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

In re	§	
	§	
Stanford International Bank, Ltd.	§	
	§	
Debtor in a Foreign Proceeding	§	Case No.: 3-09-CV-0721-N

RECEIVER'S RESPONSE TO THE ANTIGUAN LIQUIDATORS' DECEMBER 3 SUPPLEMENTAL BRIEF

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The principal issue before the Court is the location of the "center of main interests" (equivalent to "principal place of business") of Stanford International Bank Ltd ("SIB"). As discussed herein, SIB's COMI was not Antigua. SIB had two "main interests": selling CDs and investing (or otherwise disbursing) sales proceeds. Both activities were managed and directed from the U.S. and conducted outside of Antigua. In fact, SIB's Antiguan managers (if they can be called that) were largely shut out of both. Most investors never saw an SIB employee and certainly never went to Antigua. Most dealt exclusively with a Stanford financial advisor.[1] SIB's connection with the US was widely known. Marketing material touted the advantages SIB enjoyed as part of Stanford Financial Group, Allen Stanford's Houston-based global financial empire. The roots of the business were advertised as going back to Lodis Stanford's insurance company in Mexia, Texas. We now know -- and the Antiguan Liquidators concede -- that the Stanford empire, SIB included, was a Ponzi scheme run by Allen Stanford and his cohorts. While Antigua played a role in the scheme, Antigua was not a nerve center or activity center -- it was where Stanford could buy off key officials in order to conduct his sham business without regulatory interference. SIB's COMI was not Antigua.

The Court requested briefing on three topics. The Receiver's responses, in summary, are as follows, with more detailed discussion following:

The applicability of alter ego doctrines. The Fifth Circuit applies alter ego doctrines not only to enforce liability against shareholders and parent companies, but also to determine a corporation's "principal place of business" for jurisdictional purposes. "When two corporate entities act as one, or are in fact one, they should be treated as one for jurisdictional purposes." *Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553, 558 (5th Cir. 1985). Courts

[1] *See*, *e.g.*, client communications directing questions regarding SIB transactions to Stanford Group Company financial advisors - October 9, 2007 Letter, April 1-June 30, 2008 Statement, February 5, 2008 Clearing Confirmation, attached as Exhibit A, at Appx. 1-4.

"[should] not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, … deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Id*. 754 F.2d at 557. Logic and consistency require that the same rule be applied in determining a corporation's COMI. The facts of the Stanford Ponzi scheme are such that multiple alter ego grounds (recognized by both state and federal common law) – most especially "sham to perpetrate a fraud" – support disregarding SIB's supposed corporate separateness and treating SIB for what it was, part of a global fraud conspiracy headquartered, not in Antigua, but in the United States.

The "passive v. active" and "far flung" factors of the *J.A. Olson* "principal place of business" analysis. Because SIB was clearly the alter ego of Stanford and his confederates, the analysis set out in *J.A. Olson* should be applied to the Stanford Ponzi scheme as a whole (which was clearly based in the U.S.) and not just to SIB. But even if the *J.A. Olson* analysis were applied to SIB in a stand-alone fashion, the conclusion would still be that SIB's COMI/principal place of business was its "nerve center," the U.S.

SIB's activities were "far flung" in the same way that the activities of the 60 separate, but commonly-owned corporations in *Toms v. Country Quality Meats, Inc*., 610 F.2d 313 (5th Cir. 1980) were far-flung, despite each having its own meat supply business.[2] SIB's certificates of deposit ("CDs") were sold worldwide through various Stanford-owned broker-dealer entities scattered about North, Central, and South America, as well as Europe. Indeed, SIB was prohibited by Antiguan law from selling CDs to Antiguans. Its investment activities were handled under the direction of Stanford and Davis by personnel in Tupelo, Memphis, Houston and Miami.

[2] See discussion of the far-flung nature of Quality Care Meats in *J.A. Olson Co. v. City of Winona,* 818 F.2d 401, 410-11 (5th Cir. 1987).

Likewise, SIB was "passive," thus providing another factor favoring SIB's "nerve center" in the U.S. as its principal place of business. SIB was passive, not in the sense that it consisted of raw land that did not require management, but in the more relevant sense that it was a sham used by Stanford and his confederates for the commission of their Ponzi scheme. The Antiguan managers had no authority over SIB's principal activities of selling CDs and investing (or diverting) proceeds. Indeed, their passivity was so extreme that they did not question the absence of valid audits of SIB's investments and investment income.

How SIB CDs were sold. SIB had no sales force. It relied on the network of Stanford-owned broker-dealer entities scattered about North, Central, and South America and Europe. It appears this network was established principally to aid in the commission of the fraud. The Antiguan Liquidators point to inter-company contracts that purportedly document a principal/agent sales arrangement. These are meaningless since all parties to the contracts were Stanford-controlled instruments being used to perpetrate the same Ponzi scheme. In determining "principal place of business," a court is "concerned with reality and not form, [and with] how the corporation operated. Unlike the theory of agency, which interprets a contractual relationship, alter ego examines the actual conduct of the parent vis-à-vis its subsidiary." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006) (internal citations omitted).

The Receiver also addresses other issues raised by the Antiguan Liquidators following his discussion of these three topics.

1. The facts of the Stanford Ponzi scheme.

SIB was part of a massive Ponzi scheme devised and directed by Allen Stanford and his close confederates.[3] The principal source of funding for the Ponzi scheme was the sale,

[3] That SIB and other Stanford entities were operated as a Ponzi scheme is agreed. Mr. Hamilton-Smith states in his initial declaration: "I do not dispute that SIB and other Stanford entities were likely engaged in a Ponzi

worldwide, of CDs issued by SIB. The principal perpetrators of the scheme besides Stanford were Stanford's right-hand confederate, James M. Davis, and Davis's assistant, Laura Pendergest-Holt. Others below them also participated.

Allen Stanford was at all times a U.S. citizen, resident initially in the continental U.S. and later in the U.S. territory of the United States Virgin Islands ("USVI"). His global financial empire was headquartered in Houston, Texas – a fact that was widely advertised to CD investors.[4] Davis and Holt were U.S. citizens, residents of Mississippi, and worked from offices in Tupelo and Memphis. This core group was assisted in the fraud by Stanford-entity employees in Houston, Miami and USVI.

According to Davis's guilty plea, the fraud even pre-dated SIB. It began in the late 1980s, with a Stanford-owned Montserrat-chartered bank named Guardian International Bank, Ltd.[5] Because of increased scrutiny by the Montserrat regulators, Stanford, in 1990, moved the Guardian banking operation to Antigua and re-opened it as SIB.[6] The fraud continued and grew.[7]

The Stanford Ponzi scheme had two main functions: to bring in investor cash by selling fraudulent CDs and then to utilize that cash to perpetuate the scheme. Both activities were controlled by the conspirators from the United States, with no meaningful management

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scheme -- indeed, my own findings to date are consistent with that allegation …." Supplemental Declaration of Nigel Hamilton-Smith, Doc. 15 at 2, ¶ 4.

4 Declaration of Karyl Van Tassel, Doc. 21-20, at 20, ¶ 44. Stanford's dual Antiguan citizenship and Antiguan knighthood should be viewed for what they were – byproducts of the influence that allowed Stanford to operate a sham bank in Antigua. While Stanford owned property within Antigua, the vast majority of his assets were outside of Antigua. *See* Declaration of David Henry, attached as Exhibit B, Appx. 5-8 (Stanford promotional videos were recorded in Houston, Texas).

5 James M. Davis Plea Agreement, Doc. 50, at 41, ¶ 17(a).

6 *Id*. at 42, ¶ 17(b).

