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

SECURITIES AND EXCHANGE COMMISSION	§	
	§	
Plaintiffs,	§	CASE NO. 3:09-cv-00298-N
	§	
vs.	§	
	§	
STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
	§	
Defendants.	§	

PERSHING CLASS ACTION PLAINTIFFS' BRIEF IN SUPPORT OF THEIR OBJECTION TO RECEIVER'S MOTION FOR ENTRY OF SECOND AMENDED ORDER APPOINTING RECEIVER

Lynne Turk, individually and as Trustee of the Lynne Caponera Revocable Trust, Gary and Laurie Spellman, and Susan Blount, individually and on behalf of all others similarly situated (the "Class Representatives"), file this brief in Support of their January 22, 2010 Notice of Objection (Doc. 977) to the Receiver's Motion for Entry of Second Amended Order Appointing Receiver (the Receiver's "Motion to Amend Order") (Doc. 958).

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I. INTRODUCTION

A large class of plaintiffs (the "Pershing Class") who purchased Stanford International Bank, Ltd. ("SIB") Certificates of Deposit (the "CDs") sold by Stanford Group Company ("SGC") in Houston has sued Pershing LLC in a case pending in this Court (the "Pershing Class Action").[1] Pershing is the only defendant. The Pershing Class Action alleges that Pershing participated, aided and abetted SIB and its related Stanford entities in the illegal sale of unregistered securities (*i.e.,* the CDs). The Receiver has admitted that the sale, by a Texas company, did, in fact, involve the unlawful sale of securities.

The Receiver's Motion to Amend the Receivership Order[2] is his latest and most curious attempt to immunize Pershing from investor victim claims. The Receiver's powers are based solely in equity. Yet it is patently inequitable for the Receiver to so fervently attempt to stop a claim against Pershing, which the Receiver cannot bring, and that will not adversely affect the Receivership Estate. The Pershing Class Action affords many Stanford victims the very real potential to share in a recovery totaling in excess of $500 million—much more than the Receiver is capable of ever obtaining for the victims. The notion that the Receiver, as an agent of the Court, could stop such a claim to benefit Pershing as a matter of "equity" is simply outrageous.

Prior to filing the subject Motion, the Receiver and Pershing claimed that the Pershing Class Action should be stayed based upon the anti-suit injunction language contained in the

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[1] The class action is styled *Lynne Turk, Gary and Laurie Spellman and Susan Blount vs. Pershing LLC,* no. 3:09-cv-02199-N, and is filed on behalf of CD purchasers under the Texas Securities Act and, alternatively, the Florida Securities Act. Plaintiff Turk originally filed an earlier class action in Florida state court on behalf of Florida purchasers of the CDs, which is also now pending in this Court: *Lynne Turk vs. Pershing LLC*, no. 3:09-cv-02198-N. Plaintiff Turk has agreed to abate the Florida class action pending resolution of the second class action.

[2] The Receiver styled his Motion as a "Joint" motion with the SEC. However, the SEC has not signed the Motion. The Motion indicates only that one attorney for the SEC "does not oppose" the Motion. (Mot. at 8.) In the Motion, the Commission itself has ***not*** taken the affirmative position that the Order should be amended to protect Pershing or that the Pershing Class Action should be stayed.

Court's March 12, 2009, Amended Order Appointing Receiver (the "Order"). However, as the Pershing Class has repeatedly pointed out, the Order does not apply to the Pershing Class Action because it: (1) ***does not*** name the Receiver, any entity in Receivership, or any defendant in this SEC action; and (2) ***does not*** seek assets or property of the Receivership Estate.[3]

Apparently conceding the point, the Receiver now seeks an amendment to the Order to expressly protect Pershing from the Pershing Class claims. Surprisingly, the Receiver filed his Motion without serving or otherwise notifying Pershing Class counsel, seeking an expedited ruling, hoping to secure a stay of the Pershing Class Action without giving the Pershing Class an opportunity to object.

The Court should not enter the Receiver's proposed Order and should not stay the Pershing Class Action. The Court's equitable power to enjoin lawsuits against third-parties like Pershing is limited to actions that seek recovery from the Receiver or the Receivership Estate. The Pershing Class Action is not such a case. The Receiver stands in the shoes of Stanford. Just as Stanford could not sue Pershing for Pershing's participation in the illegal sale of unregistered CDs, neither can the Receiver under the doctrine of *in pari delicto*.

