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

In re	:	Chapter 15
Stanford International Bank, Ltd.,	:	Case No. 09-0721 (DCG)
Debtor in a Foreign Proceeding.	:	

LIQUIDATORS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR RECOGNITION UNDER CHAPTER 15 OF THE U.S. BANKRUPTCY CODE

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In a desperate attempt to convince this Court to disregard the U.K. Court's ruling and create competing main proceedings, the Receiver contends that (i) the U.K. Court applied an "objective and ascertainable" standard to the COMI analysis that does not apply under U.S. Chapter 15 cases, and (ii) it was improper for the U.K. Court to have placed significant emphasis on factors that are objective and ascertainable to third parties because there was a fraud involved. Contrary to the Receiver's contentions, the U.K. Court followed the same standard applied in the U.S. Indeed, consistent with the Chapter 15 legislative history emphasizing that foreign court COMI interpretations should be viewed as persuasive because "they advance the crucial goal of uniformity of interpretation," nearly every U.S. court that has conducted a COMI analysis has referenced the "ascertainable by third parties" language from the EU Regulation, which courts everywhere have relied upon as informing the COMI analysis and promoting the goal that international jurisdiction be based on a place known to the debtor's potential creditors so that legal risks can be calculated. In fact, no U.S. court has ever suggested, as the Receiver advocates here, that factors unascertainable to third parties should be given equal or greater weight than ascertainable factors, let alone determined a company's COMI to be in a jurisdiction based on factors largely unascertainable when virtually all factors ascertainable to third parties place the COMI elsewhere.

Furthermore, the fact that Stanford may have orchestrated a massive fraud is clearly no basis to disregard the factors that were ascertainable and instead rely on a determination of the location from which the fraud may have been conducted. Adoption of such a rule would set a dangerous precedent, allowing fraudsters to locate the COMI somewhere no creditors or investors would have suspected.

Moreover, while the Receiver asserts that "[w]here the levers were and who was pulling them are among the most important issues in a COMI analysis" and continues to suggest that Stanford was pulling those levers from the U.S., the Receiver completely ignores Judge Hittner's recent order, which Liquidators submitted to the Court on July 6, 2009. Following an evidentiary hearing largely focused on the very issue of the location from which Allen Stanford was pulling the levers, Judge Hittner found that Allen Stanford's primary residence was not in the United States, but in Antigua. Judge Hittner also found that Mr. Stanford was almost in a constant state of travel for five years, and as the UK Court stated "it is not possible for a corporation to have world-wide COMI." ([DKT 52] UK Order ¶ 98(iv)). The facts and the case law, whether under Chapter 15 or enactments of the Model Law abroad, compel only one result here – SIB's COMI is in Antigua, where it was held out to the world to be headquartered, where its day to day operations were conducted, and where almost all of its employees and its only significant office were located.

THE PREFERENCE FOR FACTORS THAT ARE OBJECTIVE AND ASCERTAINABLE TO THIRD PARTIES IS FOLLOWED IN THE UNITED STATES

Contrary to the assertions of the Receiver and the Examiner, U.S. courts do not apply a different analysis and interpretation of COMI than courts in the European Union. To the contrary, adhering to Congress's direction that courts "shall consider" how COMI has been construed in other jurisdictions so that Chapter 15's "crucial goal of uniformity of interpretation" can be accomplished,[1] U.S. courts consistently follow the same test as *Eurofood*:

[1] *See* 11 U.S.C. § 1508 (2005) (providing that the court "shall consider . . . the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions"); H.R. Report No. 109-31, at 109-10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172-73 (explaining that consideration of COMI opinions in other countries "advance[s] the crucial goal of uniformity of interpretation").

> Courts have found that the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency ("Guide") explained that the COMI was modeled after the European Union Convention on Insolvency Proceedings ("EU Convention") which states: the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007) (citing Council Reg. (EC) No. 1346/2000, P 13); *see also In re Basis Yield Alpha Fund*, 381 B.R. at 47. This generally equates with the concept of a principal place of business in United States law.

