UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Securities and Exchange Commission,	)	
	)	
Applicant,	)	
	)	
v.	)	Misc. No: 1:11-mc-00678-RLW
	)	
Securities Investor Protection Corporation,	)	
	)	
Respondent.	)	
	)	
	)	

SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO MOTION TO INTERVENE AND TO SUSPEND THE MEMORANDUM OPINION AND ORDER OF JULY 3, 2012

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Applicant U.S. Securities and Exchange Commission ("SEC" or "Commission") respectfully submits this memorandum of law in response to Robert Cheatham's Motion To Intervene and To Suspend the Memorandum Opinion and Order of July 3, 2012 ("Motion To Intervene").

BACKGROUND

On Monday, December 12, 2011, the Commission filed its Application with this Court under Section 11(b) of the Securities Investor Protection Act of 1970 ("SIPA") for an order requiring the Securities Investor Protection Corporation ("SIPC") to file an application for a protective decree with the federal district court for the Northern District of Texas pursuant to Section 5(a)(3) of SIPA with respect to Stanford Group Company ("SGC") and to otherwise discharge its obligations under SIPA. (Dkt. No. 1).

After briefing by the parties, a hearing was held on the Commission's Application before this Court on the morning of March 5, 2012. Later that evening, SIPC and the Commission jointly filed certain factual stipulations relevant to this case. (Dkt. No. 30). The parties filed additional factual stipulations relevant to this case on March 8, 2012. (Dkt. No. 31). On July 3, 2012, this Court issued a Memorandum Opinion and Order denying the Commission's Application, relying in part on the stipulated facts submitted by the parties. (Dkt. No. 34).

On July 24, 2012, Richard R. Cheatham, who represents that he was an investor in Stanford Bank International Limited ("SIBL") certificates of deposit, filed a motion to intervene and to suspend this Court's order of July 3rd. (Dkt. No. 36). The Motion to Intervene was for purposes of seeking "reconsideration in light of the facts presented in connection [with] Intervener's [sic] Motion to Intervene." (*Id.* at 1). The Court thereafter ordered that any

response by the SEC or SIPC to Mr. Cheatham's motion be filed by August 22, 2012. (Dkt. No. 38).

ARGUMENT

Mr. Cheatham contends that he may intervene as of right in this proceeding pursuant to Federal Rule of Civil Procedure 24(a)(2). That provision states that intervention must be granted as of right, "[o]n 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." In other words, the right of a party to intervene depends on the following four factors:

> (1) the timeliness of the motion; (2) whether the applicant "claims an interest relating to the property or transaction which is the subject of the action"; (3) whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) whether "the applicant's interest is adequately represented by existing parties."

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)). In addition, a prospective intervenor must have standing under Article III of the Constitution. *Jones v. Prince George's County, Maryland*, 348 F.3d 1014, 1017 (D.C. Cir. 2003).

1. An Intervenor's Motion Must Be Timely

As noted above, intervention as of right requires a timely motion to intervene. The timeliness of a motion to intervene "is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Karsner v. Lothian*,

532 F.3d 876, 886 (D.C. Cir. 2008) (internal quotation marks omitted). However, "elapsed time alone may not make a motion for intervention untimely." *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235, 1239 (D.C. Cir. 2006).

Mr. Cheatham's Motion to Intervene for purposes of presenting his factual scenario to this Court was not timely filed, as Rule 24(a) requires. The Motion to Intervene was filed more than seven months after this proceeding was initiated, after the briefing on the merits was completed, and after this Court ruled on the merits of the Commission's Application. While Mr. Cheatham contends that his Motion to Intervene was prompted by the parties' stipulated facts in this case, those stipulated facts were filed on the Court's public docket on March 5 and 8, 2012 – more than three months prior to Mr. Cheatham's filing of his motion to intervene and after the Court issued its ruling on the merits. Mr. Cheatham, who is a licensed and practicing attorney, offers no explanation for this delay. *See Associated Builders and Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (denying as untimely a motion to intervene filed "several weeks" after the district court granted summary judgment, stating that "[a] motion for intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken" (internal quotation marks omitted)).[1]

[1] A post-judgment motion to intervene may satisfy Rule 24(a)(2)'s timeliness requirement if the motion is made for purposes of appealing an adverse judgment that the party representing the intervenor's interest is not intending to appeal. *See Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). Mr. Cheatham, however, has not suggested that he is intervening for that purpose, but rather for purposes of presenting his own particular factual scenario to this Court for consideration in the first instance.

