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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 3-09-CV 0298-N**
	§	
STANFORD INTERNATIONAL BANK, LTD., *et al.*,	§	
	§	
Defendants.	§	

BRIEF OF THE EXAMINER IN RESPONSE TO THE RECEIVER'S MOTION TO APPROVE REAL PROPERTY SALES PROCEDURES

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TO THE HONORABLE JUDGE OF SAID COURT:

John J. Little, Examiner, submits his brief[1] responding to the Receiver's Motion to Approve Procedures for Sales of Real Property [Doc. No. 389].[2]

I. Summary.

The Examiner does not oppose the sale of real property owned by the various Stanford entities currently under the jurisdiction of the Receiver. Given that the Stanford entities have all ceased to conduct business, the real properties owned by those entities will need to be liquidated at some point to secure the value of those properties for the creditors, including the Investors.

Nevertheless, for the reasons set forth below, the Examiner believes that the Receiver's Motion to Approve Procedures for Sales of Real Property fails to provide the parties and the

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[1] Pursuant to the Court's Order dated April 20, 2009 [Doc. No. 322], the Examiner's task is to convey to the Court such information as he determines may be helpful to the Court in considering the interests of the Investors. The Investors are defined as any "investors in financial products, accounts, vehicles or ventures sponsored, promoted or sold by any Defendants in this action."

[2] The full title of the Receiver's Motion is the *Receiver's Motion to Approve Procedures for Sales of Real Property, Accept CB Richard Ellis's Fee Proposal, and Conduct Sales of Real Property by Public Auction Pursuant to Proposed Real Property Sales Procedures*.

Court with sufficient information to permit the parties to evaluate and the Court to grant the various relief sought by the Receiver. The Receiver's Motion raises far more questions than it answers, and the Court should defer ruling on the Motion until such time as the Receiver provides to the parties and the Court further information on a number of critical issues. The Examiner addresses below these various issues and the questions left unanswered by the Receiver's Motion.

The Examiner also has certain reservations concerning the procedures that the Receiver proposes to use to sell the real property. Those reservations are also addressed below.

II. The Receiver's Motion.

Through his Motion, the Receiver seeks three forms of relief. He first asks the Court to approve a procedure through which he would attempt to sell more than fifty (50)[3] different pieces of real property located in Texas, Mississippi, Tennessee, North Carolina, Michigan, and the U.S. Virgin Islands. Next, he asks the Court to approve the payment of fees to CB Richard Ellis ("CBRE") in accordance with CBRE's fee proposal to the Receiver. Finally, he asks the Court for authority to sell the real property pursuant to the procedures he has proposed.

III. Questions Left Unanswered by the Receiver's Motion.

As noted above, the Examiner does not oppose the sale of real property owned by the Stanford entities, and agrees with the Receiver that the liquidation of those properties will be of benefit to the Receivership estate. The Examiner opposes the relief sought by the Receiver in the present Motion because the Receiver simply has not provided the parties and the Court with

[3] The Receiver's proposed contract with CB Richard Ellis (Appendix to Receiver's Motion, Exhibit B) lists what appear to be fifty-four (54) separate properties, including eight (8) that are described as residential. The contract also lists "multiple" properties located in St. Croix.

sufficient information to evaluate the procedure he has proposed and the fee arrangement he has made with CBRE.

A. What Properties Does the Receiver Seek to Sell?

The Receiver's Motion contains precious little information about the properties he seeks authority to sell. The Motion itself says only that there are "more than 50 different parcels." *Motion at 5.* A list of the properties can be found within the body of CBRE's fee proposal. *Appendix, Ex. B at 6-9.* That list contains no information concerning the appraised values of the various properties, nor does it contain even an estimate of the likely sales prices that the Receiver might realize if he is authorized to proceed with sales.[4] The Investors are extremely interested in learning what the Receiver estimates he is likely to realize if he is permitted to proceed with the sale of these properties using the procedure he proposes.

A corollary point is that the Receiver's Motion does not address whether there are outstanding debts secured by any of the properties he seeks to sell. It may be that there are none, but it may also be that some or all of the properties are encumbered by debt that will reduce significantly the proceeds that might be realized from the sale of these properties. The Receiver should be required to provide the parties and this Court with that information.

The list found within the CBRE proposal is not particularly informative. For two of the properties, the list states that the "description" of the properties is "unknown." *Appendix, Ex. B at 8.* For twenty-three properties located in Tennessee (all but one of which is located in Shelby County, Tennessee), the "description" is "N/A." *Id. at 8-9.* The information included on the list is identical (and not particularly informative) for nine (9) properties in Shelby County, Tennessee

[4] The lack of information concerning the value of the properties has a number of ramifications, not the least of which is that the parties and the Court have no way to determine how many of these properties might fall in the *de minimus* category (defined by the Receiver as having a value under $100,000) such that the procedures being proposed by the Receiver would not apply to those properties.

