

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

STANFORD INTERNATIONAL BANK,
LTD., ET AL.,

Defendants.

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Case No.: 3-09-CV-0298-N

**AMENDED VERIFIED MOTION SEEKING
RECLAMATION OF EQUIPMENT BY INX, INC. OR PAYMENT
IN LIEU OF RECLAMATION AND BRIEF IN SUPPORT THEREOF**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Movant INX, Inc. (“INX”) and files this Amended Verified Motion Seeking Reclamation of Equipment or Payment in Lieu of Reclamation and Brief in Support Thereof (“Motion”), and in support hereof, shows the Court as follows:

I. INTRODUCTION

INX shipped \$388,580.56 worth of information technology equipment to Stanford from December 31, 2008 through February 19, 2009 in reliance on written misrepresentations of solvency provided by Stanford to INX. It was only after these shipments were completed that Stanford learned, along with the rest of the world, of the massive Ponzi scheme carried out by Stanford and the other above-captioned Defendants and Stanford’s insolvency at all times during its relationship with INX. INX had not then, and has not since, received payment for any of the equipment shipped to Stanford. INX has made demand upon the Receiver over Stanford’s Receivership Estate for reclamation of the shipped equipment to no avail. On February 23, 2010,

This Court denied INX's Motion for Reclamation on the basis that INX is not a party to the lawsuit but allowed INX to file a Motion to Intervene. INX is concurrently filing a Motion to Intervene with this Amended Motion for Reclamation. INX seeks an order from this Court to enforce its reclamation rights against the shipped equipment and otherwise protect its interest in the equipment.

II. PROCEDURAL BACKGROUND

1. On February 16, 2009, the Securities and Exchange Commission (the "Commission") commenced a lawsuit in this Court against R. Allen Stanford, James J. Davis, Laura Pendergest-Holt, Stanford International Bank, Ltd., Stanford Group Company, and Stanford Capital Management, LLC (together, the "Defendants"). In its First Amended Complaint filed February 27, 2009, the Commission alleges that the Defendants perpetrated a multi-billion-dollar fraudulent scheme on its creditors and investors by: (1) promising high return rates on "certificates of deposit" that exceeded those available through true certificates of deposit offered by traditional banks and (2) selling a proprietary mutual fund wrap program known as Stanford Allocation Strategy using materially false and misleading historical performance data. *See* First Amended Complaint, ¶¶ 3, 6.

2. This Court found good cause to believe that Defendants violated federal securities laws through their massive Ponzi scheme and fraudulent misrepresentations of solvency regarding their investments and investment strategies and, on February 17, 2009, entered an order appointing Ralph S. Janvey (the "Receiver") as Receiver over all assets of the Defendants and all the entities they own or control [**Docket No. 10**]. On March 12, 2009, the Court entered an Amended Order Appointing Receiver (the "Receiver Order") [**Docket No. 157**].

III. FACTUAL BACKGROUND

A. Stanford's Request for Shipment of Goods on Credit

3. On December 15, 2008, Stanford Financial Group Company ("Stanford"), one of the Defendants herein, requested to purchase equipment on credit from INX and sent "Stanford Purchase Order #8696,0" (the "December 15 Stanford P.O." and, together with the January 12 Stanford P.O., the "Purchase Orders") requesting shipment of \$366,751.76 worth of information technology equipment (the "Equipment"). The December 15 Stanford P.O. is attached as **Exhibit A**, can be found in the Appendix at pages 1-2, and is incorporated by reference herein. The December 15 Stanford P.O., by implication, represents in writing Stanford's ability to purchase the Equipment. INX relied on the Purchase Orders as proof of Stanford's capability and willingness to purchase the Equipment. INX later discovered that the December 15 Stanford P.O. was fraudulent.

i. INX Makes Decision that Stanford is Creditworthy.

4. As part of INX's standard procedures for extending credit to buyers, INX requested and Stanford provided a written credit application (the "Credit Application"), which is attached as **Exhibit B**, can be found in the Appendix at pages 3-4, and is incorporated by reference herein. The Credit Application was provided to INX on or about the same time that INX received the December 15 Stanford P.O. and was signed by Stanford Chief Accounting Officer Gilbert Lopez, Jr. The Credit Application lists several credit references that could vouch for Stanford's solvency and provided Stanford's banking information to support the representation that Stanford had over \$8 million in unrestricted cash reserves. Stanford provided the Credit Application to INX in order to cause INX to extend credit to Stanford for purposes of

the December 15 Stanford P.O. and all future purchase orders provided by Stanford. INX relied on the Credit Application as written proof of Stanford's solvency.

