

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

SECURITIES AND EXCHANGE	§	
COMMISSION,	§	
	§	
Plaintiff,	§	Case No. 3:09-CV-0298-N
	§	
v.	§	
	§	
STANFORD INTERNATIONAL	§	
BANK, LTD., ET AL.,	§	
	§	
Defendants.	§	
	§	

**KLS STANFORD VICTIMS' MOTION TO INTERVENE AND FOR
APPOINTMENT TO THE OFFICIAL STANFORD INVESTOR COMMITTEE**

TO THE HONORABLE DAVID C. GODBEY, UNITED STATES DISTRICT JUDGE:

Movants Katherine Burnell, Ursula Mesa, Marcelo Avila-Orejuela, and Steven Graham (collectively "Movants"), on behalf of themselves and the KLS Stanford Victims, through undersigned counsel, file this Motion for Leave to Intervene and for Appointment to the Official Stanford Investor Committee (the "Committee") in the above captioned action, for the reasons stated as follows.

INTRODUCTION

"No receivership is intended to generously reward court-appointed officers." *SEC v. W.L. Moody & Co.*, 374 F. Supp. 465, 483 (S.D. Tex. 1974).

However, since his appointment on February 17, 2009, the Receiver has generously expended \$118.2 million upon attorneys and himself, among others. These efforts have recovered for investors \$119.7 million.

Therefore, after two years, out of a \$7 billion Ponzi scheme, the Receiver has collected net of expenses \$1.5 million.

To say that this receivership, thus far, has been a substantial failure is perhaps an understatement.

Movants file this motion to intervene in this proceeding and for appointment to the Committee on behalf of themselves and as representatives for investors with over 500 Stanford accounts that are part of the receivership (the “KLS Stanford Victims”). (Declaration of Gaytri D. Kachroo, at ¶ 6, dated July 6, 2011 (hereinafter “Kachroo Decl.”).)

The payments provided to attorneys and the Receiver in this case do not appear to reflect any reasonable compensation for the services provided nor appear in the best interests of the receivership or the victims, upon whose behalf the receivership should benefit. Moreover, the Receiver’s contingency agreements with the attorneys on the Committee create a substantial and disabling self-interest that precludes adequate, independent representation of the investors by the Committee and in this proceeding.

Movants believe increased scrutiny of the expenditures and agreements in this action are warranted, as well as independent and disinterested representation for investors. Movants therefore seek to intervene to raise those concerns and serve as such a representative.

BACKGROUND

On February 16, 2009, the Securities and Exchange Commission (“SEC”) commenced this action against R. Allen Stanford, James J. Davis, Laura Pendergest-Holt, Stanford International Bank, Ltd., Stanford Group Company, and Stanford Capital Management LLC (the “Defendants”). In its Second Amended Complaint, the SEC alleged that Defendants perpetrated a multi-billion dollar Ponzi scheme by, among other things, promising high rates of return on

“certificates of deposit” that exceeded those available through true certificates of deposit offered by traditional banks. (Docket No. 952, at ¶¶ 1-2.)

This Court issued an order finding good cause to believe that Defendants violated federal securities laws and, on February 17, 2009, appointed Ralph S. Janvey (the “Receiver”) as Receiver over all assets of the Defendants and all entities they own or control. (Docket Nos. 8, 10.) That order was amended on March 12, 2009, and again on July 19, 2010. (Docket Nos. 157, 1130.) The receivership order charged the Receiver with marshaling and preserving the assets of the receivership estate. It specifically directed the Receiver to “minimize expenses in furtherance of maximum and timely disbursement thereof to claimants.” (Docket Nos. 10, 157 and 1130 at ¶ 5(j) (emphasis added).) The receiver has failed in that directive.

I. The Receiver Has Failed to Add Any Substantial Value to the Estate.

In failing to meet his primary directive, the Receiver has imperiled any material value in the estate with excessive fee expenditures. Indeed, in the first eight weeks of his appointment, the Receiver retained fourteen law firms, accounting firms and consulting firms. (Docket No. 384.) For those first eight weeks – merely eight weeks – the Receiver submitted a fee application for approximately \$20 million in fees and costs. (*Id.*)

And over the course of the first year of the receivership, the professional fees and expenses totaled over \$46 million. (Docket Nos. 384, 669, 820, 914, 1034, 1084.)