-- the list says only that the properties are located on Chinquapin Drive. *Id. at 9.* The same is true for eight (8) properties that are identified only as being located on Collierville Arlington Rd. in Shelby County, Tennessee. *Id. at 8-9.* For the properties located in the U.S. Virgin Islands, the list provides neither the number of properties, nor the location of the properties (other than St. Croix), nor any particular description of the properties (the list says only "owned, use TBD"). *Id. at 7.*

The Receiver's Motion and Appendix makes no effort to identify the Stanford entity that owns each piece of property. As the Court well knows, there are Investors (and others) who believe that it is inappropriate for the Receiver to treat all of the Stanford entities (including but not limited to Stanford International Bank, Ltd.) as a single unit for purposes of gathering assets, paying expenses, and processing claims.[5] While that is an issue for another day, it would be both useful and appropriate for the Receiver to identify the entity that owns each piece of property that the Receiver seeks to sell.

Before the Court approves any procedure for the sale of real property, the Examiner respectfully suggests that the Court should require the Receiver to provide more complete information concerning the fifty plus pieces of property that he seeks to sell. That information should include, at a minimum, accurate information concerning where the properties are located and the uses to which the properties are put. It should include the identification of the entity that owns each property. Finally, it should include an appraised (or, at least, estimated) value for each property and the identification of any outstanding debt with respect to each property.

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[5] *See, e.g.*, Notice of Antiguan Liquidators' Objection to the Receiver's Motion for Approval of Interim Fee Application and Procedures for Future Compensation of Fees and Expenses [Doc. No. 433].

B. How and Why Did the Receiver Select CBRE?

The Examiner is familiar with CBRE and has no reservations concerning its ability to handle the marketing of the properties owned by the Stanford entities. CBRE is not the only firm that is capable of performing that task. The Receiver's Motion offers no information concerning how CBRE was selected, nor how its rates were negotiated (if they were). Any agreement by the Receiver to pay CBRE (or any other professional, for that matter) is an agreement that will be funded by dollars that would otherwise have been available to the Stanford creditors, including the Investors. The Investors want to know that the Receiver is prudently spending their money.

To that end, the Court should require the Receiver to provide at least the following information:

1. What other firms did the Receiver consider for this task?
2. Why did the Receiver select CBRE?
3. How do CBRE's costs compare to alternative firms the Receiver could have chosen?

A more fundamental issue that is not addressed in the Receiver's Motion concerns why the Receiver needs a national/international real estate firm. For fifty-one (51) of the Stanford-owned properties on CBRE's list, CBRE's fee proposal reflects that the Receiver would pay a local broker commission plus a CBRE consulting fee. *Appendix, Ex. B at 6-9*. That suggests, not surprisingly, that CBRE will not be directly involved in the marketing and sale of the lion's share of the properties.[6] Rather, it will be compensated for its consulting services, on an hourly basis, at rates that rival those of the law firms that have been engaged by the Receiver.[7] The Receiver

[6] CBRE's list shows fifty-four (54) Stanford owned properties, plus the "multiple" properties in St. Croix.

[7] CBRE will charge $500 per hour for Mr. Gordon's time (and any other executive vice president's time), $250 per hour for an associate broker's time, and $200 per hour for a consultant's time.

will also pay local brokers their commissions upon the sale of properties listed with those local brokers.

The vast majority of the property to be sold is located in the vicinity of Memphis, Tennessee (twenty-eight parcels), and Tupelo, Mississippi (seventeen parcels). It is certainly plausible that the Receiver could directly engage a real estate broker in each of those cities to handle the marketing of the properties located in the vicinity of those cities, and that by doing so he might be able to eliminate the need to pay significant consulting fees to CBRE. The Receiver's Motion does not articulate any basis for the Receiver's conclusion that it is necessary or appropriate for him to retain CBRE as opposed to local brokers.[8]

Finally, the Receiver's Motion does not attach his contract or engagement agreement with CBRE. The document found in the Appendix at Exhibit B is a "fee proposal," not a contract or engagement agreement. It does not address the Receiver's rights to terminate the engagement, nor does it address fundamental matters like the term of the engagement, any limitations of liability, or any representations or warranties that are being made by CBRE to the Receiver. The Receiver should provide the parties and the Court with a copy if his contract or engagement agreement with CBRE.