The Receiver's (as well as Pershing's) primary argument that the Pershing Class Action affects the Estate is based on an indemnity agreement between SGC and Pershing. This argument is a pretext based on an illusory indemnity obligation.

First, the terms of the indemnity provision do not apply to the Pershing Class Action.

Second, an indemnity provision that purports to protect an alleged violator of securities law is unenforceable as against public policy. Pershing could only be entitled to indemnification at some unknown time in the future – ***if and when*** Pershing is adjudicated to be free from

[3] *See, e.g.,* Pershing Class 1/12/10 Response, Brief and Appendix to Pershing Motion to Stay Class Action filed in Case No. 2199, at Appendix to this Brief at 3-268, Exhibits A, B, and C to J. Galardi Declaration, respectively.

liability. In fact, Pershing's purported indemnity claim against the Receivership Estate is prohibited and enjoined under paragraph 10 of the Order.

In essence, the Receiver is saying that the Pershing Class Action, which makes no claim against the Receivership Estate, cannot proceed because the Receiver chose to unilaterally exempt Pershing from paragraph 10 of the Court Order, and chose to permit Pershing to set off a relatively small amount of defense costs against an SGC deposit account under an otherwise unenforceable indemnity agreement. The Receiver's attempt to stretch the Court's Order to enjoin the Pershing Class Action, while excusing Pershing from the Order, is illogical and inequitable.

II. BACKGROUND

A. The Pershing Class Action

The Pershing Class Action asserts a claim individually and on behalf of a class of plaintiffs who purchased CDs through Pershing and with the substantial assistance of Pershing. Plaintiffs allege that Pershing acted as SGC's clearing broker and facilitated the sale of CDs during the applicable class period.[4] As clearing broker, Pershing held all of the securities and cash assets of SGC customers. Plaintiffs further allege that Pershing executed the transactions in the SGC customer's accounts and facilitated the transfer of funds to purchase the CDs.

The Pershing Class Action asserts a single count—that Pershing violated the Texas Securities Act and, alternatively, the Florida Securities Act, by participating and aiding in the illegal sale of unregistered, non-exempt securities (*i.e.*, the CDs). The Pershing Class Action seeks rescission, attorney fees and interest from Pershing of at least $500 million.[5]

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[4] Pershing has admitted to handling more than 1,600 transfers totaling more than $500 million in Stanford CD purchases. *See* Appendix at 86-89 (2/13/09 Affidavit of Pershing's managing director at ¶ 4).

[5] *See id.*

Damages are sought ***only*** from Pershing for its violation of state securities laws registration requirements. The Receiver is ***not*** a defendant, nor are any of the Stanford entities or former Stanford officers, directors, employees or brokers. The Pershing Class Action does not seek to obtain Receivership assets or a recovery from the Receivership Estate. On the contrary, any recovery by the class members against Pershing would decrease the liabilities of the Receivership Estate to the class.

B. The SEC Action and the Current Receivership Order

On February 17, 2009, the SEC instituted this civil action in this Court against Stanford International Bank, Ltd., its affiliated entities (collectively, "Stanford"), and a number of other defendants. Pershing is ***not*** a party to this SEC enforcement Action. On March 12, 2009, the Court entered its Amended Order Appointing Receiver (Doc. 157). Paragraph 10 of this Order, in relevant part, provides that creditors and all other persons are enjoined, without prior approval of the Court from an action to: (1) obtain possession of the Receivership Estate assets; (2) collect, perfect, or enforce a claim against the Receiver or that would attach to or encumber the Estate; and (3) set off of any debt owed by the Receivership Estate or secured by the Estate Assets based on any claim against the Receiver or the Estate. *See* Order ¶ 10 (a), (b), (c).

C. The Parties' Prior Positions Regarding the Scope of the Current Order

The Pershing Class's counsel notified the Receiver's counsel of the filing of the Pershing Class Action, and of their position that the Order did not apply to them.[6] Curiously, the Receiver immediately sided with Pershing, asserting that paragraph 10 of the Order requires that the Pershing Class Action be stayed.[7] On December 22, 2009, Pershing filed a motion for a stay in

[6] *See* Appendix at 60-72 and 56-58 (7/24/09 and 12/4/09 letters from Pershing Class counsel to Receiver's counsel).

