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., ET AL.,	§	
	§	
Defendants.	§	

RECEIVER'S RESPONSE TO MOTION OF WESTRIDGE COMMUNITY DEVELOPMENT DISTRICT FOR LEAVE TO PROCEED IN STATE COURT FORECLOSURE ACTION AGAINST STANFORD INTERNATIONAL BANK, LTD.

Granting Westridge Community Development District's ("Movant") request to proceed in a state court foreclosure action against the Stanford International Bank, Ltd. ("SIBL") would render worthless SIBL's $85 million investment in American Leisure Group Ltd. ("ALG") and would greatly disrupt the central purpose of the Receiver's work – identifying and distributing assets in an orderly, efficient and impartial manner to all the victims of the Stanford Defendants' fraud. The real estate at issue contains unfinished timeshare condominiums, none of which is habitable. Movant has not demonstrated that it will suffer substantial injury if it cannot immediately become the sole owner of a large, unfinished, uninhabitable timeshare community. On the other hand, the only way for SIBL to recover any significant value on its investment is to permit additional time for ALG to negotiate with prospective investors and complete constructive on some units which can then generate income. Movant's proposed foreclosure would eliminate any such possibility.

BACKGROUND

On February 17, 2009, the Court entered an order appointing Ralph S. Janvey as Receiver and directed him to marshal and take custody of the Receivership Estate and any "assets traceable to assets owned or controlled by the Receivership Estate." Order Appointing Receiver (Doc. 10) at ¶ 5(b); *see also* Amended Order Appointing Receiver (Doc. 157) (March 12, 2009) ("Order") ¶ 5(b). The Court also charged the Receiver with the duty to preserve the Receivership Estate for the maximum benefit of all claimants. Order at ¶ 5(j). To aid the Receiver in locating, gathering, and preserving the assets, the Court has enjoined all judicial, administrative, or other proceedings in other forums. Order at ¶ 9(a).

From 2003 through 2008, SIBL invested millions in a holding company, ALG, and its predecessor in interest. By the time the Receiver was appointed, SIBL's total investment in ALG was $85 million (approximately $35 million in debt and $50 million in equity). SIBL's interest is collateralized by mortgages on real property on which Movant has a superior lien. An ALG subsidiary, Tierra del Sol Resorts, Inc. ("TSR") also holds an interest in this real property. TSR is the debtor in a Chapter 7 proceeding in the Middle District of Florida; that court has lifted the bankruptcy stay to permit Movant to foreclose on TSR's interest. However, Movant cannot complete the foreclosure because the property is encumbered by a mortgage in SIBL's favor.

The property was slated for development as a timeshare community of condominiums in close proximity to the tourist attractions of Orlando, Florida. Construction halted after only some of the units were partially completed. None of the units are habitable and none of the amenities have been constructed. The development has generated no revenue from sales or rentals. Movant is a quasi-governmental agency that issued bonds to finance capital improvements, such as streets, to the real property securing SIBL's investment in ALG. A foreclosure by Movant will completely wipe out the value of SIBL's interest.

Pursuant to this Court's order, the Receiver has retained Park Hill Group, LLC ("Park Hill") as a private equity advisor. *See* Order, Doc. 911. Park Hill has advised the Receiver that ALG is in serious negotiations with a prospective guarantor, which if consummated, would provide the capital to satisfy several liens, to purchase SIBL's interest (albeit for less than SIBL's original investment), and to continue development of the real property. These negotiations provide the only hope that some portion of SIBL's $85 million investment will be returned to the Estate. Permitting Movant to foreclose guarantees a total loss.

The Court should not lift the injunction and allow other judicial or administrative proceedings to be prosecuted. The Movant has not demonstrated that it will be prejudiced by remaining subject to this Court's orders.

ARGUMENT

A. A blanket injunction against other proceedings is necessary; Movant's claims are not sufficiently unique or compelling to justify lifting the stay.

Movant asserts that it should be permitted to foreclose $17.4 million in special assessments on real property encumbered by a mortgage in SIBL's favor. Courts considering whether to lift a receivership injunction have applied a three-part test that balances the interests of the receiver and the moving parties:

> (1) Whether refusing to lift the injunction genuinely preserves the status quo or whether the moving party will suffer substantial injury if it is not permitted to proceed;
>
> (2) The time at which the motion for relief from the injunction is made; and
>
> (3) The merits of the moving party's claim.

SEC v. Wencke, 622 F.2d 1363, 1373-74 (9th Cir. 1980) (establishing balancing test); *United States v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 444 (3rd Cir. 2005) (adopting *Wencke*

test). Movant has the burden of proving that the balance of these factors weighs in favor of lifting the injunction. *See Acorn Technology Fund, L.P.*, 429 F.3d at 450.

These factors should be considered against the backdrop of the core purposes of a receivership: (1) the Receiver's interests are "'very broad and include not only protection of the receivership res, but also protection of defrauded investors and considerations of judicial economy'" and (2) the purpose of the injunction is "to give the receiver 'a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant.'" *United States v. Petters*, 2008 WL 5234527, *3 (D. Minn. Dec. 12, 2008) (quoting *Acorn Technology*, 429 F.3d at 443).

