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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.: 3:09-CV-0298-N
	§	
STANFORD INTERNATIONAL BANK, LTD., *et al.*	§	
	§	
Defendants,	§	
IN RE:	§	
	§	
STANFORD INTERNATIONAL BANK, LTD.,	§	Civil Action No.: 3:09-CV-0721-N
	§	
Debtor in a Foreign Proceeding.	§	

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO MOTION TO AMEND, MODIFY OR VACATE CERTAIN PORTIONS OF THE COURT'S AMENDED RECEIVERSHIP ORDER [CIVIL ACTION NO. 3:09-CV-0298-N]
AND
OPPOSITION TO MOTION TO REFER PETITION FOR RECOGNITION PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY CODE AND RELATED PLEADINGS TO BANKRUPTCY COURT [CIVIL ACTION NO. 3:09-CV-0721-N]

Plaintiff Securities and Exchange Commission opposes the motion by Nigel Hamilton-Smith and Peter Wastell (collectively, the "Antiguan Liquidators") to amend in Civil Action No. 3:09-CV-0298-N (the "Receivership Action") [docket 329] and the Antiguan Liquidators' motion to refer in Civil Action No. 3:09-CV-0721-N ("the Chapter 15 Action") [docket 1]. For the reasons set out below, the Commission respectfully submits that both motions should be denied.

PRELIMINARY STATEMENT

This is a securities enforcement action instituted by the Securities and Exchange Commission, an agency of the federal government of the United States, seeking to vindicate a public interest. The Commission alleges that R. Allen Stanford, a United States citizen and native Texan, and Jim Davis, a United States citizen and resident of Mississippi, used companies they controlled, including, but not limited to, Stanford International Bank, Ltd. ("SIB" or "SIBL") to engage in a massive fraudulent scheme that stole billions of dollars from investors. Stanford created a sham bank in Antigua to help mask the fraud he and others were running out of the United States.

The Commission seeks to hold Stanford, SIB and other defendants liable for, among other things, disgorgement of ill-gotten gains and appropriate civil penalties. In furtherance of that goal, the Commission requested the appointment of an equity receiver, subject to the oversight of an Article III federal district court, to secure, preserve and manage the defendants' assets to ensure that such assets were available for eventual disbursement. The Court, finding that it was both necessary and appropriate to appoint a receiver in order to prevent waste and dissipation of the assets of the defendants to the *detriment of the investors*, granted that request, appointing Ralph Janvey as Receiver ("the US Receiver"). As has been detailed in multiple

Reports to the Court, the Receiver has actively worked to secure and preserve assets in order to ensure that they may ultimately be distributed subject to this Court's oversight.[1]

The Court also prohibited the filing of claims that impact the Receiver and the Receivership Estate, including the filing of bankruptcy petitions under Chapter 15 of the Bankruptcy Code. This stay is consistent with the Court's authority and recognizes that the victims of this fraud should not be further burdened by the expense of satellite litigation, particularly at the early stages of the receivership. The current situation is an example of the type of burdensome distraction the stay was designed to prevent. A third party, in essence, seeks to carve out only two of multiple entities used to engineer a fraud into a separate proceeding while this Court has proper jurisdiction over all relevant entities and individuals. The resulting situation will, at best, create judicial inefficiency and extra expense. The Court may properly preclude this type of drain on receivership assets. Accordingly, the existing Amended Order Appointing Receiver stay should remain in effect, allowing the U.S. Receiver to continue his work.[2] Alternatively, if the Court elects to modify the Receivership Order to allow this

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[1] More recently, as a further safeguard on behalf of investors, the Court appointed John J. Little as Examiner, charging him with providing the Court with information the Examiner deemed relevant to the interests of investors. The Commission has conferred with the Examiner on the issues raised herein. The Commission understands – and shares -- the Examiner's interest in avoiding unnecessary litigation. The Commission respectfully submits that the current stay against claims in the existing Amended Order Appointing Receiver achieves that goal. The Commission, however, agrees with the Examiner that, if the petition is allowed, it should be considered by this Court, not a bankruptcy court.

