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

IN RE:	§	
	§	
STANFORD INTERNATIONAL BANK, LTD.,	§	Civil Action No.: 3:09-CV-0721-N
	§	
	§	
Debtor in a Foreign Proceeding.	§	

SECURITIES AND EXCHANGE COMMISSION'S
FIRST SUPPLEMENTAL OPPOSITION TO PETITION FOR RECOGNITION
PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY CODE

Dated: December 17, 2009.

Respectfully submitted,

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The Commission files this supplemental opposition to the petition of Messrs. Nigel Hamilton-Smith and Peter Wastell (the "Petitioners") for recognition as a foreign main proceeding under Chapter 15 in order to address certain issues identified by the Court. As discussed below, those issues, and indeed Petitioners' request itself, are shaped by the particular circumstances of this case. In addition, the Commission believes it important to address ongoing developments that further demonstrate that Petitioners' actions and arguments are contrary to important policy considerations.

I.
SUMMARY

Petitioners' legal arguments hinge on a false premise, i.e., that this Court is required to treat Stanford International Bank, Ltd. as if it were a legitimate business. From that false start, Petitioners point to various facts that, they say, mean (1) Antigua was SIB's principal place of business; (2) the United States financial advisors whose primary products were bogus SIB certificates of deposits and who, particularly in recent years, procured huge percentages of SIB's global revenue were not SIB agents; and (3) despite Stanford's own prominent bragging to the contrary, SIB should be viewed in a vacuum, as if separated in law and fact from other Stanford affiliates and Stanford and others who controlled it.

Petitioners' premise is flat wrong. SIB was ***not*** a legitimate business conducting real business in Antigua that ran into unexpected financial difficulties as a result of misconduct. Nothing could be further from the truth. SIB was window dressing, part of an effort to mask from United States regulatory scrutiny the massive securities fraud Stanford and others orchestrated from the United States. The law does not give effect to legal trappings that are designed for a fraudulent purpose, and, therefore, Stanford's operations should be viewed in their entirety.

This general rule applies with equal force in the Chapter 15 context. Accordingly, it is clear that SIB's center of main interest, its principal place of business, was the United States. This determination is consistent with long-standing U.S. law regarding the application of alter-ego doctrines for purposes of determining a corporate entity's principal place of business. Likewise, SIB's fraudulent origin and operation demonstrate that SIB's limited Antiguan presence was, at best, "passive," further increasing the importance of the "nerve center" and other substantial activities that occurred in the United States.

Even if Petitioners' premise is not wrong, and SIB should be treated as if it were separate, "legitimate" business, their conclusions are wrong. SIB's business focused on, first, selling certificates of deposits based on, among other things, a (false) promise that the invested funds were managed by a global force of investment advisors, second, "investing" the resulting funds. Antigua was irrelevant to these fundamental activities.

Finally, it is important to stress that Petitioners' arguments and actions in this case are inconsistent with fundamental policy concerns. Petitioners have impaired the efforts of this Court's agent to properly execute its duties and have opposed efforts of government agencies to address this multi-faceted securities enforcement matter. Chapter 15 does not require this Court to give effect to those efforts.

II.
DISCUSSION

A. STANFORD CREATED SIB AND ITS AFFILIATES TO MASK A FRAUD SCHEME HE AND OTHERS DIRECTED FROM THE UNITED STATES, AND COURTS PROPERLY TREAT SUCH FRAUDULENTLY-CREATED ENTERPRISES COLLECTIVELY FOR PURPOSES OF DETERMINING PRINCIPAL PLACE OF BUSINESS.

Under long-established jurisprudence, courts refuse to honor corporate formalities when the "corporate form" is used as a "sham to perpetuate a fraud." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006). This framework is as true in the jurisdictional context, including the determination of an entity's principal place of business, as in any other. *See Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553, 558 (5th Cir. 1985) ("When two corporate entities act as one, or are in fact one, they should be treated as one for jurisdictional purposes"). Therefore, in determining "principal place of business," courts do not elevate form over substance and instead examine what really happened in connection with various entities. *See Panalpina Weltransport GmBh v. Geosource, Inc.*, 764 F.2d 352, 355 (5th Cir. 1985). Treating affiliates as a single unit is especially appropriate here, where each affiliate's wrongful conduct is at issue. *Cf. Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160 164 (5th Cir. 1998) ("This court has attributed a subsidiary's citizenship to its parent company in alter ego situations where the subsidiary's wrongful conduct is at issue").[1]

There is no doubt that Stanford used the corporate forms of SIB and his other entities to perpetuate a fraud. For example:

- Even Petitioners agree that SIB and other Stanford entities were used to perpetuate a fraud;[2]
- Jim Davis, who served as SIB's Chief Financial Officer from his offices in the United States, admits that SIB was a fraud since its creation.[3]

[1] Generally, an alter-ego theory cannot be used to expand diversity jurisdiction, but it may be used to add places of citizenship. *Panalpina Welttransport GMBH v. Geosource, Inc.*, 764 F.2d 352, 354-55 (5th Cir. 1985). Even in shaping that limitation, which does not apply here, the Court cautioned that "jurisdictional rules may not be used to perpetuate a fraud or ill-practice upon the court." *Id.*

[2] See Supp. Declaration of Nigel Hamilton-Smith, Doc. 15 at 2, ¶4.

[3] See Plea Agreement, Doc. 50 at ¶¶17(a)-(c).

- SIB's primary investment product was referred to as a certificate of deposit which SIB would solicit to potential investors in the United States and elsewhere through Stanford Financial Group broker dealers;[4]

- At Stanford's direction and assisted by Stanford Financial Group's Chief Accounting Officer, Gilberto Lopez and the Global Controller for an affiliate of Stanford Financial Group, Mark Kuhrt, SIB's chief financial officer regularly created false books and records inflating the value of SIB's supposed investment portfolio;[5]

- SIB and other Stanford-affiliates conducted business as the "Stanford Financial Group," promising investors that these affiliations were crucial to SIB's success in an effort to lure them into the fraud;[6]

- Most people who bought certificates of deposit under SIB's name did so based on interaction with advisors employed by Stanford-affiliates, not SIB directly.[7]

- SIB, an entity that purportedly had outstanding CD-related obligations in the *billions* of dollars, had a payroll of less than $4 million. On the other hand, it purported to pay other Stanford affiliates hundreds of millions of dollars for a variety of services and the personnel providing those services were generally not in Antigua. Moreover, SIB's purported "President" drew his salary from Stanford Financial Group, not SIB.[8]

Petitioners admit that United States courts identifying an entity's "center of main interest" under Chapter 15 look to a "principal place of business" analysis. Yet, they deny that alter-ego theories apply here. Given the extensive facts demonstrating that the Stanford entities, including SIB, were merely used to perpetuate a fraud, this denial is perhaps understandable. It is, however, without legal basis.

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[4] See Plea Agreement, Doc. 50 at 17(c).

[5] See Id. at 17(i).

[6] See Doc 21-19, included within Doc. 21, Appendix to Receiver's Response to and Objections to Petition For Recognition of Foreign Main Proceeding Pursuant to Chapter 15 of the Bankruptcy Code.

[7] See Doc. 21-20, at 16-17.

[8] See Doc. 21-20, at 13-15 & 18.

Petitioners offer no authority suggesting that the Fifth Circuit's explicit approval of using alter ego type precepts in determining principal place of business in the jurisdictional context does not equally apply here. Indeed, the Fifth Circuit's guidance aside, alter ego-related ideas have helped shape at least one decision made explicitly in the Chapter 15 context. In *In re Ernst & Young*, 383 B.R. 773, 780-81 (Bankr. D. Colo. 2008), the court focused on the jurisdiction from where the fraud was directed (in that case, Canada). It paid particular attention to the fact that the fraudsters in Canada were the driving force of both entities at issue (one in Canada and one in the U.S.) because both were merely created to conduct the fraud scheme, not conduct real business. The same is true here, where Stanford set up SIB and other Stanford-affiliates to perpetuate a fraud, and he and others controlled, from the United States, those entities to continue and expand that fraud. Viewing those entities collectively, as is proper here, it is clear that SIB's "principal place of business" for purposes of Chapter 15 was the United States.

This same rationale demonstrates that the formal trappings that Stanford used to connect those entities, such as the written documents describing the purported contractual relationship between the financial advisors and SIB are of no consequence. Indeed, they are themselves part of the fraudulent scheme. In any event, however a court might interpret the legal relationship between these parties in a different circumstance, it is clear that these financial advisors sold SIB certificates of deposit. It is equally clear that courts may, and should, look to the substance of what those persons accomplished, not the manner in which a fraudulent scheme was "papered."

B. EVEN IF SIB IS TREATED AS IF IT HAD BEEN A LEGITIMATE BUSINESS AND IS VIEWED AS A SEPARATE ENTITY, ITS PRINCIPAL PLACE OF BUSINESS WAS THE UNITED STATES.

