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

In re	:	Chapter 15
Stanford International Bank, Ltd.,	:	Case No. 09-0721 (DCG)
Debtor in a Foreign Proceeding.	:	

ANTIGUAN LIQUIDATORS' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR RECOGNITION PURSUANT TO CHAPTER 15 OF THE U.S. BANKRUPTCY CODE

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Messrs. Nigel Hamilton-Smith and Peter Wastell (collectively, "Liquidators") respectfully submit this Second Supplemental Brief in support of their petition for recognition ("Petition") to address the three areas of interest the Court raised during the parties' recent telephone conference: (1) the current state of Fifth Circuit law on principal place of business, including whether Stanford International Bank's ("SIB") activities were active, passive or "far flung;" (2) the relationship between SIB and the financial advisors who marketed SIB's CDs to potential investors; and (3) the "single business enterprise" concept as part of the "alter ego" theory of imposing liability. As discussed below, an analysis of each of these issues reinforces the conclusion that SIB's center of main interests ("COMI") is in Antigua. Therefore, the Court should recognize the ongoing liquidation proceeding of SIB in Antigua (the "Antiguan Proceeding") as a foreign main proceeding pursuant to chapter 15 of the U.S. Bankruptcy Code.

Further, and as indicated in Liquidators' previous filings, recognition of Liquidators and the Antiguan Proceeding offers the best means to ensure coordination – and to avoid additional,

expensive litigation – among the several jurisdictions in which proceedings relating to SIB or its assets are pending.[1]

I. ARGUMENT AND AUTHORITIES

A. SIB'S PRINCIPAL PLACE OF BUSINESS WAS IN ANTIGUA

While chapter 15 does not refer to "principal place of business," many U.S. courts have followed the lead of European courts, and have analogized the determination of COMI to "the concept of 'principal place of business' in United States law." *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006); *see also* Case C-341/04, *In re Eurofood IFSC Ltd.*, 2006 E.C.R. 3813. Here, under Fifth Circuit principal place of business precedent, there is little doubt that SIB's principal place of business was in Antigua, the location of its headquarters and almost all of its management and employees, and the site of its day-to-day operations and activities.

The Fifth Circuit determines a corporation's principal place of business by examining the total activities of that corporation (the "total activity" test). *See J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987). The total activity test requires the court "to consider two 'focal points:' the location of the corporation's 'nerve center' and its 'place of activities.'" *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004); *see also Grinter v. Petroleum Operation Support Serv., Inc.*, 846 F.2d 1006, 1008 (5th Cir. 1988). The court should "examine the totality of the facts, including the corporation's organization and nature of its activities, to determine which of these focal points predominates." *Teal Energy*, 369 F.3d at 876; *see also id.* at 879 ("[T]he determination of a corporation's principal place of business is a fact

[1] Attached as Exhibit B hereto (App. at 261) is the Declaration of Geoffrey Rowley, a client partner with Vantis Business Recovery Services, and a key member of Liquidators' team. Mr. Rowley's Declaration provides an update on the status of the various SIB-related litigation in other jurisdictions, including Antigua, the United Kingdom, Switzerland and Canada.

intensive inquiry that can only be made after considering the totality of the corporate existence.").[2]

The Fifth Circuit has articulated three general rules to guide the principal place of business analysis: "(1) when considering a corporation whose operations are far-flung, the sole nerve center of that corporation is more significant in determining principal place of business, (2) when a corporation has its sole operation in one state and executive offices in another, the place of activity is regarded as more significant, but (3) when the activity of a corporation is passive and the 'brain' of that corporation is in another state, the situs of the corporation's brain is given greater significance." *J.A. Olson*, 818 F.2d at 411 (internal citations omitted). The court notes, however, that "[t]hese general rules … are only a starting point" and that "[i]n each case [the court] must fully examine the corporation's operations and its nerve center in the context of the organization of that business." *Id.* Here, and as was the case in *J.A. Olson*, SIB's place of activity should predominate the inquiry, but whether the Court finds that the 'place of activity' or the 'nerve center' test predominates, the totality of the facts regarding SIB's organization and its activities demonstrates that SIB's principal place of business was in Antigua.

