[ORAL ARGUMENT NOT YET SCHEDULED]

No. 12-5286

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Petitioner-Appellant,

v.

SECURITIES INVESTOR PROTECTION CORPORATION,
Respondent-Appellee

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 11-mc-678 (RLW)

CORRECTED *AMICUS CURIAE* BRIEF OF THE COURT-APPOINTED EXAMINER, THE OFFICIAL STANFORD INVESTORS COMMITTEE, AND THE STANFORD VICTIMS COALITION

IN SUPPORT OF PETITIONER-APPELLANT
AND REVERSAL OF THE DISTRICT COURT'S ORDER

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January 23, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the *amici curiae* listed below, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Initial Brief of the Securities and Exchange Commission, Appellant:

John J. Little	Court-Appointed Examiner (appointed by the Receivership Court by order dated April 22, 2009)
Official Stanford Investors Committee	Created by order of the Receivership Court dated August 10, 2010
Stanford Victims Coalition	Not-for-profit corporation chartered under Texas law on September 10, 2009

The *amici* adopt the listing of rulings and related cases set forth in the Initial Brief of the Securities and Exchange Commission, Appellant.

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Broker Injunction	Doc. No. 456 in *Janvey v. Alguire*, Civil Action No. 3:09-CV-0724-N (N.D. Tex. June 10, 2010), *aff'd* 628 F.3d 164 (5th Cir. 2010), *op'n withdrawn and replaced*, 647 F.3d 585 (5th Cir. 2011)
CD	Certificate of Deposit
Chapter 15 Order	Doc. No. 176 in *In re Stanford International Bank, Ltd.*, Civil Action No. 3:09-CV-0721-N (N.D. Tex. July 30, 2012), *appeal dismissed subj. to reinstatement*, No. 12-10836 (5th Cir. Nov. 26, 2012)
Committee Order	Receivership Proceeding, Doc. No. 1149
Examiner	John J. Little
Examiner Order	Receivership Proceeding, Doc. No. 322
Investors Committee	Official Stanford Investors Committee created by the Receivership Court
Receiver	Ralph S. Janvey, Receiver for the Stanford Financial Receivership Estate
Receivership Court	The U.S. District Court for the Northern District of Texas, Dallas Division (Godbey, J.)
Receivership Order	Collectively, Receivership Proceeding, Doc. No. 10, Order Appointing Receiver; Doc. No. 157, Amended Order Appointing Receiver; and Doc. No. 1130, Second Amended Order Appointing Receiver
Receivership Proceeding	*Securities and Exchange Commission v. Stanford International Bank, Ltd., et al.*, Civil Action No. 3:09-CV-298-N in the Receivership Court

SEC	Securities and Exchange Commission
SGC	Stanford Group Company, a registered broker-dealer and SIPC member
SIBL	Stanford International Bank, Ltd.
SIPA	Securities Investor Protection Act of 1970
SIPC	Securities Investor Protection Corporation
Stanford	R. Allen Stanford
Stanford Entities	SGC, SIBL and Stanford Capital Management, LLC
SVC	Stanford Victims Coalition

CERTIFICATE OF INTERESTED PERSONS AND RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel for the *amici curiae* certify that the following listed persons and entities have an interest, as *amici curiae*, in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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Stanford Victims Coalition Coppell, Texas		A not-for-profit corporation incorporated under the laws of the State of Texas

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for the *amici curiae* certify that the Stanford Victims Coalition has no parent company and further certify that no publicly-held company owns more than 10% of the Stanford Victims Coalition. Stanford Victims Coalition is a not-for-profit corporation corporation organized under the laws of the State of Texas.

RULE 29(c)(5) CERTIFICATE

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certify that the Brief as *amicus curiae* of the Court-Appointed Examiner, the Official Stanford Investors Committee and the Stanford Victims Coalition was primarily drafted by the Examiner. Counsel for the Stanford Victims Coalition at MURPHY & MCGONIGLE, and counsel for the Official Stanford Investors Committee at STRASBURGER & PRICE, LLP, BUTZEL LONG, and CASTILLO SNYDER, P.C., also participated in the drafting of various sections of the Brief.

No party participated in the drafting of this Brief, and no money was contributed by any party or by any party's counsel to fund the preparation of this Brief.

I. THE ROLES OF THE *AMICI CURIAE*: THE EXAMINER, THE INVESTORS COMMITTEE AND THE STANFORD VICTIMS COALITION[1]

In February 2009, Petitioner-Appellant Securities and Exchange Commission ("SEC") filed a lawsuit, *Securities and Exchange Commission v. Stanford International Bank, Ltd., et al.*, Civil Action No. 3:09-CV-298-N (the "Receivership Proceeding"), in the U.S. District Court for the Northern District of Texas, Dallas Division (Godbey, J.)(the "Receivership Court") against R. Allen Stanford ("Stanford"), his cohorts James M. Davis and Laura Pendergest-Holt, and three companies wholly owned by Stanford: Stanford International Bank, Ltd. ("SIBL"), Stanford Group Company ("SGC") and Stanford Capital Management, L.L.C. (collectively, the "Stanford Entities").[2] The SEC alleged a multi-billion dollar Ponzi scheme run by the Stanford Entities that operated from Stanford's headquarters in Houston, Texas. The primary mechanism employed by Stanford's scheme was a purported certificate of deposit ("CD") issued by Antigua-based SIBL. In the United States, SIBL CDs were sold almost exclusively by registered representatives of SGC, a registered broker-dealer and member of the Securities

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[1] This section of the Brief is submitted, in part, in compliance with FED. R. APP. P. 29(c)(4).

[2] The SEC subsequently amended its pleadings to add three additional defendants, Gilberto Lopez, Mark Kuhrt, and Leroy King, and two relief defendants, Stanford Financial Group Company and Stanford Financial Group Bldg. Inc. Civil Action No. 3:09-CV-0298-N, Doc. No. 952.

Investor Protection Corporation ("SIPC"). Interest and principal payments were funded with money invested by subsequent SIBL CD purchasers.

