UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. : 10-22078 CIV-MORENO /TORRES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ESTATE OF KENNETH WAYNE MCLEOD, F&S ASSET MANAGEMENT GROUP, INC. and FEDERAL EMPLOYEE BENEFITS GROUP, INC.,

Defendants.

PLAINTIFF'S *EX PARTE* EMERGENCY MOTION FOR ASSET FREEZE ORDER AND OTHER RELIEF, AND MEMORANDUM OF LAW IN SUPPORT

I. INTRODUCTION

1. Plaintiff Securities and Exchange Commission brings this emergency action to freeze the assets of Defendants Estate of Kenneth Wayne McLeod ("Estate of McLeod"), F&S Asset Management Group, Inc. ("FSAMG"), and Federal Employee Benefits Group, Inc. ("FEBG") (collectively "Defendants") and for other relief. Through FSAMG and FEBG, McLeod fraudulently raised at least $34 million from the 139 investors who are still currently invested in a Ponzi scheme he orchestrated. McLeod lavishly spent investor funds on self-promotional activities, including $1 million between 2005 and 2010 alone. On June 22, 2010, McLeod was found dead of a gun shot wound and it is currently unclear who, if anyone, is operating FSAMG and FEBG.

An emergency asset freeze is necessary to prevent further dissipation of investors' funds and preserve assets that could be used to pay disgorgement and civil penalties. Therefore, the

Commission requests that this Court, on an emergency basis, issue an order: (1) freezing the assets of the Defendants to preserve funds and maintain the status quo; (2) preventing the Defendants from destroying or altering documents; (3) obligating the Defendants to respond to discovery on an expedited basis; (4) requiring the Defendants to provide sworn written accountings of all assets within 10 days; and (5) setting a show-cause hearing to determine whether to issue a Preliminary Injunction and continuing Asset Freeze Order. In addition, by separate motion, the Commission asks the Court to appoint a Receiver over FEBG and FSAMG to further protect investors' assets.

II. DEFENDANTS

A. Defendants

McLeod, who was 48 at the time of his death, was a resident of Jacksonville, Florida. McLeod was the president, CEO, and chief compliance officer of FSAMG, and the president of SEBG. (Ex. 3 Declaration of John C. Mattimore ¶ 3). The Commission brings this action against his estate.

FSAMG is a Florida corporation with its principal place of business in Jacksonville, Florida. (Ex. 1 State of Florida Corporate Certification). FSAMG has been a registered investment adviser since January 2008. It purports to provide "all Federal and State employees with investment strategies that will assist in meeting their financial goals." FSAMG has approximately 7 employees. Most, if not all, of FSAMG's clients are current and former federal and state government employees, the majority of which are current and former law enforcement agents. (Ex. 3 Mattimore ¶ 8).

FEBG is a Florida corporation with its principal place of business in Jacksonville, Florida. (Ex. 2 State of Florida Corporate Certification). FEBG purports to be a financial

services and benefits consulting firm focused on federal retirement options, including the Thrift Savings Plan ("TSP"). FEBG has approximately 6 employees. Through FEBG, McLeod conducted retirement planning seminars for various federal agencies. (Ex. 3 Mattimore ¶¶ 5-7; Ex. 4 Declaration of Kurt Coront ¶ 3; Ex. 5 Declaration of Douglass Garner ¶ 3).

III. FACTUAL SUPPORT

A. Overview

For at least the past two decades, McLeod, solicited clients of his registered investment adviser, most of whom were retired federal and state government employees, and other active and retired government employees to invest in a purported bond fund invested in long-term government securities. (Ex. 3 Mattimore ¶¶ 8, 9, 14, 15, 16). McLeod offered his clients guaranteed, tax-free returns of eight to ten percent annually in the fund. (Ex. 4 Coront ¶ 5, Exs., A & B; Ex. 5 Garner ¶ 5, Exs. B & E).

In reality, the purported bond fund, which McLeod called the FEBG Bond Fund, did not exist. The investment was a Ponzi scheme, through which McLeod appears to have raised funds from approximately 260 investors nationwide. (Ex. 3 Mattimore ¶ 14, 16). He raised at least $34 million from the more than 139 investors who are still currently invested. (Ex. 6 Declaration of Tonya Tullis ¶ 5).