1. <u>SIB's Place of Activity Was in Antigua</u>

In the seminal case of *J.A. Olson Company v. City of Winona, Mississippi*, the Fifth Circuit encountered a situation that is strikingly similar to the circumstances presented here, and

[2] On November 10, 2009, the Supreme Court heard argument in the case of *Hertz Corporation v. Friend* (Case No. 08-1107). In *Hertz*, the Court will consider how lower courts should determine a corporation's principal place of business for purposes of diversity jurisdiction under 28 U.S.C. § 1332. In so doing, the Court likely will resolve the current four-way split among the Circuits on this issue. As discussed herein, the Fifth Circuit applies a "total activity" test, which is also applied by the Sixth, Eighth, Tenth and Eleventh Circuits, whereas the Ninth Circuit applies a "place of operations" test, the Seventh Circuit applies a "nerve center" test, and the Third Circuit examines the corporation's center of activity. Although formulated in distinct terms, these standards often lead to the same result on a given set of facts. *See Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1033 (9th Cir. 2009) (Kleinfeld, J., concurring) (describing the "varying verbal formulas" to determine principal place of business, which "generally amount to about the same thing"). Here, under any of these formulations, SIB's principal place of business was in Antigua.

concluded that, although a corporation's executive offices were in Chicago, its principal place of business was in Mississippi, the site of its operations.[3] *J.A. Olson*, 818 F.2d at 412-13. The Fifth Circuit's holding in *J.A. Olson* controls here.

In *J.A. Olson*, the corporation at issue manufactured wooden frames from its plant and storage facility in Winona, Mississippi. 818 F.2d at 403. The Mississippi plant constituted the corporation's "base of operations" as it was the company's only manufacturing facility at which 113 people worked, and it housed administrative offices that, among other things, provided "accounting, bookkeeping, payroll and data processing services," including accounts receivable and accounts payable. *Id.* The plant also had significant contacts with the local community. *See id.* The company's corporate offices were located in Chicago, at which the company maintained its corporate records, prepared tax returns, compiled financial reports, and negotiated insurance coverage. *Id.* "[M]ost if not all of the major corporate and financial decisions [were] made in the Chicago office." *Id.* Further, the company employed "thirty-five to thirty-seven salespeople, termed by [the plant manager] as independent contractors," who lived in "different sales areas throughout the country." *Id.* at 404.

Despite *Olson*'s nationwide sales force of independent contractors, the Fifth Circuit did not view the company's operations as "far flung" and instead reasoned that because the corporation had its operations in one state and its corporate offices in another, the "place of activity" test should predominate the inquiry. *See id.* at 413 (where sole operations are in one location and executive office is in another, "the place of activity is regarded as significant.")

[3] In *J.A. Olson*, an Illinois corporation sued a Mississippi municipality, which moved to dismiss on the ground that the plaintiff's principal place of business was also in Mississippi, and therefore the court lacked diversity jurisdiction. 818 F.2d at 403. The district court concluded that, while the company's corporate offices at which its "primary financial and other management decisions [were] made," was in Chicago, its principal place of business nonetheless was in Mississippi, the sole location of its operations. *Id.* at 413. Consequently, the district court granted the motion to dismiss, and the Fifth Circuit affirmed on appeal. *Id.*

Applying that test, the corporation's place of activity was unquestionably in Mississippi, where the company's sole operations were located. *See id.* Further, while the company's "nerve center" was located primarily in Chicago, "[s]ignificant management decisions" were also made in Mississippi, and the "decisions made in Chicago [were] based on information initially compiled by the Winona facility." *Id.* At bottom, the court concluded that the company's principal place of business was in Mississippi:

> Winona is therefore not only the locale of Olson's only substantial activity but also the place in which some significant business decisions are made. And, as we have noted, Winona is where the vast majority of Olson's employees are located, is where Olson is most visible, is where its products are manufactured, is where it has its most substantial investment, and indeed is where, more than any other place, its corporate purpose is fulfilled. Although decisions made in Chicago are clearly important, they cannot outweigh the greater significance of the activities conducted in Winona. Thus, when we consider the total activity of Olson, the balance of the relevant factors demonstrates with force that Winona is the corporation's principal place of business.

Id. at 413. Other cases draw the same conclusion on similar facts. *See Grinter*, 846 F.2d at 1007 (finding that a corporation's place of activity was where the majority of employees lived, where most of its operations were conducted and where most of its property was located); *Teal Energy*, 369 F.3d at 876-77 (place of activity where all day-to-day operations were conducted, two principal officers resided, and all of the employees resided); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 774 (7th Cir. 1986) (finding principal place of business was in Wisconsin, the location of the corporation's single plant and substantially all of its employees and officers even though "nerve center" was arguably in Chicago); *Lurie Co. v. Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405, 416 (N.D. Cal. 1970) (finding principal place of business in California, where corporation had substantially all of its operations, assets and employees, even though corporate-wide policymaking function was in New York).

