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

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

R. ALLEN STANFORD, STANFORD INTERNATIONAL BANK, LTD., STANFORD GROUP COMPANY, AND STANFORD CAPITAL MANAGEMENT, LLCS' OPPOSITION TO THE RECEIVER'S MOTION TO APPROVE PROCEDURES FOR SALES OF REAL PROPERTY, ACCEPT CB RICHARD ELLIS'S FEE PROPOSAL, AND CONDUCT SALES OF REAL PROPERTY BY PUBLIC AUCTION PURSUANT TO PROPOSED REAL PROPERTY SALES PROCEDURES

TO THE HONORABLE JUDGE:

COME NOW, DEFENDANTS, R. Allen Stanford, Stanford International Bank, Ltd., Stanford Group Company, and Stanford Capital Management, LLC, (hereinafter respectively referred to as the "Estate") and files this Opposition to the Receiver's Motion to Approve Procedures For Sales of Real Property, Accept CB Richard Ellis's Fee Proposal, and Conduct Sales of Real Property. The Estate respectfully avers the following:

II. ARGUMENT

The Receiver seeks to sell numerous pieces of real estate owned by one or more entities comprising the Estate without providing the necessary factual or legal support to justify any such sales at this time. The Motion fails to inform the Court as to how many pieces of property the Receiver proposes to sell. It does not identify where legal title to the property lies or which entities have an ownership interest in each piece of property. It does not advise the Court as to the expense of maintaining the properties or justify why the properties must be sold at this early stage in the proceedings. Indeed, in his Response to the Receiver's Motion, the Examiner concurs that the Receiver's Motion is deficient. At a minimum, the Court should require the Receiver to identify which Stanford entity holds title to the property, identify the ownership of the real property in question, and state the reasons why each piece of property needs to be sold.

More to the point, however, the Receiver's instant motion violates both the letter and the spirit of the Court's intent to maintain the "status quo" pending a final adjudication on the merits The Court has placed specific limits on the duties of the Receiver *See* Rec. Doc. No. 10, ¶3, and Rec. Doc. No. 157, ¶3. The Receiver's attempt to sell any assets at this time contravenes the Receivership Order and constitutes a breach of the Receiver's fiduciary duty to the Receivership Estate.

A. The Receiver's Request Exceeds the Scope of the Appointment Order And is a Breach of his Fiduciary Obligation to Preserve the Receivership Property for All Claimants

It is well-established that the purpose for a court to appoint an equity receiver is to take custody and manage property involved in litigation in order to **preserve** the property pending the court's final disposition of the suit. *See* Wright & Miller, 12 *Fed. Prac. &*

Proc. Civ. 2d §2981 (2005)(emphasis added). A receiver has a duty to preserve the property of the estate for the benefits of the claimants, and that duty must be undertaken without bias to one side or the other. *See Boothe v. Clarke*, 58 U.S. 322, 331 (1854). "A receiver is an indifferent person . . . he is appointed on behalf of all parties." *Id.* The receiver is a fiduciary to the person who ultimately has rights in the property. *See Citibank , N.A., v. Nyland Ltd*., 839 F.2d 93, 98 (2d Cir. 1988).

The two cases relied on by the Receiver *Jones Village*, and *Kingsport Press*, make clear that a meaningful factual showing is necessary with findings by the District Court as to why the action is justified. *See Jones v. Village of Proctorville, Ohio*, 290 F.2d at 50 (remanding case back to the District Court for "a hearing in which the factual situation will be fully presented and for findings of fact and conclusions of law, with reasons therefore by the District Judge"); *Kingsport Press v. Brief English Systems, Inc.*, 54 F.2d 497, 501 (2d Cir. 1931). Here, the Receiver has not set forth any facts or law in his Motion to enable the Court to make these findings.

Jones[1] does not support the Receiver's request seeking approval for the sale of, at best, vaguely identified real estate in one fell swoop. In *Jones*, the receivership had been ongoing for more than 20 years, yet the Court of Appeals still insisted that the Receiver provide reasons for why certain actions were necessary, including what the "financial considerations" were and whether the property in question was in fact operating at a loss. *See Jones*, 290 F.2d at 50 ("The Court is of the opinion that these important items need further explanation . . . The present financial condition of the system and its prospects for successful operation in the future are most inadequately disclosed to this Court").