The Receivership Court found good cause to believe that the Stanford Entities violated federal securities laws. On February 16, 2009, the Receivership Court appointed Ralph S. Janvey as Receiver for the Stanford Receivership Estate (the "Receiver"), which included all assets of the individual defendants and the Stanford Entities, and all entities they owned or controlled. *See* Receivership Proceeding, Doc. No. 10, Order Appointing Receiver; Doc. No. 157, Amended Order Appointing Receiver; Doc. No. 1130, Second Amended Order Appointing Receiver (collectively, the "Receivership Order").[3]

A. The Examiner

Early in the Receivership Proceeding, the Receivership Court was confronted with dozens of motions to intervene, filed by investors in SIBL CDs and holders of SGC brokerage accounts, and the possibility that hundreds more would ultimately seek to intervene. In order to avoid such an unmanageable outcome, the Receivership Court denied the motions to intervene[4] and appointed the Examiner on April 20, 2009. The Receivership Court directed the Examiner to

3 A copy of the Second Amended Order Appointing Receiver is attached as Exhibit A to the Motion for Leave to Appear as *Amicus Curiae* filed contemporaneously with this Brief.

4 Receivership Proceeding, Doc. No. 321.

"convey to the Court such information as the Examiner, in his sole discretion, shall determine would be helpful to the Court in considering the interests of the investors in any financial products, accounts, vehicles or ventures sponsored, promoted or sold by any Defendants in this action (the "Investors")." Receivership Proceeding, Doc. No. 322, at 1-2 (the "Examiner Order").[5]

The Examiner Order authorized the Examiner to "conduct such investigation as he deems necessary to provide such information to the Court," and to use "any discovery methods provided in Rules 26 through 37." *Id.* at 2. The Examiner Order also authorized the Examiner to file Reports and Recommendations with the Court "as he shall see fit," and to file briefs in response to any motion filed in the Receivership Proceeding. *Id.*

B. The Investors Committee

On September 9, 2009, three Stanford Investors (the "Movants") filed a motion seeking leave to file an involuntary bankruptcy petition against one or more Stanford Entities. The SEC, the Receiver, and the Examiner opposed that motion. The Receivership Court held a hearing on the motion during which it asked the parties to consider whether the creation of something akin to a "creditors

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5 A copy of the Examiner Order is attached as Exhibit B to the Motion for Leave to Appear as *Amicus Curiae* filed contemporaneously with this Brief.

committee" within the Receivership Proceeding might be preferable to a bankruptcy proceeding.

The Movants, the Receiver, the Examiner, and the SEC subsequently reached an agreement to resolve the motion and create an investors committee. On August 10, 2010, the Receivership Court entered its Order creating the Official Stanford Investors Committee ("Investors Committee"). Receivership Proceeding, Doc. No. 1149 (the "Committee Order").[6]

The Committee Order directs the Investors Committee to represent the creditors of the Receivership Estate "who, as of February 16, 2009, had funds on deposit at [SIBL] and/or were holding certificates of deposit issued by [SIBL]." Committee Order at 2. The Committee Order confers upon the Investors Committee "rights and responsibilities similar to those of a committee appointed to serve in a bankruptcy case," including:

a. the right to raise, appear and be heard on any issue in the Receivership Proceedings;

b. the right to consult on a regular basis with the Receiver concerning the administration of the case; and

c. the right to investigate the acts, conduct, assets, liabilities and financial condition of the Stanford Entities prior to the Receivership.

[6] A copy of the Committee Order is attached as Exhibit C to the Motion for Leave to Appear as *Amicus Curiae* filed contemporaneously with this Brief.

Committee Order at 4-5.

C. The Stanford Victims Coalition

The Stanford Victims Coalition ("SVC") is a not-for-profit corporation organized and existing under Texas law. It was founded by Ms. Angela Shaw Kogutt, a Stanford investor residing in Texas. The SVC has more than 4,000 registered members, all of whom are Stanford investors, residing in approximately 38 states and in dozens of countries around the world. The SVC was formed shortly after the Receiver was appointed, and was formally incorporated September 10, 2009.

II. PRIOR PROCEEDINGS

In November 2009, the SVC wrote to the SEC urging the SEC to direct Respondent-Appellee SIPC to initiate a liquidation of SGC under the Securities Investor Protection Act ("SIPA"). *See* Doc. 1-3 at 178, Martens Decl., Ex. 2 (Comstock Letter). The SVC provided information, documents and witnesses to the SEC in connection with a formal vote of the SEC Commissioners that occurred on June 15, 2011. That vote determined that "SIPC member [SGC] had failed to meet its obligations to customers," and made a formal request to SIPC to institute a SIPA liquidation proceeding of SGC. Doc. 1-3 at 178, Martens Decl., Ex. 2.

The SIPC Board refused to comply with the SEC's request, and on

December 12, 2011, the SEC filed an Application with the district court to compel SIPC to discharge its obligations under SIPA. Doc. 1.

III. PRELIMINARY STATEMENT

This *amicus* Brief is filed jointly by the Examiner, the Investors Committee and the SVC in support of the Petitioner-Appellant and reversal of the district court's order. Specifically, the *amici* seek to advise this Court of findings and rulings by the Receivership Court and the 5th Circuit Court of Appeals ("5th Circuit") that contradict many of the "facts" upon which the district court apparently relied.

For ease of reference, the *amici* have attached two rulings of the Receivership Court that are neither currently reported nor available via WESTLAW, as follows:

<u>Exhibit 1</u>: Doc. No. 456 in *Janvey v. Alguire*, Civil Action No. 3:09-CV-0724-N (June 10, 2010 order granting preliminary injunction as to accounts of certain former Stanford employees), *aff'd* 628 F.3d 164 (5th Cir. 2010), *op'n withdrawn and replaced*, 647 F.3d 585 (5th Cir. 2011)(the "Broker Injunction").

<u>Exhibit 2</u>: Doc. No. 176 in *In re Stanford International Bank, Ltd.*, Civil Action No. 3:09-CV-0721-N (July 30, 2012 Order on petition for recognition under Chapter 15 of the U.S. Bankruptcy Code[7])(the "Chapter 15 Order"), *appeal dismissed subj. to reinstatement,* No. 12-10836 (5th Cir. Nov. 26, 2012).

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[7] 11 U.S.C. §1501 *et seq.*

The *amici* address how these findings and rulings by the Receivership Court and the 5th Circuit relate to two issues central to this appeal. Specifically, these findings and rulings support the conclusion that at least some purchasers of SIBL CDs should be deemed customers of SGC under the reasoning of the *Old Naples* and *Primeline* decisions.[8] They also support the SEC's argument that it need only demonstrate "probable cause" to believe there are "customers" in need of protection under SIPA.

IV. SUMMARY OF ARGUMENT

In deciding this appeal, this Court can and should consider the findings and rulings that have been made by the Receivership Court and the 5th Circuit over the last four years. Both courts have extensive experience with the Stanford scheme, and both courts have made findings and rulings that largely contradict the "facts" upon which the district court relied.