[7] *See* Appendix at 91-105 (9/25/09 letter from Sadler to Beasley).

the Pershing Class Action. On January 12, 2010, the Pershing Class filed their opposition, setting forth in detail the reasons why the case should not be stayed pursuant to the Order.[8] The Court has not yet ruled on Pershing's motion to stay.

D. The Receiver Seeks to Amend the Current Order to Expressly Protect Pershing

By filing his Motion at this juncture, the Receiver apparently now concedes that the Order does not apply to stay the Pershing Class Action. The Receiver filed his Motion in this case on January 14, 2010, just two days after the Pershing Class filed their opposition to Pershing's motion to stay in the Pershing Class Action. The Receiver seeks to amend the Order to expressly and by name protect Pershing from the Class Members' claims. The Receiver proposes to specifically include "Pershing LLC" under the protective injunctive umbrella of paragraph 9 of the Order. The Receiver also seeks to amend paragraph 10 of the Order to broadly enjoin any "litigat[ion]" that would "create or impose an obligation upon the part of the Receivership Estate."[9]

There is no doubt that the Receiver's reference to an "obligation" is designed to encompass the Receiver's phantom indemnity "obligation" to Pershing. Pershing has recently conceded that the object of the Receiver's Motion is "to amend the Receivership Order to, among other things, ***make explicit that all actions against Pershing . . . are stayed***" (emphasis added).[10] Yet Class Members' counsel were not served with, or otherwise notified of, the Receiver's Motion. Undersigned counsel discovered the filing of the Receiver's Motion on January 19, 2010, only as a result of reviewing the docket in this case.

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[8] *See* Appendix at 3-35, Exs. A and B to J. Galardi Declaration.

[9] *See* Receiver's proposed Order (redline) ¶¶ 9 and 10 (Doc. 958, App. 10-21 thereto).

[10] *See* Case No. 3:09-cv-01299, Doc. 33 at 5.

III. ARGUMENT

A. The Court's Equitable Power Is Not Broad Enough to Stay the Pershing Class Action, which Does Not Seek Assets of the Receivership Estate.

Any attempt by the Receiver to amend the Order to purportedly enjoin the Pershing Class Action is an attempt to expand the Court's injunctive power beyond its equitable boundaries. It is settled law that a district court's injunctive power over an action against a party not in receivership (like Pershing) is based solely on inherent "equitable" jurisdiction over receivership property in the court's possession. *S.E.C. v. Wencke*, 622 F.2d 1363, 1369-70 (9th Cir. 1980) (the court's equitable power is based "on control over ***the property placed in receivership.***"). An anti-suit injunction can only be upheld "upon an appropriate showing of necessity" to protect receivership assets. *Id.* at 1369-70, 1371.

Therefore, Courts routinely refuse to stay class actions asserted against third-parties that do not seek receivership assets, even where the estate may have competing claims against the third-party (which is not at issue in this case).[11] For example, In *In re Phar-Mor, Inc. Securities Litigation*, 166 B.R. 57 (Bankr. W.D. Pa. 1994), the debtors moved to enjoin civil actions filed by Phar-Mor creditors and equity investors against the debtors' former accounting firm, Coopers & Lybrand, alleging securities law violations ("Creditor Actions").[12]

The bankruptcy court refused to enjoin the Creditor Actions. The Creditor Actions belonged to the creditors, not the bankruptcy estate, because the property of a non-debtor like

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[11] The Receiver has not sued Pershing. And, as a matter of law, the Receiver could not maintain the single count asserted herein against Pershing, because claims of this nature are owned by the investor, not the company or anyone who stands in the company's shoes. *See, e.g., In re Parmalat Sec. Lit.*, 2009 WL 2996509, at *8, 11-12 (S.D.N.Y. Sept. 21, 2009); *Cotten v. Republic Nat'l Bank*, 395 S.W.2d 930 (Tex. Civ. App.-Dallas, 1965, writ ref'd n.r.e.).