Like the corporation at issue in *J.A. Olson*, nearly all of SIB's operations were conducted from one location: its headquarters in Antigua.[4] Eighty-eight of SIB's ninety-three non-officer employees worked in Antigua, along with SIB's President and other management personnel.[5] *See* 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 ("Hamilton-Smith Decl.") [Dkt. #3] ¶ 27. These managers and bank officers had significant authority, including the authority to hire and fire employees. *See* Exhibit A, Third Supplemental Declaration of Nigel Hamilton-Smith in Support of Petition for Recognition of a Foreign Main Proceeding Pursuant to Chapter 15 of the Bankruptcy Code ("Hamilton-Smith Third Supp. Decl.") ¶ 3 (App. at 5).

From Antigua, these SIB employees and managers carried out ***all*** of the day-to-day bank functions including: maintaining and managing depositor accounts, maintaining client files, managing SIB's operating software, generating client statements, responding to clients' loan requests, performing credit cards and bill payment services, and handling all day-to-day communications with clients or their advisors. *See* Hamilton-Smith Decl. ¶ 29; *see also* Supplemental 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 [Dkt. #15] ("Hamilton-Smith Supp. Decl.") ¶ 18-21. Indeed, SIB operated its own computer system in Antigua, and its internal systems were managed from Antigua (*e.g.*, human resources). *See* Hamilton-Smith Supp. Decl. ¶ 18-19. And SIB also sold CDs directly to investors from Antigua,

[4] The only exception was a five-person sales office in Montreal, Canada. The existence of the Montreal office does not shift SIB's principal office from Antigua. *See Tubbs v, Southwestern Bell Tel. Co.*, 846 F.Supp. 551, 555 (S.D. Tex. 1992) (adopting the principle that "when a corporation divides its operations among more that one state, but its activities in one of those states clearly exceeds all of the activities in other states, the state with the largest volume of the operations is the principal place of business").

[5] For these purposes, Liquidators distinguish between SIB's employees and its officers, such as Mr. Davis, who might also be considered technically an employee of SIB.

several hundred of whom visited the bank. *See* Hamilton-Smith Supp. Decl. ¶ 11, 21; *see also* Second Supplemental 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 [Dkt. #32-2] ("Hamilton-Smith 2nd Supp. Decl.") ¶ 7.

SIB's headquarters also had significant contacts with the local Antiguan community, and like *J.A. Olson*, Antigua is unquestionably where SIB was "most visible."[6] 818 F.3d at 413. *See* Hamilton-Smith Third Supp. Decl. ¶ 4 (App. at 6). And though certain strategic decisions apparently were made by Messrs. Davis, Stanford and/or Ms. Pendergest-Holt, some of whom may have been in the United States, in almost all cases, those decisions were implemented by SIB employees in Antigua. *See generally* Hamilton-Smith Supp. Decl. ¶ 17-21. At bottom, under Fifth Circuit precedent, SIB's principal place of business was in Antigua and thus, by analogy, its COMI is in Antigua.

2. SIB's Activities Were Neither "Passive" Nor "Far Flung" and Thus the "Nerve Center" Test Should Not Predominate

Because SIB's activities were neither "passive" nor "far flung," the "nerve center" test should not predominate the inquiry. In the Fifth Circuit, "passive activities involve investment decisions," *Lytle v. Aspen Educ. Group*, No. 9:04-CV-228, 2005 WL 3018716, *2 (E.D. Tex. Nov. 10, 2005), and almost always involve passive investments in real estate. *See, e.g., Village Fair Shopping Center v. Sam Broadhead Trust*, 588 F.2d 431, 434 (5th Cir. 1979) (passive investment in shopping center that required almost no attention by the corporation's officers); *Nauru Phosphate Royalties, Inc. v. Drago DAIC Interests, Inc.*, 138 F.3d 160, 164 (5th Cir. 1998)

[6] Of course, Mr. Stanford also had extensive contacts with Antigua. *See generally* Hamilton-Smith Decl. ¶ 25-26 (describing Mr. Stanford's connections to Antigua). Indeed, U.S. District Judge David Hittner specifically found that Antigua was Mr. Stanford's primary residence for the last fifteen years, a finding that the Fifth Circuit affirmed. *See* Order dated June 30, 2009 ("Judge Hittner Order") [Dkt. #36-3] ¶¶ 3, 41, 44; *see also* Per Curiam Opinion dated Aug. 24, 2009 ("Fifth Circuit Opinion") [Dkt. # 43-2] at 7.