[1] *See Jones v. Village of Proctorville*, 290 F.2d 49, 50 (6th Cir. 1961).

Intervenor, Stanford Condominium Owners Association, notes in its Response in Opposition to the Receiver's Request, that receiverships ordered to conserve estates, "are to be watched with jealous eyes lest their function be perverted."[2] Before seeking authorization to sell real estate, the Receiver is duty bound to account for Receivership assets. Moreover, even after all assets are inventoried, authorization to sell property is not bestowed unilaterally upon the Receiver, but rather requires the court to determine whether the sale of a particular property is appropriate given specific factual findings. *See Blakely Airport Joint Venture II v. Fed. Savings and Loan Ins. Corp.*, 678 F.Supp 154, 156 (N.D. Tex. 1998) ("Because court authorization is not automatic, the court next decides whether a sale is appropriate at this time.").[3] Here, the Receiver has neither indicated which property or properties he seeks to sell nor why such a sale is necessary. Accordingly, the Court has no basis on which to determine whether authorizing the sale of *any* property is appropriate, let alone whether the Receiver should be empowered to sell property solely at his discretion.

The Receiver cites generally to the Receivership Order, pointing out that it is his duty to 'preserve the assets of the Estate' and offers the unsupported assertion that the sale of the unknown real property is necessary to achieve that end. The Amended Appointment Order limits the Receiver and imposes upon him a fiduciary duty to preserve, not waste, the assets of the Estate. *See* Rec. Doc. No. 157. In seeking the appointment of a

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[2] *See* Rec. Doc. 450 at p. 3, *citing Michigan v. Mich. Trut Co.*, 286 U.S. 334, 345 (1932).

[3] The Court in *Blakely* allowed the receiver to conduct a sale of property only after finding that the debt exceeded fair market value of the specific property at issue, the value of the property was declining, and the parties opposing the sale did not appear to have an interest in the property that was to be sold. *See* 678 F. Supp. at 156.

Receiver, the SEC specifically asked that the receiver be given the limited right, subject to Court approval, to sell only **wasting assets**. *See* Rec. Doc. No. 48.

Courts have strictly construed orders of appointment in determining the scope of a receiver's powers. *See Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981) ("A receiver has only that authority conferred by the Court's order appointing him."). Furthermore, the Receiver reports directly to the Court and does not have the authority to supplement or amend the Court's order appointing the Receiver. *See* Fed. R. Civ. P. 66; 1 Clark on Receivers §11(a) (3d ed. 1959). Notwithstanding the obvious contradiction between the duty to preserve the Receivership and selling off its assets, the Receiver is requesting *carte blanche* authority to dispose of Receivership assets so long as doing so conforms to procedures *amendable at his discretion*. *See* Examiner's Brief in Response to the Receiver's Motion.

The Receiver has <u>already</u> breached his duty to preserve the assets in the Receivership Estate for all claimants by failing to prevent the sale of Estate assets and irreparably harming the Estate and its investors. In his opposition to the Receiver's Motion for Approval of Interim Fee Application and Procedures for Future Compensation of Fees and Expenses, filed last week, Mr. Stanford sets forth numerous sales of assets caused by the Receiver which have already occurred and which have already diminished significantly the value of the Estate that the Receiver has been charged with "preserving." *See* Rec. Doc. No. 439.

B. The Receiver Cannot Liquidate Receivership Property Until the Case is Resolved on the Merits

Selling Receivership property will abrogate this Court's ability to render a meaningful judgment on the merits. A preliminary injunction preserves the status quo, prevents irreparable injury to the parties and preserves the court's ability to render a meaningful decision after a trial on the merits. *See Meis v. Sanitas Service Corp*, 511 F.2d 655 (5th Cir. 1975). If the Receiver is able to sell many of the Estate's assets prior to an adjudication on the merits, the Court's findings will have little or no value.

