

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

STANFORD INTERNATIONAL BANK,
LTD., STANFORD GROUP COMPANY,
STANFORD CAPITAL MANAGEMENT,
LLC, R. ALLEN STANFORD,
JAMES M. DAVIS, and
LAURA PENDERGEST-HOLT,

Defendants.

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CASE NO. 3-09-CV0298-N

**MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO ENFORCE
RECEIVERSHIP ORDER AND INJUNCTION AND MOTION FOR CONTEMPT¹**

¹ Underwriters file this Motion subject to their pending Motion to Intervene in this case, which was filed on December 3, 2009.

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Preliminary Statement

This Court has repeatedly ordered that *all* actions relating to Receivership Assets shall be brought in this Northern District of Texas, and has specifically enjoined Allen Stanford (“Stanford”) and his lawyers from “taking further steps to seek relief in any court other than [the Northern District] relating to the Policies” issued to Stanford entities. Despite these clear prohibitions, Stanford, Laura Pendergest-Holt (“Holt”), Gilberto Lopez, Jr. (“Lopez”), and Mark Kuhrt (“Kuhrt”) (collectively the “Criminal Defendants”), and their lawyers, chose to violate this Court’s orders. First, the Criminal Defendants and their lawyers filed and pursued a Motion for Payment of Fees² in the United States District Court for the Southern District of Texas (the “Southern District”) against Certain Underwriters at Lloyd’s of London and Arch Specialty Insurance Company (collectively “Underwriters”)³ as part of the criminal proceedings currently pending against them. Second, the Criminal Defendants and their lawyers brought suit⁴ against Underwriters, again in the Southern District (collectively the “Southern District Actions”), seeking an order requiring Underwriters to pay proceeds of the various insurance policies issued by Underwriters,⁵ and seeking a preliminary injunction forcing Underwriters to do so. The filing

² See Motion for Payment of Fees or in the Alternative, Stay of Criminal Proceedings, *United States v. Stanford*, CR. No. 09-342 (S.D. Tex. Aug. 24, 2009) (Holt’s motion); Request for a Court Order Requiring Payment of Legal Fees, or in the Alternative, for a Stay of His Criminal Case, *United States v. Stanford*, Cr. No. 09-342 (S.D. Tex. Aug. 24, 2009).

³ Certain Underwriters at Lloyd’s of London includes Lloyd’s of London Underwriting Members in Syndicates 2987, 2488, 1886, 2623, 1084, 4000, 1083, 1183, 1274 and 623.

⁴ See Second Amended Complaint, *Laura Pendergest-Holt et al. v. Certain Underwriters at Lloyd’s of London and Arch Specialty Insurance Co.*, 4:09-cv-03712 (S.D. Tex. Dec. 1, 2009). Underwriters’ App. at 14-32.

⁵ Underwriters issued three insurance policies to Stanford Financial Group Company (“SFG”), Stanford Group Company, and their affiliated entities. These policies are a Directors’ and Officers’ and Company Indemnity Policy, reference 576/MNK558900 (the “D&O Policy”); a Financial Institutions, Crime and Professional Indemnity Policy, reference 576/MNA851300 (the “PI Policy”); and an Excess Blended “Wrap” Policy, reference 576/MNA831400 (the “Excess Policy”) (collectively, the “Policies”).

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and continued pursuit of the Southern District Actions constitutes contempt of this Court's Orders and warrants appropriate sanctions, including ordering the Criminal Defendants to withdraw and/or to dismiss immediately the Southern District Actions.

I. EMERGENCY CONSIDERATION

Underwriters respectfully urge this Court to take up this Motion on an emergency basis. The Criminal Defendants have moved for injunctive relief on the Policies in the Southern District seeking an order requiring Underwriters to pay out immediately large sums of potential Receivership Assets. Judge Hittner has set the matter for hearing on December 17, 2009 at 1:30 p.m. Those funds, if paid, will almost certainly never be recouped by Underwriters or the Receiver.

II. FACTUAL BACKGROUND

A. The SEC Commences This Action And the Court Enters a Receivership Order

On February 17, 2009, the Securities and Exchange Commission ("SEC") filed the above captioned suit in this Court against Stanford, James M. Davis ("Davis"), Holt, and three related companies⁶ (collectively the "Defendants"), alleging that they had orchestrated a fraudulent, multi-billion dollar investment scheme through a program that sold more than \$8 billion in fraudulent certificates of deposit. This Court immediately issued an Order Appointing Receiver ("Receivership Order").⁷ That Order, among other things, appointed Ralph S. Janvey as

⁶ The companies include Antigua-based Stanford International Bank (SIB), Houston-based broker-dealer and investment adviser Stanford Group Company, and investment adviser Stanford Capital Management.