7 *Id*. at 41-42 ¶¶ 17(a)-(e).

input from Antigua.[8] Current sales proceeds were used to pay interest and principal on previously purchased CDs, to incentivize Stanford-affiliated financial advisors (i.e., salesmen) with above-market commissions, to richly reward Stanford's confederates for their complicity, and generally to maintain the Stanford empire's false appearance of strength. And, of course, money went to Allen Stanford himself. Lots of it. Secret SIB financial records, maintained exclusively in the U.S. and USVI, list $1.8B in "notes receivable" from Allen Stanford.[9] Money was also bled off in other ways to support Stanford's extravagant lifestyle. Funds that were left over after these diversions were invested, although the value of the investments totaled only a small fraction of the fictitious amount reported to the public and to regulators.[10]

To perpetrate the fraud, Allen Stanford and his confederates used more than 100 separately incorporated entities – all wholly-owned by Stanford, either directly or through intermediate companies.[11] These companies, which included SIB and Stanford Trust Company ("STC"), did business under the brand name of "Stanford Financial Group." A marketing video informed investors:

> Stanford Financial Group is a family of financial services companies with ***global reach***. We serve over ***40,000 clients who reside in 79 countries on six continents***. Our ***world headquarters are located in Houston, Texas***, and we have a continual ***growing number of offices around the world*** to serve our clients.[12]

SIB marketing materials touted the Bank's membership in the Stanford Financial Group as a great advantage and one of the reasons for its purported (but fictitious) success:

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[8] Doc. 21-20, at 5, ¶ 12.

[9] Doc. 21-20 at 10, ¶ 24(b)(ii).

[10] Doc. 50, at 31, 41-50, ¶¶ 17(a)-(ll).

[11] Stanford Financial Receivership, Organization Chart Support, Entity Ownership Structure - Alphabetical Listing, attached as Exhibit C, Appx. 9-13.

[12] KVT-20, Doc. 29, at 792.

> We are a ***member of the Stanford Financial Group*** of companies and greatly ***benefit from services and support provided by the wholly owned Stanford affiliates around the globe***.[13]
>
> SIB has received this benefit without the capital expenditures required for ***opening and maintaining multiple global offices***. As a result the Bank's operational and administrative costs are approximately 40% of revenue, compared to other international banks which generally allocate 60% to 80%.[14]

The vast majority of CDs were sold, not by SIB, but through financial advisors employed by Stanford-owned broker-dealer entities such as Stanford Group Company ("SGC") in the United States, Stanford Fiduciary Investment Services in Miami (which sold only to non-U.S. customers and thus was not required to follow SEC disclosure regulations), Stanford Bolsa Y Banca S.A. in Mexico, and Comisionista De Bolsa in Columbia.[15] Most CD purchasers never saw an SIB employee, and instead dealt only with their financial advisor, who, to them, was the face of the Stanford companies, including SIB.[16] "High-rollers" – potentially large investors – were given trips to Antigua as an incentive for them to invest, but in almost all instances, they were first "hooked" by a financial advisor, who would receive a commission if the sale occurred. SIB had few sales to "walk-up" customers.

CDs were sold to people from all over the world, although in terms of dollar amount, there were more sales to U.S. citizens (37% based on most recent statement mailing address) than to citizens of any other country.[17] Moreover, Stanford financial advisors located in the U.S. accounted for 42%-44% of all CD sales in 2007 and 48% of sales in 2008 – far more

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[13] KVT-22, Doc. 21-19, at 807.

[14] KVT-22, Doc. 21-19, at 803.

[15] Doc. 21-20, at 16, ¶ 33.

[16] Doc. 21-20, at 16, ¶ 34.

[17] According to the Antiguan Liquidators, Venezuela was the only other country that approached the U.S. in terms of dollars invested in fraudulent CDs. *See* Affidavit of Nigel John Hamilton-Smith (filed in UK on 4-21-09), at 15, ¶ 49.6, attached as Exhibit D, Appx. 14-34.

than financial advisors in any other country.[18] By contrast, there were virtually no Antiguan CD investors – partly because Antigua is an impoverished island but also because Antiguan law prevents Antiguan-chartered "international" companies like SIB from serving Antiguans.[19]

Most of the CD revenue money bypassed Antigua entirely and went directly to accounts in Canada, the United States and England, from where it was disbursed among many other Stanford entities and accounts.[20,21] Investors who paid by wire transfer were instructed to wire funds directly to SIB's account at Toronto Dominion. Checks in U.S. dollars were mailed by financial advisors to Antigua, but did not stay there. Those checks were not deposited in Antigua – they were bundled and sent regularly to Trustmark in Houston for deposit.[22]

Corporate separateness was not respected within the Stanford empire. Cash management for all of SFG, including SIB, was handled in Houston, by a group headed by Patricia Maldonado.[23] SIB's principal bank accounts were at two Houston banks – Trustmark and Bank of Houston.[24] Money was transferred from entity to entity as needed, irrespective of legitimate business need. Ultimately, all of the fund transfers supported the Ponzi scheme in one way or another, or benefitted Allen Stanford personally. For example, Davis personally approved transfers of SIB investor funds to other Stanford entities of at least $115M simply "on

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18 Doc. 21-20, at 5, ¶ 14.

19 *See* Doc. 21-20, at 6, ¶ 16.

20 Doc. 21-20, at 6, ¶ 17 & at 22, ¶ 48.

21 The only substantial funds deposited in Antigua was $9M in November and December 2008. Davis ordered these funds be sent to Bank of Antigua, even though SIB was experiencing a flood of CD redemptions akin to a "run on the bank." The timing of the transfers, as the Stanford empire crumbled, suggests the establishment of a "flight fund." Doc. 21-20, at 6 and 8, ¶¶ 16, 22(b) & KVT-7, Doc. 21-16, at 686-87.

22 Declaration of Karyl Van Tassel, Doc. 18 in case number 3:09-cv-00298, at 10, ¶ 28 & 11-12, ¶ 31; Doc. 21-20, at 22, ¶ 49.

23 Doc. 21-20, at 7-8, ¶ 22.

24 Doc. 21-20, at 30-31, ¶¶ 61, 62.

behalf of Shareholder" -- in other words, for Allen Stanford. These transfers were ultimately recorded on SIB's balance sheet as receivables from the Shareholder, Mr. Stanford.[25]

SIB managers in Antigua were so marginalized that they had no role in managing the Bank's two principal activities, selling CDs and investing (or otherwise disbursing) the proceeds. Sales and marketing were directed from the U.S. Little actual sales activity occurred on Antigua (principally, the previously mentioned entertainment of "high rollers"). Everything having to do with investments -- choosing them, managing the portfolio, and maintaining the investment records -- was handled by Jim Davis (who was Chief Financial Officer for SIB even though he officed in Tupelo and Memphis) and persons working under Davis in the U.S. and USVI, including Laura Pendergest-Holt.[26] SIB customers were sent marketing materials called SIB Quarterly Updates which were printed and mailed from the U.S.[27]

Every Ponzi scheme depends on misrepresentations concerning profitability and investment safety. In this case, the lies emanated from the U.S. False statements regarding SIB's financial strength, investment portfolio value, investment diversification and earnings were regularly issued from the U.S. for use by financial advisors, potential investors and regulators.[28] Investment values and earnings were pegged at whatever amounts were needed to give SIB acceptable financial performance and capital ratios.[29] Davis's office produced SIB's quarterly financial reports that had to be filed with the Antiguan Financial Services Regulatory

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25 Other examples of corporate disregard include: the bribing of SIB's Antiguan auditor using funds from a Swiss bank account in the name of Stanford Financial Group (*see* fn 37, *infra*); the use of corporate funds (whose ultimate source was SIB deposits) to purchase fishing equipment, lures, hooks, diving gear, clothing and apparel, furniture, placemats and napkin rings, make-up, and various other personal items (*see* Oct. 28 Decl. of Jeff Ferguson and its exhibits, Doc. 858 in case no. 09-298) and Allen Stanford's payment of entity funds to lobbyists working to reduce his personal tax liability (*see* § 7 *infra*).

26 *See* Emails dated March 18, 2008 and March 27, 2008, Exhibit E, Appx. 35-41.

27 *See* Emails dated June 18, 2007 and July 29, 2008, Exhibit F, Appx. 42-45.