The findings and conclusions of the Receivership Court and the 5th Circuit demonstrate that the reasoning of the 11th and 10th Circuits in *Old Naples* and *Primeline*, respectively, should control the result here and compel the conclusion that some or all of the Stanford customers who purchased SIBL CDs through SGC are "customers" in need of SIPA protection. The only real distinction identified by

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8 *In re Old Naples Sec. Inc.*, 223 F.3d 1296 (11th Cir. 2000); *In re Primeline Sec. Corp.*, 295 F.3d 1100 (10th Cir. 2002).

the district court between those decisions and this case is that the scheme here was constructed so that the customer funds deposited with SGC were routed through a clearing broker or other Stanford-owned affiliate entity before they were stolen by Stanford and returned to SGC to fund its operations (or disbursed to Stanford or other Stanford entities) instead of being used to purchase SIBL CDs.[9] To permit such a distinction, engineered by the architects of the scheme, to control the application of SIPA would impermissibly elevate form over substance.

The findings and conclusions of the Receivership Court and the 5th Circuit, along with evidence in the record before the district court, also support the SEC's position that it should be held only to the same "probable cause" standard that SIPC must meet in commencing a liquidation under SIPA. When it comes to SGC's customers who purchased SIBL CDs, one size does not fit all. Those customers will be in a far better position to establish their status as "customers" under SIPA once a liquidation proceeding is actually commenced. Until such time, potential claimants have no opportunity to demonstrate their right to SIPA protection.

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9 The district court attempted to distinguish *Old Naples* and *Primeline* by noting that "both of those cases involved an introducing broker who never deposited the client funds at issue with the clearing broker." This purported "distinction" is both inaccurate (at least some client funds were deposited with a clearing broker in *Old Naples*) and insufficient to disqualify SGC customers from being "customers" in need of protection under SIPA. *See* infra at 23.

V. ARGUMENT

A. Findings and Rulings by the Receivership Court and the 5th Circuit Contradict the Facts Relied upon Below

The Receivership Court has presided over the Receivership Proceeding for almost four (4) years, during which it has become intimately familiar with the facts and circumstances surrounding the Stanford Financial Group Ponzi scheme. There are now more than 100 different actions pending as a part of the Receivership Proceeding.[10] Chapter 15 Order at 56. Among other things, the Receivership Court has fully resolved certain actions,[11] has issued[12] and denied[13] preliminary injunctions with respect to other actions, and has ruled on a petition for recognition pursuant to Chapter 15 of the Bankruptcy Code.[14] The 5th Circuit has also devoted substantial attention to the Receivership Proceeding; nine (9) separate opinions of

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[10] Many of these actions have been transferred to the Receivership Court for pretrial coordination by the Judicial Panel on Multidistrict Litigation. *See generally*, *In re Stanford Entities Securities Litigation*, MDL No. 2099.

[11] *See Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 793 F.Supp.2d 825 (N.D. Tex. 2011), *aff'd* 699 F.3d 848 (5th Cir. 2012).

[12] *See Janvey v. Alguire*, 647 F.3d 585 (5th Cir. 2011)(affirming issuance of Broker Injunction).

[13] *See Janvey v. Libyan Investment Auth.*, 478 Fed. App'x 233 (5th Cir. 2012)(affirming district court order declining to issue preliminary injunction sought by Receiver).

[14] *See* Chapter 15 Order (appeal pending).

that Court relating to the Receivership Proceeding are available in the Federal Reporter and the Federal Appendix.[15]

The findings and rulings of the Receivership Court and the 5th Circuit contradict the facts relied upon by the district court on certain critical questions. Those questions are:

1. Was SIBL separate and distinct from SGC?
2. To what extent was SGC funded by SIBL CDs?
3. What role did SGC play in selling the SIBL CDs?
4. Did the SIBL CDs "in fact exist" for SGC clients?

Each is addressed below.

1. Was SIBL separate and distinct from SGC?

The district court erroneously treated SGC and SIBL as distinct entities, *see* Op. at 10, and gave little credence to the SEC's argument that SGC and SIBL operated as one entity. Op. at 17. Both the Receivership Court and the 5th Circuit reached the opposite conclusion and have consistently held that SGC, SIBL and all

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15 *Janvey v. Democratic Senatorial Campaign Comm.*, 699 F.3d 848 (5th Cir. 2012); *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3067(U.S. July 18, 2012)(Nos. 12-79, 12-86, 12-88); *Janvey v. Libyan Investment Auth.*, 478 Fed. App'x 233 (5th Cir. 2012); *Janvey v. Alguire*, 628 F.3d 164 (5th Cir. 2010); *opinion withdrawn and replaced*, 647 F.3d 585 (5th Cir. 2011); *SEC v. Stanford Int'l Bank, Ltd.*, 429 Fed. App'x 379 (5th Cir. 2011); *SEC v. Stanford Int'l Bank, Ltd.*, 424 Fed. App'x 338 (5th Cir. 2011); *Pendergest-Holt v. Certain Underwriters at Lloyd's London*, 600 F.3d 562 (5th Cir. 2010); *Stanford v. Janvey*, 404 Fed. App'x 912 (5th Cir. 2010); *Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009).

other Stanford Entities were part of a single criminal enterprise used to steal billions of dollars.

Whether SGC and SIBL were distinct entities or operated as one was a central issue in the Receivership Court's consideration of a petition for recognition filed by Joint Liquidators appointed by the Antiguan courts to oversee the Antiguan liquidation of SIBL. As to that issue, the Receivership Court concluded that "Stanford and his affiliates [including but not limited to SGC and SIBL] operated as one." Chapter 15 Order at 27. The Receivership Court further decided to "pierce the veil" of SIBL and aggregate all the Stanford Entities, including SGC and SIBL:

> The Receiver has shown that Stanford operated the entire network of Stanford Entities as an integrated unit in order to perpetrate a massive worldwide fraud. *To ignore these findings would elevate form over substance – thereby legitimizing the corporate structure that Stanford utilized to perpetrate his fraud* and running afoul of Fifth Circuit precedent cautioning courts to look beyond the surface. Thus, because [SIBL] did not observe corporate formalities and because all the Stanford entities were 'operated as one for purposes of perpetrating a fraud on investors' [citation omitted], the Court pierces [SIBL's] corporate veil and aggregates the Stanford Entities.

Chapter 15 Order at 36 (emphasis added). The SEC argues that the district court elevated form over substance by adhering to the supposed corporate form of SIBL and SGC and not recognizing that both operated as part of a single criminal enterprise. SEC Brief at 45-49. The Receivership Court agrees.

