

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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No.: 3-09CV0298-N
	§	
STANFORD INTERNATIONAL BANK, LTD.,	§	
STANFORD GROUP COMPANY,	§	
STANFORD CAPITAL MANAGEMENT, LLC,	§	
R. ALLEN STANFORD, JAMES M. DAVIS, and	§	
LAURA PENDERGEST-HOLT,	§	
	§	
Defendants.	§	

**JOINT MOTION OF THE RECEIVER AND THE EXAMINER REGARDING COIN
AND BULLION CLAIMS AND ASSETS**

**I.
INTRODUCTION**

Ralph S. Janvey, as Receiver for Defendants and all Stanford-related entities, and John J. Little, the court-appointed Examiner, respectfully move the Court for an order authorizing the Receiver to address coin and bullion claims and assets as set forth below.

**II.
BACKGROUND**

SCB is a coin and bullion dealer and depository co-located with the headquarters of the defendant Stanford Group Company in Houston, Texas. SCB’s primary line of business was to sell coins and bullion to customers and to store the coins and bullion in vaults located at SCB or at nearby commercial banks. Customers would purchase their coins and bullion directly from SCB or indirectly through a financial advisor of Stanford Group Company.

On February 16, 2009, the Securities and Exchange Commission commenced a lawsuit in this Court against R. Allen Stanford, two associates, James M. Davis and Laura Pendergest-Holt, and three of Mr. Stanford's companies, Stanford International Bank, Ltd., Stanford Group Company, and Stanford Capital Management, LLC. The Court entered (1) a Temporary Restraining Order, Order Freezing Assets, Order Requiring an Accounting, Order Requiring Preservation of Documents, and Order Authorizing Expedited Discovery ("TRO"); and (2) an Order Appointing a Receiver, Ralph S. Janvey, over all property, assets, and records of Defendants, and all entities they own or control ("Receivership Order"). Because SCB is wholly-owned by Stanford Group Holdings, Inc., which in turn is wholly-owned by R. Allen Stanford, an individual defendant, SCB is part of the receivership estate and is subject to the TRO and the Receivership Order.

The TRO, which necessarily was broad in scope, froze the assets of SCB and customer accounts with SCB. TRO ¶¶ 5 - 7. In compliance with the TRO and the Receivership Order, the Receiver ceased the business of SCB and began an investigation into the business of SCB to determine the proper legal treatment of open transactions and coins and bullion held by SCB. This court extended the asset freeze and the Receiver's authority with a Preliminary Injunction as to R. Allen Stanford filed March 12, 2009, an Agreed Preliminary Injunction as to Stanford International Bank, Ltd., Stanford Group Company and Stanford Capital Management, LLC filed March 2, 2009, and an Amended Order Appointing Receiver filed March 12, 2009.

SCB holds approximately \$27.5 million¹ in coins and bullion, most of which has been claimed by individual customers. Based on his investigations to date, the Receiver has identified

¹ All dollar amounts used in this motion reflect the cost basis of the coins or bullion. Actual dollar amounts are subject to adjustment because of fluctuating market conditions. Also, this motion does not address issues or amounts related to the Receiver's ongoing litigation against Dillon Gage, Inc. regarding a pre-receivership wire transfer of approximately \$3 million from SCB to Dillon Gage, Inc.

the following categories of coin and bullion holdings and transactions, each of which presents distinct legal issues and requires separate treatment and analysis:

1. SCB holds approximately \$20.2 million of coins and bullion that are individually marked and wrapped, identified to specific customers, and stored by SCB on behalf of 147 customers who purchased the coins and bullion and directed SCB to hold the coins and bullion on their behalf;
2. SCB holds approximately \$1.0 million of coins and bullion that were ordered and paid for by 70 SCB customers, obtained by SCB and individually marked and wrapped for delivery to such customers, and held by SCB for delivery to those 70 customers;
3. SCB holds approximately \$500,000 in payments that it received from 26 customers who ordered coins and bullion from SCB that the Receiver cannot deliver because he does not have possession of the coins and bullion ordered by such customers;
4. SCB holds orders for approximately \$1.0 million of coin and bullion orders as to which customers have not paid;
5. SCB holds approximately \$1.8 million of coins and bullion as undesignated inventory that is not subject to claims in another category; and
6. SCB holds approximately \$3.0 million of coins and bullion on behalf of a named defendant.

In sum, the Receiver and Examiner seek approval for the Receiver to undertake the actions set forth below with regard to the above categories of claims and assets.

