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'S RESPONSE TO RECEIVER'S MOTION FOR APPROVAL TO RELEASE PORTION OF HOLDBACK

As it has throughout this proceeding when addressing matters related to the Receiver's fees, the Commission has, among other things, sought to balance the fact that the Receiver and professionals working with him have been required to work on a variety of difficult tasks with the fact that the funds available for distribution are exceeded by the harm suffered. It is also important to note that, despite whatever dissatisfaction the Receiver may feel related to the holdback, the Receiver's team of professionals has received substantial compensation for work performed in this case.

Taking these various factors into account, on balance, the Receiver's motion to release a portion of the professional fees that have been held back should be denied. First, it is premature

because, regardless of the number of years that have passed, it is not yet possible to evaluate the Receiver's overall success. Moreover, to the extent it is possible to evaluate results so far, those results do not currently justify additional payments to the Receiver or the professionals working with him.

A. It is premature to consider releasing any of the held-back fees.

As the Receiver acknowledges, when it imposed the holdback, the Court suggested that the time to revisit the held-back fees would be when the results obtained for the Receivership were more certain. The Receiver claims that, given the passage of several years, it is now possible to evaluate those results.

This reasoning is flawed because it asks the wrong question. The Receiver's motion, as a general matter, is based on the idea that the Court may evaluate results by equating "success" to performance of tasks necessitated by duties assumed when accepting a role in an equity receivership. In other words, according to the Receiver's motion, because he has performed a variety of tasks, he and the professionals working with him should be paid additional funds.

But that analysis, if correct, would wholly eliminate the need to consider what result the receivership generated for investors. And that is not the law. Contrary to the Receiver's suggestion, the amount of funds available for distribution (i.e., the result generated by the receivership) is a key factor in evaluating requested compensation by an equity receiver. *See, e.g., SEC v. Striker Petroleum, LLC*, 2012 WL 685333 at *3 (N.D. Tex. March 2, 2012).[1] Indeed,

[1] Even in the absence of an objection, courts must carefully examine the fee application to determine whether the time spent, services performed, hourly rates charged, and expenses incurred by the Receiver are justified under the factors set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974). *See SEC v. Megafund Corp*., 2008 WL 2839998, *2 (N.D. Tex. June 24, 2008). The factors set forth in *Johnson* include (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount

a primary reason the hold-back was instituted initially was to serve as a check on activities that may not lead to recovery for defrauded investors. For example, as the Receiver notes, a material amount of work related to pursuing litigation against investors, including those who had net losses as a result of Stanford's fraud, as relief defendants. Such work provided no value to investors.[2] Perhaps, as the Receiver suggests, some of that work will prove useful in pursuing other fraudulent transfer litigation. But the time to answer that question is when the Court and the parties know the results of that litigation, including how much additional money is spent pursuing it.

The Receiver glosses over this fact by focusing on specific tasks undertaken by the Receiver and his team. Indeed, the bulk of his motion is spent providing a general description of various activities that have been performed. While there are issues related to those activities, the Commission respectfully submits that the threshold standard here remains: what has the receivership resulted in for defrauded investors. And the answer to that question is: nobody knows yet.

The Receiver apparently believes that the end-result to investors is not relevant to the fees awarded. But it is well-settled that a district court may focus available funds on the "most

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involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 488 F.2d 714, 716-717. "In considering applications for compensation by receivers and their attorneys, the courts have long applied a rule of moderation, recognizing that 'receivers and their attorneys engaged in the administration of estates in the courts of the United States … should be awarded only moderate compensation.'" *See SEC v. Byers*, 590 F. Supp. 2d 637, 645 (S.D.N.Y. 2008).