[12] While case law construing receivership injunctions in similar situations is sparse, bankruptcy cases addressing a court's power to prohibit lawsuits against non-debtors are instructive. A bankruptcy court's anti-suit injunction power is also based on its "equity powers" to protect the bankruptcy estate. *See In re Phar-Mor, Inc. Sec. Lit.*, 166 B.R. 57, 61 (Bankr. W.D. Pa. 1994) (citing 15 U.S.C. § 105(a) of the Bankr. Code).

Coopers was not property of the creditor. *Id.* at 61-62. The court determined not to exercise its equitable power, because to do so would "trample the rights of the [creditors] to assert their independent and distinct claims against a non-bankrupt third party." *Id.* at 62.

Similarly, *In re Lendvest Mortgage, Inc.*, 1990 WL 357806 (N.D. Cal. 1990), a bankruptcy arose out a Ponzi scheme involving the debtor, LendVest. Plaintiff in a separate class action sued LendVest's former attorneys and accountants. *Id.* at *1. The bankruptcy trustee sought to enjoin the class action. The court refused to do so. Prosecution of the class action would not interfere with the bankruptcy estate, because the class action involved the non-debtor attorneys' and accountants' independent liability" to LendVest investors. The court ruled that the class would be harmed by a delay of their claims against "a party who possibly had substantial liability for their injuries, as well as substantial resources for recovery." *Id.* at *6.

As in *Phar-Mor* and *Lendvest,* Plaintiffs ***do not*** seek to sue the Receiver or any entity in Receivership, and do not seek to recover any assets from the Receivership Estate. The sole source of relief sought by the Class Members is economic damages from Pershing's own substantial operational assets,[13] for ***Pershing's violations*** of state securities registration laws. The requisite nexus between the third-party litigation against Pershing and the Receivership Estate is not present in this case. The Pershing Class Action is less intrusive on the Receivership Estate than the third party actions against Coopers were in the *Phar-Mor* bankruptcy estate. In *Phar-Mor*, the debtor had asserted independent civil claims against Coopers. *Id.* at 63. Here, the Receiver has not asserted, and is barred from asserting any claims against Pershing. On the

[13] Pershing has claimed SGC placed approximately $5 million in a Pershing deposit account. The Pershing Class has no intent to recover from this account. According to its June 30, 2009 Statement of Financial Condition (Unaudited), Pershing had "Total member's equity" (*i.e.*, net worth) of $1.551 billion. *See* www.pershing.com/media/sofc_6-2009_unaudited.pdf. According to its web site, Pershing had approximately $715.8 billion in assets held in custody.

contrary, the Receiver is working with Pershing in an attempt to stop the Pershing Class Action.

B. The Order Should Not Be Amended to Recognize the Receiver's Purported Indemnity Obligation to Pershing, Because Such An Obligation Would Not Be Grounds to Stay the Pershing Class Action.

The Receiver claims that the Pershing Class Action affects the Receivership Estate because of "the contracts between Pershing and SGC" require the Estate to indemnify Pershing" for its defense costs. *See* Mot. to Amend Order at 3. However, any purported indemnity obligation would not be a basis for a stay even if it were enforceable, which it is not.

1. Even a valid indemnity obligation would not be grounds for a stay.

Even a valid indemnity obligation (which is not the case here) would not be a legitimate basis for staying the Pershing Class Action. For example, in *In re Continental Air Lines, Inc.*, 61 B.R. 758 (Bankr. S.D. Tex. 1986), the debtor initially persuaded the bankruptcy court to use its equitable power to enjoin actions filed against third party, non-debtors outside the bankruptcy court. On appeal, however, the district court held that the injunctions never should have been issued. The bankruptcy court "overreached," and the injunctions "significantly intrude[d] into the state and federal rights" of the enjoined plaintiffs. *Id.* at 782. Importantly, even if the result of the third party litigation would create indemnity obligations on the part of the debtor, it was not a sufficient basis to enjoin the litigation. *Id.*

In *In re Reliance Group, Inc.*, 235 B.R. 548, 558 (Bankr. D. Del. 1999), the shareholders of a company in bankruptcy (*i.e.*, the debtor) sued the company's officers and directors for securities laws violations (the "Shareholder Litigation"). The debtor sought to enjoin the Shareholder Litigation, arguing that the officer and director defendants in the Shareholder Litigation might have claims against the company for indemnification of litigation costs, settlement and damages. *Id.* at 557. The court acknowledged that the Shareholder Litigation would probably increase the debtor's indemnity liability, but the court still refused to stay the

Shareholder Litigation. *Id.*

The debtors in *Continental* and *Reliance Group* were in the same position as the Receiver now finds himself in this case. As in *Continental* and *Reliance Group*, even a valid indemnity claim against the Estate (of which there is none) is insufficient grounds to stay the third-party litigation. Therefore, the Court should not amend the Order as requested by the Receiver.