C. What is the Likely Cost of the Process the Receiver Advocates?

Given the magnitude of the fees and expenses sought in the Receiver's first interim fee application (Doc. No. 384), it is fair to say that the Investors are particularly sensitive to the

[8] The Receiver's Motion does talk about CBRE preparing various informational memoranda, confidentiality agreements and offering memoranda concerning the "larger commercial properties." The information provided by the Receiver in his Motion does not identify which properties are viewed by the Receiver and/or CBRE as "larger commercial properties." The Examiner assumes that Stanford's former headquarters at 5050 Westheimer, in Houston, Texas, is one of these "larger commercial properties, but cannot identify any others based upon the information provided by the Receiver.

likely costs that will be incurred if the Receiver's procedure for selling real property is approved. The Receiver's Motion does not speak to this issue. The Motion does not provide appraisals or estimated values for the various pieces of property at issue, from which the Investors could at least calculate the likely impact of real estate commissions in the range of 4% to 6%. The Motion provides almost nothing in the way of an estimate from CBRE concerning the amount of consulting time that it might devote to its engagement by the Receiver,[9] and offers no hint as to the likely costs that the Receiver will incur if CBRE provides consulting services pursuant to its proposal. Before the Court approves the Receiver's procedure for selling real property and his agreement to engage CBRE, the Examiner respectfully suggests that it should require the Receiver to provide at least some estimate of the amounts that he is proposing to spend.

IV. Concerns about the Receiver's Proposed Procedure.

The Receiver's procedure for selling real estate seems to combine aspects of the process through which Receiver's typically sell receivership property (the process mandated by 28 U.S.C. §2001 *et seq.*) with the process through which debtors (and others) typically sell property in a bankruptcy (11 U.S.C. §363). In this combined process, the Receiver proposes to do a number of things that cause the Examiner some concerns, as set forth below.

A. The "Break-Up" Fee Paid to the "Stalking Horse"[10] Bidder.

The Examiner understands that property sales in the bankruptcy courts often involve what the Receiver has called a "stalking horse" bidder, and the Examiner further understands that the

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[9] CBRE's list does estimate, as to "multiple" US leasehold properties, that it would devote four consultant hours to each leasehold property, and that Stanford estimates that there are ten to fifteen such leasehold properties. CBRE's list does not indicate whether those consultant hours are $200 hours or $500 hours. *See Appendix, Ex. B, p. 6.*

[10] At least one court has observed that the term "stalking horse" is "both underinclusive and misleading as a purported justification for a break-up fee." *In re Integrated Resources, Inc.*, 147 B.R. 650, 661 (Bankr. S.D.N.Y. 1992).

bankruptcy courts often approve the payment of a "break-up" fee to a "stalking horse" bidder who is ultimately outbid for a piece of property. The Receiver's Motion suggests that this "break-up" fee would "cover, inter alia, all of the Stalking Horse's costs and out-of-pocket expenses (including attorneys' fees) in connection with its due diligence and the preparation and negotiation of the purchase and sale agreement." *Motion at 10.* The Motion does not anywhere suggest that the "break-up" fee would be capped or limited in any way.

Courts that have considered the propriety of paying "break-up" fees have identified a number of factors that should be considered. Those factors include (but are not limited to) the following:

1. Whether the agreement negotiated with the "stalking horse" is an arms-length transaction;

2. Whether the proposed "break-up" fee constitutes a fair and reasonable percentage of the proposed purchase price; and

3. Whether the dollar amount of the "break-up" fee is so substantial that it provides a "chilling effect" on other potential bidders.

In re Hupp Industries, Inc., 140 B.R. 191, 194 (Bankr. N.D. Ohio, 1992). *See also In re O'Brien Environmental Energy*, 181 F.3d 527, 534 (3rd Cir. 1999)(identifying various sets of factors used to evaluate "break up" fees). The Receiver's Motion contains no discussion of any of these factors; it says simply that bankruptcy courts allow the payment of such "break-up" fees.[11]

To justify the payment of a "break-up fee," the Receiver's Motion focuses upon the risks undertaken by the "stalking horse." The Receiver ignores the various benefits that the "stalking horse" bidder receives from filling that role. Among other things, the "stalking horse" bidder would likely have considerably more time to conduct his due diligence than would bidders who

[11] Not all courts have found "break-fees" acceptable. *See, e.g., In re America West Airlines, Inc.*, 166 B.R. 908 (Bankr. D. Ariz. 1994)(payment of break-up fee not in best interest of estate).