⁷ The Court amended its Order Appointing Receiver on March 12, 2009, but the provisions of the Receivership Order relevant to this Motion remain unchanged. (*See* Amended Order Appointing Receiver [Docket No. 157]) (hereinafter, "Receivership Order" refers to the February 17, 2009 Order Appointing Receiver, as amended on March 12, 2009).

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Receiver to marshal and manage the Receivership Estate.⁸ The Receivership Order grants the Receiver authority to “take and have complete and exclusive control, possession and custody of the ‘Receivership Estate,’ which includes, among other things, the assets, monies, securities, and other properties, real and personal, tangible and intangible, of the Defendants.”⁹ The Receivership Estate includes all of the Receivership Assets, potentially including the Policies.¹⁰ The Receivership Order further compels the Receiver to take “all acts necessary to conserve, hold, manage, and preserve the value of the Receivership Estate, in order to prevent any irreparable loss, damage, and injury to the Estate ...”¹¹ and enjoins any payment or expenditure of any asset of the Receivership Estate.¹²

In furtherance of the Court’s interest in preserving the Receivership Estate, the Receivership Order enjoins and restrains any person from initiating or continuing any action against the Receivership Estate, or any agents, officers, or employees related to the Receivership Estate, or “which affect the Receivership Assets,” *except in this Court*. The Court expressly precluded:

9. Creditors and all other persons ... from the following actions, except in this Court ...

(a) The commencement or continuation, including the issuance or employment of process, of any judicial, administrative, or other proceedings against the

⁸ The “Receivership Estate” consists of “Receivership Assets” and “Receivership Records.” *Id.* ¶ 2. The Order Appointing Receiver defines “Receivership Assets” as the “assets, monies, securities, properties, real and personal, tangible and intangible, or whatever kind and description, wherever located, and the legally recognized privileges (with regard to the entities), of the Defendants and all entities they own or control.” *Id.* ¶ 1.

⁹ *Id.* ¶¶ 1, 4.

¹⁰ Underwriters contend that Policy exclusions or conditions may exclude payment of proceeds. Until final adjudication of the coverage issues, though, all claims as to those proceeds must be asserted in this Court.

¹¹ *Id.* ¶¶ 5(g), 8.

¹² *Id.* ¶ 7.

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Receiver, any of the defendants, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate, arising from the subject matter of this civil action.

...

13. Defendants, and their respective agents, officers, and employees, and **all persons in active concert or participation with them are hereby enjoined from ... filing or prosecuting any actions or proceedings which involve the Receiver or which affect the Receivership Assets ... except with the permission of this Court. Any actions so authorized ... shall be filed in this Court.**¹³

B. The Court's Injunctive Orders Apply to the Claims Seeking Relief Related to the Policies

1. On September 28, 2009, the Court Enjoined Stanford and Anyone Acting in Concert with Him, Including His Attorneys, from Seeking Relief Relating to the Policies Outside of this Court

On September 22, 2009, Allen Stanford filed an emergency application in the English High Court of Justice seeking reimbursement under the Policies for defense costs.¹⁴ On September 27, 2009, the Receiver requested that this Court enjoin the application and require Stanford to withdraw his application.¹⁵ Underwriters joined that request.¹⁶ On September 28, the Court confirmed its exclusive jurisdiction over claims involving the Policies or its proceeds and ordered Stanford to withdraw his application and again enjoined him and anyone acting in concert with him from taking steps to seek relief relating to the Policies in any other forum. This Court stated:

¹³ *Id.* ¶¶ 9, 13 (emphasis added).

¹⁴ See Receiver's Request for Order Enforcing Injunction and Requiring Allen Stanford to Immediately Withdraw Emergency Application in the English Courts Concerning Insurance Proceeds. [Docket No. 803].

¹⁵ *Id.*

¹⁶ See Certain Underwriters at Lloyd's of London's Joinder in Receiver's Request for Order Enforcing Injunction and Requiring Allen Stanford to Immediately Withdraw Emergency Application in the English Courts Concerning Insurance Proceeds. [Docket No. 808].

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The Court finds that it has jurisdiction over Defendant Allen Stanford, as well as the insurance policies at issue ... It appears that Stanford is purporting to seek relief before another tribunal relating to the Policies. Such actions by Stanford both violate the terms of this Court's prior orders, as well as threaten to interfere with this Court's jurisdiction over the Policies.