28 Doc. 21-20, at 5-6, ¶ 15.

29 Doc. 21-20, at 11, ¶ 24(b)(iv).

Commission ("FSRC"). According to Davis's guilty plea, these were delivered to an SIB officer in Antigua identified only as Executive A, who would then sign them (apparently despite a lack of personal knowledge) and deliver them to the FSRC.[30]

For most of its core operational needs, SIB relied on services provided by Stanford entities located in the U.S. or the USVI. The SIB's Antiguan payroll totaled approximately $3.6M annually. By comparison, in 2008 alone, SIB paid other Stanford entities $268M for a wide array of services, including cash management, investment management, and in-house legal services. Approximately 75% of this money went to Stanford entities headquartered in the U.S. and the USVI.[31]

The principal functions of SIB employees in Antigua were to keep the client accounting records, send out client statements (although the statements were actually printed and mailed from Puerto Rico), and perform certain private banking functions such as paying credit card bills for a small subset of clients. These limited duties served principally to give SIB a false appearance of legitimacy. Sending out client statements indicating CD balances is fundamentally deceptive when the assets backing the CDs are woefully inadequate. In other words, Stanford and his confidants used SIB and its Antiguan employees as instruments of fraud (perhaps unwitting instruments) to further the Ponzi scheme.[32]

SIB's top Antiguan officer was not even on SIB's payroll. The salary of president Juan Rodriguez-Tollentino was paid by Stanford Financial Group from the U.S. SIB was not even involved in processing the payroll for its non-management employees. That was processed

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30 Doc. 50, at 43, ¶ 17(i).

31 Doc. 21-20, at 13, ¶ 30 & at 14-15, ¶ 32(a).

32 Doc. 21-20, at 13, ¶ 29.

by SFG employees in Houston and paid from an SIB account located at Trustmark Bank in Houston.[33]

Admittedly, the small island nation of Antigua (population 86,000, per capita GDP $19,400[34]) had a role in the Ponzi scheme. While Antigua was neither its "nerve center" or "activity center," it did provide a compliant and lax environment in which Stanford could operate his sham bank. With local building projects and large loans to the Antiguan government (at least $80M, and perhaps more, of fraudulently-obtained investor funds), Allen Stanford was able to purchase the goodwill of the Antiguan government, along with Antiguan citizenship (without surrendering his U.S. citizenship) and an Antiguan knighthood. With bribes, Stanford purchased the complicity of Antigua's top international bank regulator, Leroy King, as well as a second as-yet unidentified official of the FSRC.[35] And King did not just "look the other way"; he actively supported the Ponzi scheme by, among other things, allowing Stanford's in-house lawyer to draft the FSRC's response to inquiries from the Eastern Caribbean Central Bank.[36]

Stanford also bribed SIB's Antiguan independent auditor, Charlesworth Hewlett, with payments from a Stanford Financial Group Swiss account.[37] Hewlett conducted his audits exclusively in Antigua, even though there were virtually no source records for investments or investment income for him to review there. That did not prevent him, however, from issuing

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33 Doc. 21-20, at 18, ¶ 38.

34 CIA World Fact Book, https://www.cia.gov/library/publications/the-world-factbook/geos/ac.html.

35 Doc. 50, at 45- 46, ¶¶ 17(o)-(w).

36 08/01/06 email from Mauricio Alvarado re FSRC Antigua and enclosed letter from LeRoy King to Eastern Caribbean Central Bank, actually drafted by Alvarado, attached as Exhibit G, Appx. 46-50.

37 *See* Supplemental Declaration of Karyl Van Tassel, KVT-23, KVT-24, KVT-25, Doc. 42, filed in case no. 3:09-cv-00721-N. On May 19, 2008 Jim Davis emailed a Swiss bank, instructing the bank to increase monthly payments to Hewlett from £15,000 (approximately $29,000) to £20,000 (approximately $39,000) effective June 15, 2008. These payments, which were over and above Hewlett's audit fees, were made from a Societe Generali (SocGen) account in the name of Stanford Financial Group, the umbrella name for Stanford's entire empire. While Mr. Hamilton-Smith describes SFG as a mere "concept" and not a separate legal entity, it was certainly real enough to bribe on behalf of SIB.

clean audit reports, year after year.[38] Having co-opted SIB's regulator and its (supposedly) independent auditor, Stanford was able to perpetrate his scheme without interference.

2. The Fifth Circuit applies the alter ego corporate disregard doctrines in determining "principal place of business." Consistency and logic require that the same rules be followed for COMI purposes.

a. "When two corporate entities act as one, or are in fact one, they should be treated as one for jurisdictional purposes."

Appropriately, the first topic on which the Court requested additional briefing was the applicability of corporate-disregard doctrines. The Antiguan Liquidators assert that corporate disregard doctrines such as alter ego are used only to impose liability on shareholders or parent companies and are therefore irrelevant to the issue of COMI. AL's 2d Supp. Brief, Doc. 55, at 17. They are wrong. For more than twenty-five years, the Fifth Circuit has applied corporate disregard doctrines in determining both diversity subject-matter jurisdiction (i.e., the "principal place of business" analysis) and personal jurisdiction.[39] *Freeman v. Nw. Acceptance Corp*., 754 F.2d 553, 558 (5th Cir. 1985) (Oregon parent corporation with Oregon presence nonetheless held to be citizen of Colorado for diversity purposes because it was the alter ego of its subsidiary, a Colorado corporation).

"When two corporate entities act as one, or are in fact one, they should be treated as one for jurisdictional purposes." *Id*. at 558. In determining "principal place of business," courts within the Fifth Circuit should "refuse[] to elevate form over substance." *Id*. at 557.[40]

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[38] *See* KVT-24, Doc. 42, at 7.

[39] "[I]t would be irrational to hold that a parent and a subsidiary have been fused for purposes of in personam jurisdiction … but remain separate for purposes of subject matter jurisdiction. Recognizing fusion as fusion for all jurisdictional purposes makes good sense." *Freeman v. Nw. Acceptance Corp*., 754 F.2d 553, 558 (5th Cir. 1985).

[40] In the case of diversity jurisdiction, the alter ego doctrine is applied to defeat diversity, not to preserve it. For example, in *J.A. Olson,* 818 F.2d at 401, the plaintiff, an Illinois corporation, with its principal place of business in Mississippi, argued that diversity existed between itself and the Mississippi defendant because it was the alter ego of its parent company, whose principal place of business was in Illinois. In keeping with the rule that diversity jurisdiction is narrowly applied, the Fifth Circuit held that the plaintiff could not assert its own status as an alter ego to establish diversity. *Id*. at 413.

Courts "[should] not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, … deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Id*. (quoting *Chicago, Milwaukee, & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Assoc.,* 247 U.S. 490, 501, 38 S. Ct. 553, 557 (1918). A court, therefore, "[sh]ould accomplish whatever piercing and adjustments [it] consider[s] necessary to protect the court's jurisdiction." *Panalpina Welttransport GmBh v. Geosource, Inc*., 764 F.2d 352, 355 (5th Cir. 1985).

b. The same approach applies in determining COMI.

Courts have recognized that COMI generally equates to "principal place of business." *In re Bear Stearns High Grade Structured Credit Strategies Master Fund, Ltd*., 374 B.R. 122, 129 (Bank. S.D.N.Y. 2007); *In re Tri-Cont'l Exch. Ltd*., 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006).[41] Given that parallel, it would be illogical and inconsistent not to apply alter ego doctrines in determining COMI. In fact, in the most apt Chapter 15 opinion to date, *In re Ernst & Young, Receiver*, 383 B.R. 773 (Bankr. D. Colo. 2008), the alter ego doctrine was applied for that very purpose. *Ernst & Young*, like the present case, involved a multi-jurisdiction, multi-entity fraudulent investment scheme (the opinion does not use the term Ponzi, but its description of the scheme sounds very similar to the Stanford Ponzi scheme, although smaller). The court treated the entities involved in the scheme as "one for purposes of perpetrating a fraud on investors." *Id*. at 781.

The Friedmans, husband and wife, resided in Canada, when they formed, under Canadian law, an investment company named KDI that purported to sell investments in real

[41] *See also* Jay L. Westbrook*, Chapter 15 At Last*, 79 Am. Bankr. L.J. 713, 719 (2005) ("Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same. One example is use of the phrase 'center of main interests,' which could have been replaced by 'principal place of business' as a phrase more familiar to American judges and lawyers.")

estate syndicates. Through subsidiaries, KDI raised funds from investors in the United States, Israel and Canada. By far, most of the proceeds – 88% – were raised by KDI's U.S. subsidiary, KD/CO. As it turned out, the Friedmans were siphoning off much of the investment money as it came in. The fraud was discovered by Canadian regulators, who shut it down by obtaining a freeze order from an Alberta court and later, from the same court, an order appointing Ernst & Young as a common law receiver over KDI and its subsidiaries. *Id*. at 774-76.