However, for all of those expenses, as of his latest interim report, accounting for recovery through January 31, 2011, the Receiver’s total cash inflows were approximately \$188.3 million. (Docket No. 1237.) Of that amount, \$63.1 million constituted cash balances in Stanford accounts on the day the Receiver was appointed, and \$5.5 million constituted “trailing revenue.” (*Id.*) Therefore, the Receiver’s efforts have only added approximately \$119.7 million to the receivership estate.

Yet, the Receiver has paid out approximately \$102.8 million — none to the investors. (Docket No. 1236, at pp. 14-15.) Instead, that amount includes \$55.4 million to law firms, accountants and consultants, not including the month of January 2011. (Docket Nos. 384, 669, 820, 914, 1033, 1084, 1132, 1163, 1183, 1247 and 1297.) In addition, the Receiver has indicated that he “will apply for payment . . . at the appropriate time” of approximately \$14.4 million in professional fees and costs that have been held back and not yet paid. (Docket No. 1236, at p. 14.) The fees and expenses paid to the Examiner through September 2010 total approximately \$1 million. (*Id.* at 15.)

Thus, the total of fees and expenses incurred to operate the receivership through January 31, 2011 is \$118.2 million.

As a result, there remains only \$1.5 million for the Stanford victims from the efforts of the Receiver, an amount which will likely be consumed by the Receiver. It is clear that the Receiver has not added any substantial value to the estate, and failed in his primary directive.

II. The Official Stanford Investors Committee Has Failed to Adequately Represent the Interests of Investors Because the Majority of Its Members are Interested.

Over the past year and a half, no one but Mr. Stanford has objected to the crippling fees of the Receiver.

Supposedly to represent the interests of investors, and in particular intervenor investors represented by Peter Morgenstern of Morgenstern & Blue LLC, on August 10, 2010, the Court entered an order approving a compromise between the Receiver, the SEC, the Examiner and Mr. Morgenstern’s clients creating the Committee. (Docket No. 1149.)

The Committee consists of Mr. Morgenstern, John J. Little (the court-appointed Examiner), Ed Snyder, Ed Valdespino, and Jaime Pinto Tabini, all attorneys. There are only two individual investors on the Committee, Angela Shaw and Dr. John Wade.

Rather than serve as a significant check on the Receiver, the attorneys on the Committee have merely negotiated fees for themselves. On December 16, 2010, the Receiver and Committee reached a written agreement, approved by Court Order on February 25, 2011, whereby the Receiver delegated the prosecution of all fraudulent transfer lawsuits to the law firms sitting on the Committee. (Docket Nos. 1208, 1267.) The Receiver maintains responsibility for identifying and investigating all potential claims at the expense of the receivership estate. (Docket No. 1208, at p. 7.) Yet, those law firms receive 25% of the net recovery of any such action after all their expenses are paid and without regard to time spent on the cases. (*Id.* at p. 8.)

The order pre-approved the fee arrangement as reasonable and adopted the language from the proposed order providing that the attorneys “need not make further application to this Court prior to payment unless required by Rule 23.” (Docket No. 1267.) There is no procedure or mechanism in place to allow any objection to the reasonableness of the fees, no disclosure of attorney time records, and no hearing required before the attorneys are allowed to collect their contingency fee. Thus, there will be no determination whether the services provided by these attorneys added value to the estate in exchange for the significant amount they were compensated — 25%.

And the potential compensation to these attorneys is enormous. After entering into the contingency fee agreement, the Receiver and Committee attorneys filed dozens of identical, boiler-plate lawsuits seeking damages ranging up to hundreds of millions of dollars. *See, e.g., Janvey and The Official Stanford Investors Committee v. PGA Tour, Inc.*, Case No. 3:11-cv-00226-N (N.D. Tex. 2011) (\$13 million); *Janvey and the Official Stanford Investors Committee v. IMG Worldwide, Inc.*, Case No. 3:11-cv-00117-N (N.D. Tex. 2011) (\$10.5 million); *Janvey*

and The Official Stanford Investors Committee v. The University of Miami, Case No. 3:11-cv-00041-N (N.D. Tex. 2011) (\$6.3 million); *Janvey and The Official Stanford Investors Committee v. The Golf Channel, Inc.*, Case No. 3:11-cv-00294-N (N.D. Tex. 2011) (\$5.9 million); *Janvey and The Official Stanford Investors Committee v. Giusti*, Case No. 3:11-cv-00292-N (N.D. Tex. 2011) (\$2.5 million).¹

The majority of the Committee is therefore interested and cannot adequately represent the interests of investors.