1. Lifting the injunction would interfere with the Receiver's ability to maintain the status quo.

This Receivership is complex and far-reaching. There are nearly 200 entities with holdings in 10 foreign countries and thousands of customers who are potential victims of the Defendants' fraud. A blanket injunction against litigation and administrative proceedings is the only way the Court may be assured of control over and thus the protection of the Receivership Estate while the Receiver performs the duties mandated by the Court's Order. *See SEC v. Wencke*, 622 F.2d at 1369 ("The blanket stay was found by the district court necessary to achieve the purposes of the receivership. We conclude the district court had the power to enter the order."); *SEC v. Byers*, 592 F. Supp. 2d 532, 536 (S.D.N.Y. 2008) (concluding the court had authority to enter a blanket injunction - "If the court could not control the receivership assets, . . . the receiver would be unable to protect those assets.") (citing *Wencke*, 622 F.2d at 1369-70). Without the control provided by the Court's blanket injunction against litigation, the Receiver would be unable to maintain the status quo.

Stanford's investment in ALG is just one of many instances where huge sums of money are trapped in a complex and/or ill-advised scheme. Stanford's $85 million investment is secured by a mortgage in the four parcels on which Movant seeks to foreclose – but is also subject to other, superior liens. Foreclosure would effect a total lose of SIBL's investment; on the other hand, a delay of a few months could permit ALG to complete negotiations with a prospective guarantor and return at least a few million to the Estate.

Moreover, allowing Movant to proceed in another jurisdiction would encourage numerous – potentially thousands – of other investors and creditors to seek approval to pursue their claims in other forums out of fear that they would lose the "race to the courthouse."[1] Because the Movant's claim is in essence no different from many other claims against Estate entities, many other parties would demand the same approach. The result would be piecemeal litigation conducted in different jurisdictions with different outcomes, all of which would have a detrimental impact on the Receivership Estate and other claimants. *See Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985) ("[Blanket injunctions against litigation] can serve as an important tool permitting a district court to prevent dissipation of property or assets subject to multiple claims in various locales, as well as preventing 'piecemeal resolution of issues that call for a uniform result.'") (citation omitted).

Defending – or responding to discovery requests – in a large number of lawsuits and/or arbitrations also would divert the Receiver from the performance of his duties. *See Wencke*, 622 F.2d at 1373 ("The Receiver must be given an opportunity to progress in his

[1] In fact, more than 50 separate lawsuits already have been filed in various state and federal courts, some of which are securities class actions. Several cases have been referred to this Court by the Multi District Litigation panel for joint treatment of preliminary matters, such as discovery. FINRA has received hundreds of Stanford investors' complaints. The Receiver has been largely successful in convincing plaintiffs in these cases to suspend prosecution and to comply with the Court's injunction. Permitting Movants to proceed with their foreclosure action would work directly counter to these efforts.

assigned tasks before this Court contemplates lifting any stays. To remove the stay as requested could seriously damage the Receivership estate by, among other reasons, disrupting the orderly administration by the Receiver of this case.").

First, responding to discovery could require the expenditure of significant Estate resources. The Stanford entities used over 200 operational, financial, and accounting systems that did not centrally report. The paper records of the various, geographically dispersed offices were collected as quickly as reasonably possible and shipped to a central location in Houston, where they remain warehoused. As the Receiver has made clear in numerous filings to this Court, even basic information that one would expect to be easily accessible, required "discovery" and confirmation through investigation and testing because the Stanford books are records were inherently unreliable. Only a fraction of the Stanford records – those absolutely necessary to fulfill the Receiver's Court-ordered duties – have been scanned, indexed, or analyzed. Vast quantities of data and paper remain untouched.

Second, every one of the more than 20,000 Stanford CD holders, and numerous vendors, landlords, tenants, and other claimants, are potential litigants who, so far, have been enjoined from proceeding in other forums. With the injunction in place, more than 400 claimants have attempted to intervene in this action, more than 50 related lawsuits have been filed, and hundreds of claims have been filed with FINRA. If this Court lifts the injunction and permits Movant to go forward with foreclosure of its interest, the Receiver will soon be awash in discovery requests from the hundreds or thousands of other claimants who will resume or initiate lawsuits or arbitration to recover their losses. This would undoubtedly result in additional expense to the Receivership Estate, depleting assets that are already insufficient to satisfy the claims of all the victimized investors and creditors. *See Acorn Technology*, 429 F.3d at 443 ("A

district court should give appropriate substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate."); *see also, SEC v. Pittsford Capitol Income Partners, L.L.C.*, 2007 WL 61096, *2 (W.D.N.Y. Jan 5, 2007) (granting judgment creditors' request to lift the injunction would defeat the fundamental purpose of protecting the estate property and returning the property to the victims because "only a handful of victims would receive close to full compensation while the pro rata shares available to the hundreds of other victims would be significantly diminished.").

In short, there is no better way to maintain the status quo and protect the interests of all claimants than a blanket injunction prohibiting litigation.