5. In further investigation of Stanford's creditworthiness and in order to verify the information contained in the Credit Application, INX Director of Credit and Collections Joe M. Hedgecock interviewed Jim Outlaw of Trustmark National Bank, whose reference was provided on the Credit Application, and contacted Stanford Chief Financial Officer James M. Davis and Chief Accounting Officer Gilbert Lopez, Jr. Mr. Davis and Mr. Lopez both reassured Mr. Hedgecock of Stanford's ability to pay for the Equipment purchased on credit and Stanford's liquidity as represented in the December 15 Stanford P. O. and the Credit Application. Mr. Outlaw of Trustmark National Bank assured Mr. Hedgecock that Stanford regularly maintained approximately \$8 million in unrestricted case at Trustmark National Bank. Mr. Hedgecock relied on these representations of solvency. The Affidavit of Joe M. Hedgecock is attached as **Exhibit C**, can be found in the Appendix at pages 5-10, and is incorporated by reference herein.

6. In addition to the December 15 Stanford P.O., the Credit Application, and the accompanying misrepresentations of solvency made in and in connection with these writings, INX also obtained a report on December 16, 2008 prepared by Dun & Bradstreet regarding Stanford's solvency (the "Dun & Bradstreet Report"). A true and correct copy of the Dun & Bradstreet Report is attached as **Exhibit D**, can be found in the Appendix at pages 13-24 and is incorporated by reference herein. The Dun & Bradstreet Report indicated that Stanford on average made payments to suppliers 17 days within the reported terms. According to the Dun & Bradstreet Report, it was prepared by Dun & Bradstreet using information provided by Stanford and Stanford's management, and also from other creditors of Stanford, for purposes of publicly providing information concerning Stanford's financial condition, creditworthiness, and solvency

to potential trade creditors of Stanford, including INX. INX relied on the Dun & Bradstreet Report as written proof of Stanford's ability to pay its creditors.

7. INX relied upon the Purchase Orders reflecting Stanford's commitment and ability to purchase the Equipment, the Credit Application, the Dun & Bradstreet Report, and other misrepresentations made by Stanford in support of these documents as outlined above in making its decision to extend credit to Stanford. In reliance on these written representations of solvency, INX shipped the Equipment to Stanford as discussed below.

ii. INX Ships the Equipment to Stanford.

8. Based on Stanford's representations of solvency described above, INX shipped Stanford a total \$388,580.56 of Equipment beginning on December 31, 2009 and continuing up until the appointment of the Receiver. The first of such shipments was made on December 31, 2008 for \$366,751.76 worth of Equipment pursuant to the December 15 Stanford P.O. Also on December 31, INX issued Invoice No. 96882 for the same amount to Stanford for that shipment (the "December 31 Invoice"). The December 31 Invoice is attached as **Exhibit E**, can be found in the Appendix at pages 25-28, and is incorporated by reference herein.

9. On January 12, 2009, Stanford again requested to purchase equipment on credit from INX in "Stanford Purchase Order #8791,1" requesting shipment of \$21,828.80 worth of Equipment from INX (the "January 12 Stanford P.O."). The January 12 Stanford P.O. is attached as **Exhibit F**, can be found in the Appendix at pages 29-31, and is incorporated by reference herein. The January 12 Stanford P.O., by implication, represents in writing Stanford's ability to purchase the Equipment, upon which INX relied. INX later discovered that the January 12 Stanford P.O. was fraudulent.

10. INX shipped Stanford \$560.00 worth of Equipment on February 11, 2009 pursuant to the January 12 Stanford P.O. Also on February 11, INX issued Invoice No. 97768.1 to Stanford for the same amount (the "February 11 Invoice"). The February 11 invoice is attached as **Exhibit G**, can be found in the Appendix pages at 30-31, and is incorporated by reference herein.

11. To complete shipment of the January 12 Stanford P.O., INX shipped Stanford \$21,268.80 worth of Equipment on February 19, 2009. Also on February 19, INX issued Invoice No. 97768.2 to Stanford for the same amount (the "February 19 Invoice"). The February 19 Invoice is attached as **Exhibit H**, can be found in the Appendix at pages 34-35, and is incorporated by reference herein.

12. All three shipments were shipped to Stanford Financial Group, 5051 Westheimer Road, 10th Floor, Houston, Texas 77056. INX did not and has not received payment from Stanford for the total of \$388,580.56 related to the invoices attached hereto as Exhibits E, G & H, despite extending credit to Stanford in reliance on Stanford's misrepresentations of solvency made within three (3) months of the shipments. Stanford owes INX \$388,580.56 as reflected on Exhibits E, F, and G.

B. Stanford Placed Into Receivership

13. For at least a decade, unbeknownst to INX or any other creditors or investors to Stanford, Stanford and the other Defendants executed a massive Ponzi scheme. As discussed above, the Commission commenced its lawsuit against the Defendants on February 16, 2009 and alleged that the Defendants perpetrated a multi-billion-dollar fraudulent scheme on its creditors and investors, which class of creditors includes INX. This Court found that Defendants violated federal securities laws through their massive Ponzi scheme and fraudulent misrepresentations of

solvency and, on February 17, 2009, entered an order appointing the Receiver over all assets of the Defendants and all the entities they own or control. The Receiver Order was subsequently amended on March 12, 2009.