McLeod attracted many of his clients through retirement planning seminars across the country that various federal and state agencies paid him to conduct. (Ex. 4 Coront ¶ 3; Ex. 5 Garner ¶ 3). FEBG was the wholly-owned corporation that McLeod used to conduct his retirement seminars. McLeod used these presentations to build relationships with the government employees and then solicit them when they retired to roll over their retirement accounts for him to manage through FSAMG, his wholly-owned registered investment adviser.

(Ex. 4 Coront ¶ 7; Ex. 5 Garner ¶ 7). FSAMG has approximately $43 million under management for 1,147 clients, most of whom are retired government employees.

McLeod also solicited these clients and other active and retired government employees to invest in the purported FEBG Bond Fund. (Ex. 4 Coront ¶ 5; ¶ Ex. 5 Garner ¶ 5; Ex. 3 Mattimore ¶¶ 9, 13, 15). Although McLeod described the fund to investors in various ways, he primarily emphasized that long-term government securities would guarantee the principal. (Ex. 5 Garner ¶ 5, Ex. A; Ex. 3 Mattimore ¶ 15; Ex. 4 Coront ¶ 5). McLeod told at least one investor it was a special fund for "family and friends, and families of the fallen agents." (Ex. 4 Coront, Ex. A). He sent investors correspondence regarding their investment, including promissory notes and FEBG Bond Fund account statements. (Ex. 7 Promissory Note; Ex. 5 Garner, Exs. B & E; Ex. 3 Mattimore ¶ 16).

In reality, there was no FEBG Bond Fund, McLeod never invested his clients' money in government securities, and the money was never generating tax-free returns of eight to ten percent annually. McLeod simply used new investor funds to pay prior investors interest and principal, and to provide funds to himself and his companies. Between 2005 and June 2010 alone, McLeod spent more than $1 million on promotional expenses to bolster his image in the community, including paying for stadium box seats and an annual trip for him and forty friends to the Super Bowl. (Ex. 6 Tullis ¶ 6).

B. FEBG and FSAMG

For more than 20 years, McLeod traveled to various government agencies to conduct FEBG employee benefits counseling and planning seminars. (Ex. 3 Mattimore ¶ 5). These government agencies paid FEBG up to $15,000 each for these seminars. (Ex. 3 Mattimore ¶ 6). FEBG held itself out as a "financial services and benefits consulting firm focused on Federal

retirement options" and "dedicated to the complex issues surrounding special group employees, including Law Enforcement Officers, Firefighters and Air Traffic Controllers."

FEBG also provided personalized benefits analyses specific to government employees' retirement plans and their financial portfolios. (Ex. 3 Mattimore ¶ 6; Ex. 5 Garner ¶ 4). McLeod provided seminar attendees with a questionnaire, which inquired about their salary, retirement plan, and savings account allocations, among other things. (Ex. 3 Mattimore ¶ 7). Government employees could return their completed questionnaire to FEBG for an individually customized projection of their retirement income.

In addition, FEBG provided recommended allocations among TSP retirement account funds and makes changes in the account for employees who provided their TSP system username and password. (Ex. 5 Garner ¶ 4). For customers wanting additional guidance for things such as leaving federal for private employment, FEBG charged $300 to conduct a more comprehensive benefit review.

FEBG customers could also choose to become clients of FSAMG and have McLeod manage their money. (Ex. 4 Coront ¶ 7; Ex. 5 Garner ¶ 7). FSAMG has other clients as well, although most are FEBG customers. FSAMG presently has approximately $43 million in assets under management, all of which are held in custodian accounts at another firm. These funds are almost entirely invested in mutual funds. FSAMG charges its clients a 1% management fee and issues account statements to its clients based on figures provided by the custodial firm.

C. The Ponzi Scheme

In addition to the traditional investments McLeod offered through FSAMG, he offered many investors the opportunity to participate in the purportedly tax-free FEBG Bond Fund. (Ex.

4 Coront ¶ 5; Ex. 5 Garner ¶ 5; Ex. 3 Mattimore ¶¶ 9, 13, 15). McLeod also referred to this fund on different occasions as the FEBG Special Fund or the FEBG Fund.

McLeod promised investors guaranteed returns of eight to ten percent and told them that their principal would be invested in and secured by government bonds. (Ex. 4 Coront ¶ 5; Ex. 5 Garner ¶ 5, Ex. B & E). McLeod explained to several investors that the fund invested in only long term government securities, which provided a thirteen percent return. (Ex. 3 Mattimore ¶¶ 8, 9, 14, 15, 16; Ex. 4 Coront, Ex. A). McLeod said that he used the three to five percent spread to expand FEBG and his other businesses, but the investors' principal would remain untouched. (Ex. 5 Garner, Ex. A).