Ernst & Young filed a Chapter 15 petition for recognition in bankruptcy court in Colorado, where KD/CO had been incorporated and had its offices. The Colorado Commissioner of Securities opposed the application on the ground that the COMI of KD/CO was in the United States because it was incorporated there and most of the fraud had been committed in the U.S. The bankruptcy court rejected the Commissioner's argument and held that KD/CO's COMI was in Canada, from where the fraud had been directed. According to the court, "there is a reasonable probability KDI and KD/CO were operated as one for purposes of perpetrating a fraud on investors." 383 B.R. at 781. "[T]here was no real business being operated out of either entity. Rather, the creation of both KDI and KD/CO was part of a fraudulent scheme." 383 B.R. at 780. "The driving force behind both entities was the Friedmans. … [T]hey formed their fraudulent organizations(s) and directed the operations … from Canada." *Id*.

Similar observations can be made about Stanford's control of SIB from the U.S.

c. Under either state law or federal common law, the corporate fiction is disregarded when the corporate form is used to perpetrate fraud.

The Antiguan Liquidators correctly point out that the Texas Supreme Court, in *SSP Partners v. Gladstrong Inv. (USA)*, 275 S.W.3d 444, 454 (Tex. 2008), held that there is no separate "single business enterprise" corporate disregard doctrine in Texas. Rather, the grounds for disregarding the corporate fiction in Texas remain those described more than twenty years ago in *Castleberry v. Branscum*, 721 S.W.2d 270, 271-72 (Tex. 1986). As a reminder of what those are, the court quoted from *Castleberry*:

> *We disregard the corporate fiction even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result.* Specifically, we disregard the corporate fiction:
>
> (1) *when the fiction is used as a means of perpetrating fraud*;
>
> (2) *where a corporation is organized and operated as a mere tool or business conduit of another corporation*;
>
> (3) *where the corporate fiction is resorted to as a means of evading an existing legal obligation*;
>
> (4) where the corporate fiction is employed to achieve or perpetrate monopoly;
>
> (5) where the corporate fiction is used to circumvent a statute; and
>
> (6) *where the corporate fiction is relied upon as a protection for crime or to justify a wrong*.

Id.; 275 S.W.3d at 454 (emphasis added). The four grounds emphasized by italics apply directly to the Stanford scheme.

Federal common law, as applied in the Fifth Circuit, holds the same.

> . . . [C]ourts will apply the alter ego doctrine and hold a parent liable for the actions of its instrumentality in the name of equity when the corporate form is used as a "sham to perpetrate a fraud." In making an alter ego determination, a court is "concerned with reality and not form, [and with] how the corporation operated." Unlike the theory of agency, which interprets a contractual relationship, alter ego examines the actual conduct of the parent vis-à-vis its subsidiary.

Bridas S.A.P.I.C., 447 F.3d at 416 (internal citations omitted).[42] The kind of fraud or illegal

[42] The Antiguan Liquidators appear to contend that Antiguan law governs this question, although they cite nothing for this proposition. It is worth noting, however, that English common law, which Antigua purports to follow, also calls for the corporate form to be disregarded when it is used to perpetrate fraud. *See e.g., Kensington*

purpose that justifies disregarding the corporate veil "is present where incoming revenues are directed away from an undercapitalized corporation and into the hands of the controlling party." *Id*. at 420 (quoting with approval, *Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 198 (3d Cir. 2003)).

Federal common law and state law regarding the corporate disregard doctrines are substantively the same. The Fifth Circuit made that point in *Jon-T Chemicals*. "Here, we find no need to determine whether a uniform federal alter ego rule is required, since the federal and state alter ego tests are essentially the same. Our non-diversity alter ego cases have rarely stated whether they were applying a federal or state standard, and have cited federal and state cases interchangeably." 768 F.2d 690, n. 6.[43]

Ponzi schemes fit precisely the alter ego and "sham to perpetrate a fraud" grounds for disregarding the corporate fiction. This is illustrated by *Securities and Exchange Commission v. Resource Development International, LLC*, 487 F.3d 295 (5th Cir. 2007), which arose out of a Northern District of Texas SEC receivership involving a Ponzi scheme. The Fifth Circuit in that case affirmed the district court's holding that the corporate veil of a corporation named M&M should be pierced so that its owner, Martella, would be held liable for its acts. 487 F.3d at 303. "[D]efendant Martella utilized his control over defendant corporation M&M for an illegal purpose (violation of the Court's [stay] order) and to perpetuate a fraud [the Ponzi scheme that gave rise to the receivership]." 487 F.3d at 303.

Int'l Ltd. v. Congo [2006] 2 B.C.L.C. 296, 341-50 (Cooke, J.) (The Court should pierce the corporate veil where a group has been structured in a dishonest manner and used for a scheme of concealment.).

[43] In another case, *SEC v. Res. Dev. Int'l,, LLC*, 487 F.3d 295, 302 (5th Cir. 2007), the Fifth Circuit pointed out that the term "alter ego" has come to be used "as a synonym for the entire doctrine of disregarding the corporate fiction." The court, quoting from an earlier Fifth Circuit case, grouped corporate disregard grounds into three instead of six, as *Castleberry* did, although the substance of the two cases is the same: "The corporate veil is pierced when: (1) the corporation is the alter ego of its owners or shareholders; (2) the corporation is used for an illegal purpose, and (3) the corporation is used as a sham to perpetrate a fraud." *Id.*

3. The Ponzi scheme activities were "far flung," SIB's Antiguan operations were "passive," and its "nerve center" and "place of activity" were both in the U.S.

As discussed above, Fifth Circuit precedent requires application of the alter ego corporate disregard doctrines in assessing SIB's principal place of business. In other words, the relevant principal place of business is that of the Stanford Ponzi scheme as a whole. Nevertheless, even if that precedent were disregarded and the Court instead were to apply the guidelines from *J.A. Olson Co. v. City of Winona,* 818 F.2d 401 (5th Cir. 1987) just to SIB, the conclusion would be the same: that SIB's COMI/principal place of business was in the U.S.

The Court is familiar with the *J.A. Olson* guidelines:

> The principal place of business begins with the general rules of these component tests: (1) when considering a corporation whose operations are far flung, the sole nerve center of that corporation is more significant in determining principal place of business, (2) when a corporation has its sole operation in one state and executive offices in another, the place of activity is regarded as more significant, but (3) when the activity of a corporation is passive and the "brain" of the corporation is in another state, the situs of the corporation's "brain" is given greater significance

818 F.2d at 411. However, these guidelines are "only a starting point. In each case, [the court] must fully examine the corporation's operations and its nerve center in the context of the organization of that business." *Id.* A court "should not obfuscate the ultimate quest …; the issue is not the nerve center of a corporation or the place of activity of a corporation but, rather, the issue is the principal place of business of the corporation." *Id.* "[N]either the 'nerve center' nor the 'place of activity' test inflexibly dictates the corporation's principal place of business." *Id.* at 409. The court must base its decision on the totality of the facts. *Id.* at 406.

The totality of the facts of this case, whether analyzed under the "nerve center" or "place of activity" test, point to the same COMI/principal place of business for SIB: the U.S.

a. The Stanford Ponzi scheme was far-flung and managed from a central nerve center, the U.S.

The Antiguan Liquidators describe the facts of *J.A. Olson Co.* as "strikingly similar" to those of this case. They are anything but that. The J.A. Olson Co., a Mississippi-incorporated subsidiary of an Illinois company, operated a picture frame manufacturing business in Mississippi. There was no hint of fraud in the case. J.A. Olson's Mississippi facility was a real factory that turned out a real product. In contrast, SIB's rented ersatz-Georgian-style bank building in Antigua was a front for a Ponzi scheme.