join the process at the public sale. Also, the "stalking horse" is the only bidder who has an opportunity to negotiate favorable purchase terms. The Receiver's Motion makes it clear that subsequent bidders must propose terms that are substantially similar to, or better than, the terms negotiated by the "stalking horse." *Motion at 7.* Finally, the "stalking horse" has an economic edge in that any subsequent bidder must offer more than the "stalking horse" bidder's bid, plus the "break-up fee." *Id.*

The Examiner suggests that any procedure that includes the payment of a "break-up fee" to the Receiver's "stalking horse" bidder should also include a cap on the amount of such fee (expressed as a percentage of the bid). Where bankruptcy courts have permitted the payment of a "break-up" fee, it is not uncommon to see those fees limited to a small percentage of the amount bid. *See In re Integrated Resources, Inc.*, 147 B.R. 650, 661 (Bankr. S.D.N.Y. 1992)(approving "break-up" fee equal to 1.6% of the proposed purchase price); *In re Hupp Industries, Inc.*, 140 B.R. 191, 194 (Bankr. N.D. Ohio, 1992)(noting that "break-up" fees between one and two percent have been authorized by some courts). The Examiner respectfully suggests that any procedure approved by the Court that permits the use of a "stalking horse" bidder should also limit the amount of any "break-up" fee to no more than 2% of the amount bid by the "stalking horse."

B. Appraisals are a Useful Reality Check.

The Receiver apparently does not contemplate any role for appraisals in the procedure he advocates. His Motion identifies no appraised or estimated values for any piece of property (nor for the properties as a whole), and this procedure does not require that appraisals be obtained at any point in the process.

The Examiner respectfully suggests that the Receiver should be required to obtain at least one appraisal for each piece of real property he proposes to sell. While his procedure might well

yield a fair price for each piece of property, there is no way to tell if that is the case unless there is some yardstick by which the sale can be evaluated. That yardstick is an appraisal.

Forty-five (45) of the properties are located in the vicinity of Memphis, Tennessee or Tupelo, Mississippi. It should not be particularly expensive to commission a local real estate appraisal firm in each of those cities with the task of delivering appraisals for those properties. Similarly, the Receiver can certainly identify and hire a real estate appraiser in Houston who can deliver appraisals of the five (5) pieces of property located in and around Houston.

C. The Court Should Reject "Website Only" Notice.

The Receiver proposes that the only notice he will provide of a proposed "public sale" will be via his website.[12] The Receiver makes the bold and wholly unsubstantiated claim that this "website only" notice will be "just as effective as publication of the Notice in newspapers for four weeks." The Receiver also attempts to support this claim by suggesting that he would have to purchase advertisements in "a dozen different" newspapers for a four week period, *Motion at 5,* and that such an expenditure would be "hard to justify." The Examiner disagrees.

A potential buyer of real estate in Shelby County, Tennessee (twenty-five properties) or Prentiss County, Mississippi (at least eleven properties) would have little or no reason to visit the Receiver's website. The Receiver's website is directed at individuals and entities with an interest in the Stanford Receivership, and more specifically at claimants in that Receivership. There would be no reason for a potential real estate buyer in Shelby County, who was otherwise uninvolved with Stanford, to even consider reviewing the Receiver's website. Conversely, that same potential real estate buyer in Shelby County likely knows that properties to be sold at public sale traditionally are advertised via notices published in the local paper.

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[12] The Receiver also indicates that contact will be made with potential buyers identified by CBRE, but such selective contact is hardly a substitute for "public notice."

The Receiver's complaint that publication is too expensive rings hollow. The Receiver's Motion contains no information concerning the likely costs of publishing notice, nor does it contain any information through which one can determine how that cost compares to the value of the real estate to be sold. As noted previously, the vast majority of the real estate at issue is located in only a few counties in Tennessee (Shelby and Fayette Counties) and Mississippi (Lee and Prentiss Counties). While it is difficult to imagine that the cost of publishing notice in those counties would be "hard to justify," the Receiver could present information concerning those costs to the Court and seek relief. For example, he might ask the Court to reduce the number of newspapers in which he must publish notice, or to reduce the number of weeks of publication from four weeks to three, or even two. He has done none of this.

D. The Receiver's Notice and Motion are Inconsistent.

The Receiver's Motion indicates that competing bids are to be submitted five (5) business days prior to the date of the public auction. *Motion at 6.*The Receiver's proposed Notice indicates that competing bids are to be submitted three (3) business days prior to the date of the public auction. *Appendix, Ex. A.* The Receiver obviously needs to inform the Court and the parties as to which time period -- three business days or five -- he intends to require.