14. Since his appointment, the Receiver has begun to manage the Receivership Estate and has made certain information regarding the Receivership Estate publicly available through a dedicated webpage.¹ The Receiver has also established procedures for claimants to give the Receiver notice of potential claims by filing a claim notification form giving the claimant's contact information, description of the claim, and the amount of the claim. An excerpt from the Receiver's Stanford webpage titled Notifying the Receiver of Claims (Other Than Seeking Release of a Frozen Customer Account) is attached hereto as **Exhibit L**, can be found in the Appendix at pages 52-55, and is incorporated by reference herein.

C. INX Serves Reclamation Demand on Receiver

15. On April 7, 2009, pursuant to the Receiver's authority to contract and negotiate with claimants, INX sent a letter to the Receiver, the Receiver's attorneys, and the Receiver appointed in Antigua demanding reclamation of the Equipment (the "April 7 Reclamation Letter"). The April 7 Reclamation Letter is attached as **Exhibit I**, can be found in the Appendix at pages 36-46, and is incorporated by reference herein. INX sent subsequent correspondence to the Receiver on April 10 and April 17 and made final demand for reclamation to the Receiver on April 30, 2009. Despite numerous correspondence with the Receiver's attorneys regarding payment for or reclamation of the Equipment, the Receiver refused to return the Equipment.

IV. RELIEF REQUESTED

16. INX hereby respectfully requests that this Court enter an order: (1) allowing INX to reclaim the Equipment or, in the alternative, requiring the Receiver to pay INX the full amount

¹ <http://stanfordfinancialreceivership.com/index.shtml>

of its claim against Stanford; (2) requiring the Receiver to provide an accounting of the Equipment, describe the Equipment in the Receiver's possession, and identify the location of the Equipment; and (3) restraining and enjoining the Receiver, the SEC, and others from using, selling, or transferring the Equipment.

17. A proposed form of order granting the Motion is attached hereto as **Exhibit J**, can be found in the Appendix at pages 47-48, and is incorporated by reference herein. A proposed form of order granting a temporary restraining order in favor of INX is attached hereto as **Exhibit K**, can be found in the Appendix at pages 49-51, and is incorporated by reference herein.

V. ARGUMENTS AND AUTHORITIES

A. Jurisdiction

18. This Court has assumed exclusive jurisdiction over the assets, real and personal, of the Defendants and all entities they own or control, including the Equipment. *See* Receiver Order ¶ 1. Creditors and all other persons are restrained and enjoined, without prior approval from the Court, from any act to obtain possession or collect, assess, or recover a claim against the Receivership Estate assets. *See* Receiver Order ¶¶ 10(a) & (c).

B. Reclamation

19. INX respectfully requests this Court to enter an order requiring the Receiver to turn over the Equipment subject to INX's reclamation demand to INX. A seller may reclaim goods sold to an insolvent buyer upon demand made within ten days after the buyer's receipt of the goods when the seller discovers that the buyer has received the goods while insolvent. If, however, a misrepresentation of solvency has been made to the particular seller in writing within three months before delivery of the goods, the ten day limitation does not apply. Texas Bus. &

Com. Code § 2.702. The right of reclamation is specifically created in favor of a credit seller by Texas Bus. & Comm. Code § 2-702, but, in order for the right to arise, certain conditions must be met: (i) the buyer must have received the goods on credit; (ii) the buyer must receive the goods while insolvent; and, finally, (iii) the seller must learn of the buyer's insolvency and make demand for return of the goods. *U.S. v. Westside Bank*, 732 F.2d 1258, 1260 (5th Cir. 1984).

20. Reclamation is a rescissional remedy that allows a seller of goods to an insolvent buyer to recover the goods sold. *See In re Pester Refining Co.*, 964 F.2d 842 (8th Cir. 1992). It is premised on the theory that a seller who delivers goods to an insolvent buyer has been defrauded. *Id.* In effect, Texas Bus. & Com. Code § 2.702 means that a seller transfers only voidable title to an insolvent buyer, and such title is voided and reverts to the seller upon its reclamation demand. *See Matter of Telemart Enterprises, Inc.*, 524 F.2d 761, 765-66 (9th Cir. 1975) (discussing UCC § 2-702).

i. Stanford's Insolvency When Receiving Equipment on Credit from INX

21. In order for a seller to have a right of reclamation against a buyer, the seller must show that the buyer was insolvent at the time its performance was due. *V.I. Sales Corp. v. 3M Business Products Sales, Inc.*, 3 U.C.C. Rep. Serv. 170 (N.Y. Sup. 1966). The Texas Business and Commerce Code provides three alternative measures of insolvency: (i) having generally ceased to pay debts in the ordinary course of business other than a bona fide dispute; (ii) being unable to pay debts as they become due; or, alternatively (iii) being insolvent within the meaning of the federal bankruptcy law.² Tex. Bus. & Comm. Code § 1.201(23). *See also In re Video King of Illinois, Inc.*, 100 B.R. 1008 (Bankr. N.D. Ill. 1989); *Matter of AIC Photo, Inc.*, 57 B.R. 56 (Bankr. E.D.N.Y. 1985).