(affirming district court's conclusion that foreign company was "passive investor in land and its primary activities were management-oriented"); *Muirfield (Delaware) L.P. v. Pitts, Inc.*, 17 F. Supp. 2d 600, 604-05 (W.D. La. 1998) (finding that business was "management-oriented, and the partnerships it owns and manages are involved in passive efforts – the purchasing, holding, leasing and selling of land").

While SIB, like any bank, engaged in investment activities, it is nothing like the passive real estate investment companies to which courts have applied this "passive" activities approach. SIB's investment portfolio did include investments in real estate,[7] but SIB's operations in Antigua involved far more than mere passive investing, including issuing credit cards, making loans, selling CDs, maintaining the bank's accounts, approving new accounts, and operating the bank's internal systems, such as information technology and human resources. *See, e.g.*, Hamilton-Smith Decl. ¶ 29; Hamilton-Smith Supp. Decl. ¶ 18-21. The Fifth Circuit has never held that a bank's investment activities may trump its bricks-and-mortar operations for purposes of determining its principal place of business. Such a dramatic change would have implications far beyond this case.

Nor were SIB's operations "far flung." The "far flung" analysis is not meant to apply to companies whose customers or sales are "far flung." *J.A. Olson* itself had a nationwide reach. *See J.A. Olson*, 818 F.2d at 404. Instead, it applies to companies whose ***operations*** are far-flung: a company must have "varied activities which are carried on in different states." *Id.* at 407. SIB did not carry out varied activities in different locations; rather, the evidence demonstrates that SIB's operations were conducted not just principally – ***but nearly exclusively*** – from Antigua.[8]

[7] All of those real estate assets were located in Antigua. *See* Hamilton-Smith 2nd Supp. Decl. ¶ 5.

[8] The "nerve center" test provides an "inference that a corporation's principal place of business is its headquarters." *J.A. Olson*, 818 F.2d at 408.

Indeed, SIB's only other location was a small, five person sales office in Montreal, Canada. Hamilton-Smith Decl. ¶ 25. Liquidators have uncovered no case in which a court has found that a corporation with only two locations has "far flung" operations,[9] and the Fifth Circuit has observed that the test will not apply to a company whose operations are concentrated in one state. *See J.A. Olson*, 818 F.2d at 407 ("'nerve center' test inapposite to company engaged in one activity in one state) (citing *Spector v. Rex Sierra Gold Corp.*, 227 F. Supp. 550, 551 (S.D.N.Y. 1964)).

While a network of financial advisors marketed SIB CDs to potential investors (SIB also sold CDs directly from Antigua), those financial advisors were not employees of SIB, and instead operated as independent contractors. *See* Hamilton-Smith Supp. Decl. ¶ 11; *see also* Second Affidavit of Nigel John Hamilton-Smith ("Hamilton-Smith 2nd U.K. Aff.") ¶ 20(i)-(ii) (attached as Exhibit A-1 to Hamilton-Smith 2nd Supp. Decl.). The Fifth Circuit encountered a similar situation in *J.A. Olson*, where the corporation at issue employed a team of thirty-five to thirty-seven independent contractors who sold the company's products to the public, but the appellate court did not consider the operations of Olson "far flung." See *id.* at 404, 413. As the *Olson* court implicitly recognized, many companies maintain broad (and often independent) sales forces, and that alone is not sufficient grounds to trigger the "far flung" prong of the analysis. If it were, the "nerve center" test would swallow up the principal place of business analysis in a

[9] *Compare Karage v. First Advantage Corp.*, No. 3:09-CV-0604-M, 2009 WL 2568261, at *2 (N.D. Tex. Aug. 19, 2009) (Lynn, J.) (finding defendants' operations "far flung" where defendant corporation had "numerous locations throughout the United States and abroad"); *Fogleman v. Meaux Surface Prot., Inc.*, No. 07-1485, 2008 WL 4001861, at *5 (W.D. La. Aug. 27, 2008) (finding corporation's operations to be far flung where corporation had subsidiary in Houston, offices and supply warehouse in Louisiana, and operations in the Gulf of Mexico region, including Louisiana, Texas, the Gulf of Mexico and in "international waters"); *Leyva v. J.B. Hunt Transport, Inc.*, No. H-08-1019, 2008 WL 2312667, at *2 (S.D. Tex. June 4, 2008) (defendant's operations were "far flung" where it "conducts business activity in each of the contiguous 48 states"); *Goryl v. Tidal Software, Inc.*, No. H-07-2079, 2007 WL 2471469, at*2-3 (S.D. Tex. Aug. 27, 2007) (corporation's operations were "far flung" where it had employees and locations in eleven different states); *Carter-Langham, Inc. v. Phillips Petroleum Co.*, 957 F. Supp. 940, 941 (S.D. Tex. 1997) (finding petroleum corporation's operations were "far flung" where company had operations in all fifty states and in twenty countries worldwide);