III. Movants are Disinterested and Independent Investors Who Represent Stanford Victims Worldwide.

Movants represent a diverse group of Stanford investors from around the world.

Catherine Burnell is a British citizen residing in Antigua. (*Kachroo Decl.*, at ¶ 2.) She created and manages one of the top blogs for Stanford victims, called the Stanford Forgotten Victims, which has received over 60,000 visits. (*Id.*) She lost her life savings of over \$810,000 in the Stanford Ponzi scheme. (*Id.*) Marcelo Avila-Orejuela is an Ecuadorian citizen and former Ecuadorian ambassador who lost nearly \$200,000. (*Id.* at ¶ 3.) Mr. Avila-Orejuela actively communicates with South American investors about the Stanford fraud and the Receivership. (*Id.*) Ursula Mesa is a United States citizen, originally from Peru and currently resides in Florida. (*Id.* at ¶ 4.) She and her family lost over \$2 million; she herself lost approximately \$100,000. (*Id.*) Steven Graham is a United States citizen and resides in Louisiana. (*Id.* at ¶ 5.) He is actively involved in the Stanford Victims' Coalition in Louisiana. (*Id.*) He lost \$1.7 million in the Stanford fraud and together with his brother close to \$3 million. (*Id.*)

¹ There are also non-boilerplate lawsuits for billions of dollars which are potentially subject to the pre-approved contingency fee arrangement. *See Wilkinson v. BDO USA, LLP*, Case No. 3:11-cv-01115-N (N.D. Tex. 2011) (\$10.7 billion); *Mendez v. Pershing LLC*, Case No. 3:11-cv-00314-N (N.D. Tex. 2011), (over \$500 million); *The Official Stanford Investors Committee v. Breazeale, Sachse & Wilson LLP*, Case No. 3:11-cv-00329-N (N.D. Tex. 2011) (\$300 million).

Movants are disinterested and independent investors that provide a needed voice to the Committee, and should be added as voting members.

ARGUMENT

Movants' interests have not, thus far, been adequately protected in this action, nor have the interests of the victims as a whole. The Committee lacks a majority of independent and disinterested parties to represent the interests of investors. It lacks a broader international presence to reflect the voice of the worldwide victims of the Stanford fraud. Moreover, the Committee has failed to address the issues regarding the significant fees and expenses, and the operation of the receivership that have depleted the value of the estate. Investors are inadequately represented in this action. Movants' motion to intervene should be granted under the mandatory intervention provisions of Rule 24(a)(2) of the Federal Rules of Civil Procedure, and in the alternative, under the permissive intervention provisions of Rule 24(b).

A. MOVANTS ARE ENTITLED TO INTERVENTION UNDER THE MANDATORY PROVISIONS OF RULE 24(a)(2).

Under Rule 24(a)(2) intervention as a matter of right is appropriate where movant is able to establish the following four factors, as in this case:

“(1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit.”

Edwards v. City of Houston, 78 F.3d 983, 999 (5th Cir. 1996) (internal citations omitted). The test “is a flexible one, which focuses on the particular facts and circumstances surrounding each application.” *Id.* In ruling on a motion to intervene, the Court must accept as true the allegations contained in the motion to intervene. *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 57 (5th Cir. 1977).

1. This Motion to Intervene Is Timely Filed.

To determine whether a motion to intervene is timely, courts consider: (1) the length of time between when the movant knew or should have known of its interest in the case and the time it filed the motion to intervene, (2) the extent of the prejudice to existing parties resulting from the movant's failure to move for intervention as soon as it knew or should have known of its interest in the case, (3) the extent of the prejudice to the movant if the motion is denied, and (4) any unusual circumstances affecting a determination that the motion is timely. *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). When seeking intervention under Rule 24(a), courts "should apply a more lenient standard of timeliness." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266 (5th Cir. 1977).

