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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No.: 3:09-cv-0298-N
	§	
STANFORD INTERNATIONAL BANK, LTD., STANFORD GROUP COMPANY, STANFORD CAPITAL MANAGEMENT, LLC, R. ALLEN STANFORD, JAMES M. DAVIS, and LAURA PENDERGEST-HOLT,	§	
	§	
Defendants,	§	
and	§	
	§	
STANFORD FINANCIAL GROUP, and THE STANFORD FINANCIAL GROUP BLDG INC.,	§	
	§	
Relief Defendants.	§	
	§	

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO KLS STANFORD VICTIMS' MOTION TO INTERVENE

I.
Summary

Plaintiff Securities and Exchange Commission ("Commission") opposes the "KLS Stanford victims'" ("movants") motion to intervene. The Commission in no way minimizes the effect Stanford's fraud has had on all Stanford investors, including movants. But, movants' interests are represented by several parties: the Commission, a court-appointed and supervised Receiver, an independent Examiner appointed by the Court, and an Investor Committee appointed by the Court. Mere disagreement with certain decisions of one or more of these parties does not warrant intervention. As the Court has previously recognized, allowing every investor that is dissatisfied with the status of the receivership to intervene would unduly interfere

with this proceeding and, ultimately, not advance investors' collective interest. To put it simply, there are thousands of harmed investors. If these movants are permitted to intervene, where would the interventions end? For these and other reasons set out below, movants' motion to intervene should be denied.[1]

II.
Argument

An application for non-statutory intervention as of right under Federal Rule of Civil Procedure 24(a)(2) must meet four requirements. The application must: (1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of that interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party. *See League of United Latin Am. Citizens v. Clements*, 884 F.2d 185 (5th Cir. 1989) (applicant must meet all four requirements of Rule 24(a)(2) to intervene as of right). If a movant fails to satisfy any one of the requirements, it precludes intervention as a matter of right. *See Haspel & Davis Milling & Planting Co. Ltd v. Bd. Of Levee Comm'rs of the Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007).[2]

Movants' complaints are not unusual. Courts are often asked to consider efforts by investors to intervene in enforcement actions involving equitable receiverships. *See, e.g., CFTC v.*

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[1] The same concerns apply to movants' request to be appointed to the Investor Committee.

[2] The Commission also notes that in securities enforcement actions, efforts to intervene without Commission consent are frequently denied. Indeed, courts have broadly applied Section 21(g) of the Exchange Act to preclude any interference by private parties in Commission law enforcement proceedings without Commission consent. *See e.g., Aaron v. SEC*, 446 U.S. 680 at 717 n.9 (1980) (Blackmun, J., concurring); *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 at 332 n.17 (1979); *SEC v. Qualified Pensions, Inc.*, 1998 U.S. Dist. LEXIS 942 at *14 (D.D.C. Jan. 16, 1998) (intervention); *SEC v. McCaskey*, 56 F. Supp.2d 323, 325 (S.D.N.Y. 1999); *SEC v. Wozniak*, 1993 U.S. Dist. Lexis 1241 (N.D. Ill. 1993) (intervention); *SEC v. Bradt*, 1995 WL 215220 (S.D. Fla. Mar. 7, 1995); *SEC v. Egan*, 821 F. Supp. 1274 (N.D.Ill. 1993) (third-party complaint); *SEC v. Downe*, 1994 U.S. Dist. LEXIS 2292 at *7 (S.D.N.Y. March 3, 1994) (cross-claims); *SEC v. Keating*, 1992 U.S. Dist. LEXIS 14630 at *10 (C.D. Cal. July 23, 1992) (indemnification and contribution). A few courts, exercising their broad discretionary authority, have allowed intervention. *See, e.g., SEC v. Credit Bancorp., Ltd.*, 194 F.R.D. 457, 465-66 (S.D.N.Y 2000), *SEC v. Hollinger Int'l, Inc.*, 2004 WL 422729 (N.D. Ill. Mar. 2, 2004), and *SEC v. Heartland Group, Inc.*, 2003 WL 1089366 (N.D. Ill. Mar. 11, 2003). Those cases do not, however, demonstrate the propriety of intervention in this case.

Privatefx Global One, et al., 2011 WL 888051, *8 (S.D. Texas, March 11, 2011) (noting that "[w]ith regard to the last prong, the Receiver is charged with protecting the interests of all the investors" and denying intervention request); *CFTC v. Chilcott Portfolio Mgmt., Inc*., 725 F.2d 584, 586 (10th Cir. 1984).