In their attempt to argue that SIB's "operations" were "nearly exclusively" performed from Antigua, Petitioners ignore SIB's basic business model. As discussed above and elsewhere, very little of substance actually occurred in Antigua. Real decisions were made from the United States. Nevertheless, Petitioners would have this Court focus on the minimal activities conducted in Antigua. That is not the law in this Circuit.

To the contrary, this is precisely the sort of situation in which the Fifth Circuit has recognized that minimal operations in the jurisdiction of incorporation cannot offset the reality that real decisions involving a company are made elsewhere. For example, in *Toms v. Country Quality Meats, Inc*., 610 F.2d 313, 315. (5th Cir. 1980), the Court relied on the fact that, despite having operations and local management in Georgia, a company "was essentially run" from, and therefore had its principal place of business in, Texas. It based its decision on contracts, managed in Texas, that tied the company to similarly operated, far flung entities. Because these contracts and, therefore, the company, were managed in Texas, the company's principal place of business was in Texas. Likewise, in *Langford v. Santa Fe Drilling Co.*, 50 F. Supp.2d 631, 633 (E.D. Tex. 1999) (*quoting Force v. E.I. Dupont DeNemours*, 770 F. Supp. 335 (E.D. Tex. 1991), the court noted that a company that conducted worldwide operations through its affiliates was a "quintessentially 'far-flung'" corporation with its nerve center (i.e., the place from which decisions were made) providing the principal place of business.[9]

The same situation is present here. Indeed, public statements bragging that SIB was a "member of the Stanford Financial Group of companies," and had a "global reach" were part of the bait used to lure investors. It was also well advertised that SIB supposedly "benefited" from this network.[10] Moreover, the selling of CDs *was* SIB's activity and that activity was controlled

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[9] In *Langford* the court also took into account other factors, including revenue generated from different locations. Here, at least during 2007 and 2008, Stanford financial advisors in the United States provided significantly more SIB revenue than financial advisers in any other country. See Doc. 21-20, at 5.

[10] See Doc. 21-19.

and implemented outside Antigua, and in large measure in the United States. To ignore that activity (and the place from which it was controlled) is to ignore SIB as it really existed.[11]

The same analysis also addresses another issue raised by the Court, i.e., whether SIB's activities were passive. The facts here demonstrate that SIB's activities in Antigua were not only passive, but, aside from serving as window-dressing for the fraud scheme, inconsequential. Employees there did little to run SIB's business other than rubber stamp materials and decisions made in the United States. Because SIB was a far flung operation whose activities in Antigua were, at best, passive, and its nerve center (along with substantial meaningful activity) was in the United States, its principal place of business is the United States.[12]

C. PETITIONERS HAVE HAMPERED, NOT ADVANCED, WORK TO ADDRESS THE FRAUD'S FALL-OUT AND IS CONTRARY TO PUBLIC POLICY.

United States courts have long recognized that an equity receivership is a significant, and appropriately flexible, tool within the U.S. legal and regulatory regime to address the devastating effects of Ponzi schemes like the one executed by Stanford.[13] It was within this well-established framework that the Court properly asserted jurisdiction over (and gave the U.S. Receiver, its agent, authority over) SIB, Stanford, and other Stanford-related entities and their assets,

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[11] Petitioners compare this case to *J.A. Olson*. That comparison is, at best, apples to oranges. In *J.A. Olsen*, a manufacturing company that maintained its only manufacturing plant in Mississippi sued a Mississippi city in federal court, and argued that diversity jurisdiction existed because, despite the crux of its operations being in the Mississippi city, the company had its corporate headquarters in Illinois. The company was a real company, producing a product in Mississippi (and only in Mississippi).

[12] This conclusion is not inconsistent with the decision by Judge Hittner that Stanford was a flight risk given his extensive international contacts. Suffice it to say, the interests weighed in a pre-trial detention proceeding are different than the interests weighed in determining a center of main interest under the bankruptcy code.

[13] It is axiomatic that an equity receivership is a frequently approved means of generally distributing Ponzi-scheme related assets. *See generally* Receiver's Response and Objections to Petition for Recognition of Foreign Main Proceeding [Doc. 20] at 33-35. Any such distribution plan would, of course, be subject to this Court's approval and supervision.