way the Fifth Circuit has never held. As one district court explained, "[i]t is the business operations of a corporation, however, that must be 'far-flung and varied' to trigger application of the nerve center test, not simply the sales and results of those business operations." *Columbia Gas Transmission Corp. v. Burdette Realty Improvement, Inc.*, 102 F. Supp. 2d 673, 678-79 (S.D. W.Va. 2000), *aff'd*, 62 Fed. Appx. 544 (4th Cir. May 12, 2003). This analysis and the Fifth Circuit's conclusion in *J.A. Olson* control here.

3. Even if SIB's Operations Were Passive or Far Flung (Which They Were Not), Its "Nerve Center" Was in Antigua

Assuming *arguendo* that SIB's operations were "far flung" or its activities were "passive," SIB's "nerve center" was located in Antigua. Thus, even if the "nerve center" test predominates the inquiry, SIB's principal place of business remains in Antigua, and by analogy, its COMI is in Antigua.

The "nerve center" test "focuses on the site from which the corporation's business is directed and controlled." *Karage v. First Advantage Corp.*, No. 3:09-CV-0604-M, 2009 WL 2568261, at *2 (N.D. Tex. Aug. 19, 2009) (Lynn, J.) (citing *J.A. Olson*, 818 F.2d at 406-08). "Among the factors relevant to the determination are: (1) the exclusivity of decision making at the nerve center; (2) the degree of autonomy delegated to other locations; (3) the location of corporate offices; and (4) the amount of managerial authority at a given location." *Id.* For at least five reasons, application of these factors establishes that SIB was directed and controlled from Antigua.

First, it is undisputed that SIB's only corporate office was in Antigua, and it had no offices in the United States. *See* Hamilton-Smith Decl. ¶ 25, 27. It would be unprecedented to find that a corporation's "nerve center" was somewhere the corporation had no office at all

because a couple of senior officers were purportedly making certain strategic decisions from the offices of an affiliated company.

Second, though Messrs. Stanford and Davis and Ms. Pendergest-Holt may have made certain strategic decisions regarding SIB's products and investments (as the Receiver has argued), their decisions were neither exclusive nor independent of Antigua. Antiguan managers and employees implemented those decisions and exercised significant autonomy and managerial authority.[10] For example, SIB personnel in Antigua managed the bank's Tier 1 investments. Hamilton-Smith Supp Decl. ¶ 17. Further, most of SIB's officers and managers worked in Antigua, including SIB's President (Juan Rodriguez-Tolentino), Senior Vice President (Miguel Pacheco), Vice President of Operations (Eugene Kipper), Vice President of Client Support (Beverly Jacobs), Human Resources Manager (Jennifer Roman), Finance Manager (Omari Osbourne), Internal Auditor (Trevor Bailey), Compliance Officer (Lisa-Ann Christian), and Quality Control Supervisor (Eloise Matthew). *See* Hamilton-Smith Supp. Decl. ¶ 19. These officers had full managerial authority over the day-to-day operations of their various departments. *See* Hamilton-Smith 3rd Supp. Decl. ¶ 3 (App. at 5). Indeed, Liquidators have "found nothing in SIB's books and records or in this course of [their] investigation to suggest that any substantial management services – in terms of IT, human resources, accounting or the running of the business – were provided to SIB from persons outside Antigua." Hamilton-Smith Supp. Decl. ¶ 15.

Third, in this context, finding a purported "nerve center" outside of Antigua undermines the predictability that the COMI standard is meant to provide. Chapter 15 itself makes clear that

[10] In *Kanzelberger*, the Seventh Circuit held that a corporation's principal place of business was in Wisconsin, even though the company was run by its president "in dictatorial fashion" in Chicago. *See Kanzelberger*, 782 F.2d at 777-78.

"[i]n interpreting [the chapter], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508 (2005); *see also In re Eurofood*, 2006 E.C.R. 3813. Both U.S. and international sources have made clear that a debtor's COMI should be something that potential creditors can ascertain when they deal with the debtor, not something that would be based on a later analysis of who was making strategic decisions and where they were located at the time. Because insolvency is a foreseeable risk, "international jurisdiction [should] … be based on a place known to the debtor's potential creditors." *In re Betcorp Ltd.*, 400 B.R. 266, 286 (Bankr. D. Nev. 2009) (quoting Report on the Convention of Insolvency Proceedings).[11] Indeed, courts have defined COMI as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. at 634 (quoting Council Reg. (EC) No. 1346/2000); *In re Bear Stearns High Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007) (same). Indeed, for this reason (among others), the court in the United Kingdom concluded that SIB's COMI was in Antigua. *See* Dkt. #36. Finding that SIB's principal place of business, and then by analogy its COMI, based upon a "nerve center" in a country in which the bank had no offices or employees would undermine the certainty and objective factors that COMI is designed to provide.

