the extent the funds in the court’s registry exceed an amount in excess of directly traceable fraud losses. Defendants-in-interpleader Cedar Management, Vic Bauman, and Skyward Management (“Objectors”) oppose the motion to intervene. No other Defendant has filed a response to the motions. Having carefully considered the moving papers, legal authorities, arguments of counsel, and the court record, the court grants the motion to intervene, denies the motion to dismiss or stay certain claims as moot, establishes an order of distribution re: the Interpleaded Funds, and refers this matter to Magistrate Judge Battaglia to oversee the distribution of the Interpleaded Funds as more fully set forth below.

BACKGROUND

The Present Action

On February 11, 2009 the United States commenced this interpleader action by depositing \$5,322,855.09 (the “Interpleaded Funds”) into the Registry of the Court and identifying 147 potential claimants/defendants. (Docket No. 1). The fund consists of \$3,521,863.63 seized from the attorney trust account of Cameron Campbell on April 15, 2004 at the First National Bank (“FNB”) in La Jolla, California. The remainder of the funds, \$1,059,200, was seized on June 18, 2004 from Integrated Payment Systems, “[w]hich funds represented proceeds from checks processed by Integrated Payment Systems for First National Bank which had attempted to return funds to forty-seven (47) individual payors from deposits made into the attorney trust account by Cameron Campbell.” (Compl. ¶6).¹ At the time of the seizure of the funds by the United States, HMS Financial Inc. (“HMS”), with the assistance of Garth Bailey, was attempting to have the funds transferred to either Germany or the Caribbean Island of St. Vincent. (McLennan Decl. ¶11; Bailey Decl. ¶1-10).

The underlying Ponzi scheme involved HMS, a Canadian company. Potential investors were advised of high-yield instruments that purportedly paid returns ranging from 6% to 15% per month. Such returns were supposedly obtained through participation in special European bank “programs.” (Compl. ¶9).

Potential investors were instructed to direct their checks payable to Garth Bailey, a Canadian Lawyer, or his professional corporation. Id. In the course of the investment scheme, “247 guaranteed funds checks, all payable to Garth Bailey or his professional corporation, were deposited by Cameron Campbell” at FNB. Id. The checks represented investments in the HMS scheme made by investors throughout the United States and Canada. Id. ¶10. Garth Bailey has allegedly admitted under penalty of perjury that HMS conducted an illegal Ponzi scheme. Id. ¶11.

The Defendants identified in this interpleader action are “individuals residing in the United States and Canada who did business with or invested funds with or through Cameron Campbell, Garth Bailey, and HMS.” (Compl. ¶4). The Government requests that the Defendants-in-Interpleader be required to litigate their respective claims to the Interpleaded Funds and requests that the court identify

¹ Accrued interest on these amounts exceeds \$650,000. (Compl. ¶7).

1 the “proper recipients of the proceeds.” (Compl. ¶4:25-26).

2 Proposed Intervenor and the Canadian Class Action

3 Proposed Intervenor appear as representative members of a certified Plaintiff Class in the
4 Canadian Class Action and on behalf of certain Doe Defendants 1-12 who are able to directly trace
5 their monies into the Interpleaded Funds. Proposed Intervenor Alexander and Barrett, representing
6 both United States and Canadian citizens, are the certified class representatives in Easton v. HMS
7 Financial, a Canadian Class Action pending before the Court of the Queen’s Bench of Alberta,
8 Judicial District of Calgary, Alberta, Canada. Defendants in that action include HMS, its principals,
9 and a group called the Canadian Aggregator Defendants. The Canadian Aggregator Defendants
10 consist of those individuals or entities that bundled investments from victim investors and assisted or
11 facilitated HMS in operating a fraudulent Ponzi scheme, including Objectors herein. (McLennan
12 Decl. ¶4). On October 9, 2008 the Canadian Court certified a class defined as “all individuals, other
13 than the Defendants, who have invested money with HMS, directly or indirectly, and suffered losses.”
14 Id. ¶8. The total amount of the fraudulent scheme is estimated at \$50 to \$80 million. Id. ¶23-24.

