IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 3:09-CV-298-N
v.	§	
	§	
STANFORD INTERNATIONAL BANK, LTD., et al,	§	
	§	
Defendant.	§	

MARQUETTE PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO CLARIFY SCOPE OF ANTISUIT INJUNCTION, OR, IN THE ALTERNATIVE, FOR LEAVE TO INITIATE NONPARTY ARBITRATION AGAINST PERSHING, LLC

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Marquette Plaintiffs submit this Memorandum in Support of their Motion to Clarify Scope of Antisuit Injunction, or, in the Alternative, for Leave to Institute Nonparty Arbitration.

PRELIMINARY STATEMENT

Marquette Plaintiffs (or "Movants") file this Motion after agreeing with Pershing to stay their Louisiana state court cases against Pershing pending arbitration proceedings. Movants' claims against Pershing are outlined in detail in their attached, original complaints. *See* Appendix at 1 and 23. The gist of Movants' claims against Pershing is that Pershing is liable for its misconduct related to Movants' purchase and retention of Stanford International Bank Certificates of Deposit ("SIB CDs"). Therefore, shortly after this Court appointed the Receiver for the Stanford Estate, Movants brought suit against Pershing. Movants now wish to proceed with arbitration of their claims against Pershing. Although Movants do not believe that the anti-suit injunction provision of the March 12, 2009 Amended Order Appointing Receiver applies to their claims against Pershing, Movants have nevertheless agreed with Pershing to seek the permission of this Court to proceed with arbitration proceedings. This Court should grant Marquette Plaintiffs' motion for leave to initiate arbitration proceedings against Pershing because: (1) Pershing has agreed to arbitrate Movants' claims; (2) the Receiver has covenanted with Pershing not to pursue any claims against Pershing; and (3) Movants' arbitration proceedings against Pershing would not interfere with the Receiver's duties to the Stanford Estate or investors.

PROCEDURAL BACKGROUND

On February 16, 2009, the Securities and Exchange Commission (the "Commission") commenced a lawsuit in this Court against R. Allen Stanford, James M. Davis, Laura Pendergast-Holt, Stanford International Bank, Ltd., Stanford Group Company, and Stanford

Capital Management, LLC (together the "Defendants"). In its First Amended Complaint filed February 27, 2009, the Commission alleges that the Defendants perpetrated a multi-billion-dollar fraudulent scheme on its creditors and investors. (*See* First Amended Complaint ¶¶ 3, 6.)

This Court found good cause to believe that Defendants violated federal securities laws through their massive Ponzi scheme and fraudulent misrepresentations of solvency regarding their investments and investment strategies and, on February 17, 2009, entered an Order appointing Ralph S. Janvey (the "Receiver") as Receiver over all assets of the Defendants and all the entities that they owned of controlled. (Doc. 10.) On March 12, 2009, the Court entered an Amended Order Appointing Receiver (the "Receiver Order"). (Doc. 157.) Paragraph 9(a) of the March 12 Order enjoins "[t]he commencement or continuation . . . of any judicial, administrative, or other proceeding against the Receiver, any of the defendants, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate, arising from the subject matter of this civil action." (*Id*. at 7.)

On April 22, 2009, Plaintiffs Milford Wampold III, Wampold & Company, Inc.; Milford Wampold Support Foundation; Kenneth Bird; Teresa Lamke; Antonio Carrillo; Maria Carrillo; and Herman Thibodeaux filed their original petition against Pershing, Certain Underwriters at Lloyds of London ("Lloyds"), and their individual Stanford Financial Advisors. *See* Appx. at 1 for Plaintiffs' Original Petition. On August 13, 2009, Plaintiffs Numa Marquette; Gail Marquette; Cornelius Shaw; Patricia Shaw; Raymond Hunter in his individual capacity and on behalf of Ramona Hunter; Diane Hunter; Lynn Wiggins; Tony Harper; Linda Pace in her individual capacity and as independent executrix of the succession of Jackson Allen Pace; Monya Paul; Heidi Gaiennie in her individual capacity; Dina Dickerson in her individual capacity; Jason Hutchinson, Heidi Gaiennie and Dina Dickerson as beneficial owners of the