Fourth, finding that SIB's "nerve center" was in the United States would require this Court to disregard the findings of U.S. District Judge David Hittner. Though the Receiver has argued that Mr. Stanford controlled SIB (and the entire Stanford enterprise) from his "base of operations" in Houston, *see* Declaration of Ralph Steven Janvey ("Janvey Decl.") [Dkt. #21-3]

[11] *See* Liquidators' Consolidated Reply in Support of Their Petition for Recognition Under Chapter 15 of the U.S. Bankruptcy Code [Dkt. #32] at 7 n.4.

¶ 7(g), Judge Hittner specifically rejected this contention when he revoked the Magistrate Judge's release order, and ordered Mr. Stanford detained pending trial. In particular, Judge Hittner found that Mr. Stanford "***lived primarily outside of the United States for at least the last fifteen (15) years***," that his ***"primary residence for the past fifteen years" was Antigua***, and that Stanford's alleged "***family ties to Houston [were] tenuous at best and of recent vintage***." Judge Hittner Order ¶ 3, 41, 44 (emphasis added).[12] On Mr. Stanford's appeal, the Fifth Circuit reached a similar conclusion. *See* Fifth Circuit Opinion at 7 ("[w]hile Stanford did grow up in Texas, he has spent the last fifteen years abroad. His international travels have been so extensive that, ***in recent years, he has spent little to no time in the United States***.") (emphasis added). In the face of these findings, it is difficult to understand how SIB's "nerve center" could be located in a country in which Mr. Stanford – the primary fraudster – has not resided for the past fifteen years.

And ***fifth***, finding that SIB's nerve center was outside of Antigua would, as a practical matter, defy logic. While the Receiver has argued that Messrs. Stanford and Davis and Ms. Pendergest-Holt (and others) may have exercised control over SIB, he has not – and cannot – point to any particular location within the United States or elsewhere (other than Antigua) that would serve as the corporate offices of SIB. *See J.A. Olson*, 818 F.2d at 407 ("the nerve center, ***or corporate offices***, will clearly be the principal place of business at which a corporation does business") (emphasis added). Because SIB had no offices in the United States, any purported "nerve center" in the U.S. would be located in a state in which the company had no offices and its owner and principal shareholder did not reside. At best, the "nerve center" would be imputed

[12] As indicated in Liquidators' motion for leave [Dkt. #43], the Fifth Circuit affirmed Judge Hittner's findings, concluding that the district court "did not abuse its discretion in concluding that the relevant factors weighed in favor of detention" and that the findings were supported by the record. *See* Liquidators' Opposed Motion For Leave to File an Order from the Fifth Circuit as Supplemental Support for Their Petition [Dkt. #43], Exhibit A at 5. The Court granted Liquidators' motion by order dated November 2, 2009 [Dkt. #51].

to the locations of the controlling persons,[13] but there is no precedent to create such a roaming "nerve center." That cannot be the law.

At bottom, while this Court should refrain from applying the "nerve center" test in these circumstances, to the extent SIB had a "nerve center," it was in Antigua. Thus, Antigua is SIB's principal place of business, and by analogy, its center of main interests.

B. THE FINANCIAL ADVISORS WHO MARKETED SIB'S CDS WERE NOT AGENTS OF SIB

The relationship between SIB and the financial advisors who marketed SIB CDs does not alter the conclusion that SIB's COMI is in Antigua.[14] As an initial matter, the financial advisors who sold SIB's CDs were not SIB employees. *See* Exhibit A-1, Affidavit of Nigel John Hamilton-Smith ("Hamilton-Smith Orig. U.K. Aff.") ¶ 48(a) (App. at 21). Rather, they operated individually under management agreements with SIB, or were employed by other Stanford companies which had management agreements with SIB. *Id.* These advisors worked for Stanford related entities all over the world, including Antigua, Aruba, Canada, Colombia, Ecuador, Mexico, Panama, Peru, Switzerland, and Venezuela, as well as in the United States. Hamilton-Smith 2nd U.K. Aff. ¶ 11(b)(iii). All of the financial advisors marketed the CDs but none had authority to contract on behalf of SIB. *Id.* Further, Liquidators understand that the financial advisors sold other Stanford-related products besides SIB CDs. *See* Hamilton-Smith 3rd Supp. Decl. ¶ 5 (App. at 6).