A. As the Court has already found, harmed investors' interests are adequately represented.

Movants have not demonstrated that intervention is required or appropriate. Most significantly, they fail to demonstrate that their interests are not adequately represented by existing parties.[3] Movants' claimed interest is the same as every other investors: the money lost in their accounts. [*See* Movants' Motion at pg. 9; Doc. No. 1393-1 at paragraph 7]. There can be little doubt, however, that the Commission and other parties share the goal of maximizing the assets available to help offset those losses. Movants' interests are more than adequately represented.

First, it is well recognized that, particularly in SEC enforcement cases, a receiver plays an important role in protecting all investor interests. *See, e.g. Securities and Exch. Comm. v. First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981). Indeed, it is well-established that a receiver, acting under the supervision of the Court, can establish procedures that adequately protect the rights of investors and claimants. *SEC v. Elliott*, 953 F.2d 1560, 1566-67 (11th Cir. 1992) (due process rights of the investors or claimants would be protected by adequate notice and opportunity to be heard in the context of a receivership); *SEC v. Hardy*, 803 F.2d 1034, 1036, 1039-40 (9th Cir.1986) (approving of the claims procedures used by a district court in a receivership case when all claimants were given reasonable notice and opportunities to be heard at hearings); *SEC v. TLC Investments and Trade Co.* 147 F. Supp.2d 1031 (C.D. Cal. 2001)

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[3] For many of the same reasons, they cannot demonstrate that their interests may be impaired absent intervention.

(noting two basic principles to the application of equitable receiverships in securities enforcement actions: a district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad, and a primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors, including defrauded investors).

Although movants state that their interests are adverse to the Receiver's interests because of the Receiver's fees, that is merely restating that they believe the receivership has been too expensive. That argument offers no challenge to the Court's earlier conclusion that the Receiver's interests are not adverse to harmed investors. [See Doc. No. 321 at pg. 5 ("The Receiver's interest is therefore not adverse to the interests of the putative interveners insofar as they are possible creditors of Stanford or potential victims of fraud.")].

Second, the Court has already determined that the Commission provides adequate representation for the interests of harmed investors, even those who strongly disagree with the conduct of the Receiver. [See Doc. No. 321 at p. 4]. That is consistent with the well-established rule that the Commission serves as adequate representation of investors' interests in receiverships arising out of securities enforcement actions. *See Baker v. Wade*, 743 F.2d 236, 241 (5th Cir. 1984).[4]

Finally, movants do not even address the Court's decision to appoint an Examiner charged with giving a voice to investor interests. When it denied earlier investor motions to intervene, the Court explained that an Examiner was being appointed "specifically to present the collective

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[4] As noted below, movants make a vague assertion of "substantial waste and nonfeasance." That argument, however, centers on their complaint about the receiver's fees and disagreement with the Investor Committee. This unsubstantiated claim has no merit.

interests of Stanford investors to the Court." [Doc. No. 321 at p. 4]. Notably, given movants' focus on the fees requested by the Receiver, the Examiner is specifically charged with authority to file responses to the Receiver's fee applications. [*See* Doc. No. 1149 at paragraph 4]. In addition, while also working with the Investor Committee, the Examiner retains the rights and duties to represent collective investor interests that were originally conferred on him by the Court. [Doc. No. 1149 at paragraph 3]. In short, as the Court has already found: "considering the SEC, the Receiver, and the Examiner, the Court finds that movants' interests are adequately represented." [*Id.*][5]

Movants offer no reason why their request to intervene differs from those that have been denied. If anything, there are even fewer grounds to support intervention now. In the time since the Court denied earlier investor motions to intervene, the Court has increased investors' role in these proceedings by not only appointing the Examiner, but also by authorizing the creation of an Investor Committee that (except for the Examiner in his role as a member) owe fiduciary duties to Stanford investors in the same way that members of a bankruptcy committee owe duties to unsecured creditors. [Doc. No. 1149 at paragraph 1(h)].

B. General dissatisfaction does not warrant intervention.

In the face of this representation and prior Court rulings, movants' request to intervene is based only on generic complaints about the status of the receivership. While the Commission empathizes with the dissatisfaction felt by movants (and others), movants have not set out reasons sufficient to justify intervention.

1. Dissatisfaction with Fees

First, movants complain generically that, despite what they describe as high fees requested by the Receiver, there have been no investor objections. [Motion at pg. 11]. Similarly, movants'

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[5] The Court reiterated that conclusion on March 8, 2010. [*See* Doc. No. 1030 at pg. 2]

counsel states in her supporting declaration that "[t]he issues of exorbitant fees and the operation of the estate … do not appear to be adequately raised or addressed by the [Investor Committee] nor any other party to this proceeding." [*See* Doc. No. 1393-1]. Of course, this ignores the multiple objections to, among other things, the Receiver's fees by the Commission and the Examiner during this case, the resulting ongoing hold back of 20% of the Receiver's fees, and the Court's review and approval of the Receiver's fee applications. And, as instructed by the Court, the Commission, the Examiner and the Receiver continue to consult regarding the Receiver's activities and fee applications.[6] The record in this case amply demonstrates that the Commission, the Examiner, the Court and, most recently, the Investor Committee have each taken steps designed to represent investors' interests.

