

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

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<b>SECURITIES AND EXCHANGE COMMISSION,</b>	§	
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	§	
<b>Plaintiff,</b>	§	<b>Case No.: 3-09-CV-0298-N</b>
	§	
<b>v.</b>	§	
	§	
<b>STANFORD INTERNATIONAL BANK, LTD., ET AL.,</b>	§	
	§	
	§	
<b>Defendants.</b>	§	

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**INX, INC.’S RESPONSE TO RECEIVER’S MOTION  
FOR APPROVAL OF INTERIM DISTRIBUTION PLAN**

**TO THE HONORABLE DAVID C. GODBEY,  
UNITED STATES DISTRICT JUDGE:**

COMES NOW, INX, Inc. (“INX”), an intervening party in the above-captioned case, and files this Response to Receiver’s Motion for Approval of Interim Distribution Plan (the “Interim Distribution Motion”), and, in support thereof, would respectfully show the Court as follows:

**I. INTRODUCTION**

1. The Receiver inappropriately requests that this Court approve an interim distribution to general unsecured creditors while intentionally not providing any distribution to secured or priority creditors including INX. *See, e.g.*, INX Judgment, pp. 1, 8 and 9 (Docket No. 1466)(The Court ordered the Receiver “to allow INX a priority claim in the Receivership’s administrative claims process.”). The requested interim distribution is neither fair nor reasonable because (a) the Receiver provides no evidence that monies will be available to pay all secured and priority creditors in the future and (b) INX’s priority claim should not be subordinated to unsecured claims because the law does not support such subordination by virtue of the fact that

INX's property was unlawfully taken from it by Stanford Financial Group ("SFG"), just like the investor claimants. *See, e.g.*, Intervention Order, p. 3 (Docket No. 1301) ("...the Receiver took delivery of some of the equipment sought by INX. INX, however, has not received payment or return of even that shipment..."). Furthermore, although the Receiver is cognizant that the Court has already granted INX an allowed priority claim in the administrative process, it is abundantly clear that the Receiver has reconciled and investor claims first before reconciling the non-certificate of deposit claims. Therefore, INX respectfully requests that this Court deny the Interim Distribution Motion until the Receiver<sup>1</sup> (a) reconciles the remaining claims and (b) reports to the Court and creditors with a full analysis of the amounts of the allowed secured, priority and unsecured claims that exist in this case (especially when, as of December 31, 2012, the Receiver has already processed over 94% of all claims filed and has less than 6% of claims remaining to reconcile<sup>2</sup>).

## **II. BACKGROUND AND PROCEDURAL HISTORY**

2. INX<sup>3</sup> sold equipment to SFG. On March 15, 2010, INX filed (a) a Motion to Intervene ("Intervention Motion") (Docket No. 1038) and (b) an Amended Verified Motion

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<sup>1</sup> On February 16, 2009, the Securities and Exchange Commission commenced a lawsuit in this Court against R. Allen Stanford and various other parties including without limitation SFG. On February 17, 2009, this Court 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 [Docket No. 157].

<sup>2</sup> On January 9, 2013, the Receiver filed his Eighth Monthly Report Regarding Fees and Expenses Incurred as a Result of the Claims Process [Docket No. 1764], and stated therein that 1,801 claims remain to be processed of the 30,289 total claims he received.

<sup>3</sup> INX immediately sought the return of its equipment from the Receiver. The Receiver refused all of INX's demands. On April 17, 2009, INX filed a Notice of Reclamation Demand (Docket No. 313). On June 9, 2009, INX filed a Verified Motion Seeking Reclamation of Equipment by INX, Inc. or Payment in Lieu of Reclamation and Brief in Support Thereof ("Reclamation Motion") (Docket No. 459). On February 23, 2010, the Court entered an Order Denying the Reclamation Motion because INX was not a party to the case (Docket No. 1022).

Seeking Reclamation of Equipment by INX, Inc. or Payment in Lieu of Reclamation and Brief in Support Thereof (“Amended Reclamation Motion”) (Docket No. 1039).<sup>4</sup>

3. On March 29, 2011, the Court entered an Order granting the Intervention Motion and Sale Motion<sup>5</sup> (“Intervention Order”) (Docket No. 1301).<sup>6</sup> On November 4, 2011, the Court entered an Order granting the Amended Reclamation Motion (“INX Judgment”) (Docket No. 1466).<sup>7</sup> The INX Judgment ordered the Receiver “to allow INX a priority claim in the Receivership’s administrative claims process.” *See* INX Judgment, pp. 1, 8 and 9.