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[13] The Receiver asserts that, in addition to Houston, "[c]ontrol was also exerted from Tupelo, Mississippi, Memphis, Tennessee, and Christiansted, St. Croix, U.S.V.I." Janvey Decl. ¶ 7(g). Each of those locations cannot simultaneously be SIB's "nerve center" and/or principal place of business. *See also* Declaration of Karyl Van Tassel [SEC Dkt. #316] ¶ 12 ("SIBL's multi-billion portfolio of cash and investments was actually managed and controlled by Stanford and Davis, apparently with assistance from Holt, ***from various locations within the U.S.***") (emphasis added).

[14] SIB also sold CDs to investors from its Antiguan headquarters. Hamilton-Smith 2nd U.K. Aff. ¶ 11(b)(iv).

The U.S.-based financial advisors worked for an entity called the Stanford Group Companies ("SGC"), and though they marketed SIB CDs to potential depositors, they were not agents of SIB. There are several elements necessary to establish an agency relationship, and none of those elements is present in SIB's relationship with SGC. First, courts require a meeting of the minds in establishing an agency and the consent of both the principal and the agent to create the agency. *Carr v. Hunt*, 651 S.W.2d 875, 879 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). In this case, however, SIB and SGC expressly agreed that SGC's sale of SIB's CDs would not create an agency relationship. *See* Exhibit A-14, Stanford Financial Joint Marketing Agreement ¶ 7 (as between SIB and Stanford Financial Group, Inc., providing that it did "not create an agency, partnership or joint venture between the parties," and that "[n]o party will have any authority to legally bind or obligate the other party in any manner whatsoever.") (App. at 143). There is no evidence in the record of the parties expressing, in either words or conduct, a contrary intention.

Additionally, courts require that the principal have the right to control the agent's activities – "[t]he defining feature of the agency relationship is the principal's right to control the actions of the agent." *Schott Glas v. Adame*, 178 S.W. 3d 307, 315 (Tex. App.— Houston [14th Dist.] 2005), *abrogated on other grounds by PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 169 (Tex. 2007). The principal's control must include the right to control the details of the agent's work. *Id.* ("This right to control includes not only the right to assign tasks but the right to dictate the means and details of how the agent will complete these tasks"). Here there is no evidence that SIB controlled the activities of SGC's financial advisors. In fact, even the U.S. Receiver concedes that SIB in Antigua did not manage the sale of SIB CDs in the United States. *See* Decl. of Karyl Van Tassel ¶ 32(b) [Dkt. #21-20].

Finally, courts also frequently require that the agent have the authority to bring about or alter the business or legal relationships between the principal and third persons. *See, e.g.*, *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 219 (6th Cir. 1992) (holding that plaintiff was not agent of company because plaintiff did not have legal power to bind company). Here, none of the financial advisors employed by Stanford affiliates anywhere in the world were authorized to contract on behalf of SIB. *See* Hamilton-Smith 2nd U.K. Aff. ¶ 11(b)(iii). And, as mentioned above, the Joint Marketing Agreement expressly provided that neither SGC nor SIB "have any authority to legally bind or obligate the other party in any manner whatsoever." Joint Marketing Agreement ¶ 7.

Courts analyzing similar circumstances have consistently held that a company's COMI or its principal place of business is in the jurisdiction where its operations are conducted even if the company has sales representatives in other jurisdictions. Nonetheless, the court held that the debtors' COMI was in St. Vincent and the Grenadines because they "conducted regular business operations" there. 349 B.R. at 629. Similarly, in *J.A. Olson*, the company at issue employed "thirty-five to thirty-seven sales people" who were described by the company's plant manager as "independent contractors" and who lived "in their different sales areas throughout the country." 818 F.3d at 404. Nevertheless, the Fifth Circuit concluded that the company's principal place of business was in Mississippi, where its operations were located. *See id.* at 412-13.

C. SIB IS NOT THE ALTER EGO OF ANY DEFENDANT OR ANY OTHER STANFORD RELATED ENTITY

1. <u>The "Single Business Enterprise" Theory of Liability Is No Longer Viable</u>

The Court asked the parties to address the "single business enterprise" doctrine as it relates to an *alter ego* analysis. The "single business enterprise" liability doctrine is a creature of Texas law. *See Paramount Petroleum Corp. v. Taylor Rental Ctr.,* 712 S.W.2d 534 (Tex.