Nolan Gilbert Hutchinson Testamentary Trust; and II City Plaza, LLC as assignee of Regions Bank filed their petition against Pershing, Certain Underwriters at Lloyds of London, and the Stanford Financial Advisors. *See* Appx. at 23 for Plaintiffs' Original Petition. Marquette Plaintiffs asserted the same claims against Defendants in both actions. Shelby Ortis, John Thibodeaux, and Patricia Thibodeaux were later added as Plaintiffs to the first-filed action, and I.J. Sherman was added as Plaintiff to the second-filed action (Plaintiffs in both actions are herein referred to as "Marquette Plaintiffs" or "Movants"; Defendants in both actions are herein referred to as "Marquette Defendants"). *See* Appx. at 46, 49, and 51 for amended petitions adding additional Plaintiffs. Marquette Defendants removed both actions to the United States District Court for the Middle District of Louisiana. *See* Appx. at 54 for Notice of Removal, 3:09-cv-00323-JVP-CN (M.D. La. May, 29, 2009), and Appx. at 57 for Notice of Removal, 3:09-cv-00734-JVP-DLD (M.D. La. Sept. 3, 2009). The Middle District of Louisiana subsequently remanded both actions to the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana. *See* Appx. at 77 for Remand Order 3:09-cv-00226-JJB-DLD (M.D. La. Sept. 14, 2009) and Appx. at 81 for Remand Order 3:09-cv-00734-JVP-DLD (M.D. La. Nov. 11, 2009).

After agreeing with Marquette Defendants to multiple delays for the time to answer suit, Marquette Plaintiffs agreed to stay their state-court litigation. As to Pershing, Marquette Plaintiffs entered into joint stipulations that the parties agreed to proceed to arbitration pending clarification of the applicability of the antisuit injunction contained in the March 12 Order Appointing Receiver. *See* Appx. at 82 and 87 for Joint Stipulations and Orders Regarding Stay of Proceedings Pending Arbitration. The Marquette Plaintiffs' cases against the Financial

Advisor Defendants and Lloyds remain stayed, and at this time, Plaintiffs do not seek this Court's permission to proceed against the Financial Advisor Defendants or against Lloyds.

ARGUMENT

Marquette Plaintiffs move that this Court: (1) clarify that the scope of the Receivership Order does not extend to enjoin Movants' arbitration with Pershing; and/or (2) grant Movants leave to proceed to arbitration against Pershing. Pershing is not a part of the Receivership estate; therefore, the anti-suit provision of the Receivership Order should not preclude Movants from proceeding to arbitration with Pershing. Moreover, Movants' claims against Pershing – which seek to hold Pershing liable for its independent wrongful conduct – are based purely upon Louisiana state law, and do not implicate any of the current litigation taking place in this Court. Indeed, the Receiver has covenanted with Pershing not to pursue litigation against Pershing. Because of that covenant, the Receiver cannot argue in this instance – as he has with respect to motions filed by other investors seeking permission to pursue claims against former Financial Advisors[1] – that Movants' arbitration proceedings against Pershing will interfere with, or be duplicative of, his own litigation or distribution of Estate assets through this Court. There is, therefore, no practical or just reason to bar the Movants, who have been experiencing significant financial hardship since the Stanford empire collapsed, from arbitrating their claims against Pershing. Finally, even if this Court finds that the anti-suit provision of the Receivership Order applies facially to Movants' proposed arbitration with Pershing, then principles of equity dictate that this Court should grant Movants permission to proceed to arbitration.

[1] *See*, *e.g.*, Receiver's Response to Motion to Compel Arbitration of Claims Against Certain Associated Persons of Stanford Group Company (Doc. 828), at 4.

I. MARQUETTE PLAINTIFFS SEEK CLARIFICATION THAT THEIR ARBITRATION WITH PERSHING IS NOT SUBJECT TO THIS COURT'S ANTISUIT INJUNCTION.