In that same Chapter 15 Order, the Receivership Court concluded that the facts[16] would justify a substantive consolidation of SIBL, SGC and the other Stanford Entities.[17] *Id*. at 35. The Receivership Court made similar findings when granting summary judgment to the Receiver in a fraudulent transfer action brought against certain national political committees. *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 793 F.Supp. 2d 825 (N.D.Tex. 2011), *aff'd* 699 F.3d 848 (5th Cir. 2012).

> The evidence further demonstrates that the Ponzi scheme was comprised of over 100 interrelated entities whose primary, if not exclusive, source of funding was derived from [SIBL CDs] and that the Stanford Defendants' compensation was generated from the same source.

793 F.Supp. 2d at 856.

The district court's treatment of SGC and SIBL as distinct, separate entities finds no support in the record and is contradicted by the findings of the Receivership Court and the 5th Circuit. If SGC and SIBL are treated as parts of a

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[16] Among the facts cited by the Receivership Court were: "(4) commingling of funds among the Stanford Entities was the norm, (5) Stanford directly or indirectly owned all Stanford Entities, (6) SIB "loaned" Stanford $1.8 billion without a guaranty, (7) Stanford and his associates transferred assets among the Stanford Entities in disregard of corporate formalities." Chapter 15 Order at 34-35.

[17] The Receivership Court did not substantively consolidate the Stanford Entities because that mechanism is not available outside a bankruptcy proceeding. Chapter 15 Order at 35, n. 41.

single scheme, the stipulations relied upon by the district court would have a significantly different meaning. Some likely examples follow:

> 3. [The fraudulent enterprise of which SGC was a part] offered [fictitious] certificates of deposit ("CDs") to investors. In order to purchase a [fictitious] CD, an investor had to open an account with [the fraudulent enterprise of which SGC was a part].
>
> 5. Investors in [fictitious CDs] received periodic statements from [the fraudulent enterprise of which SGC was a part] reflecting the balances in their [fraudulent] accounts, including their [fictitious] CD balances.

Considering SGC and SIBL as parts of a single criminal enterprise compels the conclusion that there are likely "customers" of SGC in need of SIPA protection.

2. To what extent was SGC funded by SIBL CD funds?

Old Naples relied in part upon evidence that the SIPC member brokerage firm used funds delivered to a commonly-owned non-SIPC member to pay the obligations of the SIPC member firm. *Old Naples*, 223 F.3d at 1303-1304. In the district court, the SEC offered evidence that SGC similarly used SIBL funds to pay SGC obligations.[18] The district court was "unswayed" by that evidence. Op. at 17.

Both the Receivership Court and the 5th Circuit have addressed the extent to which SIBL CD proceeds were stolen and diverted to SGC, other Stanford Entities,

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18 The SEC offered evidence that approximately $628 million in SGC investor funds flowed from SIBL to SGC during the five year period from 2004 through 2008. Doc. No. 25-3, Martens Third Decl. Ex. 2, at ¶¶ 26-28 (a declaration by the Receiver's expert).

and Stanford himself. For example, in the Broker Injunction the Receivership Court found:

> CD Proceeds largely went to speculative and illiquid investments; payments to the first round of investors; large "loans" that Stanford and his associates used funded [sic] a lavish lifestyle; *and commissions, bonuses, and loans to SGC employees*.

Broker Injunction at 2 (emphasis added). The Chapter 15 Order included a similar finding:

> [T]he SIBL CD proceeds did more than just keep the bank afloat. Stanford Entities and Stanford himself received large disbursements of the proceeds.

Chapter 15 Order at 29. *See also id*. at 42 ("Most of the Stanford Entities' revenue came from selling CDs.").

In affirming the Broker Injunction, the 5th Circuit similarly determined that SIBL CD proceeds funded the operations of SGC:

> Finally, the FA Defendants' [former brokers of SGC] position that SGC should be separated from [SIBL] is of no moment. As made clear by the Van Tassel Declarations,[19] *SGC received the bulk of its revenue from commissions for the sale of the [SIBL CDs] and fees for other services it provided to [SIBL] related to the CD investment portfolio*.

[19] Karyl Van Tassel is the Receiver's expert witness and forensic accountant.

Janvey v. Alguire, 647 F.3d 585, 599 (5th Cir. 2011)(emphasis added).[20] The Receivership Court reiterated the 5th Circuit's finding in the political committees case. *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 793 F.Supp. 2d 825, 857 n. 55 (N.D.Tex. 2011), *aff'd* 699 F.3d 848 (5th Cir. 2012).

These findings demonstrate that SGC customer funds intended to purchase SIBL CDs nevertheless ended up in the possession of SGC, not to purchase the securities sold to its customers but rather to fund SGC's operations and pay commissions to the SGC brokers selling the CDs.

3. What role did SGC play in selling the SIBL CDs?

Both *Old Naples* and *Primeline* focused upon the customer's "legitimate expectations" and understanding in dealing with her brokerage firm.

> If an investor intended to have the brokerage purchase securities on her behalf and reasonably followed the broker's instructions regarding payment, she can be considered a "customer" under SIPA if the brokerage or its agents then misappropriated the funds. [Citations omitted]

Old Naples, 223 F.3d at 1303; *Primeline*, 295 F.3d 1100, 1107. The district court spent little time addressing the role of SGC in selling the SIBL CDs.

The Chapter 15 Order included extensive findings concerning the role SGC played in the promotion and sale of SIBL CDs. They include:

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[20] The 5th Circuit withdrew its prior opinion in *Janvey v. Alguire*, 628 F.3d 164 (5th Cir. 2010), and substituted this opinion. 647 F.3d at 589 n.1.

> CD sales largely bypassed Antigua, as depositors wishing to deposit funds were usually introduced to [SIBL] through their financial advisors, who maintained primary if not sole contact with the depositor and were often located where the depositor resided. Chapter 15 Order at 42.
>
> US investors *exclusively purchased* CDs through broker-dealers in the United States at SGC. *Id.* (emphasis added).
>
> Stanford overwhelmingly marketed his CDs through Stanford broker-dealers in non-Antiguan territories. *Id.* at 43.
>
> [B]roker-dealers in the United States generated substantially more CD sales, by dollar amount, than broker-dealers in any other country, and no other country approached the magnitude of the United States as a generator of CD sales. *Id.*
>
> Most CD purchasers never saw or interacted with Antiguan employees, and notably, only a small number actually went to [SIBL's] Antiguan location to attempt to redeem their CDs. Investors instead dealt only with their financial advisors, few of whom were based in Antigua. These *financial advisors were essentially the face of the Stanford enterprise to investors*, providing CD applications, CD investment managing, and Stanford brokerage accounts. *Id.* at 49 (internal record citations omitted)(emphasis added).