² Insolvency within the context of the Bankruptcy Code with respect to an incorporated entity refers to the financial condition where the sum of the corporation's debts is greater than all of the entity's property at a fair market valuation. 11 U.S.C. § 101(32)(A).

22. By the Receiver's own admission, Stanford had generally ceased to pay its debts in the ordinary course of its business by the time the Receiver was appointed. According to the information made publicly available through the Receiver's webpage dedicated to Stanford issues, the Receiver is working to review Stanford's records and information to identify other potential claims against the Receivership Estate, which review the Receiver anticipates to take significant time. *See* Exhibit L at pg. 53 of the Appendix. In response to the volume of such claims that the Receiver anticipates, the Receiver has provided a mechanism for potential claimants against the Receivership estate to submit notice to the Receiver of their claims instead of relying on the Receiver's notice to file formal claims against the Receivership Estate at a later time. *See id.*

23. Furthermore, Stanford was unable to pay its debts as they became due when it received the shipment of Equipment. Stanford failed to respond to INX's December 31 Invoice, the February 11 Invoice, or the February 19 Invoice with timely payment requested therein. *See* Exhibit C, ¶ 13 at pg. 10 of the Appendix.

24. Finally, Stanford is presumed to be insolvent under federal bankruptcy law because it has been adjudged a Ponzi scheme under federal bankruptcy law. *See* First Amended Complaint, ¶¶ 3, 6; Receiver Order. A Ponzi scheme is, as a matter of law, insolvent from its inception. *Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924) (reasoning that Charles Ponzi, the person from whom the term Ponzi scheme derives its name, was always insolvent in perpetrating his scheme and became daily more so: "Any money he had at any time was solely the result of loans by his dupes"); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006); *Quilling v. 3D Mktg., LLC*, 2007 U.S. Dist. LEXIS 24914 (N.D. Tex. Feb. 8, 2007); *In re Ramirez Rodriguez*, 209 B.R. 424, 430-431 (Bankr. S.D. Tex. 1997); *In re Taubman*, 160 B.R. 964, 978 (Bankr. S.D. Ohio

1993). The perpetrator of a Ponzi scheme is insolvent from the very beginning, and because the perpetrator's source of income may only be obtained from further fraudulent activities in furtherance of the Ponzi scheme, the scheme remains insolvent until its inevitable collapse. *Id.*

25. As previously stated, Stanford and the other Defendants executed a massive Ponzi scheme. *See* First Amended Complaint. The Receiver was appointed because this Court found Stanford to be in violation of federal securities law and found that Stanford had operated as a Ponzi scheme. *See id.* A Ponzi scheme is fraudulent per se and is fraudulent as to all who may deal with the company. *See SEC, et al v. Resource Development Int., LLC, et al*, 487 F.3d 295, 301 (5th Cir. 2007) (observing that, in the Fifth Circuit, proving that an entity operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made). The Court's finding that Stanford has operated as a Ponzi scheme throughout its existence, in addition to the other measures of insolvency proven under the Texas Business & Commerce Code, establishes that Stanford was insolvent at all times when it (i) ordered the Equipment, (ii) received the Equipment, and (iii) was required to pay INX for the Equipment pursuant to the invoices.

ii. Stanford's Written Misrepresentations of Solvency

26. Whether a writing satisfies as a written misrepresentation of solvency is a question of fact. *Theo. Hamm Brewing Co. v. First Trust*, 242 N.E.2d 911, 914 (Ill. App. Ct. 3d 1968) (finding that a check can comply with the requirements of a writing under UCC Article 2-702). Implicit within the writing requirement is the requirement that the seller treat the writing as a representation. *Id.* at 914-15. *See also In re Hardin*, 458 F.2d 938, 940-41. One indication of such treatment is if the seller relies upon the writing as an element in its course of dealing with the buyer. *Theo. Hamm Brewing Co.*, 242 N.E. 2d at 915. The act of delivering the goods to the

buyer constitutes the seller's reliance on the written misrepresentation of insolvency. *In re Hardin*, 458 F.2d 938.