McLeod further told investors that their principal would be locked up for various periods of up to eight years, supposedly due to the long term nature of the fund's underlying government securities. (Ex. 3 Mattimore ¶ 14; Ex. 4 Coront, Ex. A). Investors had the option to roll over their quarterly interest payments into the fund to earn compound growth, which many investors did. (Ex. 5 Garner ¶ 7). This allowed McLeod to perpetuate the scheme.

McLeod did not provide most investors with any offering documents for the purported bond fund. (Ex. 3 Mattimore ¶ 9). However, some received a "FEBG, Inc. Special Fund" promissory note, which outlined the terms of the investment as described above. (Ex. 7 Promissory Note). Others received memos from McLeod and FEBG noting receipt of their investment and guaranteeing a set rate of return. (Ex. 4 Coront, Ex. B).

McLeod also provided some investors with FEBG Bond Fund account statements he created on FEBG letterhead. (Ex. 5 Garner, Exs. B & E; Ex. 3 Mattimore ¶ 16). These statements show the amount of the investors' investment along with inflated account balances reflecting purported interest earned. (*Id.*).

Both active and retired government employees invested in McLeod's bond fund. Some investors rolled over their federal retirement and savings accounts into the bond fund or invested their inheritances and their children's tuition savings. (Ex. 4 Coront ¶ 7; Ex. 5 Garner ¶ 7). The purported safety of the bond fund was an important factor in some investors' decision to retire. (Ex. 4 Coront ¶ 7). McLeod told investors that the fund's investors included "high level members of Congress, federal judges, and agency heads." (Ex. 4 Coront ¶ 5 & Ex, A; Ex. 5 Garner ¶ 6).

McLeod's records indicate that while some investors may have redeemed their investments, the approximately 139 investors who remain invested in the scheme contributed at least $34 million. (Ex. 6 Tullis ¶ 5). Several of these investors tried to redeem their investments, only to have McLeod tell them lies, such as there would be a delay in payment because the government was in arrears sending interest checks on the underlying bonds, or because of the purportedly long-term nature of the bonds. (Ex. 3 Mattimore ¶ 14; Ex. 4 Coront Ex. A).

The bond fund has been FEBG's greatest source of income for at least the past four years. In fact, FEBG has recently been doing many seminars for free due to restricted government budgets. (Ex. 3 Mattimore ¶ 6). FEBG has survived on Ponzi proceeds and has not been profitable since at least 2004. (Ex. 6 Tullis ¶ 9). Since forming FSAMG in 2008, McLeod has also used Ponzi proceeds to pay FSAMG's payroll and operational expenses.

D. Misrepresentations and Omissions

Defendants made a number of material false statements and omissions to investors orally, in the "FEBG, Inc. Special Fund" promissory notes, in the FEBG Bond Fund account statements, and in correspondence with investors.

Most significantly, McLeod, in his representative capacity for FEBG and FSAMG, misrepresented to investors that their money would be placed in a bond fund invested in and secured by government securities. (Ex. 5 Garner Exs. A & B; Ex. 3 Mattimore ¶ 15; Ex. 4 Coront ¶ 5). There was, in truth, no fund or other investment vehicle and McLeod never invested any investor money in bonds.

- Despite this, McLeod referred to the fund as the FEBG Bond Fund and the FEBG account statements purport to reflect "FEBG Bond Activity." (Ex. 5 Garner Exs. B & E).

- The FEBG Special Fund Promissory notes indicated that the investors' principal "will be placed in an account secured by government securities" and will remain "untouched in government securities." (Ex. 7 Promissory Note).

- In his letter to investors, McLeod wrote, "With all of the Ponzi Scams going on around the world I wanted to insure you that this account is 100% secured by US Gov't Securities and the principal is never touched until liquidated." (Ex. 5 Garner Ex. A).

- McLeod told one investor, "FEBG is 100% Gov't securities so unless the [government] goes out of the business all ok there too!" (Ex. 4 Coront ¶ 8, Ex. C).

- McLeod also promised investors a guaranteed rate of return of eight to ten percent, but failed to disclose that this guarantee was impossible to fulfill because the investment was a Ponzi scheme. (Ex. 4. Coront ¶ 5, Ex. A & B; Ex. 5 Garner ¶ 5, Exs. B & E). FEBG had insufficient income to pay investors other than from money from new investors. (Ex. 6 Tullis ¶ 9; Ex. 3 Mattimore ¶ 14).

