

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

No. 3:09-cv-00298-N

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

Defendants.

**NON-PARTY SOCIÉTÉ GÉNÉRALE PRIVATE BANKING (SUISSE) S.A.’S LIMITED
OBJECTION TO THE RECEIVER’S AMENDED 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 AND
RELATED FORMS AND PROCEDURES FOR SUBMITTING PROOFS OF CLAIM**

Non-party Société Générale Private Banking (Suisse) S.A. (“SG Suisse”) submits this Limited Objection to the Receiver’s Amended 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 and Related Forms and Procedures for Submitting Proofs of Claim (the “Amended Bar Date Motion”).¹ [Doc. # 1546.] SG Suisse requests that the order establishing a bar date (the “Bar Date Order”) be modified to provide expressly that any claim arising in the future as a result of the Receiver’s or any other creditor-plaintiff’s successful pursuit of a fraudulent transfer

¹ SG Suisse submits this objection subject to and without waiving its Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim in *Rotstain v. Trustmark National Bank*, No. 3:09-cv-02384-N, MDL No. 2099. The relief sought in this application is a limited modification of the proposed bar date order only, which is premised on SG Suisse’s continuing objection to this Court’s lack of personal jurisdiction.

or avoidance action is excepted from the bar date and need not be filed until 30 days after the judgment giving rise to the claim becomes final. In the alternative, SG Suisse requests that the Court modify the Bar Date Order to expressly preserve defenses to litigation claims asserted by parties other than the Receiver.

1. SG Suisse has not yet asserted a claim against the Receivership Estate. However, SG Suisse is a defendant in a related action pending before this Court, *Rotstain v. Trustmark National Bank*, No. 3:09-cv-02384-N, MDL No. 2099. The *Rotstain* action was brought by a group of CD holders alleging that SG Suisse and certain other banks were the recipient of fraudulent transfers in the form of banking fees paid to the defendants for actions such as wire transfers to or from accounts held by certain Receivership Entities.

2. SG Suisse contends that it is not liable for any fraudulent transfers and has moved to dismiss the *Rotstain* action for lack of personal jurisdiction and failure to state a claim upon which relief can be granted. [Doc. # 32, MDL No. 2099.] However, if the *Rotstain* plaintiffs secure a judgment against SG Suisse for the benefit of the Receivership Estate, SG Suisse may have a claim for unpaid funds against the Receivership Estate because the challenged payments will be undone. The proposed Bar Date Order does not make clear that contingent claims of this sort are excluded from the proposed deadlines.² As such, SG Suisse may be forced to file a protective claim with the Receiver by the deadline set in the Bar Date Order. Numerous other

² The Amended Proposed Bar Date Order provides, at paragraph 4(a), that “claim” is defined as “a potential or claimed right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, against one or more of the Receivership Entities.”

individuals and entities that have received payments from one or more of the Receivership Entities may also be in a similar position.³

3. SG Suisse objects to the Amended Bar Date Motion only to the extent that the procedures proposed therein would require a person submitting a claim with the Receiver to consent to personal jurisdiction in this Court “for all purposes.” (Proposed Proof of Claim Form at 5.)⁴ SG Suisse believes that the “for all purposes” language is too broad and could be read as a consent to jurisdiction (or waiver of a defense to jurisdiction) in pending litigation brought by parties other than the Receiver, such as the *Rotstain* action. Although the Amended Proposed Bar Date Order preserves defenses to litigation claims asserted by the Receiver,⁵ it does not expressly preserve defenses to claims by other plaintiffs.

4. As the Court is aware, SG Suisse has moved to dismiss the *Rotstain* action for lack of personal jurisdiction. The Court has not ruled on that motion, and SG Suisse does not believe that it should face the risk of waiving its jurisdictional defenses in the *Rotstain* action because of the need to submit a contingent proof of claim in this action.

³ The Receiver has taken the position that investors who received “false profits” or “net winnings” from the Stanford ponzi scheme have no possible claim with the Receivership Estate if they are forced to disgorge the false profits in a clawback action. (*See* Amended Bar Date Motion at 19.) There has been no allegation, however, than the bank defendants in the *Rotstain* action were the recipient of false profits or net winnings from the Stanford ponzi scheme.

⁴ The Proposed Proof of Claim Form provides “CONSENT TO JURISDICTION: By submitting your Proof of Claim Form, you consent to the jurisdiction of the United States District Court for the Northern District of Texas for all purposes and agree to be bound by its decisions, including, without limitation, a determination as to the validity and amount of any claims asserted against the Receivership Entities. In submitting your Proof of Claim Form, you agree to be bound by the actions of the United States District Court for the Northern District of Texas even if that means your claim is limited or denied.”