15 The Plaintiff Class moves to intervene in this action in order to protect the interests of
16 hundreds of investors who were defrauded in the HMS Ponzi scheme. Upon application by the
17 Plaintiff Class, on June 2, 2009, Justice J.D. Rooke of the Canadian Court issued an order (1)
18 permitting innocent claimants who have directly traceable claims to the Interpleaded Funds to receive
19 such funds and (2) requesting that the balance of the Interpleaded Funds be paid to the Clerk of the
20 Court of Alberta, Judicial district of Calgary. (Suppl. McLennan Decl. Exh. 1).

21 This is the second time that the Plaintiff Class has sought to obtain possession over the
22 Interpleaded Funds. On March 23, 2004, Magistrate Judge Porter issued the seizure warrant for the
23 funds in the trust account of Cameron Campbell. On July 24, 2007 Proposed Intervenor brought a
24 motion pursuant to Federal Rule of Criminal Procedure 41(g) for the return of the seized property.
25 Proposed Intervenor requested that the funds be transferred to the control of the Court of Queen’s
26 Bench of Alberta. Magistrate Porter determined that Proposed Intervenor had an adequate remedy
27 under the Mutual Legal Assistance Treaty and therefore denied the Rule 41(g) motion.

28 The Plaintiff Class has conducted substantial discovery in the Canadian action. The Class

1 further represents that the information and discovery in their possession will assist the court “in
2 identifying and notifying any additional HMS Investors who were payors of the seized funds that
3 constitute the Interpleaded Funds.” (McLennan Decl. ¶¶16-17).

4 Procedural History

5 As of May 15, 2009, there were 102 answering Defendants asserting total claims in the amount
6 of \$3,666,352.71. (Status Report, Docket No. 163). Of the answering Defendants, six are represented
7 by counsel and 96 are pro se. Fourteen answering Defendants with total claims of \$1,295,722 reside
8 in the United States. The rest of the answering Defendants are Canadian citizens. Further, about 50%
9 of the appearing parties filed answers as “Doe Defendants,” as they were not named as Defendants-in-
10 Interpleader in the complaint.

11 FBI Special Agent John Ireland has reviewed the answers of the answering Defendants. Based
12 upon the records obtained during the investigation of the criminal activities of Cameron Campbell,
13 he has been able to match with some degree of certainty 16 named answering Defendants with
14 traceable claims in the amount of \$267,037.03. Id.

15 **DISCUSSION**

16 THE MOTION TO INTERVENE

17 Proposed Intervenors seek to intervene both as a matter of right and for permissive
18 intervention. Rule 24 of the Federal Rules of Civil Procedure provides for two types of intervention.
19 Under Rule 24(a), intervention "shall be permitted when the applicant claims an interest which may,
20 as a practical matter, be impaired or impeded by disposition of the pending action, and that interest
21 is not adequately represented by existing parties." Under Rule 24(b), intervention may be allowed in
22 the court's discretion when the applicant's claim and the primary action involve a common question
23 of law or fact, and allowing intervention "will not unduly delay or prejudice the adjudication of the
24 rights of the original parties." Fed.R.Civ.P. 24. In either case, Rule 24 has traditionally been
25 construed liberally in favor of applicants for intervention. See Washington State Bldg. & Construction
26 Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982).

27 **Intervention as a Matter of Right**

28 A party satisfies the requirements for intervention as a matter of right upon showing: “(1) the

1 application for intervention must be timely; (2) the applicant must have a ‘significantly protectable’
2 interest relating to the property or transaction that is the subject of the action; (3) the applicant must
3 be so situated that the disposition of the action may, as a practical matter, impair or impede the
4 applicant’s ability to protect that interest; and (4) the applicant’s interests must not be adequately
5 represented by the existing parties in the lawsuit.” Southwest Center for Biological Diversity v. Berg,
6 268 F.3d 810, 817 (9th Cir. 2001). The court accepts as true the non-conclusory allegations made in
7 support of a motion to intervene. Id. at 819.