The Court therefore enjoins Allen Stanford and anyone acting in concert with him, including his attorneys, from taking further steps to seek relief in any court other than this relating to the Policies. Stanford is ordered immediately to take all steps reasonably necessary to withdraw any request for relief relating to the Policies from any other court¹⁷

In no uncertain terms, the Court pronounced that the Policies belong to *this Court's* exclusive jurisdiction; that the Receivership Order's injunctive provisions apply to *any* actions relating to the Policies; and that all actions seeking relief relating to the Policies must be brought *in this Court*. Despite these directives, the Criminal Defendants, including Stanford, continue to flaunt these directives by pursuing the Policies' proceeds in other courts.

2. On October 9, 2009, the Court Reasserted Its Jurisdiction Over the Policies

On June 24, 2009, the Receiver staked out his position that proceeds of the Policies are assets of the Receivership Estate as that term is used in the Receivership Order. On June 30, 2009, Defendant Holt filed an "Expedited Motion for Clarification That Receivership Order Does Not Apply to D&O Policy Proceeds, Or, Alternatively, for Authorization of D&O Policy Proceeds, and Brief in Support."¹⁸ Holt's motion sought a ruling from this Court that the proceeds of the D&O Policy are not property of the Receivership Estate and that Defendants' defense costs in various proceedings could be paid by Underwriters without violating the

¹⁷ Order Granting Receiver's Request for Order Enforcing Injunction and Requiring Allen Stanford to Immediately Withdraw Emergency Application in the English Courts Concerning Insurance Proceeds. [Docket No. 810] (emphasis added) (hereinafter "September 28 Order").

¹⁸ [Docket No. 538].

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Receivership Order.¹⁹ Alternatively, Holt asked the Court to permit the payment of defense costs to her counsel.²⁰ Stanford joined Holt's motion on July 6, 2009.²¹

In resolving Holt's Expedited Motion, this Court exercised its equitable discretion to permit Underwriters to pay certain costs incurred by the Criminal Defendants in defending their various lawsuits and criminal proceedings, subject to the terms, conditions, and exclusions of the Policies. In that October 9, 2009 Order, the Court made no comment about whether any such payments were required.²² In explaining its decision, the Court made plain its continued intention to retain its exclusive jurisdiction over the Policies and claims for the proceeds of the Policies, writing,

Today the Court holds only that its prior orders do not bar Lloyd's from disbursing policy proceeds to fund directors' and officers' defense costs in accordance with the D&O policies' terms and conditions. The Court does not, however, hold that any defendant is entitled to have its defense costs paid by D&O proceeds. Lloyd's reminds the Court that Lloyd's may ultimately deny coverage for even the individual directors' and officers' claims as barred by various policy exclusions. The Court also does not today authorize Lloyd's to pay any claims other than those for defense costs. *Whether and how any successful claims within policy coverage will be paid is a matter the Court can address if and when that issue is ripe.*²³

By this Order the Court indicated for the third time its clear intent to retain control over claims to Policy proceeds.

¹⁹ *Id.*

²⁰ *Id.*

²¹ [Docket No. 567].

²² The Court expressly reserved ruling on whether proceeds of the Policies constituted Receivership Assets, finding that such a decision was not necessary to resolve Holt's Expedited Motion. Order re: Motion for Clarification of the Court's Receivership Order. [Docket No. 831].

²³ *Id.* (footnote omitted) (emphasis added).

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3. The Criminal Defendants Disregard This Court's Orders and Seek Relief Related to the Policies in Two Proceedings in the Southern District of Texas

Each Criminal Defendant has sought reimbursement under the Policies for costs, charges, and expenses incurred in their defense of this case and the criminal proceeding in the Southern District. Underwriters paid the Criminal Defendants' defense costs through August 27, 2009, but denied the Criminal Defendants' requests for reimbursement of defense costs after that date.²⁴

On August 24, 2009, Holt and Lopez separately filed motions in their criminal proceeding requesting that Judge Hittner order Underwriters to pay their legal fees.²⁵ On November 13, 2009, Holt's attorneys urged the Southern District to set those motions for hearing. Judge Hittner conducted a hearing on these motions on November 17, 2009.²⁶ The Criminal Defendants are represented in the criminal case by Kent Schaffer and George McCall Secrest (Stanford); Dan Cogdell, James Madison Ardoin, and Chris Flood (Holt); and Jim Lavine, Jack Zimmerman and Cole Ramey (Lopez).²⁷ Although each of these attorneys was present at the hearing, none of these attorneys raised this Court's prior Order enjoining Stanford and anyone acting in concert with Stanford from seeking relief relating to the Policies outside of this Court. Judge Hittner has not ruled on Holt's and Lopez's motions.