27. A purchase order is a writing authorizing a seller to deliver goods to a buyer with payment to be made later. Blacks Law Dictionary 1270 (8th ed. 2004). A purchase order inherently represents the buyer's capacity and willingness to pay for the requested goods on credit after the seller delivers the goods to the buyer – it is a written representation of solvency. Stanford issued two separate purchase orders to INX, the December 15 Stanford P.O. and the January 12 Stanford P.O., for a total of \$388,580.56 in Equipment. *See* Exhibits A and F at pgs. 1 and 29 of the Appendix, respectively. In conjunction with Stanford's other written representations of solvency, INX relied on the purchase orders as written representations of Stanford's solvency and delivered goods to Stanford in reliance thereon. *See* Exhibit C, ¶ 8 at pg. 8 of the Appendix.

28. In addition to the purchase orders, Stanford also provided INX with the Credit Application. *See* Exhibit B at pgs. 3-4 of the Appendix. The Credit Application is a written document that Stanford provided to INX in order to supplement the purchase orders and provide INX with pertinent financial information, including the name and contact information for Stanford's chief financial officer and accounting officer and bank information, and the contact information for key trade references who could vouch for Stanford's creditworthiness and solvency, as measured by Stanford's ability to pay debts as they become due. The entire Credit Application's purpose – and Stanford's intention in providing the Credit Application to INX – was to establish Stanford's solvency and ability to repay the amounts owed, and to cause INX to extend credit to Stanford. In conjunction with Stanford's other written representations of

solvency, INX relied on the Credit Application as a written representation of Stanford's solvency and delivered goods to Stanford in reliance thereon. *See* Exhibit C, ¶ 8 at pg. 8 of the Appendix.

29. The third form of writing upon which INX relied in extending credit to Stanford is the Dun and Bradstreet Report. *See* Exhibit D at pgs. 13-24 of the Appendix. The Dun and Bradstreet Report is a public report generated by Dun & Bradstreet with information provided by the subject of the report and by key credit and trade references. The Dun and Bradstreet Report and other similar reports are prepared with the cooperation of the reports' subjects for the purpose of making information regarding a company's solvency and creditworthiness readily available to potential trade creditors. Stanford authorized INX to investigate such reports and rely on their representations of solvency in making its credit decision. *See* Exhibit B at pgs. 3-4 of the Appendix ("For the purpose of establishing an account, we hereby authorize you to make such checks and investigations of trade references and other information as necessary."). In conjunction with Stanford's other written representations of solvency, INX relied on the Dun & Bradstreet Report as a written representation of Stanford's solvency and delivered goods to Stanford in reliance thereon. *See* Exhibit C, ¶ 8 at pg. 8 of the Appendix.

30. The combination of the purchase orders, the Credit Application, and the Dunn and Bradstreet Report painted a picture to INX of a solvent Stanford that would be able to repay the amounts owed to INX for the purchase of the Equipment on credit. INX relied on the representations of solvency contained within these writings and shipped the requested goods to Stanford on credit. *See* Exhibit C, ¶¶ 8, 9-11 at pgs. 8-9 of the Appendix.

31. In hindsight, it is clear that all writings that Stanford provided to INX to further its efforts to purchase equipment from INX on credit were fraudulent representations of solvency because of Stanford's Ponzi scheme. The question of a Ponzi scheme perpetrator's intent to

defraud other parties interacting with the company by misrepresenting its solvency is not debatable. *Conroy v. Shott*, 363 F.2d 90, 92 (6th Cir. 1966); *Taubman*, 160 B.R. at 983. See also *SEC, et al v. Resource Development Int., LLC*, 487 F.3d 301, 301 (5th Cir. 2007). A Ponzi scheme is fraudulent per se and is fraudulent as to all who may deal with the company. See *Id.* (observing that, in the Fifth Circuit, proving that an entity operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made). INX, like the rest of the world, learned of Stanford's insolvency after the Commission initiated its lawsuit against Stanford and the other Defendants on February 16, 2009 and the Receiver was appointed on February 17, 2009. See Exhibit C, ¶ 14 at pg. 10 of the Appendix. Until February 2009, INX justifiably relied upon all written and oral representations of solvency that Stanford provided INX to sell the Equipment to Stanford on credit. See Exhibit C, ¶ 14 at pg. 9 of the Appendix.