- McLeod perpetuated the scheme by lulling investors with false account statements for the FEBG Bond Fund. (Ex. 5 Garner Exs. B & E). These account statements show fictitious account balances and purported interest earned by the investors.

Finally, Defendants misappropriated the offering proceeds to conduct a Ponzi scheme, and to pay distributions to McLeod, and at least $1 million in extravagant entertainment expenditures. (Ex. 6 Tullis ¶ 6).

V. LEGAL ARGUMENT

A. The Defendants Violated the Anti-Fraud Provisions of the Federal Securities Laws

In order to obtain a temporary restraining order and an asset freeze in this action, the Commission must make a prima facie showing that the Defendants violated the securities laws. *SEC v. Unifund SAL*, 910 F.2d 1028, 1035 (2nd Cir. 1990); *SEC v. Lybrand*, No. 00 Civ.1387, 2000 WL 913894 *1, *9 (S.D.N.Y. July 6, 2000); *SEC v. Unique Fin. Concepts, Inc.*, 119 F. Supp. 2d 1332, 1338 (S.D. Fla. 1998), *aff'd*, 196 F.3d 1195 (11th Cir. 1999). This "proper showing" has been described as "a justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the SEC to believe that the defendants were engaged in violations of the statutes involved." *SEC v. Gen. Refractories Co.*, 400 F. Supp. 1248, 1254 (D.D.C. 1975).

The Commission appears "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *Management Dynamics*, 515 F.2d at 808. The Commission therefore faces a lower burden than a private litigant when seeking an injunction, and need not meet the requirements for an injunction imposed by traditional equity jurisprudence. *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); accord *SEC v. International Loan Network, Inc.*, 770 F. Supp. 678, 688 (D.D.C. 1991), *aff'd*, 968 F.2d 1304 (D.C. Cir. 1992). Unlike private litigants, the Commission need not demonstrate irreparable harm or the unavailability of an adequate remedy at law. *Unique Financial*, 119 F. Supp. 2d at 1338; *Lybrand*, 2000 WL 913894 at *9. Nor is it required to show a balance of equities in its favor. *Unifund SAL*, 910 F.2d at 1036; *SEC v. Musella*, 578 F. Supp. 425, 434 (S.D.N.Y. 1984).

The Complaint alleges the Defendants violated Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and that McLeod and FSAMG violated Sections 206(1) and (2) of the Investment Advisers Act of 1940 ("Advisers Act").

Section 17(a) of the Securities Act, which proscribes fraudulent conduct in the offer or sale of securities, and Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, which proscribe fraudulent conduct in connection with the purchase or sale of securities, prohibit essentially the same type of sales practices. *United States v. Naftalin*, 441 U.S. 768 (1979). To establish a violation, the Commission must show: (1) a misrepresentation or omission (2) that is material (3) in the offer of or in connection with the purchase or sale of a security (4) made with scienter (5) in interstate commerce. *SEC v. Chemical Trust*, 2000 WL 33231600 at *9 (S.D. Fla. Dec. 19, 2000); *SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992).

1. Defendants Made False Statements and Omissions

As demonstrated above, Defendants misrepresented to investors that their money would be invested in a bond fund that did not in fact exist. While McLeod referred to the FEBG Bond Fund in various ways, his key misrepresentation was that the investor's money would be securely invested in long-term government bonds. McLeod falsely told investors that the investment would provide a guaranteed 8-10% tax-free return.

Defendants made these false statements orally to investors, in the fund's promissory notes, in fabricated account statements, and in general correspondence with investors. McLeod omitted to tell his investors that there was in fact no bond fund, that none of the money was invested in government securities, and that the entire thing was a long running Ponzi scheme he had orchestrated.

McLeod admitted to the Commission's staff that he told prospective investors in the FEBG Bond Fund "anything they wanted to hear" in order to get them to invest. (Ex. 3 Mattimore ¶¶ 12, 15). McLeod also admitted that his representations to clients that the funds were invested in government bonds, that their investment was guaranteed, and that the interest on the investment was tax-free, were all false. (*Id.*). In order to continue the "scheme," as he referred to it in conversations with the Commission staff, McLeod told investors not to discuss their investment in the FEBG Bond Fund with anybody. (Ex. 3 Mattimore ¶ 15).