²⁴ See Letter from Barry Chasnoff and Neel Lane to Dan Cogdell (Nov. 11, 2009). Underwriters' App. at 3-12.

²⁵ See Motion for Payment of Fees or in the Alternative, Stay of Criminal Proceedings, *United States v. Stanford*, CR. No. 09-342 (S.D. Tex. Aug. 24, 2009) (Holt's motion); Request for a Court Order Requiring Payment of Legal Fees, or in the Alternative, for a Stay of His Criminal Case, *United States v. Stanford*, Cr. No. 09-342 (S.D. Tex. Aug. 24, 2009).

²⁶ At Judge Hittner's request, counsel for Underwriters attended the November 17, 2009 hearing on Holt's motion as "invited nonparties." Underwriters' counsel urged that "by acceding to the requests of a United States District Judge to be here today, [they were] not agreeing that [Underwriters] are part of [that] case or that the [criminal court] has jurisdiction." The Court responded "You're not making an official appearance." Transcript of Nov. 17, 2009 Hearing at 67, *United States v. Stanford*, Crim. No. 09-342 (S.D. Tex. Nov. 17, 2009).

²⁷ Richard Kuniansky has been appointed, through the CJA fund, to represent Mark Kuhrt.

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Just before the hearing on Policy payments in the criminal case, Holt filed a Complaint in the Southern District challenging Underwriters' denial of her insurance claim and asserting causes of action for breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code. Holt also sought a declaration regarding Holt's rights under the Policies. On December 1, 2009, Stanford, Lopez, and Kuhrt joined Holt in a second amended complaint, requested the case be transferred to Judge Hittner's court, and sought an emergency preliminary injunction ordering Underwriters to fund the defense of all their civil and criminal lawsuits.²⁸ Attorney Lee Shidlofsky represents Holt, Stanford, and Lopez and attorney Gregg Anderson represents Kuhrt in the civil action. The lawsuit does not make any reference to this Court's September 28 Order. Judge Hittner set the injunctive relief request for hearing on December 17, 2009 at 1:30 pm.²⁹

C. Insurance Coverage Issues Are Already Pending Before this Court

On November 18, 2009, Underwriters filed an Original Complaint for Declaratory Judgment ("DJ Action") in this Court seeking a declaration that, among other things, the Criminal Defendants are not entitled to coverage under the D&O Policy on the grounds that their Loss results from a claim arising from acts of Money Laundering, as defined by the Policy.³⁰ Underwriters explain that enjoining the litigation in other jurisdictions is necessary both to

²⁸ Second Amended Complaint, *Laura Pendergest-Holt et al. v. Certain Underwriters at Lloyd's of London and Arch Specialty Insurance Co.*, 4:09-cv-03712 (S.D. Tex. Dec. 1, 2009). Underwriters' App. at 14-32.

²⁹ Order, *Laura Pendergest-Holt, et al. v. Certain Underwriters at Lloyd's of London and Arch Specialty Insurance Co.*, 4:09-cv-03712 (S.D. Tex. Dec. 2, 2009). Underwriters' App. at 34.

³⁰ *Certain Underwriters at Lloyd's of London et al. v. Stanford et al.*, 3:09-cv-02206 (N.D. Tex. Nov. 18, 2009). This lawsuit also seeks clarification regarding Underwriters' obligations under the PI Policy.

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preserve this Court's exclusive jurisdiction over the Policies and to maintain the orderly administration of the Receivership Estate and Receivership Assets.

III. ARGUMENT AND AUTHORITIES

This Court should order Stanford, Holt, Lopez, and Kuhrt to withdraw and/or dismiss the Southern District Actions and hold these individuals in contempt of court. This Court should also hold the Criminal Defendants' attorneys Shidlofsky, Anderson, Schaffer, Secrest, Cogdell, Ardoin, Flood, Lavine, Zimmerman, and Ramey in civil contempt for violating this Court's injunction if they do not immediately dismiss and withdraw the Southern District Actions. "[T]he power of the courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *S.E.C. v. First Fin. Group of Tex., Inc.*, 659 F.2d 660, 669 (5th Cir. Oct. 1981) (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911)). A finding of civil contempt is warranted if there is "clear and convincing evidence 1) that a court order was in effect; 2) that the order required certain conduct by the respondent; and 3) that the respondent failed to comply with the court's order." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000) (quoting *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992)) (affirming district court's finding that pilots' union was in civil contempt for violating a temporary restraining order and awarding airline compensatory damages caused by violation of the order). Contempt is committed when a person violates a court order requiring in specific and definite language that a person refrain from doing an act. *Martin*, 959 F.2d at 47. The contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order. *Am. Airlines, Inc.*, 228 F.3d at 581. Further, "good faith is irrelevant as a