RECOMMENDATIONS BY CATEGORY

A. Category 1: Stored Coins and Bullion

The Receiver has possession of approximately \$20.2 million of coins and bullion that were purchased by 147 SCB customers. These coins and bullion were individually marked and stored for such customers by SCB. Based on information currently available to the Receiver, 46 of these coin and bullion accounts, worth approximately \$9.0 million, are related to Pershing accounts through which CD proceeds flowed and that are still subject to the account freeze.

However, only one of these 46 account holders--Michael Asmer--has insufficient funds in his Pershing account to cover for the receipt of CD proceeds. The Receiver and Examiner request that the Court allow for the immediate release of all the Category 1 SCB accounts except for the account belonging to Michael Asmer.²

Based on the Receiver's investigation of the circumstances surrounding these Category 1 transactions, customers purchased such coins and SCB recorded the coins as held by the individual purchasers both in its electronic records and by physical wrappings around the specific coins purchased. Both the customers and SCB reasonably anticipated and believed the customers had purchased tangible assets (coins and/or bullion) and that SCB was holding such coins in bailment for the customers.³

Also within Category 1 are approximately \$15,000 of coins and bullion delivered by two customers to SCB for appraisal. The delivery of goods solely for appraisal creates a bailment relationship. *Sampson v. Birkeland*, 63 Ill.App.2d 178 (1965). The Receiver and Examiner

² Both the Court and the Receiver are well aware of the Examiner's opposition to both the account freeze and the Receiver's pursuit of "claw back" claims against Stanford investors. Despite his views on these topics, the Examiner believes that it is appropriate for the Receiver to continue to hold the coin & gold assets of Mr. Asmer, provided that the continued hold on these assets is released if and when Mr. Asmer's Pershing accounts are released pursuant to the Court's June 29 Order [Doc. No. 433] or otherwise.

³ There are some decisions that have concluded that coin and bullion operations like SCB were selling "investment contracts" to investors and were, therefore, subject to the securities laws. *Sec. Exch. Comm'n v. Brigadoon Scotch Distrib.*, 388 F.Supp. 1288, 1292 (S.D.N.Y. 1975); *see also Sec. Exch. Comm'n v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974)(adopting a broad definition of an "investment contract" that was used in *Brigadoon*). To support this theory, the Receiver would have to prove, on an investor by investor basis, that SCB was part of a "unified scheme to defraud." *See Sec. Exch. Comm'n v. Amerifirst Funding, Inc.*, 2008 WL 919546, *4 (N.D. Tex. 2008). Such a connection may be made by the fact that SCB was never a viable operating entity and had continual net operating losses subsidized by CD revenues. In addition, most coin and bullion sales were made through referrals from Stanford financial advisors, and the coin and bullion investments were often presented as complimentary to other investments and services. Nevertheless, the cases adopting this view of an "investment contract" clearly did so in order to extend the protections and remedies afforded by the securities laws to aggrieved investors. Here, the application of the "investment contract" theory would yield the opposite result as the expectations of both SCB and its customers – that the customers were purchasing coins and bullion for their own accounts and that SCB was doing no more than storing those coins and bullion – would be defeated. For these reasons, the Receiver and the Examiner believe it is appropriate to treat the coins and bullion in Category 1 as both the customers and SCB intended – as assets owned by the customers that should be delivered to the customers.

request that the Court authorize the Receiver to release such coins and bullion to the two customers.

B. Category 2: Coins and Bullion Present at SCB and Identified to Paid Customer Orders

Approximately 70 customers ordered and paid in full for approximately \$1.0 million of coins and bullion that are in the possession of the Receiver. The Receiver and Examiner recommend releasing to these customers the coins and bullion that they ordered and paid for, and that SCB acquired and identified to the customers, rather than rejecting the contracts and retaining the coins for the estate.

The Receivership Order, among other things, grants the Receiver “the full power of an equity receiver under common law.” Receivership Order ¶ 2. The Receiver, as an arm of the Court and with the inherent power of an equity receiver at common law, has the power to reject or to adopt executory contracts. 2 Ralph Ewing Clark, *A Treatise on the Law & Practice of Receivers* (3d. ed. 1992) § 442(a); *U.S. Trust Co. v. Wabash Ry. Co.*, 150 U.S. 287, 299-300 (1893); *Sunflower Oil Co. v. Wilson*, 142 U.S. 313, 322 (1892). However, under the Uniform Commercial Code, buyers of goods have a right to recover the actual goods if (1) the goods have been identified with the contract made between the parties, (2) the buyer has paid all or part of the purchase price and (3) the goods have been purchased for “personal, family or household purposes.” TEX. BUS. & COM. CODE ANN. § 2.502(a) (Vernon 2008).