8 Timeliness

9 As a threshold matter, a Rule 24 motion can be granted only "upon timely application."
10 Yniguez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991). The determination of ‘timeliness’ is left to
11 the sound discretion of the court. Id. Here, Proposed Intervenors filed the present motion within
12 about two months of the filing of the complaint-in-interpleader. Accordingly, the timeliness element
13 is satisfied.

14 Protectable Interests

15 The court concludes that Proposed Intervenors demonstrate protectable interests to the
16 Interpleaded Funds. “Whether an applicant for intervention demonstrates sufficient interest in an
17 action is a practical, threshold inquiry. No specific legal or equitable interest need be established.”
18 Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995)
19 (quoting Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993). “Nevertheless, the movant must
20 demonstrate a ‘significantly protectable interest.’” Id.

21 Proposed Intervenors establish a legally protectable interest in (1) representing the interests
22 of 12 Doe Defendants with directly traceable claims to the Interpleaded Funds; and (2) assuring that
23 the remaining funds, after distribution to traceable claimants, be made available to compensate the
24 other hundreds of defrauded HMS victims. After payment of all directly traceable claims to innocent
25 investors in this case, the Proposed Intervenors, like the Government, request transfer of the balance
26 of the funds to the Canadian Court in order to compensate the remaining injured victims of the HMS
27 Ponzi scheme.

28 Objectors contend that Proposed Intervenors have “at most a contingent interest in the

1 interpleaded funds.” (Oppo. at p.4:13-14). This argument is not persuasive as the amount of funds
2 deposited with the court far exceed the total potential amount of directly traceable claims. This is not
3 the case where Proposed Intervenors have an inchoate claim. See Murphy v. Travelers Ins. Co., 534
4 F.2d 1155, 1159 (5th Cir. 1976) (inchoate claims not proper subject for interpleader relief). Rather,
5 Proposed Intervenors have made a claim against specific, identifiable property - the excess
6 Interpleaded Funds. As noted by the Government, the Canadian Plaintiff Class has a legitimate claim
7 to these excess funds in order to compensate the hundreds of victims of the HMS fraud. (Statement
8 of Non-Opposition, Docket No. 169).

9 In sum, this element favors intervention.

10 Impairment of Intervenors’ Interests

11 This element is satisfied “[i]f an absentee would be substantially affected in a practical sense
12 by the determination made in an action, he should, as a general rule, be entitled to intervene.”
13 Southwest Center, 268 F.2d at 822 (quoting Fed.R.Civ.P. 24 advisory committee’s notes). Here, in
14 the absence of intervention, the relief requested would legally and practically affect Proposed
15 Intervenors’ interests. The Canadian Class could be deprived of its interests in ensuring that all
16 defrauded investors in the HMS Ponzi scheme receive compensation on a pro rata basis for their
17 losses. The court notes that the total of all claims by responding Defendants-in-Interpleader is about
18 \$3,666,352.71, an amount substantially below the \$5,322,885.09 deposited with the Clerk of Court.
19 Accordingly, even assuming the validity of all claims, the amount of funds available to pay all
20 potential claims exceeds the total amount of the claims. Further, the United States recognizes the
21 impairment to the interests of the Plaintiff Class; and does not oppose the intervention “to the extent
22 there are funds in the registry of the Court in an amount in excess of directly traceable fraud losses,
23 such intervention by the Canadian class action serves to ensure distribution of any excess funds to
24 victims of the HMS fraud on a pro rata basis.” (Non-Opposition at p.1:26 - 2:1).

25 Accordingly, this element favors intervention.

26 Adequacy of Representation

27 In determining whether an intervenor’s interests will be adequately represented by an existing
28 party, courts consider:

1 (1) whether the interest of a present party is such that it will undoubtedly make all the
2 intervenor's arguments; (2) whether the present party is capable and willing to make
3 such arguments; and (3) whether the would-be intervenor would offer any necessary
4 elements to the proceedings that other parties would neglect.