The Examiner respectfully submits that requiring the submission of competing offers five (5) business days prior to the public auction is unreasonable, and that even the three (3) business day requirement may cause some prospective buyers to be excluded. The Examiner assumes that the Receiver's goal is to maximize the proceeds realized from the sale of these properties, not to exclude potential bidders from the process. To that end, the Examiner respectfully suggests that competing bids be accepted until one (1) business day prior to the public auction.

E. The Procedure Gives the Receiver Too Much Discretion.

The Examiner is also concerned that the Receiver's procedure grants him entirely too much discretion that could result in the sale of properties for less than full value. The Receiver retains "sole discretion" to exclude a potential bidder from the public auction if that bidder's competing offer was not timely received. *Motion at 6.* The Receiver has the right to demand from potential bidders financial information "acceptable to the Receiver in his sole discretion" that demonstrates the potential bidder's ability to close. *Id.* The Receiver has the right to determine, in his sole discretion, when and where to conduct the public auction. *Id. at 8.* The Receiver has the right, in his sole discretion, to sell individual properties or to combine parcels into a single sale. *Id. at 10.*

The Examiner is particularly troubled that the Receiver's procedure gives him the "sole discretion" to determine the "successful bidder," taking into account the form of purchase agreement submitted by each bidder, the purchase price bid, the likelihood of closing, the net benefit to the Receivership estate, and "such other facts as the Receiver may deem relevant in his sole discretion." *Motion at 9.* The Receiver's procedure appears to require that each of these factors be considered earlier in the process, such that no one factor (or combination of factors) should be permitted to derail a successful bid. For example, the form of a competing bidder's purchase agreement is one of the factors to be addressed in deciding whether that bidder submitted a qualifying bid ("such Competing Offer is on terms and conditions substantially similar to or better than those contained" in the stalking horse bid). The bidder's ability to close is another factor that the Receiver says is to be considered in determining whether a bidder has submitted a qualifying bid. The same is true of the "net benefit to the Estate" factor; the Receiver's procedure says that a qualifying bid must be for an amount sufficient to exceed the total of the stalking horse bid and the stalking horse break-up fee.

Because all these factors are to be considered in determining whether a bidder has submitted a qualifying bid, the Examiner sees no justification for permitting the Receiver to revisit these factors, and any other factor he deems appropriate, in order to identify the "successful bidder." The successful bidder, among the group of qualified bidders identified by the Receiver, ought to be the bidder who will pay the most for the property in question.

F. The Receiver Should Not Be Able to Change the Procedure.

At page 10 of the Motion, the Receiver includes three lines that are titled "Amendment of Real Property Sales Procedures." These three lines say that the Receiver can impose, at or before the public auction, "such other and additional terms and conditions as he deems appropriate." If the Receiver is going to retain that broad authority to change the procedure, one wonders what this Court's approval of those procedures means. The Examiner respectfully suggests that the Receiver should be required to obtain Court approval for any modifications to the procedures that are approved by the Court.

G. Sales Should Be Promptly Reported.

The Receiver's procedures suggest that he will report on completed sales as a part of his more general submission of reports concerning the Receivership. To date, the Receiver has submitted one such report (Doc. No. 336). The Receiver is not required to submit such reports on any regular schedule, nor has the Receiver published any schedule pursuant to which he intends to submit his reports.

The Examiner respectfully submits that the Receiver should submit reports concerning sales of real property promptly after those sales are concluded, and in no event any later than two weeks after a sale has been closed. Those reports need not be exhaustive narratives; rather, they should simply identify the property sold, the manner in which notice was published, the date of closing, the purchase price, the identity of and bid by the "stalking horse" (if that process is

approved) and the identities of and bids made by other qualified bidders. These reports likely can be prepared, in large part, by the brokers who handle the sales and auctions.

V. Conclusion.

The Examiner believes that the Court should defer ruling on the Receiver's Motion in its present form and require the Receiver to submit additional information concerning the properties he intends to sell, his retention of CBRE, and the likely costs of the procedures he seeks to have approved.

Additionally, the Examiner recommends that the procedures proposed by the Receiver, if approved, be modified in the following ways:

a. "break up" fees paid to "stalking horse" bidders should be capped at 2% of the "stalking horse" bid;

b. the Receiver should obtain and make available at least one appraisal for each piece of property he intends to sell;

c. the Court should require at least some notice published in local newspapers;

d. the Receiver must clarify for the Court the deadline for submitting competing bids;

e. the Receiver should not have discretion to reject a winning bid by a qualified bidder;

f. the Receiver should not be permitted to alter the procedures without Court approval; and

g. all sales by the Receiver should be promptly reported.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 8, 2009 I electronically submitted the foregoing document to 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 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/ John J. Little