See also Pendergest-Holt v. Certain Underwriters at Lloyd's London, 751 F.Supp.2d 876, 880 (S.D. Tex. 2010)("CDs primarily were marketed through "financial advisors" who worked for [SGC]").[21]

These findings shed a different light upon the stipulations relied upon by the district court. For example, while Stanford constructed his scheme to require

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[21] *Pendergest-Holt* was an insurance coverage action in the Southern District of Texas.

prospective CD investors to sign subscription agreements with SIBL, *see* Op. at 10, Stipulated Fact No. 3, the mechanics of making a CD investment were handled from start to finish by brokers who were agents of SGC, a SIPC member.[22] SGC agents were "the face of the Stanford enterprise." Chapter 15 Order at 49. Because SGC agents handled every aspect of a customer's SIBL CD purchase, there are almost certainly investors who "intended to have [SGC] purchase [CDs]" on their behalf and "reasonably followed the broker's instructions regarding payment." *Old Naples*, 223 F.3d at 1303; *Primeline*, 295 F.3d at 1107. Such investors are "customers" entitled to SIPA protection because they deposited their funds with their broker-dealer (SGC) for the purpose of acquiring a security (the SIBL CD), and those funds were then stolen.

4. Did the SIBL CDs "in fact exist"?

The district court relied upon its conclusion that "the SIBL CDs were in fact purchased and did in fact exist for SGC clients." Op. at 17. In reaching that conclusion, the district court relied upon the Stipulated Facts (Doc. No. 30-1) agreed upon by the SEC and SIPC. There are at least two significant problems with the district court's conclusion.

[22] Prospective CD investors in the United States were required to open SGC accounts. *See, e.g.*, Doc. No. 1-4 at 17-24, Martens Decl., Ex. 3 (SGC Account Application and Agreement); Doc. No. 25-10 at 2-10, Third Martens Decl., Ex. 4-G (Kogutt Aff., SGC Client Agreement).

First, the Stipulated Facts do not say the "SIBL CDs were in fact purchased" nor do they say those CDs "in fact exist." The phrases "in fact purchased" and "in fact exist" appear nowhere in the Stipulated Facts. Doc. No. 30-1. Instead, the Stipulated Facts establish only that the scheme operated by Stanford through SGC, SIBL and other Stanford Entities sent "most" investors some pieces of paper. *Id.* at 2, ¶¶4, 5. One piece of paper purported to be a SIBL CD; others purported to be account statements. Neither reflect what really happened to SGC customers' funds intended to purchase SIBL CDs.

The pieces of paper sent to "most" investors by Stanford, Stipulated Fact No. 4, and the periodic statements sent thereafter, Stipulated Fact No. 5, do not establish that a SIBL CD was "in fact purchased" nor that one "in fact exists." Those pieces of paper do no more to establish the existence of a "real CD" than did the statements given to customers in *Primeline*, 295 F.3d at 1109 (fictitious debentures), and *Old Naples*, 223 F.3d at 1301 (fictitious bond investments).

Second, the district court's treatment of the SIBL CDs as "real" investments that were "in fact purchased" and "in fact exist" is again contrary to the findings and rulings of the Receivership Court and the 5th Circuit. The Receivership Court has repeatedly found (and the 5th Circuit has affirmed) that Stanford and his cohorts were operating a classic Ponzi scheme from at least 1999. *See, e.g.*, *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 793 F.Supp. 2d 825, 857

(N.D.Tex. 2011), *aff'd* 699 F.3d 848 (5th Cir. 2012); Broker Injunction at 2, *aff'd* 647 F.3d 585 (5th Cir. 2011); Chapter 15 Order at 19 n. 23 ("the Court . . . holds that Stanford operated a Ponzi scheme"). The Receivership Court has further found that the centerpiece of Stanford's scheme was some $7.2 billion in "sham" CDs sold to investors (largely through SGC). Broker Injunction at 2, *aff'd* 647 F.3d 585 (5th Cir. 2011).

The Receivership Court and others have also found that Stanford and his cohorts manufactured fictitious earnings and asset values to give SIBL an acceptable looking (and wholly fictitious) financial status. *See, e.g*, Chapter 15 Order at 29 ("Davis determined bank earnings monthly, artificially pegging the amount at the number necessary to give the Bank an acceptable financial performance and capital ratios"); *Janvey v. Alguire*, 647 F.3d 585, 597 (5th Cir. 2011)(noting that Davis admitted "continued false reporting . . . upon which CD investors routinely relied"). In *Alguire*, the 5th Circuit noted the Receiver's expert testimony concerning Stanford's "creative reverse engineering" of SIB's accounting records:

> We found within SIB's accounting records worksheets used to derive *fictitious SIB revenues* back to 2004. The Ponzi scheme conspirators would simply determine what level of revenues SIB needed to report in order to both look good to investors and regulators and purport to cover CD obligations and other expenses. They would then back into that total amount by assigning equally *fictitious revenue amounts* to each category

> (equity, fixed income, precious metals, alternative) of a *fictitious investment allocation*.

647 F.3d at 597-98 (emphasis added). *See also Pendergest-Holt v. Certain Underwriters at Lloyd's London*, 751 F.Supp.2d 876, 890-91 (S.D. Tex. 2010)(Davis would "reverse engineer" desired returns by assigning fictitious revenue to various categories of purported investments).

In the SEC's analysis urging SIPC to commence a liquidation under SIPA, it characterized the SIBL CDs as "nothing more than participatory interests in a Ponzi scheme." Doc. No. 1-3 at 16, Martens Decl. Ex. 2 (SEC Analysis). That view is supported by both the Stipulated Facts relied upon by the district court and the findings of the Receivership Court and others. The pieces of paper delivered by Stanford to purported CD investors are fictions. They were no more than "participatory interests" in Stanford's Ponzi scheme, given to customers in exchange for dollars deposited with and at the behest of SGC and other Stanford-affiliated broker-dealers (and in significant measure used by those broker-dealers to fund their operations and perpetuate the Ponzi scheme).

B. *Old Naples* and *Primeline* Should Apply Here

The decisions of the 11th and 10th Circuits in *Old Naples* and *Primeline*, respectively, should control the disposition of this case. SGC customers who purchased SIBL CDs are in the same position as those who were deemed to be "customers" in both *Old Naples* and *Primeline;* like those customers, the customers of SGC should be afforded protection under SIPA.