In re Grand Prix Associates Inc., No. 09-16545 (DHS), 2009 WL 1410519, at *6 (Bankr. D.N.J. May 18, 2009) (internal quotations omitted); *see also In re Betcorp, Ltd*, 400 B.R. 266, 291 (Bankr. D. Nev. 2009) (citing *Eurofood* as authoritative and explaining that "it is important that the debtor's COMI be ascertainable by third parties … COMI is affected not only by what a debtor does, but by what a debtor is perceived as doing."). Indeed, nearly every other U.S. case analyzing COMI has made reference to the "ascertainable by third parties" standard of the EU Regulation:

> *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006) ("In the regulation adopting the EU Convention, the concept is elaborated upon as 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.' Council Reg. (EC) No. 1346/2000, ¶ 13. 'This generally equates with the concept of a principal place of business' in United States law.'");
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> *In re SPhinX, Ltd*., 371 B.R. 10, 19 (S.D.N.Y. 2007) ("[T]he Bankruptcy Court rightly concluded that objective factors ascertainable to third parties pointed to the SPhinX Funds' COMI not being located within the Cayman Islands.");
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> *In re Ernst & Young, Inc*., 383 B.R. 773, 779 (Bankr. D. Colo. 2008) (the EU Regulation places a debtor's COMI in "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" (quoting *Tri-Continental*, 349 B.R. at 634));
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> *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 336 (S.D.N.Y. 2008) ("The regulation adopting the EU Convention explains that 'center of main interests' means 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'");

> *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008) (the EU Regulation holds that COMI "means 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'" (quoting *Bear Stearns*, 374 B.R. at 129)); and
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> *In re Innua Canada Ltd*., No. 09-16362 (DHS), 2009 WL 1025090, at *5 (Bankr. D.N.J. Apr 15, 2009) ("Courts have found that the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency explained that the COMI was modeled after the European Union Convention on Insolvency Proceedings which states: 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'").

The Receiver cannot cite to any case that has applied a standard different from the objective and ascertainable standard because there are none.[2]

Cases dealing with fraud – *e.g.*, *In re Tri-Continental Exchange*. – also use the objective and ascertainable standard. No court has held that the COMI analysis should be fundamentally altered because a fraud was involved, let alone that a court should largely disregard factors that were ascertainable to third parties in such a case and instead seek to determine the location from which the fraud was conducted. The only reason that the Receiver's incorrect theory of the law on COMI is apparently palatable to some in this case is because the fraud happened to have been orchestrated (at least according to Receiver, but not Judge Hittner) from the U.S. and the ascertainable factors point to a jurisdiction of Antigua. If it were the reverse, and the fraud was orchestrated from Antigua but ascertainable factors led investors to believe that the COMI was in the U.S. because the central institution was a U.S. entity with its day to day operations in the

[2] Instead, the Receiver suggests that placing importance on whether factors are objective and ascertainable by third parties would somehow be importing a new requirement into Chapter 15. It is the Receiver, however, that is asking this Court to stray from the clear language of the statute by advocating that the Court ignore, contrary to Chapter 15's express requirement that the Court promote an application of the COMI analysis consistent with courts in other countries, the uniform recognition of courts in the U.S. and the European Union that the COMI determination should be informed by what is ascertainable to third parties to promote the goal, as recognized in the seminal report underlying the adoption of the center of main interests phrase, that "international jurisdiction . . . be based on a place known to the debtor's potential creditors [because it] enables the legal risks which would have to be assumed in the case of insolvency to be calculated." Miguel Virgos & Etienne Schmit, Report on the Convention on Insolvency Proceedings, EU Council Doc. 6500/96 DRS 8 (CFC) (May 3, 1996), ¶ 75, *available at* http://aei.pitt.edu/952/01/insolvency_report_schmidt_1988.pdf (last visited July 13, 2009).

U.S. and the investment contracts provided for the application of U.S. law, no court would even entertain the idea that the COMI is in Antigua. Under the Receiver's theory of the law, however, that would be the result. And contrary to the Examiner's warning in his brief, it is the Receiver's inaccurate view of the law that would permit the Stanfords and Madoffs of the world to secretly locate a COMI somewhere no creditors or investors would have suspected. That cannot be what was intended by the Model Act or Chapter 15. Finding COMI for SIB in the US based on a determination that the fraudsters were making the key decisions from the US, rather than based on the location where SIB was held out to investors to be headquartered, its day to day operations were conducted, and almost all of its employees and its only significant office was located, would set a dangerous precedent.