[2] As an initial matter, the Court lacks jurisdiction to consider the Antiguan Liquidators' motions. "As a general rule, a notice of appeal ousts the district court of jurisdiction over the judgment or order appealed." *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989)(citing *United States v. Hitchmon*, 587 F.2d 1357 (5th Cir. 1979); *accord Henry v. Independent American Savings Ass'n*, 857 F.2d 995 (5th Cir. 1988)). The Supreme Court has noted that "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Accordingly, the Fifth Circuit has ruled that "the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo . . . ." *Coastal Corp.*, 869 F.2d at 820; *see also Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 n.2 (5th Cir. 2008); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 578 (5th Cir. 1996). Here, two notices of appeal have been filed challenging, among other things, the Amended Order Appointing Receiver, the very order at issue in the Antiguan Liquidators' motions. Because the Amended Order Appointing Receiver is involved in the appeal, this Court may only maintain the status quo, not change it as requested by the Antiguan Liquidators.

particular Chapter 15 petition to be filed, the Commission respectfully submits that this Court, not a bankruptcy court, is the proper tribunal to consider the merits of that petition.

FACTUAL BACKGROUND

The Commission's fraud allegations in this case arise from, and center on, conduct of United States citizens that was performed largely in the United States. Stanford, like many who violate the federal securities laws, manipulated a variety of entities he owned to conduct his scheme. These entities included SIB, which was organized under the laws of Antigua. The fact that SIB was incorporated in Antigua is of little significance to this case's larger context. Stanford, the sole shareholder and chairman of SIB, is a United States citizen and native Texan. [See Defendant R. Allen Stanford's Pro Se Answer to First Amended Complaint at p. 1 (admitting that both his "home office" and one of his residences are in Houston, Texas.)] In addition to his home office in Houston, Stanford lived and worked principally in the U.S. Virgin Islands and Miami. [Van Tassel Aff at ¶ 11][3] Aside from ownership and control by Stanford, all SIB directors (including Stanford) were USA citizens except two, and neither of the non-American directors were Antiguans. [Van Tassel Aff. at ¶11]

Perhaps more importantly, SIB's "nerve" center was in the United States – for example, the management of SIB's investments, the directing of fund flows, investment strategies, and managing legal and human resources were directed from the United States. [Van Tassell Aff. ¶11]. Indeed, SIB sold CDs to U.S. investors exclusively through Stanford Group Company

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[3] Karyl Van Tassel is an agent working on behalf of the U.S. Receiver. In a previous pleading, the U.S. Receiver submitted an Affidavit from Ms. Van Tassel. For the Court's convenience, a copy of that Affidavit is attached as Exhibit A. References to Affidavit will be "Van Tassell Aff. at ____."

In addition, the Commission refers occasionally herein to the Memorandum of Law in Support of Motion For Ex Parte Temporary Restraining Order, Preliminary Injunction and Other Emergency Relief ("SEC's Memo of Law") and the Appendix In Support of Application for Ex Parte Temporary Restraining Order, Preliminary Injunction and Other Emergency Relief filed with the District Court ("SEC's TRO Appendix") and a supplemental appendix filed in support of Application for Preliminary Injunction and Other Emergency Relief.