4. On March 16, 2012, the Receiver filed an Amended Motion<sup>8</sup> For Entry of An Order (I) Establishing Bar Date for Claims; (II) Approving Form and Manner of Notice Thereof; and (III) Approving Proof of Claim Form and Procedures for Submitting Proofs of Claim (Docket No. 1546) (“Amended Claim Motion”).<sup>9</sup> On April 6, 2012, INX filed a Response to the Amended Claim Motion (Docket No. 1566). On April 24, 2012, Receiver filed a reply in Support of the Amended Claim Motion (Docket No. 1577) (“Receiver Reply”).

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<sup>4</sup> On September 16, 2011, INX filed a Request for Ruling, or, In the Alternative, Hearing on the Amended Verified Motion Seeking Reclamation of Equipment by INX, Inc. or Payment in Lieu of Reclamation and Brief in Support Thereof (Docket No. 1447).

<sup>5</sup> On January 19, 2011, the Receiver filed a Motion for Authorization to Sell Miscellaneous Property (“Sale Motion”)(Docket No. 1215). On January 20, 2011, INX filed its Response in Opposition to the Sale Motion (Docket No. 1217).

<sup>6</sup> The Intervention Order specifically ordered that “The Receiver, however, may not dispose of any property claimed by INX until the Court rules on its pending motion for reclamation.” Intervention Order, p. 4.

<sup>7</sup> The Court ordered INX to file the motion for attorneys’ fees within thirty days from the date of INX Judgment. On December 2, 2011, INX filed a Motion For Attorneys’ Fees and Brief in Support (Docket No. 1484) (“Fee Motion”). On August 23, 2012, the Court entered an Order granting in part and denying part the Fee Motion (Docket No. 1685).

<sup>8</sup> On November 16, 2011, the Receiver filed a Motion For Entry of An Order (I) Establishing Bar Date for Claims; (II) Approving Form and Manner of Notice Thereof; and (III) Approving Proof of Claim Form and Procedures for Submitting Proofs of Claim (Docket No. 1473) (“Claim Motion”). In footnote number 2 of the Claim Motion, the Receiver stated “Any claim submitted by INX will be treated in accordance with the Court’s Order of November 4, 2011.” *See* Claim Motion, p. 14 (Docket 1473).

<sup>9</sup> On May 4, 2012, the Court entered an Order granting the Amended Claim Motion (Docket No. 1584).

5. On August 28, 2012, INX filed its proof of claim (“INX Proof of Claim”). The Receiver assigned the INX Proof of Claim the following claim number: STANFORD-1013274-0. As of the date of this response, the Receiver has not served INX with a Notice of Deficiency or Notice of Determination.<sup>10</sup>

6. On January 11, 2013, the Receiver filed the Motion for Approval of Interim Distribution Plan (“Interim Distribution Motion”).

### **III. INX’S RESPONSE TO THE INTERIM DISTRIBUTION MOTION**

7. For the reasons stated above and herein, the Court should deny the Interim Distribution Motion because the requested interim distribution is neither fair nor reasonable to secured and priority creditors, particularly to INX.

8. First, this Court has already ordered the Receiver to allow INX a priority claim in the Receivership’s administrative claims process. *See* INX Judgment. Without disclosing the amount of allowed secured and priority allowed claims or disclosing the exact amount of cash available in the receivership estate to pay allowed claims, the Receiver erroneously claims that the purported secured claimants will not be prejudiced because there should be enough assets leftover to cover those claims, and any subordination to Investor CD claims can be dealt with in future distributions which may or may not come to fruition. Because the Receiver fails to adequately disclose exactly what assets will remain in the receivership estate should the Court approve the interim distribution, it is impossible to ascertain whether secured and/or priority creditors will be prejudiced by this distribution. The Receiver’s Fourth Interim Report Regarding Status of Receivership, Asset Collection, and Ongoing Activities dated June 22, 2012

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<sup>10</sup> On January 10, 2013, counsel for INX e-mailed counsel for the Receiver regarding the status of receiving a Notice of Deficiency or Notice of Determination. To date, counsel for Receiver has yet to respond to counsel for INX.