Movants in this case are timely. Only recently, on December 16, 2010, did the attorneys on the Committee enter into a self-interested agreement that precluded their independence and disinterest. (Docket No. 1208.) Movants have diligently made a careful review of the efforts of the Receiver, as well as his most recent fee application, dated June 28, 2011, all of which now detail a clear failure to provide material value to the estate on behalf of investors. (Kachroo Decl., at ¶¶ 11-12.)

There is no prejudice to the parties because of the timing of this motion. They have had a full and fair opportunity to advance the receivership. More to the point, "[t]he relevant prejudice is that created by the intervenor's delay in seeking to intervene after it learns of its interest, not prejudice to existing parties if intervention is allowed." *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001). Under this prong, "a court should ignore how far the litigation has progressed when intervention is sought, . . . the amount of time that may have elapsed since the institution of the action . . . and the likelihood that intervention may interfere with orderly judicial processes." *Doe # 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001) (internal citations

omitted). Here, any delay in seeking the appointment of disinterested and independent investors to the Committee did not create any prejudice. The appointment would serve to improve the representation of investors, which is the purpose of the Committee.

Movants, on the other hand would be severely prejudiced by a denial. The estate is being nickled and dimed by attorneys' fees. And the principal parties currently in a position to object are the attorneys who have themselves negotiated 25% contingency fee arrangements in cases filed on behalf of the estate. Representation by a majority of disinterested and independent investors is necessary.

2. Movants Have A Substantial Financial Interest In This Action.

"To demonstrate an interest relating to the property or subject matter of the litigation sufficient to support intervention of right, the applicant must have a direct, substantial, legally protectable interest in the proceedings." *Edwards*, 78 F.3d at 1004.

Movants together invested several million dollars and represent KLS Stanford Victims who have suffered substantial losses when the Stanford Ponzi scheme collapsed. (Kachroo Decl., at ¶¶ 2-6.) This loss represents a direct, substantial and legally protectable interest in this case. *See SEC v. TLC Investments & Trade Co.*, 147 F.Supp. 2d 1031, 141 (C.D. Cal. 2001) (investors in Ponzi scheme necessarily have an interest in the property at issue in an SEC liquidation of the debtor).

3. The Exorbitant Fees In This Case Will Impair and Impede Movants' Ability to Protect Their Interests.

Impairment does not require absolute impairment, but is a "more flexible, non-technical standard of 'practical impairment'" and more consistent "with the standards for joinder in Rule 19 and the class action provisions of Rule 23." *United States v. Jackson*, 519 F.2d 1147, 1150 (5th Cir. 1975) (*citing* Advisory Committee Note to Rule 24, 39 F.R.D. 69, 109-11 (1966)).

The disposition of this action will (not just “may”) impair and impede Movants’ ability to protect their interests in recovering the amounts they (and others) lost in the Stanford Ponzi scheme. The attorneys’ fees in this case have been staggering, and consumed virtually, if not all of the recovery it has generated. (Kachroo Decl., at ¶ 13.) As a matter of law, where a liquidation proceeding is likely to use up the remaining assets of a debtor that operated a Ponzi scheme, investors in that scheme satisfy the third prong for intervention as a matter of right. *TLC Investments & Trade Co.*, 147 F. Supp. 2d at 1041.

4. The Substantial Interest The Parties Have In The Fees Generated By This Action Precludes Adequate Representation.

There are limited assets in the estate. The attorneys and receiver thus far have used virtually all that they have recovered to pay themselves. Indeed, the Receiver has a substantial interest in his fees. The Committee attorneys have substantial interests in the fees they generate through contingency actions. Almost no party to this action sits completely independent of and disinterested in the assets that are recovered in this receivership. And when those assets are scarce, as in this case, their interest is sharply at odds with that of the jilted investors.

The presumption of adequate representation where the SEC is involved in the proceeding does not apply if “the applicant alleges that the representatives engaged in collusion, nonfeasance, or had an interest antagonistic to his.” *Villas at Parkside Partners v. City of Farmers Branch*, 245 F.R.D. 551, 555 (N.D. Tex. 2007) (citing *Baker v. Wade*, 743 F.2d 236, 240 (5th Cir. 1984)).