The Receiver and Examiner believe that customers falling within Category 2 have a right to recover the coins and bullion they ordered and for which they paid. Like the coins in Category 1, the coins in Category 2 have been marked--both physically and in an electronic inventory system--for delivery to the customers who ordered them. Such markings satisfy the requirement that the goods be identified with the contract. *See id.* § 2.501(a)(1) cmt. 2 (disputes

over identification are resolved in favor of the buyer); *Miles v. Starks*, 590 S.W. 2d 223, 27 (Tex. Civ. App. 1979) (an opportunity for the buyer to decline certain parts of a lot does not defeat an analysis in favor of identification). Additionally, the customers paid in full for their orders, meeting the second element of the test. Goods bought for “personal, family or household purposes” are “consumer goods” under the Uniform Commercial Code. TEX. BUS. & COM. CODE ANN. §9.102(a)(23) (Vernon 2008); *see also In re Lull*, 386 B.R. 261, 67-68 (Bankr. Haw. 2008) (holding that coins with numismatic value are “goods” and not “money”). Since Category 2 coins and bullion were ordered by consumers--not businesses--for delivery to homes (or storage by SCB), the Receiver and Examiner believe these coins and bullion are best classified as consumer goods. *See generally* TEX. BUS. & COM. CODE ANN. §9.102(a) (Vernon 2008) (defining the subcategories of goods).⁴

C. Category 3: Paid Contracts to Deliver Coins That are not in the Receiver’s Possession.

The Receiver is in receipt of approximately \$500,000 from 26 customers who ordered coins or bullion from SCB. The Receiver does not have in his possession the coins and bullion required to complete these transactions. The customers within this category fall into two subcategories, with differing results for the customers. The first subcategory includes those customers whose payments were received by SCB prior to the appointment of the Receiver. The second subcategory includes those customers whose payments were received, or checks deposited, after the appointment of the Receiver. Of the Category 3 customers, three customers

⁴ Whether these transactions fulfill the final element of being intended for “personal, family or household purposes” is a more difficult issue to ascertain, but the Receiver and Examiner believe such use was intended by these customers. Rather than attempting to investigate, and possibly litigate, the possibility that some of these customers may have been purchasing coins and bullion for non-consumer uses, the Receiver and Examiner believe it is both more cost-effective and equitable to deliver to these customers the coins and bullion that are in the possession of the Receiver and identified with these fully paid orders.

who paid a total of approximately \$17,000 fit into this second subcategory of having paid after the appointment of the receiver.

As to the customers whose payments were received prior to the Receiver's appointment, the Receiver and Examiner respectfully move the court for an order approving the rejection of these contracts and the repudiation of SCB's obligation to obtain and deliver the coins and bullion to these customers. Unfortunately, such customers will be treated as creditors of the Receivership estate and may file a claim seeking monetary compensation. As to the customers whose payments were received after the appointment of the Receiver, their payments should be returned to them.

The customers whose payments were received by SCB prior to the appointment of the Receiver are parties to executory contracts with the Receiver. As discussed under Category 2 *supra*, the Receiver has the power to adopt or to reject such executory contracts. Additionally, with respect to funds paid to an entity that has entered into receivership, the Receiver has broad discretion to determine the most equitable method of disbursing the funds and is not obligated to trace amounts paid to specific claimants. *Sec. Exch. Comm'n v. Forex Management LLC*, 242 F.3d 325, 331 (5th Cir. 2001). Because the Receiver does not have the coins or bullion needed to fill the customer orders that fall within Category 3, he would have to continue the business of SCB and find such coins or bullion in order to fill these orders. The Receiver has determined that SCB is no longer a viable entity; accordingly, he is focused on the wind-down of its operations (as well as all other Stanford entities). Continuing SCB's business for the sole purpose of filling Category 3 orders would be an inefficient use of the Receiver's limited time and resources. The Receiver and Examiner believe it would be most efficient for the Receiver to reject contracts with customers who paid for their orders before the Receiver was appointed and

make such customers creditors of the estate. This treatment of Category 3 transactions furthers the goal of treating all creditors of the estate equally.