A far more analogous case, even though it does not involve fraud, is *Toms v. Country Quality Meats, Inc*., 610 F.2d 313 (5th Cir. 1980). Country Quality Meats was a Delaware corporation qualified to do business in Georgia. Georgia was the location of its only place of business, all of its assets and all of its employees. However, it was one of 60 sister corporations, all owned by the same shareholders, that operated as meat supply companies. Each had its own local management for daily operations but received support and overall management services under separate contract from the same management firm, B&W, located in Texas. B&W had the power to transfer employees of the corporations to its own payroll, provided legal services to the corporations, formulated aspects of business policy, furnished lists of outlets from which the corporations could purchase meat, managed a blanket insurance policy covering all of the corporations, and provided the corporations with low-interest start-up financing. 610 F.2d at 315. The Fifth Circuit held that "given all these factors, Country Quality's principal place of business was in Texas." 610 F.2d at 316.

> While it is true that Georgia was where this corporation came into contact with the public, where the daily activities of the corporation occurred, and where its tangible assets were located, we find that *the activity which occurred in Texas was more significant because Country Quality was essentially run from there*.

Id. at 315. (Emphasis added.)

Seven years later, the Fifth Circuit in *J.A. Olson* relied on *Toms v. Country Quality* in crafting the "far flung" prong of its "principal place of business" guidelines:

> The scenario [in *Toms v. Country Quality*] was similar to that of a "far flung" corporation with a concentrated nerve center and diffuse places of activity. Country Quality's operations represented only a single location of the many locations of the corporate activities; the nerve center, however, was in one location. We therefore held that the principal place of business was Texas, the "nerve center" of the operation.

818 F.2d at 411.

SIB's operations were far-flung in the same way that Country Quality Meat's were. And just as Country Quality Meats was "run from Texas," SIB was "run from the U.S." Indeed, as an "international" bank, SIB was prohibited by Antiguan law from serving Antiguans. It could only serve people from other countries. Moreover, SIB's business model (if it can be called that) was not to function as a normal commercial bank, but instead to sell CDs throughout the world. SIB was then to generate a profit (again, this is the fictional version) by investing the sales proceeds and astutely managing the investments so that they returned more than the interest that it paid its customers. SIB, however, never had a sales staff or investments staff in its own name. These activities occurred in numerous places outside of Antigua through other Stanford-owned entities. The sales effort was coordinated from the U.S., with sales offices (brokerages) located across North, Central, and South America, as well as Europe. The investment function was handled under the direction of Stanford and Davis, from Tupelo, Memphis, Houston and Miami.[44]

[44] Email dated August 10, 2007 from F. Palmliden to K. Weedon, attached as Exhibit H, Appx. 51-54

b. SIB was passive. It was a sham used by Stanford and others for their fraud scheme.

SIB was a sham used by Stanford and his confederates to commit fraud. Its Antiguan managers had little or no authority over its principal activities of selling CDs and investing the proceeds. Worse yet, they were passive in the face of clear indications that the Bank was being misused.

No real bank president would have tolerated being denied a role in the management of the vast majority of his or her institution's reported asset value. Yet Mr. Rodriguez-Tollentino, SIB's president, was apparently content with that situation. The only information given to him and the other Antiguan bank officers regarding SIB's investments was in the form of monthly summaries provided by Jim Davis.[45] However, detailed backup for the summaries was kept in the U.S., and not in Antigua, where it would have been subject to examination by the FSRC in the event Stanford's people on the inside lost control of the agency's examination staff or left the agency.

It had to be apparent to higher-ranking SIB officers in Antigua that this was no benign division of labor. If nothing else, the internal audits should have alerted them that something was wrong. The audits were shams because the auditors were prohibited from seeing, much less auditing, source documents and detailed backup for 90% of SIB's assets. They had to take Davis's summaries at face value. Their audits merely compared investment values contained on SIB's financial statements against the summaries provided by Davis. Of course, the comparisons invariably matched, but that provided no audit assurance as both were fabricated by the same person.

This is a sampling of statements from SIB internal audit reports that went to

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[45] Doc. 50, at 44-45, ¶¶ 17(j)-(n).

Rodriguez-Tollentino and others in Antigua:

- "On this occasion, we did not review supporting documentation for the investments and investment income accounts."[46]

- "The audit process for the investment portfolio solely consisted of tracing the account balances from the trial balance to the account balances as presented on the balance sheet as of March 31, 2006."[47]

- "Investment Portfolio . . . Account in good order. Investment account was expressed and recorded as per summary analysis reported by CFO office."[48]

The bank officers' acceptance of this situation can only be described as "hear no evil, see evil."

Similarly, in response to the Receiver's evidence that SIB paid $268M in fees to other Stanford subsidiaries in the U.S. in 2008, compared to a total payroll of less than $4M for SIB's Antiguan staff, Mr. Hamilton-Smith responded that the $268M was a gross overcharge.[49] While far more activity occurred in the U.S. and USVI than in Antigua, Mr. Hamilton-Smith may well be right that $268M was excessive. After all, this was not a legitimate setup; it was a Ponzi scheme designed to flow money to Stanford in various ways. But this just emphasizes the iron-grip control exercised by Stanford and his confederates in the U.S. and the passivity and impotence of SIB's Antiguan management. If SIB's Antiguan managers had been real bank officers with real authority, they would have protested the arrangements and demanded different terms.

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46 KVT-13, Doc. 21-17, 1-6, at 714.

47 KVT-14, Doc. 21-17, 7-24, at 726.

48 KVT-12, Doc. 21-16, 12-25, at 705.

49 Second Affidavit of Nigel John Hamilton-Smith (filed in the UK on 5-15-09), at 9-10, ¶ 20(viii), attached as Exhibit I, Appx. 55-84.

4. It does not matter that there were inter-company "contracts" that purported to make the Stanford broker-dealer entities agents for SIB in the sale of CDs. There was no substance to the contracts as all the entities involved were instruments of Stanford's fraud.

The Antiguan Liquidators point out that the Stanford broker-dealer subsidiaries were under contract to SIB and that the contracts specified that the financial advisors were only agents of SIB with no authority to bind it. In addition, prospectuses stated that the CDs were obligations of SIB and not of the broker-dealer subsidiaries. In other words, the paperwork was made to look reassuringly like the documents of a real financial institution. The problem was, SIB was not a real financial institution. There was no real substance to the inter-company contracts and the verbiage contained in the prospectuses, since all of the Stanford entities, SIB included, were part of the same Ponzi scheme, puppets of the same puppeteer.

Under such facts, the "paperwork" defense does not apply. In determining "principal place of business," a court is "concerned with reality and not form, [and with] how the corporation operated. Unlike the theory of agency, which interprets a contractual relationship, alter ego examines the actual conduct of the parent vis-à-vis its subsidiary." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006) (internal citations omitted).

5. Public policy concerns require that the Antiguan Liquidators' application for recognition be denied or else their recognition be restricted to non-main status.

Chapter 15 contains a public policy exception:

> Nothing in the chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

11 U.S.C. § 1506. The facts warrant application of the public policy exception here. The very agency that first appointed the Antiguan Liquidators and then obtained their confirmation from the Antiguan court was complicit in Stanford's fraud. That same agency has allowed financial

fraud to flourish on Antigua for decades. It would be contrary to public policy for this Court to cede to Antigua the winding up of a company that bilked Americans and others out of billions when it was Antigua that permitted the fraud.

We now know that Stanford was able to commit his fraud because he was abetted by high-ranking Antiguan officials. Jim Davis's guilty plea says that Leroy King, head of the FSRC, and another unidentified FSRC official were bribed by Stanford.[50] The revealing letters that the Receiver has found between King and Stanford suggest Davis is correct. Indeed, the Receiver has found where King went so far as to permit Stanford's in-house attorney to draft the FSRC's response to an inquiry about SIB from the regional central bank, the East Caribbean Central Bank.[51]

It would be naïve to suppose Stanford had only two Antiguan officials on the payroll. Antiguan Attorney General Justin Simon essentially conceded there were more when he told the press this week that "the scope of the ongoing investigations into the FSRC may very well see other people in Antigua and Barbuda being implicated."[52] He was probably referring to actions that he anticipates the U.S. Department of Justice taking. To date, the Antiguan authorities have done little themselves. The Antiguan government's principal actions have been to appoint the Antiguan Receivers/Liquidators, expropriate Stanford lands, and revoke Stanford's knighthood. There have been no Antiguan indictments and Antigua's consideration of the DOJ's request for King's extradition to the U.S. has lingered for months.