There are a number of the parallels between SGC's customers and the customers in *Old Naples* and *Primeline*. Customer funds in both *Old Naples* and *Primeline* were stolen.[23] That is equally and unquestionably true of the funds deposited by SGC customers to purchase SIBL CDs. As the district court noted, both *Old Naples* and *Primeline* involved SIPC-member introducing brokers, like SGC, as opposed to clearing brokers. Op. at 11, 12. The findings of the Receivership Court and the 5th Circuit establish a number of other parallels. As in *Old Naples*, the operations of SGC were in large part funded by money SGC customers deposited for the purpose of purchasing securities (the SIBL CDs). *Janvey v. Alguire*, 647 F.3d 585, 599 (5th Cir. 2011); Broker Injunction at 2.

In both *Old Naples* and *Primeline*, the claimants were dealing with individuals who they understood to be (and who were) agents of a SIPC member broker. *Old Naples*, 223 F.3d at 1303; *Primeline*, 295 F.3d at 1107-08. That is true here. SGC "financial advisors were . . . the face of the Stanford enterprise to investors, providing CD applications, CD investment managing, and Stanford brokerage accounts." Chapter 15 Order at 49. SGC's brokers "in the United States

[23] *Old Naples*, 223 F.3d at 1301 ("Zimmerman had stolen their money"); *Primeline*, 295 F.3d at 1104 ("funds were diverted for Ameen's personal use").

generated substantially more CD sales, by dollar amount, than broker-dealers in any other country, and no other country approached the magnitude of the United States as a generator of CD sales." *Id.* at 43. Investors in the US "exclusively purchased CDs through broker-dealers in the United States at SGC." *Id.* at 42.

Both *Old Naples* and *Primeline* focus upon the investor's expectations:

> If an investor intended to have the brokerage purchase securities on her behalf and reasonably followed the broker's instructions regarding payment, she can be considered a "customer" under SIPA if the brokerage or its agents then misappropriate the funds.

Old Naples, 223 F.3d at 1303; *Primeline*, 295 F.3d at 1107 (same). This Court should do the same. The findings of the Receivership Court demonstrate that SGC investors seeking to purchase CDs likely "intended to have [SGC] purchase [CDs]" on their behalf and "reasonably followed [SGC's] instructions regarding payment." Those findings further demonstrate that "the brokerage [SGC] or its agents [Stanford, his cohorts and his affiliates]" then stole the investor's funds. *Old Naples* and *Primeline* dictate that some or all of the SGC investors who attempted to purchase CDs through their SGC brokers are "customers" in need of protection under SIPA.

In declining to follow *Old Naples* and *Primeline*, the district court largely relied upon a single supposed "fact" – that the customer funds in *Old Naples* and *Primeline* were not deposited with a clearing broker while here the customer funds likely were deposited with a clearing broker. Op. at 16-17.[24] There are two problems with the purported distinction.

The first is that it is not accurate – at least not with respect to *Old Naples*. The court's opinion in that case makes clear that at least some of the customer's money was deposited with the clearing broker:

> Weeks after each investment, funds representing the principal and interest were deposited in Eileen Brown's account with Howe Barnes [the clearing broker].

Old Naples, 223 F.3d at 1300. Moreover, *Old Naples* found that SIPA protection was available both to customers whose funds were deposited with the clearing broker and to those whose funds apparently were not.[25]

A second problem with the district court's attempt to distinguish *Old Naples* and *Primeline* is that it ignored evidence that SGC customer funds, once deposited with the clearing broker and forwarded to SIBL, were then stolen by Stanford for a variety of improper purposes, including the funding of SGC. The SEC offered evidence that referral fees and other CD-related revenue accounted for more than 50% of SGC's revenue during each year from 2004 through 2008. Doc. 25-3,

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[24] The district court also opined that *Old Naples* and *Primeline* were distinguishable because the SIBL CDs at issue "were in fact purchased and did in fact exist." Op. at 17. This Brief has already demonstrated that this conclusion is supported by neither the Stipulations nor the findings of the Receivership Court and the 5th Circuit.

[25] *Old Naples* does not specify whether the funds of other customers were deposited with a clearing broker or not.

Martens Third Decl. Ex. 2, at ¶27. The SEC also demonstrated that approximately $628M in investor funds were directed through SIBL accounts and back to SGC during the period from 2004 to 2008. Doc. 25-3, Martens Third Decl. Ex. 2, at ¶¶ 26-28. Despite this CD-related revenue, SGC had negative cash flow each year, *id.* at ¶27, and had a cumulative net loss for the five year period exceeding $94 million. *Id*. at KVT-4.[26]

In attempting to distinguish *Old Naples* and *Primeline*, the district court again elevates form over substance. Stanford and his cohorts constructed their scheme in a manner that caused investor funds deposited with SGC to pass through SGC's clearing broker before being funneled through accounts in the name of SIBL[27] and back to Stanford, SGC and other Stanford Entities, all to the detriment of investors who thought SGC was purchasing a security (a CD) for them. To deny SIPA protection simply because the structure of Stanford's scheme included SGC's clearing broker defies common sense and "legitimizes" the structure created by Stanford to steal money deposited by SGC's customers. The Receivership Court refused to elevate form over substance, *see* Chapter 15 Order at 36; this Court should as well.

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[26] The SEC's evidence is confirmed by the findings of the Receivership Court and the 5th Circuit.

[27] The SEC offered evidence that over $500 million was transferred from SGC's clearing broker to SIBL from 2006 through the inception of the Receivership. Doc. 1-4 at 40, Martens Decl. Ex. 3, Ward Aff. ¶4.

There is no meaningful distinction between this case, *Old Naples* and *Primeline*. This Court should adopt the reasoning of *Old Naples* and *Primeline* and find that some (or all) of SGC's customers are in need of protection under SIPA.

C. Stanford's Customers are in the Best Position to Establish their Status as "Customers" under SIPA

The SEC argues that it needs to show only "probable cause" to believe that there are customers in need of protection under SIPA.[28] Among the reasons offered was that the district court proceeding would not determine SIPC's liability to a single Stanford customer; rather, the district court proceeding would decide only whether SIPC was required to commence a SIPA proceeding in Texas. Doc. 25, SEC Reply at 15. In that Texas proceeding, each investor would bear the burden of demonstrating both that she was a "customer" for purposes of SIPA and the validity and amount of her claim. *Id*. *See also In re Selheimer & Co.*, 319 B.R. 395, 404 (Bnkr. E.D.Pa. 2005).

