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.	§	Case No. 03:09-CV-0298-N
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON AND ARCH SPECIALTY INSURANCE CO., Plaintiffs, v. RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., *et al.*, Defendant.	§	Case No. 03:09-CV-01736-N

RECEIVER'S REPLY IN SUPPORT OF MOTION TO ENFORCE RECEIVERSHIP ORDER AND, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER [DOC. 9]

Receiver Ralph S. Janvey submits this Reply in Support of his Motion to Enforce Receivership Order and, in the Alternative, for Protective Order [No. 09-1736, Doc. 9]. In support thereof, the Receiver respectfully shows the Court as follows.

Summary

If the Underwriters' position were the law, then any person, even an attorney, who has reviewed documents or other evidence relevant to a lawsuit would, as a result of that review, become a fact witness in that lawsuit. This unusual position is not supported by any case or legal authority. Ms. Van Tassel is not a fact witness, and the Underwriters cannot take a free ride off her work as a retained expert for the Receivership Estate.

Argument and Authorities

The Underwriters base their response to the Receiver's motion largely on the assertion that Ms. Van Tassel is a "fact" witness. *See* Doc. 11 at 1, 2, 3, 6, 10. Yet they have not cited any case holding that a retained expert who reviews records in anticipation of litigation thereby becomes a "fact" witness as to the information reflected in those records. Ms. Van Tassel has no contemporaneously acquired knowledge concerning the events at issue in the Underwriters' lawsuit. Ms. Van Tassel's only relevant knowledge comes from her review of records after the SEC filed its enforcement action and the Receivership began.[1] Thus, she is not a fact witness, and she cannot be the subject of a subpoena to testify as a fact witness.

Further, she cannot be the subject of a subpoena to testify as an expert witness. Notably, the Underwriters have not explained why they have not hired their own expert, nor have they cited any case to contradict the Receiver's authorities, which hold that it is impermissible for a party to take a free ride off of the work of another party's retained expert witness. *See* Doc. 9 at 4-5.

The only case the Underwriters cite to attempt to support the issuance of their subpoena is a 1982 Michigan district court case, in which the court held that Rule 26(b)(4) did

[1] The Underwriters assert that they not seeking a "substantial volume of documents." [Doc. 11 at 6.] But their extremely broad request includes all materials prepared "by" or "for" Ms. Van Tassel in connection with drafting her report, which is an extremely voluminous set of materials.

not prohibit issuance of a subpoena to a professor who had—independently of the litigation—prepared a report on vehicle crashes. *See Wright v. Jeep Corp.*, 547 F. Supp. 871, 873 (E.D. Mich 1982). In that vehicle rollover case, Jeep had sought access to the professor's records after it learned that a plaintiff intended to use the report as evidence against Jeep in the case. *Id*. Unlike the instant case, the professor had no connection with any of the parties to the *Jeep Corp.* case, and the professor had not developed his report in anticipation of *any* litigation. *Id*. at 874.

As the Receiver's retained expert, Ms. Van Tassel is not similarly situated to the professor in *Jeep Corp*. First, there is no suggestion that the plaintiffs in the coverage litigation are going to use Ms. Van Tassel's report against the Underwriters. Thus, her report, and the basis for it, have no relevance to any issue in the coverage litigation. Second, unlike the professor in *Jeep Corp*., Ms. Van Tassel *is* a retained expert, and she prepared her report in anticipation of litigation. Third, the Receiver (who retained Ms. Van Tassel) is adverse to Underwriters in this Court, which makes it particularly inappropriate for the Underwriters to seek to learn information about her report and expert witness work in some other case to which is the Receiver is not a party. For all these reasons, the *Jeep Corp.* order has no application to the issues in the instant motion. Accordingly, Rule 26(b)(4) applies and prohibits the Underwriters from using a Rule 45 subpoena to circumvent the limitations of Rule 26 discovery. *See, e.g., Perry v. U.S.*, No. CA3:96-CV-2038, 1997 WL 53136, at *1 (N.D. Tex. Feb. 4, 1997).

Conclusion

For the foregoing reasons, the Receiver respectfully requests that the Court enforce the Receivership Order and order the Underwriters to withdraw their subpoena to Ms. Van Tassel. The Receiver further requests any further relief to which he may be entitled.

Dated: June 23, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

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Certificate of Service

On June 23, 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 the Court-appointed Examiner, 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
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