5 Southwest Center, 268 F.2d at 822. The prospective intervenor bears the burden of demonstrating that
6 its interests are not adequately represented by the existing parties. Id. However, this burden is
7 "minimal" and the intervenor need only show that representation of its interest by existing parties may
8 be inadequate. Id. at 823.

9 Proposed Intervenors persuasively argue that no other existing party will adequately represent
10 the interest of the hundreds of absent and defrauded class members. Further, Proposed Intervenors
11 seek to represent the interests of Doe Defendants 1-12 with direct, traceable claims to the Interpleaded
12 Funds. As no other defendant-in-interpleader has substantially similar interests to those of Proposed
13 Intervenors, the court finds that their interests can only be protected by permitting them to intervene
14 in this action.

15 In sum, the court concludes that Proposed Intervenors satisfy the prerequisites of Rule 24(a)
16 to intervene in this action as a matter of right.

17 **Permissive Intervention**

18 Alternatively, the court concludes that permissive intervention is also appropriate under the
19 circumstances. Proposed Intervenors and the primary action involve common questions of law or fact
20 concerning the distribution of the Interpleaded Funds. Furthermore, the application is timely and the
21 intervention will not unduly delay or prejudice the rights of Defendants-in-Interpleader.

22 DISTRIBUTION OF INTERPLEADED FUNDS

23 This order sets forth the manner in which the Interpleaded Funds are to be distributed. The
24 Government commenced this action pursuant to Fed.R.Civ.P. 22, seeking to distribute the Interpleaded
25 Funds to victims of the HMS financial fraud scheme. "[T]he general purpose of an interpleader action
26 is to decide the validity and priority of existing claims to a res." Texaco, Inc. v. Ponsoldt, 118 F.3d
27 1367, 1369 (9th Cir.1997). Interpleader "developed in equity and is governed by equitable
28 principles." Aetna Life Ins. Co. v. Bayona, 223 F.3d 1030, 1033-34 (9th Cir. 2000) (quoting Lumis

1 v. White, 629 F.2d 397, 399 (5th Cir. 1980)).²

2 Here, there is no dispute amongst the parties appearing before this court that those
3 defendants/claimants with directly traceable monies to the Interpleaded Funds are entitled to receive
4 compensation for their losses. Similarly, there is no dispute that the balance of the Interpleaded
5 Funds, after deducting the directly traceable claims, shall be forwarded to the Canadian court. The
6 only dispute concerns the payment of directly traceable claims to individuals or entities who are
7 alleged wrongdoer defendants in the Canadian Action. To resolve this dispute, the court looks to
8 constructive trust principles.

9 “It is hornbook law that, when a fraudster acquires property from a victim by fraud, the
10 fraudster holds the property in constructive trust for his victim. Scott on Trusts § 462.4 (4th ed.
11 1989).” United States v. \$4,224,958.57, 392 F.3d 1002, 1004 (9th Cir. 2004). One who has obtained
12 something of value by “fraud, accident, mistake, undue influence, the violation of a trust or other
13 wrongful act” is an involuntary trustee of “the thing gained.” Id. There is no dispute that the
14 Interpleaded Funds represent monies obtained by HMS and others through fraudulent means. In light
15 of the allegations of wrongdoing by Objectors, their entitlement to such funds must wait the
16 adjudication of their liability in the Canadian Action.

17 The Objectors, and other similarly situated alleged wrongdoer defendants in the Canadian
18 Action, argue that their status as aggregator defendants should not be considered in distributing the
19 Interpleaded Funds. Unless there is an “enforceable judgment of liability,” Objectors conclude that
20 their exclusion would violate their “due process rights and is contrary to the policies of the United
21 States.” (Motion at p.9:20-21). This, and related arguments, are not persuasive. Despite Objectors’
22 nebulous claim that their “due process” rights have been violated, Objectors simply fail to identify any
23 manner in which their procedural or substantive due process rights have been violated.