("SGC"), a Texas corporation with offices throughout the U.S. that was registered with the Commission as a broker-dealer. [SEC's Memo. of Law (Doc. No. 6) at 5.][4] Through these efforts, SIB generated more CD sales, by dollar amount, from the U.S. than from any other country, including Antigua. [Van Tassel Aff. at ¶25.][5] Indeed, Antiguan law prohibits offshore "banks" such as SIB from providing investment services to Antiguans. In the course of offering its CDs to U.S. investors, SIB assured them in it's disclosure documents that "[b]y making this offering to Accredited Investors in the United States, [SIB] and its officers are subject to certain laws of the United States, including the anti-fraud provisions of the U.S. federal securities laws and similar state laws." [SEC's Memo of Law. at p. 21] SIB's CDs were sold in the U.S. pursuant to a Regulation D private placement. In connection with the private placement, the Bank filed a Form D with the SEC. [SEC's Memo. of Law (Doc. No. 6) at 9]

To the extent Stanford's fraud touched on areas outside the United States, the connection to Antigua is tenuous. While the Antiguan Liquidators are focused on SIB, that entity is only one of many that were used to perpetrate the fraud scheme. Stanford-related entities spanned the globe, including 15 states within the United States and at least 13 countries in Europe, the Caribbean, Canada and Latin America. These various entities, like SIB, were – regardless of where they were incorporated – controlled and managed by the key management team in the United States. Moreover, the Commission and the U.S. Receiver are working extensively in collaboration with regulators around the world, especially in Latin America, to help ensure a proper distribution of recovered assets to wronged investors.

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[4] The principal business of SGC consisted of the sales of SIB's CDs. [See Preliminary Injunction and Other Equitable Relief As to R. Allen Stanford at ¶8].

[5] It is also noteworthy that from August 2008 through December 2008 alone, approximately 50 SGC clients liquidated approximately $10.7 million in stocks, bonds, and other similar securities and invested money in SIB's CDs.[See SEC's Memo of Law at p. 20].

Most of SIB's CD sale proceeds did not even pass through Antigua and those that did were promptly sent out of the country. [Van Tassel Aff. at ¶7]. Instead, CD sale proceeds largely went directly to accounts in Canada, the United States and England and then onto various Stanford-related accounts. Indeed, even checks sent by investors directly to SIB's address in Antigua were bundled and sent daily to Trustmark Bank in Houston for deposit. [*Id*.] Moreover, although Stanford's victims are located around the world, sales to citizens of the United States and Venezuela predominated. Finally, Antiguan law prohibits offshore "banks" such as SIB from serving Antiguans – there are, at best, few direct Antiguan victims of Stanford's fraud.

This fact stands out when the Antiguan Liquidators' mandate is considered. For example, the Order appointing the Antiguan Liquidators ("the Antiguan Liquidation Order") provides that SIB is to be dissolved under the supervision of The Eastern Caribbean Supreme Court In the High Court of Justice Antigua and Barbuda ("the Antiguan Court") and the Antiguan Liquidators are to "collect and gather all such assets for the general benefit of [SIB's] creditors and as may be directed by [the Antiguan Court]. [See Antiguan Liquidation Order at paragraph 5][6] The Antiguan Order further provides that SIB's assets are to be "held for the benefit of the depositors, creditors and investors of [SIB] as their interests appear in accordance with the laws of Antigua and Barbuda, subject to the payment of the fees, expenses, and costs of the receivership and liquidation. [Id. at para. 7]

The Order then provides a priority for distributing those assets. First priority is given to fees and expenses of the Antiguan Liquidators, the cost of the receivership and liquidation, and *severance payments to former employees of SIB.* [Id. at 7.1-7.3] After those debts are paid, the Antiguan Order provides that "[t]he balance to be paid on account of the claims of creditors and

[6] The Antiguan Liquidation Order was attached as an exhibit to the Declaration of Nigel Hamilton-Smith In Support of the Petition for Recognition of a Foreign Main Proceeding Pursuant to Chapter 15 of the Bankruptcy Code. See Docket Entry No. 3, Case No. 3-09-CV-0721.

depositors of the [SIB] as at the date of th[e] Order and in accordance with their priority under the [International Business Corporations Act, Cap. 222, as amended, of the Laws of Antigua and Barbuda] and other laws of Antigua and Barbuda, or as may be ordered by [the Antiguan Court] with the remaining balance, if any, to be distributed to the shareholders of [SIB] in accordance with their entitlement. [Id. at 7.4] Notably, the priority described in Paragraph 7.4 does not identify investors, but only creditors and depositors.