The analysis is quite different for customers whose payments were received after the Receiver was appointed. Equity requires the Receiver to return such funds. *Anderson v. Stephens*, 875 F.2d 76, 79-80 (4th Cir. 1989). While the Receiver's appointment and the contemporaneous freeze order did not specifically prohibit "deposits" of customer payments, the business of the entity (here, SCB) being placed into receivership ceased as of the date the Receivership Order was entered, such that it would be contrary to the purpose of the Order to allow the receivership to continue depositing funds sent by customers. *Id.* Accordingly, the Receiver and the Examiner believe that the Court should authorize the Receiver to return payments received after his appointment to the customers who made such payments.

D. Category 4: Customers Who Have Coins and Bullion but Did Not Pay for such Orders

At the time of the Receiver's appointment, SCB held orders from customers for approximately \$1.0 million of coins and bullion. Those customers either have not paid for such orders or stopped completion of their payment. In this category, the Receiver possesses approximately \$550,000 of the coins and bullion ordered by these customers. The Receiver and Examiner respectfully move the court for an order approving the rejection of these contracts and the liquidation of the coins and bullion for the benefit of the Receivership estate.

The Receiver and Examiner do not believe it is in the best interests of the estate to pursue claims against customers who have ordered coins and bullion but who have not paid for such orders. Pursuing such claims would be costly and would distract the Receiver from his primary task of winding down the business of SCB and the other Stanford entities. It is unlikely the amounts available to be recovered by the Receiver would exceed the cost of such litigation. The

most efficient course of action is for the Receiver to reject the contracts and to liquidate the coins and bullion using the procedures outlined in paragraph G *infra*.

E. Category 5: Coins Held as Inventory for Potential Sale to Customers

The Receiver holds approximately \$1.8 million of coins and bullion that were stored by SCB as inventory for potential sale to customers. Coins or bullion in Category 5 are not subject to claims by customers. The Receiver and Examiner respectfully move the court for an order approving for the liquidation of such coins or bullion on behalf of the estate.

A common-law equity receiver has the power to dispose of property of the receivership estate when it appears that a receivership is continuing an enterprise that does not show evident signs of working out for the benefit of the creditors. *See Jones v. Village of Proctorville*, 290 F.2d 49, 50 (6th Cir. 1961). Courts appointing a receiver “should see that the business is liquidated as economically and speedily as possible, unless its continuance is demonstrably beneficial to creditors.” *Id.* (citing *Kingsport Press, Inc. v. Brief English Systems*, 54 F.2d 497, 501).

F. Category 6: Coins and Bullion Stored on Behalf of a Defendant

Approximately \$3.0 million of coins and bullion held by the Receiver were purchased by another entity owned by R. Allen Stanford or by another Defendant. The following is a list of the entities or individuals with whom such coins or bullion can be identified and the approximate amounts of such coins or bullion:

- Stanford Financial Group: \$404,000
- Stanford International Bank: \$2.4 million
- Stanford Trust Company: \$116,000
- James M. Davis: \$105,000

The Receiver and Examiner respectfully move the court for an order approving the disposition of such coins or bullion in accordance with the procedures outlined in paragraph G *infra*. The coins and bullion owned by the entities listed above, and by James M. Davis, are receivership assets and, thus, are property of the receivership estate. Order Appointing Receiver, ¶¶ 1 and 4.

G. Procedures for the Disposition of Coins and Bullion

With respect to sales of personalty by a receiver, such personalty generally must be sold in accordance with section 2001 of the Judicial Code, unless modified by the court. 28 U.S.C. § 2004. Section 2001(a) permits a public sale of personalty in the district wherein the receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises located in such county, parish, or city, as the court directs, unless the court orders the sale of the property in one or more ancillary districts. 28 U.S.C. § 2001(a). Section 2001(b) of the Judicial Code authorizes private sales of property, but only after (1) a hearing on notice to interested parties; (2) the court's appointment of three disinterested appraisers; and (3) 10-day's newspaper publication of the terms of the sale before the confirmation of any private sale. 28 U.S.C. § 2001(b). Moreover, no private sale shall be confirmed at a price less than two-thirds of the appraised value or if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 percent increase over the price offered in the private sale. *Id.*