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defense to a civil contempt order.” *TiVO, Inc. v. Dish Network Corp.*, 640 F. Supp. 2d 853, 864 (E.D. Tex. 2009) (quoting *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1353 (Fed. Cir. 1998)).

The Criminal Defendants should be held in civil contempt for filing and pursuing their motion and lawsuit in the Southern District in direct violation of this Court’s Receivership Order and September 28 Order. Their attorneys should also be held in contempt if they do not withdraw and/or dismiss the Southern District Actions. The Court’s Orders enjoined Stanford and those acting in concert with him, including his attorneys, “from taking further steps to seek relief in any court other than this relating to the Policies.” Stanford and the other Criminal Defendants are expected to obey this Court’s injunction “until it is modified or reversed, even if they have proper grounds to object to the order.” *TiVO, Inc.*, 640 F. Supp. 2d at 874 (quoting *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386-87 (1980)). The Criminal Defendants cannot unilaterally decide whether they will comply with this Court’s Orders without consequence. *Id.* The Criminal Defendants and their attorneys obviously want to avoid litigating their entitlement to the Policies’ proceeds in this Court, and their repeated attempts to seek proceeds in other courts confirm this intent. However, such actions are blatant violations of this Court’s Orders. The Criminal Defendants and their attorneys should be prohibited from seeking relief relating to the Policies’ proceeds in any court other than this Court.

A court may employ judicial sanctions in civil contempt proceedings to coerce a party into compliance with the court’s order and to compensate the complainant for losses sustained as a result of the violation of the order. *Am. Airlines, Inc.*, 228 F.3d at 585. Therefore, the Court should order the Criminal Defendants and their attorneys to withdraw and/or to dismiss their

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Southern District Actions and award Underwriters attorneys' fees incurred both in bringing this motion in this Court and in responding to Southern District Actions. *See, e.g., Commercializadora Portimex, S.A. de C.V. v. Zen-Noh Grain Corp.*, No. Civ. A. 02-1185, 2006 WL 304558, at *3 (E.D. La. Feb. 8, 2006) (awarding movant attorneys' fees incurred in bringing contempt motion and attorneys' fees incurred in defending a lawsuit in Mexico that the court ordered respondent to dismiss).

Conclusion

Underwriters respectfully request that this Court enter an Order:

(A) Finding Allen Stanford, Laura Pendergest-Holt, Mark Kuhrt, and Gilberto Lopez in contempt of this Court's Orders of February 17, 2009 and September 28, 2009;

(B) Ordering Allen Stanford, Laura Pendergest-Holt, Mark Kuhrt, and Gilberto Lopez, and their counsel, to immediately withdraw and/or dismiss the Southern District Actions related to proceeds of the Policies on or before December 7, 2009;

(C) Ordering Allen Stanford, Laura Pendergest-Holt, Mark Kuhrt, and Gilberto Lopez, and their counsel, not to proceed with the hearing scheduled for 1:30 p.m. central time, December 17, 2009 in the United States District Court for the Southern District of Texas seeking a preliminary injunction forcing Underwriters to pay proceeds of the Policies;

(D) Ordering that Lee Shidlofsky, Gregg Anderson, Kent Shaffer, George Secrest, James Ardoin, Chris Flood, Dan Cogdell, Jim Lavine, Jack Zimmerman, and Cole Ramey shall be in contempt of Court if they do not withdraw and/or dismiss the Southern District Actions related to the proceeds of the Policies on or before December 7, 2009; and

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(E) Ordering that the contemnors shall pay Underwriters reasonable attorneys' fees incurred in connection with preparing and urging this Motion and defending against the actions in the Southern District of Texas.

Respectfully submitted,

By: /s/ Daniel McNeel Lane, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document and appendix have been served on all known counsel of record via the Court's electronic filing system this 3rd day of December, 2009.

/s/ Daniel McNeel Lane Jr.
DANIEL McNEEL LANE, JR.

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