2. Movant will not suffer substantial injury if it is required to wait.

On the other side of the balance, Movant will not suffer substantial injury if it is not permitted to proceed with the foreclosure action at this time. There is no suggestion that the Movant will lose other important rights unless they it is allowed to proceed immediately. Presumably it is the delay in the enforcement of its rights that is the true complaint. But, delay alone is not a sufficient reason to lift the injunction. *See Petters*, 2008 WL 5234527, *4 (delay in ability to proceed with pending lawsuits not enough to tip the balance in favor of lifting the stay); *see also, Federal Trade Comm'n v. Med Resorts Int'l, Inc.*, 199 F.R.D. 601, 609 (N.D. Ill. 2001) (denying motion to lift injunction when the only "injury" stemmed from the delay in enforcing the movants' rights). Movant has not demonstrated that it will materially benefit from becoming the sole owner of a large, partially developed, uninhabitable timeshare community that it cannot afford to complete. To the contrary, ALG's efforts to secure a guarantor present the best opportunity for units to be completed and for lien holders, including Movant and SIBl to recover their investments.

3. Allowing other proceedings this early in the Receivership will only add to the complexity of this Receivership.

While Receiver has worked diligently, he has had only thirteen months to unravel Defendants' complicated matrix of companies, assets, and investor account transactions. Courts that have considered a motion to lift a blanket litigation injunction this early in a receivership routinely deny the motion. *See e.g., Petters*, 2008 WL 5234527 at *3 (two-month receivership - "[I]n the very early stages of a receivership, 'even the most meritorious claims might fail to justify lifting a stay given the possible disruption of the receiver's duties.") (citation omitted); *Pittsford Capital*, 2007 WL 61096 at *2 (seven-month receivership proceeding); *Federal Trade Comm'n v. 3R Bancorp*, 2005 WL 497784, *3 (N.D. Ill. Feb. 23, 2005) (three-month receivership – "'[w]here the motion from relief from stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim.'") (citation omitted).[2] The Receiver is in the early stages of pursuing fraudulent transfer claims against more than 329 former employees and 645 "net winner" investors; has executed settlements with 38 investors for more than $2.7 million; and is engaged in foreign litigation to be recognized as the proper representative (as opposed to the Antiguan Liquidators) of the Stanford International Bank, Ltd. This Court has recently approved several motions regarding the liquidation of Estate assets and no distribution plan has yet been devised.

[2] Courts frequently deny motions to lift a litigation stay even when the receivership has been pending for several years. *See Acorn Technology*, 429 F.3d at 449-50 (refusing to lift stay when receivership in effect for nearly 3 years); *SEC v. Universal Financial*, 760 F.2d 1034, 1039 (9th Cir. 1985) (refusing to lift stay after four years); *Wencke*, 622 F.2d at 1374 (refusing to lift stay after two years); *United States v. ESIC Capital, Inc.*, 675 F. Supp. 1464, 1466 (D. Md. 1987) (refusing to lift stay and finding two-year old receivership "relatively youthful"); *but cf. United States v. ESIC Capital, Inc.*, 685 F. Supp. 483, 485-86 (D. Md. 1988) (lifting stay after two years to allow foreclosure of pre-existing first lien on one piece of property in the receivership estate because single mother had no other means of supporting her children and the foreclosure action would be painless for all concerned).

4. The merits of Movant's claims are immaterial to the analysis; the balance of interests still weighs heavily in favor of maintaining the injunction.

On balance, the merits of Movant's claims are immaterial because in this case the other factors outweigh this one. In fact, many courts assume the validity and merits of the movant's claims for purposes of this balancing test yet still deny the motion to lift the litigation stay. *See, e.g., Byers*, 592 F. Supp. 2d at 537 ("Even assuming the Movants' claims are strong, however, the other two *Wencke* factors weigh heavily against lifting the injunction); *Petters*, 2008 WL 5234527, * 4 (denying motion to lift stay but assuming the "asserted claims are arguably colorable, . . ."); *Med Resorts*, 199 F.R.D. at 609 (even though preliminary injunction, asset freeze, and appointment of receiver make it "more likely that [movants] will prevail in future litigation. . . . the fact that one of the *Wencke* factors tips in favor of [the movants] is not determinative, especially when all of the others undoubtedly call for a continuation of the stay."). In *Pittsford Capital*, the creditors had *judgments in hand* and were seeking to lift the injunction so they could enforce the judgments against the assets of the receivership estate. The Court refused, primarily because lifting the injunction would allow the judgment creditors to get out ahead of other creditors with equally valid yet higher-dollar claims.

CONCLUSION

Movant has not carried its burden of proving the balance of interests weighs in favor of lifting the injunction. The Receiver requests that the Court deny the motion and stop Movant's quest to initiate a race to the courthouse.

Dated: March 17, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Robert I. Howell
Texas Bar No. 10107300
robert.howell@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
(512) 322-2500
(512) 322-2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

CERTIFICATE OF SERVICE

On March 17, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler
Kevin M. Sadler