The assertions of the Receiver and the Examiner (in his brief filed on July 8) that the reasoning of the UK Order should be disregarded are not persuasive, rely too much on distinguishable case law (*Bear Stearns*), and ignore case law on point (*Tri-Continental*) and that is binding on this Court ((*J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 408-09 (5th Cir. 1987); *Teal Energy USA, Inc. v. GT, Inc*., 369 F.3d 873, 877 (5th Cir. 2004)). Indeed, while the Receiver and the Examiner do not contest the fact that the principal place of business analysis is applicable, when it comes to applying the test to the facts here they simply and conveniently ignore it. The Fifth Circuit's decisions in *J.A.Olsen* and *Teal Energy*, however, expressly find that the principal place of business is where the business has its operations even when decision-makers are in a different jurisdiction.[3]

[3] The Fifth Circuit in *J.A. Olson* lists "visibility" as one of the factors it considered in determining principal place of business. The Fifth Circuit found that "Winona is where the vast majority of Olson's employees are located, is where Olson is most visible, is where its products are manufactured, is where it has its most substantial investment, and indeed is where, more than any other place, its corporate purpose is fulfilled." 818 F.2d at 413. The Examiner's brief did not address these important cases and instead relied almost exclusively on the *Bear Sterns* case, which is distinguishable from the facts here. (*See* [DKT 37] Reply at 3). While the Liquidators appreciate the

THE IMPACT OF THE UK ORDER ON COOPERATION

As Liquidators pointed out in their Reply, recognition of Liquidators as the foreign representative and the Antiguan Proceeding as the foreign main proceeding is the only path to cooperation among the competing jurisdictions. Such cooperation is one of the objectives of Chapter 15, but the Receiver has steadfastly refused to cooperate with Liquidators. Given the UK Order, further wasteful litigation, competing main proceedings and inconsistent court rulings appear inevitable if this Court were to ignore the consistently applied strong preference for factors that are objective and ascertainable to third parties and instead apply the Receiver's articulated test.[4] If this Court determines COMI is in the U.S., it will create competing main proceedings for the first time in Chapter 15's short history. The result of such an action will be unpredictable, but more litigation will surely follow, and the limited resources available to investors and creditors will be further diminished. There is no question that cooperation between Liquidators and the Receiver is essential to maximize the return for investors and creditors, and the sooner the Court rejects the Receiver's argument to apply an ill-advised and result-oriented COMI test, rather than the widely recognized standard applied correctly and soundly by the UK Court, the sooner investors and creditors will see the essential cooperation that is necessary.

(continued…)

efforts of the Examiner, the Examiner's failure to address these cases, some of which are binding on this jurisdiction, should persuade the Court to disregard the Examiner's arguments regarding COMI.

[4] The Examiner seems to advocate an unprecedented exception to Chapter 15 recognition – if a U.S. government agency objects to the designation of a foreign main proceeding, a Court should ignore the law, the legislative history of Chapter 15, the principles underlying Chapter 15 and apply the public policy exception. The Examiner's reasoning misses the mark. Courts routinely disagree with positions taken by the SEC. *See, e.g., Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994) ("A brief history of aiding and abetting liability serves to dispose of this [the SEC's] argument"). Likewise, a brief history of the public policy exception disposes of the Examiner's and the SEC's argument. (*See* [DKT 37] Reply at 15-18) The only reason cited by the SEC is that granting the Liquidator's petition would upset its use of equity receivers – a use that circuit courts have questioned in circumstances close to these. To accept the Examiner's logic would create a wholly new exception because all a government agency would have to do to nullify the law's application is argue that its application is contrary to governmental agency's interpretation of the law. That cannot be what Congress intended.

CONCLUSION

For these reasons, and for all of the reasons articulated in Liquidators' previous submissions to the Court, Liquidators request that the Court recognize them as "foreign representatives" and recognize the Antiguan Proceeding as a "foreign main proceeding" pursuant to chapter 15 of the United States Bankruptcy Code.

Dated: July 13, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Evan P. Singer

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