2. The False Statements and Omissions were Material

The general standard for assessing materiality enunciated in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), has been applied in the Eleventh Circuit to require a finding that "a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982) (quoting *TSC Indus.*, 426 U.S. at 449). Under that standard, Defendants' false statements and omissions were unquestionably material.

A reasonable investor would certainly think it was important to know that he or she were investing in a Ponzi scheme. While McLeod has admitted to telling investors anything they wanted to hear in order get them to invest, what he did not tell them was the truth about their investment. A reasonable investor undoubtedly would have thought it important that his or her money was in fact not being invested in long-term government bonds, was not guaranteed, that the interest was not tax-free, and that their money had been misappropriated.

3. Defendants Acted With Scienter

Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 require a finding of scienter in order to establish a violation. *Aaron v. SEC*, 446 U.S. 680 (1980). The Supreme Court has defined scienter as "intent to deceive, manipulate, or defraud."

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 192 (1976). The Supreme Court has not decided whether recklessness alone satisfies the scienter requirement. *Aaron*, 446 U.S. at 686 n.5. Lower courts, however, including the Eleventh Circuit, have concluded that scienter may be established by a showing of knowing misconduct or extreme departure from the standards of ordinary care. *SEC v. Carriba Air*, 681 F.2d at 1324.[1]

Here, the evidence overwhelmingly establishes that McLeod acted with the requisite scienter. And McLeod's scienter is imputed to FEBG and FSAMG because he owned and controlled those entities, and was entirely responsible for their actions. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972). McLeod acted with the highest degree of scienter as evidenced by the egregious nature of his misrepresentations and omissions made over more than two decades. McLeod has admitted to Commission staff that he knew his representations about the purported bond fund were entirely false. McLeod knew he was perpetrating a "scheme" when he told investors "anything they wanted to hear" in order to get them to invest and then misappropriated at least $1 million for lavish entertainment expenditures.

4. The Conduct Was In Connection With the Purchase and Sale of Securities

The Commission must show that Defendants' fraudulent conduct occurred in connection with the purchase or sale of securities. The Supreme Court has held that the federal courts should broadly interpret this "in connection with" requirement of the securities laws to effectuate their remedial purpose. *SEC v. Zandford*, 535 U.S. 813, 819 (2002); *see also SEC v. Rana Research*, 8 F.3d.1358, 1362 (9th Cir. 1993).

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[1] A finding of scienter is not required to establish a violation of Section 17(a)(2) or (3) of the Securities Act. *Aaron*, 446 U.S. at 696-97. Sections 17(a)(2) and (3) prohibit, in connection with the offer or sale of securities, fraudulent or deceitful business practices and obtaining money by untrue statements or omissions of material facts. Violations of these sections may be established by showing negligence. *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997).

McLeod's misappropriation was closely tied to his falsely telling investors that he would use their money to purchase and sell securities combined with lies regarding the value of their investments. As the Supreme Court noted in *SEC v. Zandford*, this is not a case in which, after a lawful transaction had been consummated a broker decided to steal the proceeds and did so. 535 U.S. at 820. Rather, McLeod's theft of client funds "coincided" with his scheme to fraudulently induce investors to allow him essentially to take their money in order to conduct a Ponzi scheme and for his own use. *Id.* Therefore, the misappropriation occurred in connection with the purchase or sale of securities.

The interstate commerce element is also established here. As described above, McLeod solicited investors throughout the United States from numerous different governmental agencies and communicated with investors everywhere by various mediums.

B. Defendants Violated the Antifraud Provisions of the Advisers Act

McLeod and FSAMG also violated Sections 206(1) and 206(2) of the Advisers Act. Section 202(a)(11) of the Advisers Act defines an investment adviser "as any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." This definition includes a general partner of a hedge fund or investment manager of a limited partnership who manages a fund's investments for compensation. *Abrahamson v. Fleschner*, 568 F.2d 862, 869-70 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

The Supreme Court has held that the Advisers Act establishes a statutory fiduciary duty for investment advisers to act for the benefit of their clients. *Transamerica Mortgage Adviser, Inc. v. Lewis*, 444 U.S. 11, 17 (1979). An adviser's fiduciary duties include "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts." *SEC v. Capital Gains*

Research Bureau, Inc., 375 U.S. 180, 191-94 (1963); *Decker v. SEC*, 631 F.2d 1380, 1384 (10th Cir. 1980).