The SEC sought a preliminary injunction to maintain the status quo and asked this Court to appoint a receiver to among other things, have the limited ability to "with the approval of the Court, dispose of any wasting asset." Rec. Doc. No. 48. If at a trial on the merits, the Defendants succeed, it will be a hollow victory and further damage creditors and investors if the Receiver has already disposed of many of the Receivership assets. The Receiver should not be permitted to sell Receivership property without an adjudication of the merits of the underlying claims. *See Securities Exchange Commission v. TLC Investments and Trade Co.*, 147 F. Supp. 2d 1031, 1036 (C.D. Ca. 2001) ("It is only in rare cases that it is appropriate for a receiver, rather than a bankruptcy court and particularly before judgment has been entered, to liquidate, rather than manage, the assets of a receivership.")[4]; *SEC v. Current Financial Services*, 783 F.Supp 1441, 1445-46 (D.D.C. 1992)(agreeing to appoint a receiver after TRO granted but refusing to grant receiver the right to liquidate assets; "[S]uch drastic measures are

[4] The Court in *TLC Investments* ultimately ruled that the receiver in that case could liquidate assets because of the "unique circumstances" of that case, including the fact that the liabilities outweighed the assets in the Estate and the assets sought to be sold needed constant oversight and management, such as racehorses. *See TLC Investments*, 147 F. Supp. 2d at 1036. These circumstances are not present here.

[not] appropriate prior to the entry of final judgment. The SEC may renew its motion to encompass such relief if necessary in the future").

C. There Proposed Real Property Sales Procedures are Not Beneficial the Receivership, Let Alone the Investors

The Receiver presents no evidence to the Court why the proposed Stalking Horse Contract or the choice of a Public Sale are the most beneficial to the Estate and by extension its investors.

> The term 'stalking horse' is not merely colloquial; it is also both underinclusive and misleading as a purported justification for a break-up fee. Presumably, a 'stalking horse' bidder would submit an early phony bid to absorb the initial costs and consequences of bidding, while acting in behalf of another party…**The appropriate question is whether the break-up fee served any of three possible useful functions: (1) to attract or retain a potentially successful bid, (2) to establish a bid standard or minimum for other bidders to follow, or (3) to attract additional bidders**.[5]

The Receiver has presented no evidence that any of these factors are present or that he has performed due diligence with respect to the ultimate bidder chosen as the stalking horse.[6] Additionally, the Receiver does not indicate if he chose from a pool of stalking horse bidders, which is customary practice or whether he simply chose the first bidder to come along. Furthermore, as noted in the Examiner's Response, the Receiver focuses on the risks undertaken by the "stalking horse" bidder and not the benefits which can be significant.[7]

Finally, the Receiver provides no discussion as to why a public sale would be more beneficial than a private sale under 28 USC 2001. Under 28 USC 2001 (b), a

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[5] *In re Integrated Resources, Inc.*, 147 B.R. 650, 661-662 (Bankr. S.D. NY 1992), emphasis added.

[6] *In the Matter of: Tiara Motorcoach Corp.*, 212 B.R. 133, 138 (Bankr. N.D. IN. 1997).

[7] *See* Rec. Doc. 453, at p. 8.

hearing is required and before confirmation of any private sale, "the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value." There can be little to no doubt that appraisals by disinterested persons in this matter may be more beneficial to the Estate than the services of the Receiver's proposed consultant.[8]

II. CONCLUSION

Rather than performing his duties with the high degree of care and prudence demanded of his position, the evidence presented to date makes clear that the Receiver is exceeding his authority granted in the Receivership Order by seeking to sell real estate assets. Accordingly, the Estate respectfully requests that the Court deny the Receiver's request to sell real property from the Receivership Estate.

At a minimum, the Receiver should be ordered to provide a list of the properties in question, their location and owner, and the reasons why he believes it is necessary to sell any of the properties in advance of any final adjudication by this Court and such other information as the Court deems appropriate and which is consistent with 28 U.S.C. 2001.

Respectfully submitted,

/s/ Ruth Brewer Schuster

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[8] *See also* Rec. Doc. 453, Examiner's Response, at p.9-10.

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent those indicated as non-registered participants on June 8, 2009.

/s/Ruth Brewer Schuster