Movants here effectively allege substantial waste and nonfeasance. Substantial fees have been paid to attorneys that have not generated any net benefit to the estate. Indeed, at least three Baker Botts attorneys have submitted bills at rates in excess of \$500. (*E.g.*, Docket No. 1384, at pp. 123, 202 and 284.) Still the Committee has not objected, despite the fact that other courts

have rejected those rates. *See, e.g., United States v. Petters*, Case No. 08-5348 ADM/JSM, 2010 U.S. Dist. LEXIS 44177, *5-6 (D. Minn. May 5, 2010) (“The Court shares the concerns voiced by Ritchie and the Government that professional fees continue to diminish the receivership estate. Given the limited amounts victims are expected to recover in this case, professional fees generated at hourly rates exceeding \$500 cannot reasonably be paid from the receivership estate.”). Substantial contingency fees will be dedicated to attorneys merely for filing boilerplate actions that the Receiver has already investigated through other attorneys paid on an hourly basis from the receivership estate.

It appears that there are substantial duplicative efforts within and among attorneys, creating significant waste and spending that have eroded virtually all of the net recovery. In addition, the Receiver has an interest antagonistic to the investors, because of the scarce assets available to pay the substantial fees he has generated. Because of the limited recovery to date, there is simply not enough to pay the attorneys, the consultants, the Receiver and still provide any real distribution to investors.

Yet, there are no investor objections. This lack of vigorous representation is a sufficient basis to find the current representation inadequate. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 268 (5th Cir. 1977) (“Since neither the plaintiffs nor Monsanto have either voiced the appellants’ concerns or expressed a desire to do so, their interests are not adequately represented by the existing parties to the case.”); *Ass’n of Conn. Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 103 (D. Conn. 2007) (“It is thus possible that the government may not emphasize or vigorously defend all aspects of the challenged law that are critical to the movants’ interests.” (citing *New York Public Interest Research Group, Inc. v. Regents of University of New York*, 516 F.2d 350, 352 (2d Cir. 1975) (holding that the “lack of adequate representation” prong is met when an

intervener would make a “more vigorous presentation” of a side of an argument than the government defendant))).

B. ALTERNATIVELY, MOVANTS SHOULD BE ALLOWED TO INTERVENE UNDER RULE 24(B).

While Movants’ satisfy the requirements for mandatory intervention pursuant to Rule 24(a)(2), pursuant to Rule 24(b), the Court is granted discretion to allow Movants to intervene. “In acting on a request for permissive intervention, it is proper to consider, among other things, whether the intervenors’ interests are adequately represented by other parties and whether they will significantly contribute to the full development of the underlying factual issues in the suit.” *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984).

Movants have already shown that the Receiver or the Committee does not adequately represent their interests because no party is raising the significant concerns shared by Movants and all KLS Stanford Victims regarding the substantial fees that are draining the estate. It is this failure to address fundamental concerns that also shows that Movants will significantly contribute to the full development of the underlying factual issues in this receivership. No party to the receivership is currently acting as a check on the excessive fees and expenses compared to the minimal recovery, challenging the contingency fee arrangement, the operation of the receivership and otherwise voicing concern over the ineffectiveness of this receivership. The only person objecting is Stanford — the person who allegedly committed the fraud.

Permissive intervention of disinterested and independent investors should be granted in this case.

CONCLUSION

For all the foregoing reasons, Movants respectfully request that the Court grant the motion to intervene and appoint Movants as voting members to the Committee, and grant such other relief as the Court deems just and appropriate under the circumstances.

July 7, 2011

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Counsel for KLS Stanford Victims has attempted to reach out to various parties to confer but due to timeline requirements and the prohibitive number of parties, a conference with each of the parties was not possible or practical (LR 7.1 a, b, h). The likelihood of getting full agreement on this motion is low. Thus, the Motion is presented for determination and is presumed opposed.

/s/ Carlos G. Lopez
CARLOS G. LOPEZ

CERTIFICATE OF SERVICE

On July 7, 2011, 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 all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Carlos G. Lopez
CARLOS G. LOPEZ