Both the language and the purpose of the antisuit injunction indicate that it should not apply to Movants' arbitration with Pershing. The Amended Order Appointing Receiver entered by this Court on March 12, 2009 states that creditors and all other persons are enjoined from various actions without leave of this Court, including "[t]he commencement or continuation, including the issuance or employment of process, of any judicial, administrative, or other proceeding *against the Receiver, any of the defendants, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate, arising from the subject matter of this civil action*." (*See* Doc. 157, ¶ 9 (emphasis supplied).)

Pershing does not fall within any of the categories of parties against whom proceedings may not be initiated or continued. First, Pershing is not a defendant in this action. Nor can the Receiver argue that Pershing may still be made a defendant in this action, as he has with respect to Financial Advisors whom other investors have sought leave to initiate proceedings against. (*See* Receiver's Response to Motion to Compel Arbitration of Claims Against Certain Associated Persons of Stanford Group Company, Doc. 828, at 17 ("The Receiver is still in the process of identifying all of the financial advisors who are proper relief defendants.").) That is because the Receiver has "covenant[ed] not to sue [Pershing] to recover [clearing] fees and charges or to commence other litigation against Pershing on any basis other than as a nominal defendant in an action to assert jurisdiction over Stanford Group Company accounts." (Stipulation By and Between Ralph S. Janvey, as Receiver, and Pershing, LLC Concerning Certain Accounts, Doc. 468, ¶ 5.)

Second, Pershing is not a part of the Receivership Estate, nor could the Receiver argue that Pershing is or could be a part of the Estate. Pershing is an independent entity that provided its services to the Stanford Group Companies.

Finally, Pershing is neither an agent, nor officer, nor employee of the Receivership Estate. Pershing contracted with Stanford Group Company to provide certain clearing services, but those services ceased with the Commission's initiation of the instant action. Thus, Pershing does not fall into any of the categories of entities or persons to which the antisuit injunction applies.

In addition to comporting with the language of the Receivership Order, permitting the Movants to proceed to arbitration with Pershing is consistent with the aims of the Receivership.

> [T]he purpose of imposing a stay of litigation is clear. A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant. Nevertheless, an appropriate escape valve, which allows potential litigants to petition the court for permission to sue, is necessary so that litigants are not denied a day in court during a lengthy stay.

United States v. Acorn Tech. Fund, L.P., 429 F.3d 438, 443 (3d Cir. 2005). The March 12 Order affirms these principles, with the Court explicitly reserving its ability to "consistent with general equitable principles and in accordance with its ancillary equitable jurisdiction in this matter, order[] that . . . actions may take place in another jurisdiction." (Doc. 157, ¶9.) Here, Movants do not seek to force the Receiver into court to litigate additional claims, nor will Movants' arbitration with Pershing seek Receivership Estate assets. Instead, Movants, through arbitration, seek to hold Pershing – and Pershing alone – directly liable for its misconduct related to Movants' purchase and retention of SIB CDs. Movants' arbitration will involve only Pershing,

and Movants will seek any recovery that they are awarded in arbitration from Pershing, not from the Stanford Estate.[2]

In sum, neither the language nor the purpose of the Order Appointing Receiver indicates that one non-party's (Movants') arbitration proceedings against another non-party (Pershing) should be subject to the general antisuit injunction issued by this Court. Therefore Movants, out of an abundance of caution, seek clarification from this Court on the scope of its Order Appointing Receiver prior to initiating arbitration proceedings with Pershing.

II. EVEN IF MARQUETTE PLAINTIFFS' CLAIMS AGAINST PERSHING ARE SUBJECT TO THE INJUNCTION, THIS COURT SHOULD LIFT THE INJUNCTION TO PERMIT ARBITRATION WITH PERSHING.

A. Traditional Equitable Principles Favor Lifting the Injunction.

If this Court determines that Movants' action against Pershing is subject to the stay, then this Court should not apply the *Wencke* test that it has used to deny other movants, who have sought to proceed against the Stanford Estate and/or former employees of the Stanford entities. Instead, this Court should apply the traditional equitable criteria that courts use to decide whether to continue a preliminary injunction, resulting in a partial dissolution of the injunction with respect to Movants' arbitration against Pershing.