"wherever located." In the face of this appointment, Leroy King, a corrupt securities regulator in Antigua now under indictment in the United States for his role in Stanford's fraud, retained Petitioners as a competing receiver over SIB.[14]

Since that time, Petitioners have *not* aided the international effort to secure Stanford-related assets. To the contrary, they have hampered it. They have spent, and continue to spend, significant investor funds challenging asset restrictions obtained by United States agencies and their counterparts in other jurisdictions, including the United Kingdom and Canada. These restrictions were sought by the public agencies because those agencies believed such actions were important to help address the fallout from this wide-spread fraud scheme. At the very least, these efforts secured the funds and Petitioners' efforts litigating against government agencies are a waste of investor money. They also require public agencies to expend time and resources that, as a result, cannot be used on further efforts to address the fraud and maximize any eventual recovery to all Stanford's victims. [15]

Moreover, Petitioners' ongoing effort challenging every action of the duly-appointed U.S. Receiver is, at its core, inconsistent with sound, and fundamental, public policy concerns.

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[14] An Antiguan court later confirmed this retention by appointing Petitioners as a Receiver and, later, as Liquidators.

[15] This case, then, stands in stark contrast to *In re Tri-Continental Exchange Ltd*., 349 B.R. 627 (Bankr. E.D. Cal. 2006), a case heavily relied on by Petitioners. In that case, the court rejected a single creditor's argument that a liquidation proceeding in St. Vincent and the Grenadines should not be treated as a foreign main proceeding. That case, however, could hardly be more different than this one. In *Tri-Continental*, there was no initial receivership in the United States, the foreign liquidators' winding-up proceeding had been, in effect, stayed in deference to the coordinated international criminal law enforcement and the United States Department of Justice had agreed to release to the joint liquidators real property that had been secured in an asset forfeiture proceeding. *Id.* at 631. It is also worth noting that there had been no objection by the U.S. Department of Justice, the relevant insurance regulator or any other party in interest (other than the single creditor) to the specific asset disposal being addressed. *Id.* at 639. There are other distinguishing facts. In *Tri Continental* the insurance-debtor's primary underwriter had worked in the debtor's foreign office, completing the key paperwork from that office. Likewise, the "impresario" of the scam had relocated to the foreign jurisdiction to avoid criminal indictments already issued in the United States. That is certainly not the case here.

The Court *in In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009) faced an analogous situation. In that case, an Israeli bank instituted an Israeli receivership proceeding against two entities, one a New York limited partnership and the second an Israeli corporation seeking to recover a debt. Shortly thereafter, the debtors filed U.S. Chapter 11 bankruptcy cases, triggering the automatic stays that arise from such proceedings. Notwithstanding that stay order, the creditor continued its efforts to secure from the Israeli court the appointment of a receiver, despite a clarification from the U.S. bankruptcy court that the stay order applied to efforts to seek the debtors' property, wherever located. *Id.* at 362-363. An Israeli court appointed a receiver, and declined to recognize the bankruptcy court's stay order. *Id.* at 364. The Israeli-appointed receivers filed motions in the U.S. bankruptcy court seeking, among other things, relief from the automatic stay and shortly afterwards sought recognition as a foreign main proceeding under Chapter 15. *Id*. at 364-65.

The bankruptcy court refused to grant recognition. Among other reasons, the court relied on the public policy exception found in Section 1506.[16] Acknowledging that this exception is narrow and should only be invoked when fundamental polices are at risk, the court believed recognizing a receiver appointed after the automatic stay provisions of the bankruptcy code had been triggered would severely impair the operation of the United States bankruptcy procedures. The court noted that allowing such conduct would unduly limit the federal court's proper jurisdiction over the debtor's property, wherever located, by allowing parties to circumvent the court's jurisdiction over property outside the United States, yet within the court's jurisdiction. *Id.* at 371-372. The same rationale applies here. Recognition of a competing receiver seeking

[16] The Court did not address the center-of-main-interest issue. It did note several other advantages of the bankruptcy proceeding, including the fact that the receiver appointed in that case had a limited mandate and potential conflict of interest. Those concerns are not present here, where a federal equity receiver appointed in an enforcement action may, subject to court approval and supervision, address all victims of Stanford's fraud.

authority over assets already placed under the jurisdiction of this Court undermines this Court's fundamental ability to appoint an equity receiver over SIB and its assets, "wherever located." This interference conflicts with fundamental public policy concerns. Chapter 15 does not require and, in fact, precludes, such a result.

III.
CONCLUSION

In short, Petitioners' arguments are wrong on the facts, wrong on the law and, in this securities enforcement action, inconsistent with fundamental public policy concerns. Chapter 15 does not countenance, much less require, that unjust result. Accordingly, the Commission respectfully asks the Court to deny Petitioners' petition for recognition as a foreign main proceeding under Chapter 15.

Dated: December 17, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2009, I electronically filed the foregoing document with

the Clerk of the court using the CM/ECF system which will send notification of such filing to all

counsel of record.

s/ David B. Reece