App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). However, because SIB is an international bank chartered under the laws of Antigua & Barbuda,[15] Liquidators respectfully contend that Texas law does not apply. But even if it did apply, Texas law no longer recognizes the single business entity liability theory, and thus the Court should not consider any such doctrine as part of the COMI analysis. *See SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 456 (Tex. 2008) (rejecting the theory because Texas law does not "support the imposition of one corporation's obligations on another" as permitted by the theory); *see also Acceptance Indemn. Ins. Co. v. Maltez*, No. 08-20288, 2009 WL 2748201, at *5 (5th Cir. June 30, 2009) (unpublished) (recognizing the holding of *Gladstrong*).

2. *Alter Ego* Theories Are Inapplicable To Analysis of COMI

More generally, veil-piercing theories such as *alter ego* are not relevant to the COMI analysis. Doctrines such as *alter ego* are exceptions to the traditional notion that shareholders are not liable for the debts of the corporation, *see United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690-91 (5th Cir. 1985),[16] and are used to impose liability on those shareholders and/or parent companies. But the Receiver has not advanced them for their stated purpose. He is not attempting to impose liability on Mr. Stanford or some parent company of SIB (if there was one) for the debts of SIB. Rather, he is attempting to use the assets of SIB to satisfy the claims of creditors of a number of related companies. As discussed in Liquidators' prior filings, the more appropriate theory for that purpose, and one studiously avoided by the Receiver except in his

[15] Antiguan law governed the relationship between SIB and its depositors. *See* Hamilton-Smith Decl. ¶ 31.

[16] *See also SEC v. Resource Dev. Int'l, LLC*, 487 F.3d 295, 302 (5th Cir. 2007) (in SEC receivership case, using the *alter ego* theory under Texas law ***to hold corporate principal liable*** for sham corporation's debts); *Jon-T Chems., Inc.*, 768 F.2d at 691-92 (enumerating twelve factors used in determining whether ***a subsidiary is the alter ego of its parent***); *Galvan v. Caviness Packing Co., Inc.*, 546 F. Supp. 2d 371, 378 (N.D. Tex. 2008) (for individuals, *alter ego* applies where "there is such unity ***between corporation and individual*** [or parent corporation] that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice").

letter to SIPC (previously filed by Liquidators, *see* Dkt. #44), is substantive consolidation. Substantive consolidation is a remedy that the Fifth Circuit describes as "extreme and unusual," *In re Gandy*, 299 F.3d 489, 499 (5th Cir. 2002), and it requires proof that (i) pre-petition the entities "disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005). The Receiver has offered proof of neither element, and it is his burden to do so. *See id.* at 212.

At bottom, because these doctrines are not intended for the purpose for which the Receiver has suggested them here, and because these issues are otherwise irrelevant to the COMI determination, this Court need not consider them further.[17]

3. Application of the *Alter Ego* Doctrine Here Would Contravene Its Purposes

Further, application of any veil-piercing theory is unjustified in this case. Courts apply veil piercing theories only "when necessary to prevent an injustice." *Wilson v. Davis*, __ S.W.3d __, Cause No. 01-06-00424, 2009 WL 2526439, at *9 (Tex. App.—Houston [1st Dist.] Aug. 14, 2009, no pet.). The Receiver, however, has not shown that aggregation is necessary to prevent any injustice. In fact, aggregation in this case will actually perpetrate an injustice by diluting investor recoveries. Given the undisputed fact that the vast majority of the combined assets are SIB assets, aggregation would require that investor deposits at SIB be used to pay the liabilities of other Stanford entities, which could include significant claims for taxes, for damages arising from the breach of various real property leases and for unpaid commissions. The Receiver does

[17] Indeed, even where related businesses are, unlike here, mere investment shells in which "there was no real business being operated out of either entity," the Court need not make a final determination of *alter ego* issues in order to decide whether a foreign proceeding should be recognized under chapter 15. *See In re Ernst & Young, Inc.*, 383 B.R. 773, 780, 781 (Bankr. D. Colo. 2008).

not seek aggregation to prevent an injustice, but merely to advance a misguided manufacture an argument for COMI in the United States. There is no precedent for piercing the corporate veil on those grounds.

II. CONCLUSION

For all of these reasons, and for the reasons articulated in Liquidators' chapter 15 petition and its prior papers, Liquidators respectfully request that the Court recognize them as "foreign representatives" and recognize the Antiguan Proceeding as a "foreign main proceeding" pursuant to chapter 15 of the U.S. Bankruptcy Code.

Dated: December 3, 2009.

Respectfully submitted,

/s/ Weston C. Loegering

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 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/ Evan P. Singer

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