In denying motions brought by movants who have sought permission of this Court to proceed to arbitration against former employees of Stanford, the Court has relied on *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980). (*See generally* Order of March 8, 2010, Doc. 1030; *see also* Order of March 15, 2010, Doc. 1040.) But the holding in *Wencke*, and this Court's prior

[2] Movants are aware that the Pershing Clearing Agreement, which governed the relationship between Pershing and Stanford Group, contains an indemnification clause. Movants do not, however, believe that this clause, the effect of which on the Stanford Estate has not been litigated, can operate retroactively to preclude Movants from arbitrating their claims.

application of that holding, does not apply to Movants' attempt to gain relief from the stay to arbitrate their claims against Pershing because Pershing is not a party to the Receiver's litigation.

In a recent ruling, this Court declined to lift the stay for persons who sought to proceed with actions against former Stanford employees, Stanford-owned entities, or the Receiver. (Order of March 8, 2010, Doc. 1030, at 4.) Here, the Movants' arbitration would not target any of those persons; rather, Movants' arbitration would be conducted against Pershing alone. This is a critical distinction because under *Wencke*, "[t]he dispute regarding the district court's authority centers around its power to stay or enjoin nonparties from taking action *against the entities in receivership*." 622 F.2d at 1369 (emphasis supplied). Put another way, the *Wencke* test applies to movants who seek relief from an injunction to pursue an action against one of the parties to the equity receivership. Here, Movants seek to initiate an action against Pershing – a non-party. Movants emphasize, as stated above, that the anti-litigation covenant between the Receiver and Pershing eliminates the prospect that Pershing will be brought into the Receiver's actions as anything more than a nominal defendant. As the Stipulation between the Receiver and Pershing makes clear, Pershing is not and will not be any meaningful part of Receivership litigation. Nor does it appear that Pershing possesses, in its own right, any property belonging to the Receivership.

Thus, Movants' arbitration against Pershing would not raise the concern of interference with parties to an equity receivership that prompt an analysis under the *Wencke* test. Instead, this Court should be guided by simpler, traditional notions of equity, which favor discontinuing the injunction with respect to Movants' claims against Pershing and allowing Movants to initiate arbitration proceedings with Pershing.

The test for a district court to apply when considering whether to continue a preliminary injunction is whether the movant has made a showing that changed circumstances warrant relief from the preliminary injunction. *Suarez v. Brotherhood, Ry. of U.S. and Canada, AFL-CIO*, 546 F.2d 1143 (5th Cir. 1977); *Sprint Communications Co. L.P. v. CAT Communications, Intern., Inc.*, 335 F.3d 235, 242 (3d Cir. 2003) (citing *Township of Franklin Sewerage Auth. v. Middlesex County Utils. Auth.,* 787 F.2d 117, 121 (3d Cir. 1986)). This Court's inquiry into changed circumstances will also require some reference to the original criteria that courts consider in granting a preliminary injunction.[3]

Consistent with the original criteria for granting an injunction, the Receiver has elsewhere pointed to the antisuit provision of the March 12 Order as a necessary element of protecting the Estate from the purported harm that would arise from claims that compete with actions on behalf of the Estate. (*See*, *e.g.*, Receiver's Response to Motion to Compel Arbitration of Claims Against Certain Associated Persons of Stanford Group Company, Doc. 828, at 13 ("Allowing Movants to proceed in other jurisdictions would . . . [result in] piecemeal litigation conducted in different jurisdictions with different outcomes . . . .").) While that rationale may have been persuasive as to actions against both the Stanford Entities and against Pershing when this Court first issued the Order enjoining other suits, changed circumstances dictate that that rationale no longer applies to actions against Pershing. *Once the Receiver and Pershing entered into their anti-litigation covenant, the antisuit injunction became meaningless with respect to claims against Pershing because other parties' proceedings against Pershing posed no threat of competing with the Receiver's own litigation.* Because the Receiver will not be pursuing his own

[3] The criteria for granting a preliminary injunction require the moving party to show: (1) a probability of success on the merits; (2) the possibility of irreparable harm; (3) the threatened harm outweighs damage posed by injunction; and (4) the injunction will not disserve the public interest. *Ridgley v. FEMA*, 512 F.3d 727, 734 (5th Cir. 2008); s*ee S.E.C. v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985).

claims against Pershing, he no longer has an interest in preventing Movants from pursuing their claims. This change in circumstances since the original issuance of the antisuit injunction warrants a discontinuance of the injunction with respect to Movants' claims against Pershing.