ARGUMENT

A. THE STAY AGAINST CLAIMS AFFECTING RECEIVERSHIP ESTATE WAS PROPERLY ENTERED AND SHOULD NOT BE MODIFIED OR VACATED.

1. The Stay is Within the Court's Authority.

The Court had ample authority to issue a stay against the filing of claims by third parties against the receivership. "The Supreme Court has repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest." *SEC v. Wenke*, 622 F.2d 1363, 1371 (9th Cir. 1980) (citations omitted). A necessary corollary to that power is the authority of federal courts, particularly in SEC enforcement actions such as this one, to stay proceedings against a court-appointed receivership, even as to nonparties that have notice of the stay. *Id; see also Liberte Capital Group, LLC v. Capwill*, 462 F3d 543, 551 (6th Cir. 2006); *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985) (noting that courts recognize the importance of preserving a receivership court's ability to issue orders preventing interference with its administration of receivership property).

This authority flows from the recognition that the appointment of receivers in enforcement actions furthers the policies of the federal securities laws. *See Wenke*, 622 F.2d at 1373 (noting that receivership furthers subsidiary purposes of federal securities laws, including

preservation of assets and the fact that the receiver and his staff could conduct independent investigation of claims the entities might have against former management or other parties, prosecution of which would benefit investors and deter future violations).[7] Indeed, while it is axiomatic that the Receiver, as an agent of the Court, is independent of the Commission, the Amended Order Appointing Receiver properly acknowledges the importance equity receiverships play in enforcement proceedings, authorizing the U.S. Receiver to provide the Commission and other governmental agencies with information requested in connection with regulatory or investigative activities. [Amended Order Appointing Receiver at ¶ 5(k).

The guidance offered by Justice Anthony Kennedy, writing for the 9th Circuit in *Wenke* affirming the issuance of a blanket stay is precisely on point:

> A receiver appointed by a court in the wake of a securities fraud scheme may encounter difficulties sorting out the financial status of the defrauded entity or entities. There may be a genuine danger that some litigation against receivership entities amounts to little more than a continuation of the original fraudulent scheme. Similarly, the securities fraud may have left the finances of the receivership entities so obscure or complex that the receiver is hampered in conducting litigation. Moreover, the expense involved in defending the many lawsuits which often are filed against an entity in the wake of a securities fraud scheme may be overwhelming unless some are temporarily deferred. A stay of proceedings against receivership entities except by leave of the court may be an appropriate response to the above concerns, and the district court did not abuse its discretion in this case by entering the blanket stay.

[7] The importance of equity receiverships to a securities enforcement action is a key distinction between this case and, for example, *Jordan v. Independent Energy Corporation*, 446 F. Supp. 516 (N.D. Tex. 1978), relied on heavily by the Antiguan Liquidators. Indeed, the Court in *Jordan* acknowledged that courts, including at least one appellate court, recognize district courts' power to enjoin bankruptcy proceedings when receiver has been appointed because of a fraud by management, particularly when the creditors benefiting from a bankruptcy filing include persons that had conducted the misconduct in the first place. That is the case here, where certain SIB employees are under investigation for securities fraud. Indeed, as noted elsewhere, it appears that the Antiguan Liquidators are required to provide priority in distributing SIB's assets to pay severance payments to former SIB employees. In short, the facts of this securities enforcement action are vastly different than those presented in *Jordan* and the Court's dicta in that case setting suggesting it would never be proper to preclude a bankruptcy filing has no application here.

Wenke, 622 F.2d at 1373.