The SEC also argues that the "preponderance" standard applied below created a curious result in that it would require a third party – either SIPC or the SEC – "to prove an investor's eligibility without the investor's familiarity with, or degree of access to, the particular facts." SEC Brief at 30. As the SEC correctly

[28] The *amici* agree with the SEC's view on this issue.

notes, both a customer's entitlement to coverage under SIPA and the amount of a claim can be a "fact-intensive inquiry." *Id.*

The district court's "preponderance" standard seemingly homogenizes the "tens of thousands" of Stanford customers that may have claims arising from their dealings with SGC. Op. at 7. Instead of the "factually intensive inquiry" that would occur in a SIPA proceeding to determine each claimant's right to relief, the district court's approach sweeps all potential Stanford claimants out of the process before they have an opportunity to present their claims.[29] In adopting this approach, the district court ignored evidence that went beyond the Stipulations and strongly suggests that there are at least some "customers" in need of protection under SIPA.

For example, the district court relied upon a Stipulation that "CD investors wrote checks that were deposited into SIBL accounts." Op. at 10 (Stipulation of Fact No. 3). The record contains checks that were not written to SIBL – they were written simply to "Stanford." *See* Doc. 1-3 at 193, Martens Decl., Ex. 2 (check for $50,000.00 written to "Stanford"); at 194 (check written to "Stanford"). These checks are some evidence that there are investors who were not directed to write

[29] The district court correctly notes that no Stanford claimant has a private right to compel SIPC to act. Op. at 1, *citing SIPC v. Barbour*, 421 U.S. 412 (1975). Stanford claimants will only have an opportunity to present and prove their status as "customers" and their right to relief after SIPC is ordered to commence a SIPA proceeding.

checks to SIBL, did not write checks to SIBL to fund their CD purchases, and whose circumstances differ from those reflected in the Stipulations.

The district court similarly relied upon a Stipulation that "[m]ost SGC investors either received the physical CD certificates or had them held by an authorized designee." Op. at 10 (Stipulation of Fact No. 4). The record contains evidence that at least some investors never received the physical certificates that supposedly evidenced their purchase of a SIBL CD. *See* Doc. 1-3 at 175, Martens Decl., Ex. 2 (Matthews Aff.); Doc. 25-4 at 2-4, Martens Third Decl., Ex. 3 (Kogutt Aff.). The district court ignored this evidence, even though it relied upon the supposed stipulation that the CDs "were in fact purchased" and "did in fact exist" in attempting to distinguish *Old Naples* and *Primeline*. Op. at 17; *see supra* at 17-20. That some SGC customers never received their physical CD certificates is evidence that there are investors whose circumstances differ from those reflected in the Stipulations.

As previously discussed, the district court erroneously treated SGC and SIBL as separate entities. In *Old Naples*, one fact relied upon by the court in finding that there were "customers" in need of SIPA protection was that those customers were told that the SIPC member (Old Naples Securities) and the non-SIPC member (Old Naples Financial Services) were "one and the same." *Old Naples*, 223 F.3d at 1303 and n. 12. The Receivership Court has found that SGC, SIBL and the other Stanford Entities were essentially "one and the same" – they were all part of a single scheme. Chapter 15 Order at 36; *see also Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 793 F.Supp. 2d 825, 856 (N.D.Tex. 2011), *aff'd* 699 F.3d 848 (5th Cir. 2012).

The district court ignored evidence that SGC investors were told SGC and SIBL were essentially "one and the same." *See* Doc. No. 1-3 at 175, Martens Decl., Ex. 3 (Matthews Aff.);[30]Doc. No. 25-4 at 2-4, Martens Third Decl., Ex. 4 (Kogutt Aff.).[31] The findings of the Receivership Court and the evidence of record are more than sufficient to demonstrate that at least some Stanford investors were led to believe that SGC and SIBL were "one and the same" – just like the *Old Naples* customers.

Because of the nature of the proceeding conducted in the district court,[32] it was impossible for the SEC, SIPC or the court to conduct the "factually intensive" inquiry necessary to determine if a particular Stanford investor should be deemed

[30] Sally Matthews said she was "told Stanford Group Company and Stanford International Bank were both owned by Allen Stanford and were part of the Stanford Financial Group of Companies." She also said her broker referred to "all of the Stanford companies simply as 'Stanford'" and that SIBL was "owned/controlled by the same management as Stanford Group."

[31] Michael Kogutt said he was told "that Stanford Group Company and Stanford International Bank were both owned by Allen Stanford and were part of the Stanford Financial Group of Companies."

[32] The *amici* agree that SIPA contemplates only a "summary proceeding" where the SEC seeks to compel SIPC to commence a SIPA liquidation.

a "customer" in need of SIPA protection. That inquiry is left for the SIPA proceeding, during which the investor has the burden of establishing that she is a customer and has a valid claim. *In re Selheimer & Co.*, 319 B.R. 395, 404 (Bnkr. E.D.Pa. 2005). The district court erred in holding the SEC to the same "preponderance" standard that individual investors will have to meet; it should simply have determined whether there was "probable cause" to believe that there are "customers" in need of SIPA protection.

VI. CONCLUSION

This Court should reverse the order of the district court and direct SIPC to commence a SIPA proceeding in Texas. The SEC sufficiently demonstrated that there are investors who deposited funds with SGC for the purpose of buying SIBL CDs, and that those investors, like the customers in *Old Naples* and *Primeline*, are entitled to SIPA protection.

Respectfully submitted,

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January 23, 2013

CERTIFICATE OF COMPLIANCE

1. This corrected brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,848 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

2. This corrected brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Times New Roman type.

Dated: January 23, 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on January 23, 2013, I caused the foregoing brief to be served by ECF on all parties to this appeal as follows:

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No. 12-5286

SECURITIES AND EXCHANGE COMMISSION,
Petitioner-Appellant,

v.