The collapse of SIB is just the latest chapter in a long history of financial fraud schemes involving Antigua. According to the U.S. State Department's website,

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50 Doc. 50, at 45-46, ¶¶ 17(p)-(s)

51 Doc. 50, at 46-47, ¶¶ 17(t)-(w)

52 *Attorney General Hints at Widening Net in Stanford Case,* Staboeck News, June 30, 2009, http://www.stabroeknews.com/2009/regional/06/30/attorney-general-hints-at-widening-net-in-stanford-case/ (last visited December 17, 2009).

> [C]oncerns over the lack of adequate regulation of the financial services sector prompted the U.S. Government to issue a financial advisory for Antigua and Barbuda in 1999. The advisory was lifted in 2001, but the U.S. Government continues to monitor the Government of Antigua and Barbuda's regulation of financial services.[53]

Unfortunately, this small island nation (population about 80% that of Waco, Texas) has continued to churn out major financial scandals. These have included: European Federal Credit Bank (Eurofed Bank) (closed in 2001, after it became known that former Ukrainian Prime Minister Lazarenko, the majority owner of the bank, was using it to launder money[54]); Bank of Europe (closed in 2004; was a scam to "solicit[] funds from investors with promises of high rates of return over short investment periods." Losses totaled more than $250M[55]); Caribbean American Bank (closed after principals were convicted in the U.S. of running a loan scam that defrauded investors of more than $60 million[56]); BetonSports (an illegal internet gambling scam regulated by the FSRC that was closed in 2006[57]).[58]

A second public policy concern exists. The inconsistency between the Antiguan Liquidators' obligation not to disclose information, imposed on them by the Antiguan

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53 U.S. Department of State, http://www.state.gov/r/pa/ei/bgn/2336.htm (last visited December 17, 2009).

54 *U.S. v. Lazarenko*, 476 F.3d 642, 645 (9th Cir. 2007); Matt Smith, *Cleaning House*, San Francisco Weekly, October 10, 2001, *available at* http://www.sfweekly.com/2001-10-10/news/cleaning-house/ (addressing Lazarenko's use of European Federal Credit Bank to launder funds).

55 *Mazzaro de Abreu v. Bank of Am. Corp*., 525 F. Supp. 2d 381, 384 (S.D.N.Y. 2007).

56 *See 13 Sentenced in Largest Non-Drug Money Laundering Case Ever Conducted by U.S. Customs*, U.S. Custom Service, January 10, 2001, http://www.cbp.gov/hot-new/pressrel/2001/0111-01.htm (last visited December 17, 2001); *U.S. v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (affirming conviction of one of the 13 convicts).

57 *U.S. v. BETONSPORTS PLC,* 2006 WL 3257797 (E.D. Mo., Nov. 9, 2006).

58 Perhaps more telling of the corrupt nature of the Antiguan financial sector is the story of the indictment of William Cooper for his involvement in the Caribbean American Bank fraud. Following Cooper's indictment in Florida, he was arrested by the Antiguan authorities. Michael Allen, *Antigua Makes Arrest in Florida Case in Apparent Effort to Placate the U.S.*, Wall Street Journal, May 21, 1999, at Al 1, Col. 1. The U.S. requested extradition of Cooper, which an Antiguan court denied and ordered Cooper released. *Cooper v. Attorney General*, Civil Suit No. ANUHCV2002/0228, High Court of Justice, Jan. 13, 2003, available at http://www.oas.org/juridico/Mla/en/atg/en_atg-ext-juris-wc.pdf. In rejecting the extradition, the judge ruled that (1) the extradition treaty with the U.S. was not properly passed by the Antiguan parliament; and (2) the offense of money laundering was not a crime in Antigua until May 28, 1998, after the alleged acts of the defendant occurred. *Id*. at para. 30.

appointment order, and the obligation they would necessarily undertake to provide information to the SEC and the DOJ in the event this Court were to name them SIB's representatives in the U.S. The Receiver, SIB's current representative, is obligated by this Court's Receivership Order to "[p]romptly provide the Commission and other governmental agencies with all information and documentation they may seek in connection with its [sic] regulatory or investigatory activities."[59] The Antiguan Liquidators could not comply with that same requirement because the Antiguan order under which they serve prohibits "disclosure of customer specific information … without further order of the [Antiguan] Court; and … [any] disclosure of information … to any foreign governmental or regulatory body unless such disclosure is subject to mutual disclosure obligations."[60]

This prospect of conflicting obligations is not just an abstract concern. It came to the fore in Canada. The Antiguan Liquidators, in what they referred to as "Operation Blue Water" – without seeking advance court authorization in Canada or advising either the Receiver or the AMF, the Quebec financial regulatory agency investigating SIB's collapse – entered the Montreal offices of SIB, copied all SIB computers and servers there, then erased the computers and servers and sent the copied data out of Canada, to Antigua.[61] When the AMF learned of this, it demanded the immediate return of the data. Vantis responded that they were not authorized by the Antiguan court to return it.

This situation was addressed by the Quebec court during the hearing on competing recognition motions filed by the Receiver and the Antiguan Liquidators.[62] Based on

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59 Amended Order Appointing Receiver, Doc. 157, ¶ 5(k).

60 Antiguan order of appointment, Doc. 3, at 23-24, ¶ 12.

61 The Receiver presumes this effort was called Operation Blue Water because the objective was to place a large expanse of blue water between the data and the Canadian regulator.

62 The Receiver, in addition to moving for recognition himself, also moved to vacate the previous recognition order that the Antiguan Liquidators had obtained *ex parte* when the Antiguan proceeding was still a receivership.

the evidence, the Quebec court found that the Antiguan Liquidators' conduct was so reprehensible that they could not be trusted to serve as officers of the Canadian court.

> What motives -- unspoken and unspeakable -- justify the Blue Water operation, i.e., destroying the originals, making imaged copies, before even obtaining Court authorization and moving all information out of the country to Antigua?
>
> The Court concludes that Vantis' conduct, through the [Antiguan Liquidators], disqualifies it from acting and precludes it from presenting the motion [for recognition], *as it cannot be trusted by the Court*. …
>
> Even if the liquidators' motion was well-founded on the merits, *it does not deserve the confidence of the Court*, an essential element enabling it to submit its motion, and this, because of *the absence of good faith and of respect towards the Canadian public interest*, represented by the Court and the regulatory authorities.[63]

The Quebec court also labeled "blatant and inexcusable" the Antiguan Liquidators' actions in obtaining an ex parte recognition order from a Canadian registrar (a judicial official authorized to act only in uncontested matters) without first notifying either the Receiver or the AMF and by failing to advise the registrar of "key information" affecting the right of recognition, including the existence of this receivership.[64]

The Antiguan Liquidators moved for leave to appeal the Quebec judgments (there is no appeal of right), but their motion was denied. The Quebec judgments and the findings contained in them are final.

To recognize Antigua as the jurisdiction principally responsible for winding up SIB would validate fraud, corruption and contempt for regulatory authority. That would be manifestly contrary to the public policy of the United States.

The Quebec court granted the motion and revoked the previous recognition order on the ground that it had been obtained improperly by withholding key information from the registrar and failing to notify the Receiver in advance. *See* Doc. 48, Exhibit E, at 62-82.

63 Quebec Judgment dismissing the Antiguan Liquidators' motion for recognition, Doc. 48, Exhibit E, at 80-81, ¶¶ 58-60 (emphasis added).

64 *Id*. at 77-78, ¶¶ 39-43.

6. The UK trial court's judgment (currently on appeal), which the Antiguan Liquidators want this Court to follow, cannot be followed because it expressly rejected U.S. Chapter 15 case law.

The Antiguan Liquidators repeat their argument that in deciding SIB's COMI, the court should consider only what was "ascertainable" to third parties. Stated another way, they ask the Court to give continuing effect to the Stanford-created illusion that SIB was a legitimate stand-alone bank. Chapter 15, however, contains no "ascertainability" requirement. Further, applicable U.S. case law would not countenance such a result, much less require it. The common theme of U.S. case law regarding "principal place of business," which should guide the Court in deciding the COMI issue, is that reality controls over fiction, substance controls over form.