B. *Wencke* Analysis Favors Lifting the Injunction.

Even if this Court decides that the litigation stay applies to Movants' arbitration and further decides that the *Wencke* factors dictate whether that stay should be lifted, the three *Wencke* factors here favor permitting Movants to initiate arbitration with Pershing. The three factors under *Wencke* reflect an equal balance between the interest of the Receiver and the interests of the party who seeks to have the litigation stay lifted:

(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed;
(2) the time in the course of the receivership at which the motion for relief from the stay is made; and
(3) the merit of the moving party's underlying claim

Wencke, 622 F.2d at 1374. Here, the gravity of the Movants' claims and the need to proceed with those claims, combined with the timing of their request, and the lack of harm to or interference with the Receivership show that the Movants should be allowed to initiate arbitration with Pershing.

1. The Status Quo Will be Undisturbed and the Movants will Avoid Substantial Injury if the Injunction is Lifted.

Movants' arbitration with Pershing would not trample on the status quo because the non-litigation covenant dictates that the Receiver's position with respect to Pershing – that is, to do nothing – will remain the same regardless. Thus, lifting the injunction and allowing the Movants to proceed to arbitration against Pershing would not alter the Receiver's posture at all.

On the other hand, keeping the injunction in place would cause the Movants substantial injury. Movants are, in large measure, retirees who invested their life savings in the SIB CDs

and who have lost all or a significant chunk of that investment. It has become clear that claims against their former financial advisors, if ever allowed to proceed, will not proceed until well off into the future, at which time the hopes of actual recovery are slim. Similarly, any recoupment gained from the Receiver's actions appears to be of an essentially *de minimis* amount, which will not be forthcoming for a long time yet. This is an untenable situation for individuals who expected to be able to retire and live modestly and without worry on their savings. Of course, other investors who have come before this Court suffer from similar hardship, but those investors have all sought to recoup their investments by litigating claims against their former financial advisors. Here, in contrast, Movants have, from the beginning, specifically sought to avoid the entanglements of dealing with the Receivership Estate by pursuing their recovery from a viable, non-party defendant.

Further, there is little chance that Movants' arbitration proceedings would cause any serious disruption to the Receiver's administration of his duties in this case. The Receiver has complained elsewhere about the prospect of burdensome discovery requests[4], but arbitration is contractual by nature and not akin to full judicial trial on the merits. It is well-settled that "parties to a private arbitration agreement forgo certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes." *Comsat Corp. v. Nat'l Science Foundation*, 190 F.3d 269, 276 (4th Cir. 1999). Claimants in FINRA arbitration are not held to the same pleading standards as in judicial proceedings since only "relevant facts and remedies sought" are needed for a colorable claim. FINRA Code Rule 12302(a). The fact-finding process in arbitration is not the equivalent of judicial fact-finding because the detailed rules of evidence do not apply and the rights and discovery procedures

[4] *See* Receiver's Response to Motion to Compel Arbitration of Claims Against Certain Associated Persons of Stanford Group Company (Doc. 828), at 13 ("Defending – or responding to discovery requests – in a large number of lawsuits and/or arbitrations also would divert the Receiver from the performance of his duties.").

common to civil trials are limited or unavailable. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974). Additionally, in agreeing to binding arbitration, claimants waive substantial rights that they would otherwise have in the judicial system, such as the right to trial by jury and the right to appeal an adverse ruling, which is not permitted except in very limited circumstances.