24 The hallmark of procedural due process is the right to appear with adequate representation and
25 to be heard on a particular matter before a neutral adjudicator. See Phillips Petroleum Co. v. Shutts,
26 472 U.S. 797, 821 (1985). Objectors simply fail to identify any manner in which they have been

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28 ² The underlying goal of interpleader actions is to protect the stakeholder (the person holding the funds) from inconsistent or multiple lawsuits and from possibly inconsistent or multiple determinations of liability. Texas v. Florida, 306 U.S. 398, 406-07 (1939).

1 denied the protections afforded by the procedural due process clause. The record reveals that
2 Objectors have been actively involved in defending themselves in the Canadian action, a court of
3 competent jurisdiction, and have had notice and the opportunity to appear in this interpleader action.
4

5 Further, Objectors cannot identify any substantive due process violation as there has yet to be
6 a determination of liability. Objectors appear to contend that their inability to access the Interpleaded
7 Funds is an effective freeze of their assets and therefore a violation of substantive due process. This
8 argument misconstrues the nature of this interpleader action. Even if Objectors, like every other
9 putative class member, are provisionally unable to access the Interpleaded Funds, as they have been
10 since 2005, the present action has no bearing on Objectors' liability. Whether Objectors are
11 wrongdoers in the HMS financial fraud is an issue pending before the Queen's Bench of Alberta
12 Canada, and not this court. Principles of international comity favor deferring resolution of the
13 underlying merits of the HMS financial fraud to this court. District courts should defer to parallel
14 proceedings in a foreign courts upon consideration of "the proper respect for litigation in and the
15 courts of sovereign nation, fairness to litigants, and judicial efficiency." Royal and Sun Alliance Ins.
16 Co. Of Canada v. Century Int'l Arms, Inc., 466 F.3d 88, 94 (2d Cir. 1991).

17 Furthermore, Objectors cannot demonstrate any prejudice by an order which provisionally
18 excludes potential wrongdoers from presently participating in the Interpleaded Funds. First, Objectors
19 are not precluded from making a directly traceable claim in the Canadian Action. Justice Rooke has
20 made clear in the Canadian Action that any innocent claimant with a directly traceable claim to the
21 Interpleaded Funds will receive recompense. (R.T. 7:18-8:23). Second, in the event Objectors prevail
22 in the Canadian action on the liability issue, they will be entitled to full compensation for their directly
23 traceable claims, including interest. Third, even if this court were to recognize the validity of
24 Objectors claims, Justice Rooke has enjoined the Objectors, and all other alleged wrongdoers, from
25 retaining possession over any Interpleaded Funds. (2nd Graham Decl., Exh. 1).

26 In sum, the court orders that the Interpleaded Funds are to be distributed in the following
27 manner: (1) All Defendants-in-Interpleader with directly traceable funds shall be compensated from
28 the Interpleaded Funds, including a pro rata share of accrued interest; (2) Excluded from presently


1 participating in the receipt of Interpleaded Funds are Objectors and all other alleged wrongdoer
2 defendants in the Canadian Action; and (3) The balance of the Interpleaded Funds, after compensating
3 innocent directly traceable fraud victims and the payment of administrative expenses, shall be paid
4 to the registry of the Canadian Court for distribution in that action.³

5 REFERRAL TO MAGISTRATE JUDGE

6 Pursuant to Fed.R.Civ.P. 72 and 28 U.S.C. §636 this matter is referred to Magistrate Judge
7 Anthony Battaglia to oversee the distribution of Interpleaded Funds as outlined above. Magistrate
8 Judge Battaglia is authorized to appoint a receiver to assist with the analysis of directly traceable
9 claims, and to take any other action necessary to obtain a fair, speedy, and economical distribution of
10 the Interpleaded Funds.

11 **IT IS SO ORDERED.**

12 DATED: June 23, 2009

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14 _____
15 Hon. Jeffrey T. Miller
16 United States District Judge

17 cc: All parties
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28 ³ In light of this court's order re: distribution of Interpleaded Funds, Proposed Intervenors' motion to dismiss or stay is denied as moot.