(Docket No. 1630) (“Status Report”) indicated that \$94.5 million dollars in unrestricted cash is available, but that was the cash balance as of May 31, 2012. The Status Report should be updated so that creditors and the Court are apprised of the amount of monies available to pay allowed claims. Furthermore, the Interim Distribution Motion should be amended to include a list of all allowed claims or, alternatively, the Receiver should post the allowed claims register on the Receiver’s website so the Court and creditors can review the allowed claims in conjunction with the Status Report.

9. Second, without providing the Court with any evidence supporting why the Investor Claimants need the money the most versus other defrauded creditors in this case, the Receiver states that “the Receiver believes that the interim distribution should direct resources where they are needed most --to the Investor CD Claimants.” INX respectfully disagrees. The Receiver argues that the Court should subordinate other general and secured creditors’ claims to the defrauded investors’ claims, but the cases cited by the Receiver do not hold that the Court has the authority to subordinate the claims of secured and priority creditors in favor of the investor creditors. (Emphasis added). In fact, the cases cited by the Receiver only hold that the class of fraud victims takes priority over the class of non-priority unsecured creditors with respect to proceeds traceable to the fraud. *See Quilling v. Trade Partners, Inc.*, No. 1:03-cv-236, 2007 WL 107669, \*3-4 (W.D. Mich. Jan. 9, 2007)(the court subordinated only unsecured claims to the defrauded investor unsecured claims); *see also CFTC v. PrivateFX Global One*, 778 F. Supp 2d 775, 786 (S.D. Tex 2011)(the court subordinated only unsecured claims to the defrauded investor unsecured claims); *see also Nw. Bank Wis., N.A. v. Malachi Corp.*, 245 F. App’x 488, 495 (6th Cir. 2007)(affirming partial distribution to one group of unsecured creditors over another group of unsecured creditors). In fact, in *HKW*, the Court held that one

administrative creditor's claim should not be subordinated to the defrauded investor creditors. See *SEC v. HKW Trading LLC*, No. 8:05-cv-1076-T-24-TBM, 2009 WL 2499146, \*5-6 (M.D. Fla. Aug. 14, 2009)(Emphasis added). Therefore, the Receiver does not cite to any authority supporting the subordination of secured or priority creditors to the defrauded investor creditors' claims.

10. Finally, the Receiver has argued in this case, *inter alia*, that “[t]he Receiver cannot structure a pro rata distribution proposal, however, unless and until he has processed all submitted claims and knows what claims will be allowed. Because the Receiver will make claim determinations on a rolling basis as they are submitted and then submit a proposed distribution plan after all claims are processed, it is not feasible to impose a deadline to pay individual claims tied to the date they are allowed by the Court or the Receiver.” See Receiver Reply, p. 4 (Docket No. 1577)(Emphasis added). If the Receiver is not prepared to pay INX's administrative priority claim, then, the Receiver should reconcile all claims and then seek permission to pay the allowed claims. See Receiver Reply, p. 4. The creditors have waited a long time for a distribution in this case. With merely 1,801 claims left to reconcile, it is ostensibly fair and reasonable to all creditors in this case for the Court to wait for the Receiver to finish reconciling the claims in this case and then consider a distribution to all of the creditors. The Court should approve only a distribution that pays allowed secured and priority claims in full, and then, and only then, pays allowed unsecured creditor claims.

WHEREFORE, PREMISES CONSIDERED, INX respectfully requests that this Court (i) order the Receiver to pay INX's administrative priority claim in full or otherwise (ii) deny the Interim Distribution Motion without prejudice so that the Receiver can complete the claims reconciliation and report to the Court and creditors on the amounts of the allowed secured,

priority and unsecured claims and the monies available to pay those allowed claims, and (iii) grant such other and further relief as may be just and proper.

Dated: January 29, 2013.

Respectfully submitted,

/s/ Mark A. Castillo  
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**COUNSEL FOR INX, INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that on January 29, 2013, 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 a true and correct copy of the this response on 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/ Mark A. Castillo  
Mark A. Castillo