iii. INX's Entitlement to Relief from the Receiver

32. A seller's right to reclamation vests when it sends its demand for return of the goods to the insolvent buyer. *Matter of Marin Motor Oil Co.*, 740 F.2d 220, 228-29 (3d Cir. 1984) (implementing a mailbox rule and finding that demand is effective on dispatch if it is made in a commercially reasonable manner); *In re Bel Air Carpets*, 452 F.2d 1210, 1211 (9th Cir. 1971). The seller's demand for return of the goods sold to the insolvent buyer is sufficient notice of the seller's intent to reclaim in order for the right to vest; the seller's actual possession of the goods upon demand is not required. *In re Summit Creek Plywood*, 27 B.R. 209, 213 (Bankr. N.D. Or. 1982); *Liles Bros. & Son v. Wright*, 638 S.W.2d 383, 387 (Tenn. 1982). A seller's demand of reclamation is effective against a Trustee or other party given charge over the insolvent buyer's estate. See *Matter of Daylin, Inc.*, 596 F.2d 853 (9th Cir. 1979) (trustee not a good faith purchaser and is vested with title of the bankrupt's estate as of the petition date); *In re*

Arloco Inc., 239 B.R. 261 (Bankr. S.D.N.Y. 1999) (considering a seller's reclamation right against a bankruptcy trustee); *Peck v. Augustin Bros.*, 279 N.W.2d 397 (Neb. 1979).

33. The Receiver Order gives the Receiver power over Stanford's assets, including the Equipment shipped to Stanford by INX. The Receiver Order also states that the "Receiver is further authorized to contract and negotiate with any claimants against the Receivership Estate (including, without limitation, creditors) for the purposes of compromising or settling any claim." Upon information and belief, all of the Equipment was in the Receiver's possession at the time he was appointed and at the time he received the April 7 Reclamation Letter. See Exhibit C at ¶ 16 at pg. 11 of the Appendix. Similar to a bankruptcy trustee, the Receiver stepped into the shoes of Stanford with respect to the Receivership Estate, and INX may therefore enforce its rights of reclamation against the Equipment in the Trustee's possession.

34. In summary, INX is entitled to reclamation of the Equipment under the Texas Business and Commerce Code because Stanford received the Equipment from INX on credit while Stanford was insolvent, and because Stanford, as part of its fraudulent activities in the Ponzi scheme, misrepresented its solvency to INX in writing within three months before each of the above-mentioned shipments through Stanford's purchase orders, the Credit Application, and the Dun & Bradstreet Report. INX made a timely demand for reclamation of the Equipment to the Receiver via the April 7 Reclamation Letter. INX therefore respectfully requests that the Court enter an order requiring the Receiver to return the Equipment to INX pursuant to INX's reclamation demand.

C. Demand for Payment in Lieu of Reclamation

35. A seller that has satisfied all the requirements of Tex. Bus. & Commerce Code § 2.702 is entitled to a right of reclamation. Because a seller that delivers goods to an insolvent

buyer transfers only voidable title, *see In re Pester Refining Co.*, 964 F.2d 842 (8th Cir. 1992), *Matter of Telemart Ent., Inc.*, 524 F.2d 761 (8th Cir. 1975), such a right of reclamation is superior to even a bankruptcy debtor-in-possession's right to the property. *See Archer Daniels Midland Co. v. Charter Intern. Oil Co.*, 60 B.R. 854, 857 (M.D. Fla. 1986) (applying Texas UCC § 2.702). INX submits that, even if Stanford is not a debtor in bankruptcy under 11 U.S.C. § 101, *et seq*, the Receiver's right to the Equipment is analogous to a debtor-in-possession's or a bankruptcy trustee's right to the equipment in the context of a bankruptcy case.

36. Furthermore, a seller who has established its right to reclamation under Tex. Bus. & Com. Code § 2.702 is afforded priority status as against all the buyer's general unsecured creditors. *U.S. v. Westside Bank*, 732 F.2d at 1265. INX's right to reclamation of the Equipment is therefore also superior to the rights of all of Stanford's other general unsecured creditors.

37. Because INX can establish a right to the equipment that is superior to the rights of the Receiver and Stanford's general unsecured creditors, INX respectfully requests, in the alternative to requiring the Receiver to return the Equipment to INX, that the Court enter an order requiring the Receiver to pay INX's claim in full satisfaction of INX's reclamation rights, if deemed appropriate by the Court.

D. Demand for Accounting

38. Upon information and belief, the Equipment is in possession of the Receiver, although the location and status of the Equipment is not reasonably available to INX.

39. INX respectfully requests that the Court enter an order requiring the Receiver to provide an accounting of the Equipment, describe the Equipment in the Receiver's possession, and identify the location of the Equipment.

E. Temporary Restraining Order and Preliminary Injunction

40. Finally, INX respectfully requests the Court to issue a temporary restraining order and preliminary injunction restraining and enjoining the Receiver, the Commission, and others from using, selling, and/or transferring the Equipment. To be granted a temporary restraining order and/or preliminary injunction pursuant to Federal Rule of Civil Procedure 65, the movant must establish: (i) irreparable injury; (ii) no adequate remedy at law; (iii) the movant's likelihood of success on the merits; (iv) that the balance of hardships weighs in favor of the movant, and (v) that there will be no adverse effect on public interest. *Northeast Ohio Coalition for Homeless & Serv. Employees Int'l Un. v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003); *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987); *In re Commonwealth Oil*, 805 F.2d 1175, 1189 (5th Cir. 1986). In applying these standards, the factors are not to be treated as prerequisites where each must be satisfied. Instead, the factors are to guide the court's discretion and are not meant to be rigid and unbending requirements. *In re Eagle-Picher Indus.*, 963 F.2d 855, 859 (9th Cir. 1992).

i. INX Will Suffer Irreparable Injury and Has No Adequate Remedy at Law.