Arbitration through FINRA is therefore narrower in scope than a full trial and would not place burdensome discovery demands on the Receiver. And arbitration against Pershing in particular presents virtually no burden to the Receiver and his legal team. It is easy to see how movants who have come before this Court seeking leave to initiate arbitration against former Stanford employees would seek volumes of files from the Receiver relating to those former employees. In contrast, Movants anticipate that nearly all of the relevant evidence for their claims against Pershing would come from Pershing itself; the Receiver would likely possess relatively little – if any – information that would bear on Movants' claims against Pershing.

In sum, when Marquette Plaintiffs' arbitration proceeds, any purported disruption to the Receiver's administration of the Estate regarding discovery matters will be minimal because none of the Receivership Estate entities is party to the arbitration proceedings and discovery mechanisms in FINRA arbitrations are highly limited.

2. The Time is Ripe for This Court to Permit Arbitration Between Two Non-Parties to Proceed.

Movants come to this Court well over a year after the Receiver has begun untangling the Stanford Estate. The Receiver has now had the chance to identify and target hundreds of investors who profited from the SIB CDs, including many of the former Stanford Financial Advisors. Additionally, the Receiver has been able to identify millions of dollars worth of property that make up the Receivership Estate. During this period, the Receiver was also able to

determine that Pershing would not play a role as a litigant in Receivership proceedings, as evidenced by the anti-litigation covenant between the Receiver and Pershing. While it seems reasonable to assume that the passage of more time will change the Receiver's position with respect to the former financial advisors, as the Receiver litigates the Estate's claims against the advisors to their conclusion, the passage of time will not alter the Receiver's position with respect to Pershing. Permitting Movants' arbitration with Pershing to go forward now will not be any more or less prejudicial than delaying it until a point further in the future of the course of the Receivership.

In contrast, delaying arbitration becomes more prejudicial to Movants each day. In arbitration, documentary discovery is limited and oral testimony has the potential to take on added significance. But with time, individual memories of witnesses fade and relevant documents may be inadvertently destroyed or lost. Further, the passage of time prejudices Movants financially. The majority of Movants are retirees who no longer possess the wage-earning potential of their youth. The longer they are forced to wait, the slimmer chances they have of enjoying the benefit of any recovery that they may gain through arbitration.

3. Movants Possess Colorable Claims that Favor Permitting Arbitration to Proceed.

In making the determination whether to lift the stay, it is improper for a court to attempt to actually judge the merits of the moving party's claims at an early part of the proceedings. *Acorn*, 429 F.3d at 444. Instead, the court should only determine whether the party's claims are colorable. It is only where a claim has no merit on its face that a court may end the inquiry there. *Id*. "In Louisiana, the plaintiff need not plead a theory of the case, but only facts that would support recovery." *Wilson v. Taco Bell, Inc.*, 917 So.2d 1223, 1226 (La. App. 2d Cir. 2005). Under Louisiana's fact-pleading standard, "a cause of action is not set forth by stating the

plaintiff's conclusions of law, such as duty; facts must be stated from which such conclusions of law are drawn." *Montalvo v. Sondes*, 637 So.2d 127, 131 (La. 1994). Further, Louisiana law possesses "a jurisprudential philosophy of liberal construction of pleadings." *Succession of Bijeaux v. Broyles*, 970 So.2d 1252, 1254 (La. App. 3d Cir. 2007). While additional facts would need to be developed through documents and information in Pershing's possession, the numerous facts pleaded in Movants' complaints provide colorable claims under Louisiana's liberal fact-pleading standard.

Even if this Court applies the *Wencke* test to Movants' petition for leave to proceed with arbitration, then each of those factors favors Movants in this instance.

CONCLUSION

Movants, out of an abundance of caution, request this Court's clarification that the scope of the Receivership Order's antisuit provision does not apply to Movants' arbitration with Pershing. However, even if this Court decides to apply that provision in this instance, principles of equity – regardless of the standard that this Court decides to employ – favor granting Movants leave to proceed to arbitration with Pershing.

Dated: June 18, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2010, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system, which will send a notice of the electronic filing to the counsel of record for Defendants

/s/ Benjamin D. Reichard