Moreover, movants do not explain what they would add to the proceedings, beyond adding additional briefing and expense. For example, despite claiming to have diligently reviewed the fee applications, neither movants nor their counsel offer any material, specific objection they claim should have been made or – more importantly – explained how litigating such an objection now (even if sustained as a result of litigation) would have advanced investor recovery on a net basis.[7]

Likewise, movants' counsel states that, as part of the Official Stanford Investor Committee, the movants would address the issues of exorbitant fees and the operation of the estate. But, the Court's Orders make clear that the Examiner retains his responsibilities to review and object, if

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[6] The Investor Committee is also now involved with consulting with the Receiver. Throughout these discussions, it is the Commission's hope that appropriate tasks may be undertaken by the Receiver while costs generated are minimized.

[7] Movants raise a general point that a few attorneys have charged above $500 per hour. But, they do not address the fact that those are discounted rates and have already been reviewed by the Court.

appropriate, to the Receiver's fee applications, not the Investor Committee. [See Doc. No. 1149 at paragraph 4]. Accordingly, this promise offers no support for intervention.[8]

2. Dissatisfaction with Litigation Agreement

Second, movants appear to dislike the fact that certain members of the Investor Committee have been authorized the pursue claw back litigation on a contingency-fee basis.[9] This objection does not support intervention. First, movants misrepresent the nature of the approved litigation process. They state that "[s]ubstantial 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." [Motion at pg. 11]. But, under the Court's orders, filing the cases results in no payments to counsel. Instead, the Court's orders provide that any contingency fees will be paid only from net recovery achieved in the litigation and that no fees will be paid with respect to claims that do not result in recovery. [See, e.g., Document 1207 (proposed litigation agreement between Receiver and Investor Committee) at paragraphs 10 and 12 and Doc. 1267 (authorizing Receiver to enter the agreement)].

Plus, movants do not explain how they would do things differently if permitted to intervene. For example, on one hand, as noted above, movants disapprove of the expenses that have been incurred in the receivership. But, at the same time, movants complain that certain litigation is being pursued on a contingency fee basis (with payment only occurring when there is a recovery to the estate) rather than at an hourly rate by the Receiver's counsel. This does not support intervention.

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8 For all the reasons that have been addressed here and because movants interests are adequately represented, there is also no basis for permissive intervention under Rule 24(b).

9 It does not appear that movants challenge the idea that claims against third parties may advance investor recovery.

3. Unsubstantiated Claims of Waste and Nonfeasance

Finally, to avoid the presumption that their interests are already adequately represented, movants state that they have "effectively alleged substantial waste and nonfeasance." [Motion at pg. 10]. To the contrary, movants have presented only generic complaints about the amount of fees, the status of recovery, and the litigation agreement between the Receiver and the Investor Committee. They have not pointed to any facts that would support an allegation of improper collusion between the Receiver and any party or nonfeasance. Nor could they, given that the record in this case is replete with examples of vigorous dispute between the Receiver and others, where there has been disagreement as to how to best further investors' interests. Those disputes have been resolved by the Court, and the Commission and, presumably, others remain committed to seeking to maximize investor recovery.

In other words, movants' "allegation" is, in reality, merely rephrasing their generic dissatisfaction with the *status quo.* It does not amount to a credible allegation that representatives have "engaged in collusion, nonfeasance, or had an interest antagonistic to [movants]" sufficient to overcome the presumption that the Commission adequately represents investor interests. Regardless, as discussed above, even if the presumption is not considered, in fact, investors' interests have been adequately represented.

4. Summary

In this case, the Court has taken a variety of steps to ensure that all investors' interests are protected to the extent possible. Opening the flood gates of intervention will only introduce unnecessary inefficiencies, complexity, overlapping work, and the risk of conflicting interests, competing legal theories and other burdens. Adding additional complexity and expenses to what is already a complicated task will serve only to interfere with the effective administration of this

enforcement action, reduce eventual recovery available to all investors and risk disparate treatment among claimants.

III.
CONCLUSION

For the reasons set forth above, the Commission respectfully asks the Court to deny the motion to intervene.

Dated: July 28, 2011

Respectfully submitted,

s/ David B. Reece
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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2011, 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
DAVID B. REECE