[2] At a minimum, the Commission submits that no held-back fees related to that litigation should be released. The Receiver's frequent citation to the Court's comments that there was a good faith basis for pursuing such a claim does not support releasing held back fees. The fact that the Receiver "could" pursue such a claim does not mean that he "should" have pursued them or that pursuing it was an effective use of receivership assets. And, again, the question is not whether the Receiver or those who performed work on such cases should be compensated. They have been compensated. The question here is whether it is proper to supplement that payment by releasing held-back fees, at a time when neither the Court nor the parties can speculate as to the ultimate recovery by investors.

grievously injured claimants," at the expense of others who might also have valid claims. *See, e.g., SEC v. Certain Unknown Purchasers of the Common Stock of and Call Options for the Common Stock of Santa Fe Int'l Corp.*, 817 F.2d 1018, 1021 (2nd Cir. 1987). The reason is simple: in receivership cases, like this one, the funds available for disgorgement may be limited, for reasons wholly beyond the control of any party other than the wrongdoer. In such a situation, the question becomes how to best apply the limited funds there are, with an eye towards assisting those who were most seriously harmed. That same precept should apply here, when determining whether to take limited funds, at a time when the full amount of recovery is only speculative, as additional compensation to the Receiver's team.

The Receiver suggests this principle should be ignored because administrative fees take priority in order to, as the Receiver claims, ensure that someone is willing and able to handle the work of the estate. [See Receiver's Motion, Doc. No. 1998, at p. 5]. Leaving aside the fact that the Court, in an appropriate case, could indeed reject payment of a Receiver's requested fees in light of insufficient funds, the Receiver's argument here is wrong. The question is not whether the Receiver and supporting professionals should receive compensation. The Receiver's team has been paid. To date, the Receiver's team has been paid over $64 million dollars, while investors have received only roughly $30 million. That discrepancy alone counsels against releasing any of the held-back funds at this time.

It is especially true given that, as the Receiver notes, the main source of potential recovery – litigation against third parties – is still in its early stages. And, as the Receiver's motion further notes, a sizable portion of the fees now at issue relate to work that will be used for that litigation. In order to evaluate whether additional fees should be awarded related to that work, it is appropriate to wait and see how that litigation is resolved. In short, now is not the

time to consider whether the Receiver's professionals should receive more funds. While that applies across the board, it is particularly true with regard to the several firms that have performed the majority of receivership-related work and who will continue to play a substantial role in the receivership. *Cf. Byers*, 590 F. Supp. 2d at 648 ("[w]hile [receiver's counsel] has worked hard, it is simply too early to tell the extent to which its efforts will benefit the receivership estate. This is all the more reason to apply a rule of moderation now").

B. If the Court evaluates the requested release at this time, rather than when the receivership results are known, the request should be denied.

If, as the Receiver asks, the Court looks only at the work to date, rather than waiting to see the results of the receivership, to consider whether to release held-back funds, those funds should not be released. First, contrary to the Receiver's implication, the fact that previous fee applications did not draw a filed objection from the Examiner or the Commission does not mean that the Commission agrees that all fees reflected in those applications should be paid. In fact, the reverse is true. As described generally below, for various reasons, there is no basis at this time to release any of the held-back funds.

1. Each of the firms is subject to ongoing concerns that weigh against releasing any of the held-back funds at this time.

The Receiver argues that the fact that the Court has previously approved earlier fee applications and because the Commission and the Examiner did not file objections to those applications, the release of the holdback is warranted. But that argument ignores the role the hold back plays in that process. As long as any unresolved objections or concerns related to work roughly within the range of the applicable hold back, it was not necessary to burden the Court or the parties – at this stage in the receivership – with litigation concerning objections. That does not mean, however, that all objections and concerns were resolved.

Now, the Receiver's motion apparently seeks to sweep all those issues aside. Such a result would be inconsistent with the purpose of imposing the hold back. Therefore, at a minimum, before releasing additional fees, it will be necessary for the Court to consider specific objections to each of the prior fee applications. For example, the Commission and the Examiner have repeatedly expressed concerns about staffing levels for various of the Receiver's firms and whether tasks are performed at the appropriate billing rate. While such concerns were alleviated by the holdback, they will require individual briefing if the hold back is to be released.

This concern applies to each of the firms seeking further reimbursement from the held-back funds. But, it is especially true for the Receiver's professionals that have provided the largest percentages of services and that continue to provide significant services: Baker Botts L.L.P., FTI Consulting, Inc., Ernst & Young, Thompson Knight LLP, Krage & Janvey, L.L.P. and Altenburger. It also applies to Financial Industry Technical Services ("FITS").