2. The Order should not be amended to recognize an indemnity obligation that does not apply and would not be unenforceable as a matter of public policy.

In fact, the Receiver's purported indemnity obligation is illusory. Pershing's alleged right to indemnity is based on paragraph 18 of SGC's December, 2005, Clearing Agreement with Pershing. The indemnity provision is limited to any "action arising out of one or more of ***SGC's*** or any of its agent's or employee's ***negligent, dishonest, fraudulent or criminal acts***..." (emphasis added).[14] However, the Pershing Class Action is based solely on ***Pershing's*** statutory violation for aiding the unlawful sale of unregistered securities. This statutory violation exists irrespective of any alleged underlying negligent, dishonest, fraudulent or criminal acts of SGC or Stanford. The Class Representatives need only prove that: (1) they purchased CDs; (2) that the CDs were securities that were not exempt from state law registration requirements; and (3) that Pershing's conduct in facilitating the CD sales is sufficient to impose strict liability for rescission against Pershing under the state securities statutes. *See* Tex. Rev.Civ. Stat. Ann. Art. 581-33; §517.211, Fla. Stat. The Pershing Class Action does not trigger any indemnity to Pershing.

Further, it is black-letter law that indemnification for violation of the securities laws is contrary to public policy. *See, e.g., Stonewall v. Ted S. Finkel Inv. Servs., Inc.*, 641 F.2d 323, 335 (5th Cir. 1981) (no indemnification for claims based on securities fraud *or* failure to register); *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 676 (9th Cir.

[14] *See* Appendix at 270-303, 288 in particular (12/27/05 Clearing Agreement, ¶ 18.2.1).

1980); *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 724 (2d Cir. 1981). Claims for indemnification where the underlying liability arose from securities law violations "run[s] counter to the policies underlying the securities acts" and therefore, should not be permitted. *Eichenholtz v. Brennan*, 52 F.3d 478, 484-85 (3rd Cir. 1995) (citing cases). These principles are well-settled because "a securities wrongdoer should not be permitted to escape loss by shifting his entire responsibility to another party." *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979). Accordingly, Pershing should not be allowed to avail itself of an inapplicable and unenforceable claim for indemnity as a basis for amending the Order.

The Receiver may argue that Pershing is entitled to debit a "deposit account" that SGC previously established at Pershing under the Clearing Agreement. However, the indemnity provision in the Clearing Agreement between Pershing and SGC does not provide for the advancement of litigation costs, and does not give Pershing an immediate right to reimbursement from the deposit account as they are incurred. The Court should not stay the Pershing Class Action based on a hypothetical, and therefore unenforceable, indemnity claim. *See supra.*

Similarly, a June 12, 2009 Stipulation between the Receiver and Pershing, which purports to give Pershing a right to draw down no more than $6.5 million from the deposit account for defense costs, is not grounds for a stay.[15] Not surprisingly, the Court never approved this Stipulation or any agreement to give special preference to Pershing.[16]

The Court should not punish the Pershing Class for the Receiver's decision to consent to Pershing's otherwise unenforceable request to set of its defense costs against the deposit account. Pershing's use of the deposit account for defense costs is expressly barred by paragraph 10(d) of

[15] *See* Appendix at 305-319 (¶¶ 1, 4, 6 particularly).