The standard for establishing violations of the fraud provisions of the Advisers Act is similar to the standard already outlined above with respect to Sections 17(a) and 10(b). Section 206(1) of the Advisers Act prohibits any investment adviser from, directly or indirectly, employing any device, scheme or artifice to defraud any client or prospective client. Section 206(2) of the Advisers Act prohibits any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client. Scienter is required for a violation of Section 206(1), but not for Section 206(2). *Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Capital Gains*, 375 U.S. at 184, 191-92.

As discussed above, McLeod and FSAMG made egregious misrepresentations and omissions in connection with carrying out the Ponzi scheme. McLeod solicited clients of FSAMG to invest in a bond fund that he knew was entirely fictitious and made whatever representations he thought were necessary to get them to invest.

Accordingly, McLeod and FSAMG also violated Sections 206(1) and (2) of the Advisers Act.

C. **Emergency Relief**

In its Complaint, the Commission seeks injunctive relief, disgorgement of the Defendants' ill-gotten gains, prejudgment interest, and civil penalties against FEBG and FSAMG. The ancillary remedies of a temporary restraining order against FEBG and FSAMG and an asset freeze as to all Defendants is appropriate here to prevent the Defendants from dissipating the proceeds of the fraudulent scheme and to ensure funds are ultimately available to

satisfy any final judgment the Court might enter ordering the payment of disgorgement, prejudgment interest, or civil penalties.

1. **A Temporary Restraining Order is Necessary**

By making a *prima facie* showing the Defendants have violated the securities laws, we have met the first prong of the two-prong test to determine whether the Court should issue a temporary restraining order. To meet the second prong, the Commission need only show a "reasonable likelihood" of future violations. *Manor Nursing Centers*, 458 F.2d at 1100.

In assessing whether there is a "reasonable likelihood" of future violations, courts look to the following factors: (1) the egregiousness of defendant's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of a defendant's assurances against future violations; (5) the defendant's recognition of the wrongful nature of the conduct: and (6) likelihood of opportunities for future violations. *Carriba Air*, 681 F.2d at 1322; *Unique Financial*, 119 F. Supp. 2d at 1340. Past illegal conduct is highly suggestive of the likelihood of future violations. *CFTC v. Matrix Trading Group*, 2002 WL 31936799 at *12 (S.D. Fla. Oct. 3, 2002).

In this case, each of the factors set forth above weighs in favor of the Court entering a temporary restraining order. First, the conduct of McLeod, as imputed to FEBG and FSAMG is egregious. Second, the conduct is hardly isolated, as it spans more than two decades. Third, McLeod has demonstrated a high degree of scienter in that he knowingly lied to investors for many years. As to the fourth and fifth factors, the Defendants have not offered any assurances against future misconduct and or understanding of the wrongfulness of their conduct. Finally, unless this Court restrains and enjoins FEBG and FSAMG, there is a significant risk that investors will continue to suffer harm.

2. An Asset Freeze is Necessary

This Court has the authority to enter an *ex parte* order temporarily freezing the assets of the Defendants under Federal Rule of Civil Procedure 65, Sections 20(b) and 22(a) of the Securities Act, Section 21(d) of the Exchange Act, and its broad equitable powers. *SEC v. Asset Recovery and Management Trust, S.A.*, 340 F.Supp.2d 1305, 1308 (M.D. Ala. 2004) ("When there is a showing of a securities law violation, the freezing of assets may be appropriate to ensure that the assets will be available to compensate public investors") (citations omitted); *SEC v. Current Fin. Servs.*, 62 F.Supp.2d 66, 67-68 (D.D.C. 1999) ("District courts have the equitable power to use ancillary remedies to preserve assets, as conferred by Section 20(b) and 22(a) of the Securities Act of 1933 and by Section 21(d) of the Securities Exchange Act of 1934."); *SEC v. United Communications, Ltd.*, 899 F. Supp. 9, 11-12 (D.D.C. 1995) ("District courts have power to grant any proper form of ancillary relief necessary to effectuate the purpose of the securities statutes . . . and by now it is well established that the district courts have the power to use these ancillary remedies to preserve assets.").[2]

In addition, pursuant to their general equity powers, federal courts may order ancillary relief to effectuate the purposes of the federal securities laws. *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2nd Cir. 1990); *Levi Strauss & Co. v. Sunrise Int'l Trading Co.*, 51 F.3d 982, 987 (11th Cir. 1995) (a request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998) (federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action); *SEC v. R.J. Allen & Assoc.*, 386 F. Supp. 866,