2. Fees related to unsuccessful services.

Second, while it is difficult at this stage to identify precisely how much fees for some firms relate only to specific tasks described generally in the Receiver's motion, several of the examples highlighted by the Receiver actually counsel against releasing more fees. For example, the Receiver notes the various work he has performed in foreign jurisdictions, including the settlement agreement reached with the Joint Liquidators appointed in Antigua. But the fact that work was performed does not mean that the results of that work warrant additional fees, even if the work was appropriately engaged.[3]

[3] And, it is far from clear that all such work was necessary. In Canada, for example, there was appropriate work performed in connection with the Receiver's effort to be recognized in that jurisdiction. For this reason, and given that the Receiver has received a large portion of the funds that were in Canada and is preparing to distribute them, if the Court is inclined to release any funds before the receivership's results are known, it may be appropriate to release a portion of the fees related to that work that have been held back from Osler, Hoskin & Harcourt LLP.

The Commission agrees, for example, that the settlement agreement with the Antiguan Liquidators was a promising development.[4] But it was necessary in large part because of unsuccessful efforts by the Receiver in Antigua, the United Kingdom and Switzerland. Again, the question is not the quality of the work performed in those jurisdictions. Likewise, the question is not whether the firms that performed such work should be compensated: each has received substantial compensation. The question is whether the results obtained as a result of that work warrant releasing additional fees. The undisputable fact is that the Receiver's efforts in those jurisdictions were unsuccessful; therefore, there is no basis to release any portion of the hold back to those firms.[5]

3. Firms whose work cannot yet be evaluated.

Three firms have only been engaged relatively recently in the receivership or have not yet performed a significant level of services. Consequently, the very reasons that warranted a prospective hold-back in 2009 apply equally now to those firms: Basham, Ringe y Correa S.C., Gerald T. Groner, Esq., and Deloitte. In addition, given those circumstances, it is not possible to

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But, the Receiver also refers repeatedly to challenges to the Ontario Attorney General's work in connection with Stanford-related assets located in Canada. The Receiver repeatedly refers to that work as a seizure that required action by the Receiver. To the contrary, the Ontario authorities initiated proceedings in that jurisdiction to safeguard those assets, and the Receiver was involved in and aware of that process. To the extent the Receiver later determined it more proper to consider challenging the action does not mean that the work performed threatening such an action was of benefit to investors. To the contrary, there is no reason to provide further compensation for such work.

[4] It should be noted, of course, that, the settlement agreement was the result of work by various parties, not only the Receiver.

[5] This would include any fees related to this work performed by the Receiver's primary firms that are continuing to provide significant services (Baker Botts, FTI, Thompson Knight, Krage & Janvey and Altenburger) and the fees held back from firms in those jurisdictions (3-4 South Square in the United Kingdom and Roberts & Co. in Antigua).

Likewise, there is no basis to pay the Receiver's former public relations firm (Pierpont) any additional fees. It is unclear what, if any value, Pierpont provided to investors.

evaluate the results obtained from any of their work. Accordingly, there is not yet any justification for releasing any funds that have been held back from those firms.

C. Conclusion

The Receiver focuses on the fact that the receivership has been sustained longer than five years. That focus is misplaced. Likewise, the Receiver's recitation of various tasks that have been performed to fulfill his duties as an equity receiver do not support his request. The key fact in addressing the request to release the hold back should be the result, i.e., the recovery obtained for investors, of the receivership. It is too soon to make that evaluation. Under these circumstances and until the Court can evaluate the Receiver's performance compared to the ultimate result, there is no reason to release further funds.

Date: June 9, 2014

Respectfully submitted,

s/ David B. Reece

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2014, I electronically filed the foregoing document with the Clerk of the court for the Northern District of Texas, Dallas Division, by using the CM/ECF system which will send notification of such filing to all CM/ECF participants and counsel of record.

s/ David B. Reece
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