[16] A Court-approved March 13, 2009, Stipulation between the Receiver and Pershing (Doc. 166) has nothing to do with the "deposit account," but is instead concerned with the Receiver's use of funds to pay for Receivership expenses from separate SGC "proprietary accounts" held at Pershing, which are not at issue here.

the Court's Order, which prohibits a "set off of any debt owed by the Receivership Estate or secured by the Receivership Estate Assets." But for the Receiver's unilateral decision not to enforce the Court Order against Pershing, Pershing's claim for indemnity under the Clearing Agreement would have been subordinate to the claims of the Stanford victims. In that case, if Pershing were to ultimately prevail in the Pershing Class Action, and its indemnity provision were held to be both enforceable and applicable, then Pershing would be seeking reimbursement from the Receiver like the thousands of other creditors. Instead, the Receiver chose, without Court approval, to elevate Pershing's status above that of other creditors and victims.

As it stands, any interest in protecting a relatively modest sum in the deposit account (which is a small fraction of what the Receiver has spent to maintain the receivership) hardly justifies staying a Class Action seeking $500 million from Pershing.

3. The cased cited by the Receiver do not apply.

The cases primarily relied upon by the Receiver at pages 4 and 5 of his Motion are inapplicable, because, unlike here, the enjoined suits were ***directly against the receiver or for receivership property***. *See Liberte Capital Group v. Capwill,* 462 F.3d 543, 549, 553-54 (6th Cir. 2007) (staying an action against the receiver and the entities in receivership); *Schauss v. Metal Depository Corp.*, 757 F.2d 649 (5th Cir. 1985) (dealing with the debtor corporation's bank account).[17] The results of these cases are not surprising, and both cases reinforce the proposition that the Court's power to issue a stay is limited to protecting Receivership assets. *See, e.g.*, *Liberte Capital Group*, 462 F.3d at 551 ("Once assets are placed in receivership, a district court's

[17] See also cases cited by Receiver at page 4 of his Motion: *In re Crown Vintage, Inc.*, 421 F.3d 963, 970-71 (9th Cir. 2005 (enjoining action against bankruptcy trustee and liquidating trustee in another jurisdiction); *Seaman Paper Co. of Mass., Inc. v. Polsky*, 537 F. Supp. 2d 233 (D. Mass. 2007) (dismissing suit against receiver); *Fed. Home Loan Mortgage Corp. v. Village of North Tarrytown*, 829 F. Supp. 82, 88 (S.D.N.Y. 1993) (addressing "any suits against the receiver or the property" under the receiver's control); *Le v. S.E.C.*, 542 F. Supp. 2d 1318 (N.D. Ga. 2008) (holding that creditor was required to obtain leave or court before suing the receiver).

equitable purpose demands that he court be able to exercise control over ***claims brought against those assets***.") (emphasis added).

The Receiver has not cited any authority for the proposition that the Order can be amended to purportedly stay a class action against a third-party, such as Pershing. To the contrary, the law requires that the Pershing Class Action be permitted to go forward. *See supra; see also Duval v. Gleason*, 1990 WL 261364 (N.D. Cal. Oct. 19, 1990) (refusing to enjoin securities action against non-debtor defendants because securities action imposed independent liability on non-debtor defendants, and debtor had no ownership interest in funds sought by plaintiffs); *In re Teknek, LLC*, 563 F.3d 639, 649 (7th Cir. 2009) (reversing bankruptcy court injunction prohibiting collection on claims alleging liability of joint-tortfeasor separate from debtor); *In re Reliance Acceptance Group, Inc.*, 235 B.R. 548 (Bankr. D. Del. 1999) (shareholders of debtor corporation could not be enjoined from pursuing securities claims against debtor corporation's directors, because claims were not to recover assets of estate).

C. Equity Dictates That the Receiver's Motion Be Denied.

As an agent of the Court, the sole object of the Receivership is to achieve an equitable result for the victims of the Stanford Ponzi scheme. The relevant equitable considerations dictate that the Order not be amended to include any language that purportedly stays the Pershing Class Action. In stark contrast to the Receivership, the Pershing Class Action has the ability to affect a meaningful recovery for many of the victims at relatively little or no expense to the victims or the Receivership Estate. Based on Pershing's admission, it cleared over one-half billion dollars in CD purchases and Pershing has an estimated net worth in excess of a billion dollars. Pershing clearly has the financial means to affect a rescission to a large number of CD purchasers and will be forced to do so if the Plaintiffs prevail in the Class Action. It is preposterous that the Receiver

is seeking to indefinitely stay a $500 million class action for the benefit of Stanford victims in order to protect Pershing.