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[2] *See also SEC v. Rogatinsky*, Case No. 03-60648-Civ-Martinez, Temporary Restraining Order Freezing Assets (S.D. Fla. April 4, 2003); *SEC v. American Financial Group of Aventura*, Case No. 02-22198-Civ-Graham, Order Granting *ex parte* Motion for Temporary Asset Freeze (S.D. Fla. July 25, 2002); *SEC v. Johnson*, Case No. 01-7874-Civ-Hurley, Order Granting *ex parte* Motion for Asset Freeze (S.D. Fla. Dec. 12, 2001). (Copies of Orders attached as Ex. 8).

881 (S.D. Fla. 1974) (once the equity jurisdiction of the court has been invoked by a securities law violation, the Court possesses the necessary power to fashion an appropriate remedy);

When there are concerns that defendants might dissipate assets, or transfer them beyond the jurisdiction of the Court, the Court need only find some basis for inferring a violation of the federal securities laws to impose an asset freeze. *Unifund SAL*, 910 F.2d at 1041-42. *See also SEC v. Margolin*, 1992 U.S. Dist. LEXIS 14872 at *19-*20 (S.D.N.Y. Sept. 30, 1992) (court issued freeze order based on "sufficient showing" that an asset freeze was necessary to prevent defendants from "secreting or dissipating" assets); *SEC v. Householder*, Case No. 02 C 4128, 2002 WL 1466812 (N.D. Ill. July 8, 2002) (federal courts have the power to freeze a defendant's assets to ensure that the defendants will not secrete or dissipate assets); *SEC v. Grossman*, 1987 U.S. Dist. LEXIS 1666, at *35-*36 (S.D.N.Y. Feb. 17, 1987) ("An order freezing assets may be imposed even in the absence of a preliminary injunction.").

The evidence the Commission has presented in support of an asset freeze provides more than a sufficient basis for inferring the Defendants violated the federal securities laws. An asset freeze is appropriate to maintain the status quo and to prevent dissipating investors' funds. Courts have frequently recognized that an order requiring disgorgement will be rendered meaningless unless they impose an asset freeze prior to the entry of final judgment. *United States v. Cannistraro*, 694 F. Supp. 62, 71 (D.N.J. 1988), *aff'd in part and vacated in part*, 871 F.2d 1210 (3rd Cir. 1989); *R.J. Allen & Assocs., Inc.*, 386 F. Supp. at 881 ("As to the issue of an asset freeze, the court certainly has the ability to ensure that the defendants' assets are not secreted or dissipated before entry of final judgment concluding this action.").

3. An Order Prohibiting Destruction or Alteration of Records, Requiring a Sworn Accounting, and Expedited Discovery

The Commission seeks an immediate order prohibiting the Defendants from destroying or altering records. This order will prevent the disappearance or destruction of documents before investors' claims can be adjudicated and help assure that whatever equitable relief might ultimately be appropriate is available. *R.J. Allen*, 386 F. Supp. at 866.

The Commission also seeks an Order allowing the parties to conduct discovery on an expedited basis (two day's notice for depositions and document discovery) and requiring the Defendants to file with this Court, within ten days, a sworn written accounting. This expedited discovery pending the Commission's request for a continuing Asset Freeze Order is needed, for among other reasons, to allow the Commission to trace assets of the Defendants. This will allow the Commission to take appropriate steps to insure that all of the relevant assets are preserved and protected for FEBG's investors.

4. Request For A Continuing Asset Freeze Order and a Hearing

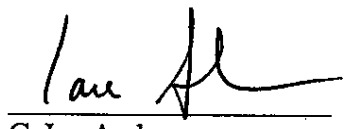
Finally, the Commission requests that the Court set a show cause hearing and order the Defendants to show cause, if any, why the Court should not grant a Preliminary Injunction and issue a continuing Asset Freeze Order over them.

VI. CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for an order: (1) temporarily restraining FSAMG and FEBG; (2) freezing the assets of the Defendants to preserve funds and maintain the status quo; (3) preventing the Defendants from destroying or altering any documents; (3) obligating the Defendants to respond to discovery on an expedited basis; (5) requiring the Defendants to provide sworn accountings; and (6) setting a show cause hearing. For the Court's convenience, a proposed order is attached.

Respectfully submitted,

June 24, 2010

By: 

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