2. The Stay Should Not Be Lifted to Permit the Chapter 15 Petition.

The reasons supporting a stay of litigation are not diminished simply because the Antiguan Liquidators seek recognition as liquidating agents for SIB. To the contrary, the inability of a receivership estate to meet all of its obligations is typically the *sine qua non* of the receivership *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551-53 (6th Cir. 2006). "The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary. . . . The district court may require all . . . claims to be brought before the receivership court for disposition pursuant to a summary process consistent with the equity purpose of the court…" *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551-53 (6th Cir. 2006). Where "rightful claims to assets exceed the assets available, the court, with the help of the receiver, must determine how to distribute the assets equitably. . . . [D]istributing . . . the assets [of the entity placed in receivership] is one of the central purposes of the receivership." *Securities Exchange Commission v. Capital Consultants LLC*, 453 F.3d 1166, 1172 (9th Cir. 2006); *see United States Securities Exchange Commission v. The Infinity Group Company*, 226 F. App. 217, 2007 WL 1034793 (3d Cir. 2007).

It is also important to note that this Court, and through its supervision, the Receiver, are able to properly address *all* relevant assets, not merely those of two Stanford-controlled entities. It makes no difference that significant estate assets are located outside U.S. borders. The Court, in its receivership order, "assume[d] exclusive jurisdiction [over] and t[ook] possession of the assets . . . of whatever kind and description, *wherever located*, . . . of the Defendants and all

entities they own or control."[8] "When a district court has *in personam* jurisdiction over the defendant, . . . a duly appointed receiver may exercise authority over any assets located in foreign countries provided that his actions are taken in accord with or otherwise do not violate the law of that foreign nation." *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1187 (11th Cir. 1991). In contrast to the Receiver's ability (subject to the Court's supervision) to properly account for all claimants – particularly the investors' who were direct victims of fraud – as noted above, it appears that the Antiguan Liquidators flexibility in distributing assets will be limited.

These differing priorities may be especially important given the well-known close relationship between Stanford/SIB and Antigua. For example, the U.S. Receiver has informed the Commission that it appears that Stanford, through some of his wholly-owned entities, made two different loans to the Antiguan government, one in the amount of $40 million and another in the amount of EC$300 million (about US$100 million). The government has yet to repay either loan. Other evidence suggests that, at least as of 2005, an internal audit team of Stanford Financial Group noted that Stanford-related entities maintained accounts receivable to the Antiguan government in excess of $84 million and that, in most cases, there was no evidence of recent payments.[9] While the exact nature (and current status) of those loans is unclear, the fact that the Antiguan government perhaps has a financial interest connected to Stanford is relevant to analyzing whether a party owing its appointment to the Antiguan Financial Services Regulatory Commission will properly safeguard the interests of all investors. It is also worth noting that the Antiguan Liquidators have argued forcefully (and with success in Antiguan courts) that this Court's orders are void in Antigua. Yet, they now seek the benefit of this Court's rulings when it

[8] Doc. 10 at ¶ 1; Doc. 157 at ¶ 1. (emphasis added.)

[9] Exhibit B is a copy of what appears to be an internal audit report detailing these receivables.

suits their purposes. This type of double standard should not be countenanced.

Under the circumstances of this case, the Commission respectfully requests that the Court maintain its order prohibiting claims against affecting the Receivership Estate, including the Antiguan Liquidators' Chapter 15 Petition.

B. IF THE EXISTING ORDER IS MODIFIED, THE PETITION FOR RECOGNITION SHOULD NOT BE REFERRED TO BANKRUPTCY COURT.

If the Court elects to allow the Antiguan Liquidators' Chapter 15 Petition, the Commission respectfully submits that proceeding should be considered in this Court and not referred to bankruptcy court. This Court is familiar with many of the underlying facts of this case and can properly dispose of the Petition. There is little purpose to having dual proceedings involving these complex facts. *Cf.* 11 U.S.C. § 157 (providing that on a proper motion by a party, the district court is required to withdraw a reference to a bankruptcy court to the extent resolution of the case requires consideration of both Title 11 and other laws of the United States regulating organizations or activities effecting interstate commerce).

Dated: May 11, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 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