Moreover, maintenance of this Class Action will not result in any material disruption to or burden upon the Receivership Estate. A relatively small amount of discovery is needed from Receivership parties as Pershing's conduct is at the center of this case.

On the other hand, the injury and pain sustained by the class members is real, and it is axiomatic that justice delayed is justice denied. It is no surprise therefore, that "[t]he party seeking a stay bears the burden of justifying a delay tagged to another legal proceeding." *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983); *see also In re Landvest Mortg., Inc.*, 1990 WL 357806, at *5. The Receiver cannot meet that burden. The Receivership could go on indefinitely, as memories fade and evidence is either lost, scattered or destroyed. The Receiver cannot sue Pershing. The Class Action is likely the only vehicle through which the victim class members will obtain meaningful recovery. According to the Receivership Examiner, there is a "substantial possibility that the whole of the Receivership Estate could end up, not in the hands of the victimized investors, but in the pockets of the Receiver and the firms he has retained."[18]

In the Receiver's Interim Report on Asset Collection and Cost Reduction (the "Report") filed on October 28, 2009, some eight months after the institution of this Receivership, the Receiver admits that even "[i]f we were completely successful in our efforts to put together the largest possible fund for the benefit of victims, we may be able to return to them as much 20 cents on the dollar, just based on the activities to date."[19] Those "activities to date" included the

[18] *See* Appendix at 150-169, 153 in particular (Brief of Examiner in Response to Second Interim Fee Application at pg. 2).

[19] *See* Appendix at 227-232, 230 in particular (Receiver's 10/28/09 Interim Report at pg. 4).

"claims against investor relief defendants," which comprised $894 million of the $1.5 billion in claims being pursued by the Receiver.[20] At the November 2, 2009 oral argument for the appeal regarding the clawback issue, the Receiver's counsel admitted that if the clawbacks fail, victims "stand[] to receive pennies, if anything, from the receiver. . . ."[21] On November 13, 2009 the Fifth Circuit rejected the Receiver's "claims against investor relief defendants." As such, even if the Receiver were completely successful in its remaining efforts (specifically identified in the Report), the victims are looking at roughly eight cents on the dollar on the Receiver's best day.[22]

The Receiver's attempt to modify the Court's injunction without giving notice to the Class Representatives suggests that for some inexplicable reason he is more interested in protecting Pershing than in seeing justice obtained for the investor victims. Delaying the Class Action indefinitely, while the Receiver sues investors[23] and continues to exhaust tens of millions of dollars in Receivership assets with the potential recovery to the victims being negligible at best, is neither equitable nor reasonable. *See In re Lendvest Mortg., Inc.*, 19990 WL 357806, at *5-6 (denying stay because trustee's "showing of hardship falls far short of that required").

IV. CONCLUSION

The Receiver's Motion to Amend the current Order should be denied. The Order cannot be amended to expressly protect Pershing from class actions that do not name the Receiver or

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[20] *Id.* at 227-228.

[21] Appendix at 321-330, at 331 in particular (Trans. at 54:2-6).

[22] Both the SEC and the Examiner have objected to the Receiver's fourth interim fee request. *See* Appendix 248-269. According to the Examiner's opposition filed last week, "the Receiver has topped the forty-one million dollar mark"(p.1), and has recovered $128.8 million, of which $65.4 million "was on hand at the Receiver's appointment" (p.5). The Examiner also reiterated that there is a real possibility that there may be no recovery from the Receivership to Stanford's investors (p.6).

[23] Even after being rebuked by the Fifth Circuit and being widely criticized for exhausting significant sums pursuing ill designed claw back claims against investors (the victims), On December 7, 2009, the Receiver filed an amended complaint against hundreds of investors.

any of the Receivership entities, and that do not seek any recovery from or assets of the Receivership Estate. The Receiver's purported indemnity obligation to Pershing would not be grounds to stay the Pershing Class Action even if it were enforceable, which it is not.

Respectfully submitted,

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ATTORNEYS FOR PERSHING CLASS ACTION PLAINTIFFS

CERTIFICATE OF SERVICE

On February 2, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served the Court- appointed Receiver, all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

By: /s/ Joseph G. Galardi
Joseph G. Galardi