⁵ *See* Amended Proposed Bar Date Order ¶ 7(t)(i) (Filing a claim does not waive “[a]ny defenses a Claimant has or may have against litigation claims asserted by the Receiver, including but not limited to any rights the Claimant has or may have to appeal rulings of the trial court in such cases.”).

5. The manner in which contingent claims such as this are handled in bankruptcy proceedings is instructive. Under section 502(h) of the Bankruptcy Code and Rule 3002(c)(3) of the Federal Rules of Bankruptcy Procedure, a creditor generally has 30 days to file a proof of claim arising from the recovery of property in an avoidance action such as a fraudulent transfer case. *See* 11 U.S.C. § 502(h) (“A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined . . . the same as if such claim had arisen before the date of the filing of the petition.”); Fed. R. Bankr. P. 3002(c)(3) (in a case under chapter 7, 12, or 13, “[a]n unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity . . .”); *see also* Fed. R. Bankr. P. 3003(c)(3) (in a case under chapter 9 or 11, “[n]otwithstanding the expiration of [the bar date fixed by the court], a proof of claim may be filed to the extent and under the conditions stated in Rule 3002 . . . (c)(3)).

6. This separate timeline for “springing” or contingent claims is appropriate because the effect of avoiding a transfer is to place the transferee in the position it would have been in had the transfer not been made, *i.e.*, an unpaid creditor. This result is derived from the equitable concept of equality of distribution. As the Supreme Court explained in interpreting the bankruptcy laws in place over 100 years ago, “[once] litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors.” *Page v. Rogers*, 211 U.S. 575, 581 (1909) (citing *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356 (1905)); *see also id.* at 363-64 (when a preference has been given up, creditor is entitled to equal footing with other creditors and to prove claims); *Buffum v. Peter Barceloux Co.*, 289 U.S. 227, 237 (1933) (same following judgment on fraudulent transfer claim).

7. Although this is not a bankruptcy proceeding, it is an equitable one, and the policy of equality of distribution underlying section 502(h) of the Bankruptcy Code has a place here. Although filing a protective claim could preserve this right, it would be inequitable to force a contingent creditor to waive a jurisdictional or other litigation defense in order to assert its rights.⁶

8. Accordingly, SG Suisse requests that the Court expressly provide that any claim arising in the future following the Receiver's or any other plaintiff's successful pursuit of a fraudulent transfer or avoidance action is excepted from the bar date and need not be filed until 30 days after the judgment giving rise to the claim becomes final. If the Court declines to include the above-requested language, SG Suisse requests that the Court, at a minimum, modify the Bar Date Order to expressly preserve defenses to litigation claims asserted by parties other than the Receiver.

⁶ SG Suisse notes that the bankruptcy court overseeing the *Madoff* SIPA proceedings held that any determination of whether section 502(h) would apply in that case would be an improper advisory opinion since no avoidance claims had been filed against the movants. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 08-01789 (BRL), 2009 WL 458769, at *2 (Bankr. S.D.N.Y. Feb. 24, 2009). SG Suisse, however, is an actual defendant in pending litigation, and thus does not face the same "tactical decision" that the *Madoff* court observed any potential defendant must consider in filing a proof of claim. *See id.*

Dated: April 20, 2012

/s/ Noelle M. Reed

Noelle M. Reed
State Bar No. 24044211
Noelle.Reed@skadden.com
Daniel E. Bolia
State Bar No. 24064919
Daniel.Bolia@skadden.com
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1000 Louisiana St., Suite 6800
Houston, TX 77002
Tel: (713) 655-5122
Fax: (713) 483-9122

George A. Zimmerman
(Admitted pro hac vice)
George.Zimmerman@skadden.com
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
Tel: (212) 735-3000

Of Counsel:

Michelle L. Davis
State Bar No. 24038854
Michelle.Davis@skadden.com
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
2521 Springer Rd.
Midlothian, TX 76065
Tel: (972) 723-6370
Fax: (713) 483-9197

ATTORNEYS FOR SOCIÉTÉ GÉNÉRALE
PRIVATE BANKING (SUISSE) S.A.

CERTIFICATE OF SERVICE

I certify that on April 20, 2012, I electronically filed the foregoing document with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means. All others were served a copy via U.S. mail postage prepaid.

/s/ Noelle M. Reed _____
Noelle M. Reed