The Antiguan Liquidators cite two U.S. cases for their "ascertainable" proposition, *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006) and *In re Bear Stearns High Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007). Neither does more than mention in passing that the reporter notes of the failed European Union Convention[65] describe COMI as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *Tri-Continental*, 349 B.R. at 634; *Bear Stearns*, 374 B.R. at 129. This quote was dictum in that it did not form the basis for the court's decision in either case. Further, in cases such as this one, the Antiguan Liquidators' interpretation of this sentence perverts the meaning of "center of main interests." By giving exclusive effect to the last phrase, "ascertainable by third parties," it gives no effect to the first and more important phrase, "the place where the debtor conducts the administration of his interests on a regular basis." The Antiguan Liquidators in effect read the

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65 The European Union Convention was to be an agreement among the member states of the EU addressing which state was to be the venue of insolvency proceedings for debtors within the EU. It was not intended to be a cross-border statute that would govern insolvencies between EU and non-EU countries. Although the EU members failed to reach agreement on the Convention, the EU did later promulgate an insolvency regulation roughly based on the principles of the Convention. *In re Betcorp Limited*, 400 B.R. 266, 277 n. 14 (Bankr. D. Nev. 2009).

sentence as if it says that a debtor's COMI is where the debtor "*appears* to conduct the administration of its interests." But the sentence does not say that. Neither *Tri-Continental* nor *Bear Stearns* can be read to suggest that, when a given country's role was to front for a fraud scheme controlled and operated from the U.S., the court should find the debtor's COMI to be in the fronting jurisdiction and not in the U.S.[66]

The Antiguan Liquidators urge this Court to adopt the UK trial court's reasoning that SIB's COMI was in Antigua because of "objective and ascertainable" facts such as the presence in Antigua of a bank building, purported officers, and employees. Their position that this Court should follow the UK trial court is particularly ironic given that the UK trial court, *at the Antiguan Liquidators urging*, disregarded U.S. case law construing Chapter 15. The UK trial court instead adopted the Antiguan Liquidators' interpretation (with which the Receiver disagrees) of the European Court of Justice opinion in *In re EuroFood IFSC Ltd*., 2006 E.C.R. I-3813.[67] The UK trial judge did so even though Chapter 15 and the English Cross-Border Regulation are virtually identical, and the EU Insolvency regulation construed in *EuroFood* is considerably different from both and even has a different function.[68]

According to the UK trial judge:

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66 In *Tri-Continental*, the court held that St. Vincent and the Grenadines (SVG) was the COMI of three fraudulent insurance companies that were formed in and at all times operated from SVG. The fraudster behind it all, although a U.S. citizen, had fled the U.S. years before to avoid charges based on a previous scheme. Then, during a ten year period, he launched and ran a new scheme from SVG. Unlike SIB, the fraudster's three SVG insurance companies were not part of a larger financial services empire headquartered in the U.S. 349 B.R. at 629-31. In *Bear Stearns*, the court held that the COMI of two Cayman Island-chartered hedge funds was in the U.S., from where they had been managed. 374 B.R. at 129-130.

67 The Receiver disagrees that the *Eurofood* opinion would require a court to disregard outright fraud in determining a debtor's COMI, even under the EU insolvency regulation. There is no indication in the opinion that the Irish subsidiary at issue had been a sham to perpetrate a fraud. Although the parent company, Parmalat, was involved in a major financial scandal in Italy, the ECJ was silent about any involvement on the part of the Irish company. *In re EuroFood IFSC Ltd*., 2006 E.C.R. I-3813.

68 Rather than being a true cross-border statute, the European Regulation instead determines which of the Member States of the European Union will have jurisdiction to handle the insolvency of a company doing business within the EU. It does not address insolvencies arising outside of the EU. *See* fn 56.

> According to *re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* the[] contacts [that establish COMI] can include the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of a majority of the debtor's creditors or of a majority of creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes. However, none of these factors in American jurisprudence is qualified by any requirement of ascertainability. In my judgment this is not the position taken by the ECJ in *Eurofood*.[69]

Rejecting American jurisprudence in favor of the Antiguan Liquidators' interpretation of *Eurofood*, the UK court was led to an astounding conclusion: "The location of the principal movers of the fraud (Sir Allen, Mr. Davis and Ms. Pendergest-Holt) … in the USA," because it was not "ascertainable by third parties," was irrelevant – so irrelevant that their presence in the USA did not even rebut the COMI presumption based on where SIB was chartered.[70]

Lest the Court get the misimpression that the UK trial judge was expressing bedrock English law, it should be pointed out that this was the first truly contested case applying the English Cross-Border Insolvency Regulation.[71] In an article published soon after the decision, one of the UK's more prominent insolvency practitioners questioned the logic of the decision:

> In cases of fraud, … over-emphasis [on third-party ascertainability] risks letting a party win by dint of a factually erroneous presumption, thereby shoring up the fraudsters' house of cards and potentially turning the court into a vehicle of fraud. That is not sound reasoning; nor is it sound policy for the Model Law.[72]

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69 UK Judgment, Doc. 35, at 20, ¶ 67.

70 Doc. 35, at 28-29, ¶¶ 98-99.

71 Further, in arriving at his conclusion, the UK trial judge had to overrule one of his own earlier rulings, *Re Lennox Holdings Ltd*, [2009] BCC 155, in which he determined the COMI of two Spanish companies by applying a "head office functions" test. The court rejected its approach in the previous case. "I now consider that I was wrong to do so." Doc. 35, at 18, ¶ 61.

72 Look Chan Ho, *Cross-Border Fraud and Cross-Border Insolvency: Proving COMI and seeking recognition under the UK Model Law*, 24:9 Journal of International Banking and Financial Law 537 (2009).

That, however, was precisely the effect of the UK judgment: It gave effect to Stanford's smoke and mirrors.

Fortunately, the Court's reasoning was sufficiently novel (or controversial) that the Receiver was granted leave to appeal (there is no appeal of right in such a case). The Court of Appeal heard five days of argument last month. The parties await a decision.

Not only did the UK trial court apply an incorrect legal standard (certainly incorrect under Chapter 15), it applied that standard incorrectly in view of the evidence. SIB's strong connection with the U.S. was not just ascertainable to third parties, it was loudly trumpeted by Stanford and his cohorts. SIB was never marketed as a stand-alone bank perched on the tiny island of Antigua. In virtually all materials, it was represented to be part of Stanford Financial Group, a global company headquartered in the U.S. Some of those materials are discussed above.[73]

The UK trial court's form-over-substance approach is antithetical to U.S. law. It is also contrary to Canadian law, as evidenced by the Quebec court's recent judgments denying the Antiguan Liquidators' application for recognition and granting the Receiver's. Although the Antiguan Liquidators' are correct that the Quebec court was not concerned with COMI, as the Cross-Border Model Law had not yet gone into effect there, the Quebec court did, though, base its decision on the location from which the fraud scheme was controlled – in effect, the scheme's "principal place of business."

> The Court is of the view that for Ponzi style frauds, the real and important connection is situated at the place of business of the nerve center or as one could call it, the center of the spider web of this fraud.

[73] *See* Declaration of David Henry, attached as Exhibit B, Appx. 5-8 (Stanford promotional videos were recorded in Houston, Texas).

> The importance of the nerve center in Houston is beyond dispute. The most equitable solution is that the Court recognize the receivership and Janvey, the United States Receiver, as foreign representative.[74]

The Quebec court's conclusion that Houston was the center of Stanford's spider web is the only one permitted by the evidence.

7. Stanford's residency and his Antiguan citizenship.

The Antiguan Liquidators try to make much of Stanford's Antiguan citizenship and Antiguan knighthood. Both should be regarded for what they were: products of the same purchased influence that allowed Stanford to conduct a sham banking operation in Antigua for 18 years.

The Antiguan Liquidators also point to J. Hittner's order finding that Stanford resided on Antigua for 15 years. The Receiver does not know in what sense J. Hittner used the term "resided." Stanford had company-owned residences available for his use in Houston, Miami, St. Croix and Antigua. However, the Receiver's investigation indicates that Stanford spent far less time in Antigua than he did elsewhere.[75]

The evidence at the hearing will show that during the initial years of the Ponzi scheme, Stanford resided within the continental U.S., in Texas and Florida. In 2007, he established his residency on St. Croix, part of the USVI, in order to take advantage of valuable tax benefits offered under USVI statutes. USVI law required Stanford to be physically present on St. Croix at least 183 days of the year in order to be eligible for the tax benefits. Stanford

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[74] Exhibit C, Doc. 48, Quebec Judgment Granting Janvey Application, at 33, ¶¶ 35-36.