2. An Intervenor's Interests Must Not Be Adequately Represented

Intervention as of right also depends on whether the interests of the proposed intervenor are adequately represented by the existing parties to the proceeding. Here, Mr. Cheatham's interests are adequately represented by the Commission in this proceeding.[2]

Section 11(b) of SIPA authorizes the Commission to bring this proceeding to accomplish "the protection of customers of any member of SIPC." 15 U.S.C. § 78ggg(b). Unlike the typical SEC enforcement action where the Commission can obtain remedies such as financial penalties to be paid to the SEC, an action under Section 11(b) of SIPA allows for no remedies, financial or otherwise, benefitting the SEC.[3] The beneficiaries of a Section 11(b) proceeding are the investors in need of SIPA's protection. Thus, while the SEC does not represent particular SIBL investors in this proceeding, the entire purpose of the proceeding is to protect the interests of SIBL investors such as Mr. Cheatham. The SEC has vigorously and thoroughly represented those interests in its litigation of this matter. Accordingly, Mr. Cheatham's interests – like the interests of other SIBL investors – are represented in this proceeding.

What is more, Congress has necessarily determined that the SEC's representation of investor interests in a Section 11(b) proceeding is adequate. As the Supreme Court has held, Section 11(b) confers on the SEC – and the SEC alone – the authority to bring this proceeding to protect investors. *SIPC v. Barbour*, 421 U.S. 412, 425 (1975). Indeed, SIPA confers on the SEC "'plenary authority' to supervise the SIPC," *id.* at 417 (quoting S.Rep. No. 91-1218), and

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[2] The D.C. Circuit has held that, if a motion to intervene "was not timely, there is no need for the court to address the other factors that enter into an intervention analysis." *Associated Builders*, 166 F.3d at 1257.

[3] Even in an SEC enforcement proceeding, individual victims cannot intervene to press their unique interests absent Commission consent. *Cf.* 15 U.S.C. § 78u(g); *SEC v. Falor*, 270 F.R.D. 372, 374-75 (N.D. Ill. 2010) (discussing whether intervention is statutorily precluded in SEC enforcement actions). *But see SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1390 (D.C. Cir. 1980).

"[t]here is not the slightest reason to think" that Congress "intended [the SEC's] efforts to be supplemented by those of private investors," *id.* at 425. In effect, Congress has determined that the SEC's exclusive authority to bring a Section 11(b) proceeding is adequate to protect investor interests. Accordingly, to permit an individual investor to intervene in a proceeding under Section 11(b) to raise arguments other than those raised by the Commission would run counter to Congress's determination that the exclusive grant of authority to the SEC to bring a proceeding under Section 11(b) is adequate to protect investor interests. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 537 (1972) (holding that statutory grant of "exclusive" authority to the Secretary of Labor to bring an action challenging a union election precluded an individual union member from intervening to raise claims not presented by the Secretary).[4]

None of this is to say that there is no opportunity for Mr. Cheatham's situation to be addressed under SIPA. Consistent with SIPA, the Commission will consider Mr. Cheatham's factual situation, investigate his claims as necessary, and, if the Commission deems it appropriate, refer the facts to SIPC for appropriate action, including potentially the initiation of a liquidation proceeding. But Mr. Cheatham's effort to present his claim to this Court is inconsistent with the structure, procedures, and policies of SIPA.

[4] In an effort to establish that his interests are not adequately represented in this proceeding, Mr. Cheatham takes issue with the SEC's decision to stipulate to certain facts. But "quibbles over litigation tactics" or strategy are insufficient to establish that a proposed intervenor's interests are not adequately represented in a matter. *Jones*, 348 F.3d at 1020. "'If disagreement with an existing party over trial strategy qualified as inadequate representation, the requirement of Rule 24 would have no meaning.'" *Id.* (quoting *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001)).

Dated: Washington, DC
August 22, 2012

Respectfully submitted,

/s/ Matthew T. Martens

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2012, I caused service of the foregoing SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO MOTION TO INTERVENE AND TO SUSPEND THE MEMORANDUM OPINION AND ORDER OF JULY 3, 2012 as follows:

1. by ECF on the following:

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2. by email and by depositing in the United States mail on the following:

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