41. INX will suffer irreparable injury for which there is no adequate remedy at law if this Court does not issue a temporary restraining order and preliminary injunction restraining and enjoining the Receiver, the Commission, and others from using, selling, or transferring the Equipment. Upon information and belief, the Receiver has possession of the Equipment, and the Receiver, the Commission, and others continue to use the Equipment. The value of the Equipment, like the value of most technology equipment, decreases with use, and further and continued use of the Equipment by the Receiver, the Commission, and others will significantly decrease the Equipment's value. *See* Exhibit C at ¶ 17 at pg. 11 of the Appendix.

42. More pressing, however, is the Receiver's apparent authority to sell the Equipment without further order of the Court or notice to INX or other parties in interest. In the Receiver's motion of April 9, 2009, the Receiver claims the authority "to dispose of such . . . property, including without limitation: . . . (B) selling or disposing of such furniture, equipment, or other property free and clear of liens in the manner the Receiver in his discretion deems appropriate." [Docket No. 286]

43. Once a seller has made its reclamation demand on an insolvent buyer, the buyer may not sell the goods. *Matter of Daylin, Inc.*, 596 F.2d 853. A seller who exercises its reclamation rights against an insolvent buyer is barred from all other remedies with respect to the goods, including damages arising from a subsequent resale of the goods. Tex. Comm. & Bus. Code § 2.702(c); see also *Bullock v. Joe Bailey Auction Co.*, 580 P.2d 225 (Utah 1978) (discussing UCC § 2-702). Furthermore, the seller's reclamation right is cut off by the rights of a buyer in the ordinary course of business or any other good faith purchaser under Article 2. Tex. Comm. & Bus. Code § 2.702(c). A person buys in good faith when it purchases the goods without knowledge that the sale violates the rights of another person in the business of selling goods of that kind. See Tex. Bus. & Comm. Code § 1-201(9). It follows, therefore, that, if the Receiver sells or disposes of the Equipment, INX's rights to reclamation of the Equipment will be effectively terminated, and INX will have no remedy against a buyer in the ordinary course or any other good faith purchaser of the Equipment or any right to damages arising from the resale of the Equipment.

44. Furthermore, once terminated, INX's priority claim against the Stanford estate for payment on the invoices for the Equipment will be treated as all other general unsecured claims

against the Stanford estate. *See supra* ¶¶ 35-37. No amount of monetary damages can restore the priority to INX's claim, once lost.

ii. INX Is Likely to Succeed on the Merits.

45. INX has a substantial likelihood of success on the merits as to all relevant issues, although INX is not required to prove that it will ultimately prevail on its reclamation claim in order to be granted the requested temporary restraining order and/or preliminary injunction. *See Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). INX will likely succeed on the merits because it has shown that it meets all the requirements of a reclamation action under the Texas Business and Commerce Code: INX sold the Equipment to Stanford on credit. *See* Exhibit C at pgs. 5-12 of the Appendix. Stanford received the Equipment while insolvent. *See supra* ¶¶ 21-25. INX received written misrepresentations of Stanford's solvency within three months before delivering the Equipment to Stanford. *See supra* ¶¶ 26-31. After discovering Stanford's insolvency, INX made demand to the Receiver for return of the Equipment. *See* Exhibit C, ¶ 16 at pg. 11 of the Appendix; Exhibit I at pgs. 36-46 of the Appendix.

iii. The Balance of Hardships Weighs in Favor of INX.

46. The Receiver will suffer no irreparable harm if the injunctive relief is granted, but INX stands to suffer the immediate and irreparable termination of its reclamation rights against the Equipment without further notice from the Receiver or the Court. The Receiver derives all his authority over the Receivership Estate from this Court. *See* Receiver Order ¶¶ 1 (giving the Court exclusive jurisdiction and possession of the Receivership Estate) & 3 (limiting duties of Receiver to matters relating to the Receivership Estate in the Receiver's possession). The Receiver is charged with the duty to conserve, manage, and preserve the Receivership Estate and prevent any irreparable loss, damage, or injury to the Receivership Estate. Receiver Order ¶¶

5(g) & (j). Because the Receiver's authority over the Equipment as part of the Receivership Estate derives from the Court's authority over the Receivership Estate, and because the Receiver is charged with the duty to preserve – not distribute – the Receivership Estate, injunctive relief prohibiting the Receiver from selling the Equipment pending the resolution of INX's reclamation claim does not unduly burden the Receiver.