Because the costs and logistics of complying with the procedures of section 2001 would hamper the ability of the Receiver to efficiently dispose of the coins and bullion in a manner that would maximize value to the estate, the Receiver and Examiner respectfully move the court for an exception to §2001 pursuant to its authority under § 2004. *See* 28 U.S.C. § 2004; *SEC v. Kirkland*, No. 6:06-183-Orl-28KRS, 2008 WL 426532 (M.D. Fla. Sept. 12, 2008) (authorizing

deviation from requirements of 28 U.S.C. § 2001 where compliance with procedures would be cost-prohibitive). According to the numismatic expert retained by the Receiver, coins and bullion are best sold at sophisticated public auctions around the United States that occur throughout the year. Montgomery Decl. ¶ 12, App. at 4. Additionally, coins and bullion with low margins or low values would most efficiently be sold through private sales. *Id.* at ¶ 15, App. at 4. The cost of obtaining multiple appraisals of the coins and bullion, and of complying with the other requirements of §2001, would substantially decrease the amounts the estate could realize on the sale of such coins and bullion. *Id.* at ¶ 16, App. at 4. Thus, the Receiver would be unable to maximize the value of these assets to the estate if limited to the provisions of and procedures required by §2001.

The Receiver and Examiner propose that coins and bullion should be sold at numismatic auctions that are held on a periodic basis throughout the United States. If the Receiver and the Examiner determine it would be unprofitable to sell certain coins or bullion at numismatic auctions, the Receiver and Examiner propose to obtain one disinterested appraisal of the coins or bullion and to sell such coins or bullion in private sales at a price no less than two-thirds of the appraised value.

Whether sold through public auctions or private sales, the Receiver and the Examiner further propose that the Receiver will prepare and file a report with the Court detailing the manner in which the coins and bullion are ultimately sold, the proceeds realized from such sales, and the expenses incurred in connection with such sales.

H. Reservation of Receiver's Right to Pursue Claims

Although the Receiver believes that the recommendations described above are equitable and appropriate given all of the circumstances, any release or delivery of coins or bullion must be subject to the Receiver's right to pursue claims against the owners of such coins or bullion if

the Receiver later determines they participated in the fraud or received proceeds from fraudulent activities. Allowing the Receiver this right not only protects the value of the receivership estate, but also provides necessary protection to other customers and potential claimants against the receivership estate. Accordingly, the Receiver respectfully requests that the release or delivery of coins and bullion be subject to the Receiver's right to pursue claims against customers who have received proceeds from fraudulent activities or products.

**III.
CONCLUSION AND REQUEST FOR RELIEF**

The Receiver and Examiner request that the Court grant this motion in all respects, and specifically, as outlined above, to treat the various types of claims related to coins and bullion as set forth in this motion and as summarized below:

- a. authorizing the immediate release of all coins and bullion held in Category 1 accounts, excepting only the account of Michael Amser;
- b. authorizing the immediate release of all coins and bullion held in Category 2 accounts;
- c. authorizing the Receiver to reject SCB's executory contracts with Category 3 customers who paid for coins and/or bullion prior to the Receivership Order, and to return to Category 3 customers any payments received by the Receiver after the Receivership Order;
- d. authorizing the Receiver to reject SCB's executory contracts with Category 4 customers and to liquidate the coins and bullion held by the Receiver with respect to such contracts;
- e. authorizing the Receiver to liquidate the coins and bullion held by SCB as inventory;

- f. authorizing the Receiver to liquidate the coins and bullion held by SCB for the accounts of Stanford Financial Group, Stanford International Bank, Ltd., Stanford Trust Company or James M. Davis; and
- g. approving the procedures suggested by the Receiver and the Examiner for the liquidation of the coins and bullion described in Categories 4, 5 and 6 of this Motion.

Dated: July 29, 2009

Respectfully submitted,

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EXAMINER

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**ATTORNEYS FOR RECEIVER
RALPH S. JANVEY**

CERTIFICATE OF CONFERENCE

Counsel for the Receiver conferred with the parties to this case. Counsel for the Receiver conferred with David B. Reece, counsel for the SEC, who stated that the SEC is not opposed to this motion and the relief sought herein. Counsel for the Receiver attempted to contact Jeff Tillotson, counsel for Laura Pendergest-Holt, but was unable to do so, and is thus unable to say whether Ms. Pendergest-Holt opposes the motion. Counsel for the Receiver conferred with Ruth Schuster, counsel for R. Allen Stanford, who stated that Mr. Stanford is opposed. Counsel for the Receiver conferred with Manuel P. Lena, Jr. counsel for U.S.D.O.J. (IRS) who stated that the IRS is not opposed to this motion and the relief sought herein. Counsel for the Receiver attempted to contact David Finn, counsel for James Davis, but was unable to do so, and is thus unable to say whether Mr. Davis opposes the motion. Accordingly, this Motion is opposed.

/s/ David T. Arlington
David T. Arlington

CERTIFICATE OF SERVICE

On July 29, 2009 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 the Examiner and 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/ David T. Arlington
David T. Arlington