[75] The Receiver certainly does not differ with J. Hittner's bottom-line conclusion that Stanford was a flight risk. He still had friends and allies in the Eastern Caribbean, some of whom are now pursuing legal actions on his behalf. Moreover, on Davis's orders, $9M was transferred to the Bank of Antigua (not to SIB) in November and December 2008, as the scheme was collapsing and liquidity was much needed elsewhere. The timing suggests this money may have been intended as a flight fund. Also, Stanford's residence on St. Croix was irrelevant for J. Hittner's purposes. First, its location in a U.S. Territory made it unsuitable as a bolt hole. Second, by the time of the bond revocation hearing, the St. Croix property was unavailable to Stanford, because the Receiver already had possession of it.

carefully orchestrated his activities in 2007 and 2008 so as to meet this minimum requirement.[76] Further, the evidence will show that Stanford commissioned lobbyists to help him meet the residency requirement, either as it then existed, or by lobbying Congress or the Treasury Department to alter the requirement to make it easier to meet, and that Stanford spent corporate funds (largely traceable to SIB deposits) in an effort to reduce his personal tax liability.

Stanford and his girlfriend, Andrea Stoelker, also a U.S. citizen, lived in Christiansted, St. Croix, in a large colonial-era mansion titled in the name of one of the many Stanford corporations. This is where they kept their clothing and other personal effects.[77] They had maids, chefs, gardeners and around-the-clock guards. Stanford received his personal mail in Christiansted, at a post office box at the Gallows Bay Station post office. His personal staff – Executive Assistant Kye Walker and Personal Assistant Kelly Taylor – also resided on St. Croix and had offices in the colonial mansion that contained the Stanford living quarters. Christiansted was the home port of Stanford's yacht, the Sea Eagle, on which he spent much time. It is also apparent that Stanford intended St. Croix to be his long-term residence. He purchased a large estate in the countryside outside of Christiansted and, over the year preceding the scheme's collapse, had an existing mansion and various out-buildings on the property torn down to make way for the new home he planned to build.

8. Substantive consolidation is a red herring.

The Antiguan Liquidators again assert that the Receiver has not established that substantive consolidation is appropriate for the Stanford entities. A number of points need to be made regarding this argument:

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[76] See Emails between A. Stanford and D. Hubener dated October 8, 2007, attached as Exhibit J, Appx 85-89.

[77] The evidence will show that Stanford's effects included 13 custom suits, 60 dress shirts, 21 pairs of black dress shoes, 9 pairs of brown dress shoes, and much more.

A recognition motion under Chapter 15 raises only a limited number of issues, substantive consolidation not being among them. For purposes of this case, the pertinent issues are (i) COMI and (ii) whether recognition of the Antiguan Liquidators would violate U.S. public policy. *See* 11 U.S.C. sec. 1506, 1517(a)(3)..

- Substantive consolidation is a bankruptcy concept and this is not a bankruptcy proceeding. It is an equitable receivership. Because of the Court's broad discretion, equity receiverships are well suited for sorting out complex fraud schemes such as the one perpetrated here. The Receiver's previous briefs to the court cite numerous cases in which equity receiverships have been used to wind up complex frauds.[78]

- If, as the Antiguan Liquidators assert, it would be unfair to SIB investors for their claims to be put on a par with the claims of creditors of other Stanford entities, then this Court can take that into consideration in approving a final distribution plan. If, at that time, the Court determines that it would be more equitable for some or all SIB investors to have first claim against assets, then the court can order claims classified so as to achieve that result.[79]

- Although the bankruptcy substantive consolidation standard cited by the Antiguan Liquidators does not apply, if it did, it would be satisfied here. Mr. Janvey and Ms. Van Tassel point out in their respective declarations that whether or not SIB creditors are given first claim on assets will have no practical significance, since SIB investor claims will comprise the vast majority of claims against the combined Stanford entities (Mr. Janvey estimates more than 90%). In addition, if each of the more than 100 Stanford entities were separately wound up, the added administrative expense of doing so would result in SIB investors getting less than they otherwise would. In other words, even if the Court chose not to give priority to SIB investors, the dilutive effect of including other claims would be more than offset by the administrative cost savings.[80] Moreover, as already discussed, corporate separateness was not respected within the Stanford Financial Group. Once funds entered the system, they were shunted around irrespective of legitimate business needs. In addition, a major marketing draw for SIB was its membership in the Stanford Financial Group, which purportedly saved costs and allowed SIB to pay higher interest rates. Stanford Financial Group was one ball of wax and it was portrayed as such to creditors.

78 *See* Response to Petition for Recognition, Doc. 20, at 32-36 & nn.15-16.

79 "The district court has broad powers and wide discretion in equitable distributions." *S.E.C. v. Great White Marine & Recreation, Inc*., 428 F.3d 553, 556 (5th Cir. 2005). *See also Quilling v. Trade Partners, Inc.,* 572 F.3d 293, 298 (6th Cir. 2009) ("[A] district court's decision relating to the choice of distribution plan for the receivership is reviewed for abuse of discretion.")

80 *See* Declaration of Ralph S. Janvey, Doc. 21 at 24-25, ¶ 14; Doc. 21-20, at 32-33, ¶ 65.

- Even in bankruptcy cases (of which this is not one), substantive consolidation is used for multi-entity Ponzi schemes. *See In re Bonham*, 229 F.3d 750, 763-71 (9th Cir. 2000) (affirmed the substantive consolidation of the bankruptcy estates of the Ponzi control person and the entities she manipulated in perpetrating the Ponzi scheme.); *In re Bennett Funding Group, Inc.,* 232 B.R. 565, 567 (Bankr. N.D.N.Y. 1999) (notes the substantive consolidation of the various corporations involved in the Bennett Funding Group Ponzi scheme.); *In re New Times Securities Services, Inc*. 371 F.3d 68, 73 (2d Cir. 2004) (notes that the various entities comprising the $33M New Times Ponzi scheme were substantively consolidated.); *In re Financial Federated Title and Trust, Inc*., 347 F.3d 880, 882 (11th Cir. 2003) (notes that related entities involved in the $115M FinFed Ponzi scheme were substantively consolidated.); *In re Baker & Getty Financial Services, Inc*., 106 F.3d 1255, 1258 (6th Cir. 1997) (notes that personal estates of the perpetrators of a "classic 'Ponzi' scheme were substantively consolidated with the three corporations they used to perpetrate the scheme.); *Sender v. Simon*, 84 F.3d 1299, 1302 (10th Cir. 1996) (notes that the three hedge-fund limited partnerships involved in a Ponzi scheme were substantively consolidated.); *Grassmueck v. American Shorthorn Association*, 365 F. Supp. 2d 1042, 1043 (D. Neb. 2005) (Notes that the bankruptcy court substantively consolidated the estates of 271 investment partnerships involved in a fraudulent cattle investment scheme, the personal estates of the fraudsters, and 31 other "assumed name" and alter ego entities.); *In re Midland Euro Exchange Inc*., 347 B.R. 708, 711 (Bankr. C.D. Cal. 2006) (In case involving "massive Ponzi scheme" totaling more than $100M, the court substantively consolidated the estates of the three entities involved in the fraud, as well as the personal estates of the fraudsters who directed them.); *In re Apponline.com, Inc.*, 315 B.R. 259, 267 (Bankr. E.D.N.Y. 2004) (notes that three corporations involved in a Ponzi-type scheme were substantively consolidated with the estates of the fraudster who directed the scheme.); *In re Western World Funding, Inc., et al*, 54 B.R. 470, 472 (Bankr. D. Nev. 1985) (notes the substantive consolidation of five investment entities involved in a Ponzi scheme.).

CONCLUSION AND PRAYER

Accordingly, the Receiver requests that the court deny the Antiguan Liquidators all relief they seek under their Chapter 15 motion and accord them no rights in or over SIB's assets and affairs.

Dated: December 17, 2009

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

On December 17, 2009, I electronically submitted the foregoing response with the clerk of court for the US 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).

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