47. On the other hand, however, INX stands to suffer the irreparable loss of its reclamation rights to the Equipment if the Receiver is not enjoined from selling the Equipment. As discussed above, a seller who exercises its reclamation rights against an insolvent buyer is barred from all other remedies with respect to the goods, including damages arising from a subsequent resale of the goods. Furthermore, the seller's reclamation right is cut off by the rights of a buyer in the ordinary course of business or any other good faith purchaser *See* sources cited *supra* ¶ 43. The Receiver has claimed the authority to dispose of property of the Receivership Estate, including the Equipment, free and clear of liens as deemed appropriate in the discretion of the Receiver. *See* Receiver's Motion, Docket No. 286. Without the injunctive relief requested herein, the potential injury to INX far outweighs the potential injury, burden, or inconvenience to the Receiver if the injunctive relief is granted.

iv. No Adverse Effect on Public Interest.

48. The public interest will not be harmed, but, rather, will be benefitted by issuance of the injunctive relief for INX because the injunction will further the Texas Legislature's intent and the public's interest in giving sellers a remedy against insolvent buyers for the rescission of sales and the return of the goods subject to the rescinded sale. The public interest is served by protecting the rights of creditors who have been defrauded by insolvent buyers – particularly insolvent buyers who have perpetrated massive Ponzi schemes, and Tex. Bus. & Comm. Code §

2-702 expresses this important public interest in the State of Texas. This Court is vested with the duty to further such public interests and to oversee the orderly management of the Receivership Estate for the benefit of its many creditors. The relief requested herein will facilitate these public interest goals.

49. In summary, INX has a substantial likelihood of success on the merits with regard to its reclamation claim to the Equipment. There is a substantial threat of immediate and irreparable harm for which INX has no adequate remedy at law. The issuance of a restraining order and preliminary injunction will not cause harm to the Receiver or any other party in interest, but will prevent significant harm to INX. The issuance of a restraining order and injunctive relief will not disserve the public interest. INX therefore respectfully requests that the Court restrain and enjoin the Receiver, the SEC, and others from using, selling, or transferring the Equipment. INX further requests that this Court set the required bond in such sums as the Court deems proper.

VI. REQUEST FOR ATTORNEYS FEES, INTEREST, AND RESTOCKING FEE

50. INX respectfully requests the Court enter an order granting its attorneys fees under Texas Civil Practice & Remedies Code § 38.001 for the furnished Equipment INX provided to Stanford and Stanford's breach of its oral or written contract with INX and/or under 28 U.S.C. § 1927.

51. INX also requests that the Court award interest in the amount of \$26,806.45 as of March 12, 2010. This interest is due to INX as provided for under Texas Finance Code § 302.002 (Vernon Supp. 2005) (setting an interest rate of six (6) percent when interest is not specified by contract). In addition, if the Receiver returns to INX its property (as opposed to

paying on the contract), INX requests the restocking fee of 15 (fifteen) percent (\$58,371.08) outlined in the invoices. *See* Exhibits E, G, and H.

VII. REQUEST FOR HEARING

52. INX respectfully requests that the Court set this Motion for Hearing.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, INX hereby respectfully requests that this Court enter an order: (1) allowing INX to reclaim the Equipment or, in the alternative, requiring the Receiver to pay INX the full amount of its claim against Stanford; (2) requiring the Receiver to provide an accounting of the Equipment, describe the Equipment in the Receiver's possession, and identify the location of the Equipment; and (3) restraining and enjoining the Receiver, the Commission, and others from using, selling, or transferring the Equipment.

Dated: March 15, 2010

Respectfully submitted,

/s/ Stephanie D. Curtis

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COUNSEL FOR INX, INC

CERTIFICATE OF CONFERENCE

The undersigned counsel certifies that, on May 12, 2010, I conferenced with Sue Ayers, counsel for the Receiver, regarding the relief requested in this motion, and that Ms. Ayers indicated that the Receiver was opposed.

/s/ Michelle MacLeod
Michelle MacLeod

CERTIFICATE OF SERVICE

I hereby certify that, on March 15, 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. Furthermore, I served a true and correct copy of the foregoing motion upon the parties listed below by first-class mail.

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/s/ Michelle MacLeod
Michelle MacLeod

VERIFICATION OF JOE HEDGECOCK

On this 9 day of June 2009, I, Joe Hedgecock, declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury, that the foregoing factual statements are true and correct to the best of my knowledge and that I would attest to the same if set forth in a separate declaration or affidavit.



Joe Hedgecock, Director of Credit and Collections
INX, Inc.

Barbara Anne Caldwell