SECURITIES INVESTOR PROTECTION CORPORATION,
Respondent-Appellee

***AMICUS CURIAE* BRIEF OF THE COURT-APPOINTED EXAMINER, THE OFFICIAL STANFORD INVESTORS COMMITTEE, AND THE STANFORD VICTIMS COALITION**

EXHIBIT 1

Broker Injunction

Doc. No. 456 in *Janvey v. Alguire*,
Civil Action No. 3:09-CV-0724-N (N.D. Tex. June 10, 2010),
aff'd 628 F.3d 164 (5th Cir. 2010),
op'n withdrawn and replaced, 647 F.3d 585 (5th Cir. 2011)

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

RALPH S. JANVEY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:09-CV-724-N
	§	
JAMES R. ALGUIRE, *et al.*,	§	
	§	
Defendants.	§	

PRELIMINARY INJUNCTION

This Order addresses the Receiver's application for preliminary injunction [392]. Because the Court finds that the Receiver satisfies all the requirements to obtain a preliminary injunction under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), the Court grants his application. The Court enjoins certain former Stanford employees ("Employee Defendants")[1] from removing funds currently frozen in accounts located at Pershing LLC and JP Morgan Clearing Corp., unless funds in the accounts exceed the total of: (1) commissions earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation.[2]

[1] *See* Appendix A (list of Employee Defendants).

[2] For a totals for each category of funds for each defendant, see the declaration of forensic account Karyl Van Tassel. App. to Receiver's Mot. for Prelim. Inj. at 3–12 [393].

I. Background

A. The Stanford Ponzi Scheme

In February 2009, the Securities Exchange Commission ("SEC") sued various players in what it called a "massive Ponzi scheme" controlled by R. Allen Stanford. Stanford, through his Stanford International Bank ("SIB"), issued some $7.2 billion in sham certificates of deposit ("CDs") to investors.[3] Stanford perpetuated his fraud through a web of more than 100 entities. Defendants in this case are former employees of the Stanford entities. Most worked for Stanford Group Company ("SGC"), a registered broker-dealer; SGC's principal source of revenue was the sale of SIB-issued CDs.

The Stanford scheme operated as a classic Ponzi scheme, paying dividends to early investors with funds brought in from later investors. CD proceeds largely went to speculative and illiquid investments; payments to the first round of investors; large "loans" that Stanford and his associates used funded a lavish lifestyle; and commissions, bonuses, and loans to SGC employees. Indeed, by the time the SEC filed suit, most of the $7.2 billion revenue from CD sales was gone, and the value of the Stanford entities' combined assets was less than $1 billion.

B. Procedural History

After the SEC brought suit against Stanford, this Court appointed a Receiver to "marshal, conserve, protect, and hold funds and assets" obtained in connection with this scheme. The Court appointed Ralph S. Janvey as the receiver of these assets, and vested him

[3]The facts in this section represent the Court's findings based on the evidence before it in this proceeding.

"with full power of an equity receiver under the common law as well as such powers as are enumerated herein in this order." The Court also froze all accounts that originated through SGC, and the Receiver took control of those accounts.

Several months after the Court froze these accounts, the Court advised the Receiver that he must either assert claims against account holders or release their accounts. Thus, the Receiver sued hundreds of investors ("Investor Defendants") and former Stanford employees ("Employee Defendants"), bringing claims against them in the SEC proceeding as "relief defendants." The Court then severed the "relief defendant" complaint from the SEC action, creating this separate lawsuit, *Janvey v. Alguire*. Shortly after this case commenced, the Receiver asked the Court to continue the account freeze as to the Investor Defendants. The Court held a hearing on the issue on July 31, 2009, at which it ruled that the asset freeze could continue only with respect to interest earned from the CDs, but not with respect to return of principal. The Fifth Circuit affirmed the Court's Order in part and reversed it in part, holding that the Receiver must release *all* of the Investor funds because the Investor Defendants were not proper "relief defendants." *Janvey v. Adams*, 588 F.3d 831, 834–35 (5th Cir. 2009).

The Fifth Circuit in *Adams* did not specifically address whether the Employee Defendants were proper relief defendants. *See generally id.* However, in light of the Fifth Circuit's reasoning, the Receiver amended his complaint against the Employee Defendants. *See* Second Am. Compl. at 4–5 [156].[4] His only remaining claims against the Employee

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[4]The new complaint states:

The Receiver now respectfully files this Second Amended Complaint Against

Defendants are fraudulent transfer and, in the alternative, unjust-enrichment.

Further, post-*Adams*, the Receiver reached a partial compromise with the Employee Defendants regarding a partial release of their frozen accounts. *See* Order of Jan. 7, 2010 [174]. Several months later, the parties reached another compromise resulting in an another agreed order, which this Court entered. *See* Order of Apr. 6, 2010 [379]. That order provided for the immediate release of all funds in the Employee Defendants' accounts, with the exception of several limited categories of funds. The funds that were to remain frozen were: (1) commissions earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation. *Id.* at 1.

The April 6 account freeze was set to expire on June 1, 2010. The Receiver asked Court to continue the account freeze in the form of a temporary restraining order, a preliminary injunction, or a writ of attachment. *See* Mot. for Prelim. Inj. at 33 [392]. The Court granted the request for temporary restraining order pending resolution of the preliminary injunction application. *See* Order of May 28, 2010 [448].

The Receiver asks the Court to enjoin "removal or dissipation of the assets in the Accounts" pending a trial on the merits in this case. *Id.* The Employee Defendants argue that the Court must deny the Receiver's preliminary injunction application because (1) the Court cannot issue a preliminary injunction because their claims are subject to arbitration,

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> Former Stanford Employees and an Appendix in support, amending herein his claims against the Former Stanford Employees to dismiss the relief-defendant claims against them in light of the recent decision of the U.S. Court of Appeals for the Fifth Circuit in *Janvey v. Adams*, Nos. 09-10761 & 09-10765, 2009 WL 3791623 (5th Cir. Nov. 13, 2009).

Id. at 5.

(2) the Receiver's requested relief is really an impermissible motion for writ of attachment; (3) the Receiver cannot meet the requirements for a preliminary injunction; and (4) the Receiver's calculation of CD proceeds are flawed. The Court addresses each of these arguments in turn.

II. THE COURT CAN GRANT PRELIMINARY RELIEF BEFORE DECIDING WHETHER TO COMPEL ARBITRATION

Defendants argue that the Court is without power to grant preliminary injunctive relief because the Receiver's claims against them are subject to arbitration. The Fifth Circuit has not weighed in on the question of "'[w]hether the [Federal] Arbitration Act bars the issuance of a preliminary injunction pending arbitration.'" *RGI, Inc. v. Tucker & Assocs., Inc.*, 858 F.2d 227 (5th Cir. 1988) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127 (1985) (White, J., dissenting from denial of cert.)). The Fifth Circuit *has* held that, at a minimum, a district court may issue a preliminary injunction pending arbitration where such relief was contemplated by the parties' agreement. *RGI*, 858 F.2d at 231.

The situation in this case is different from the cases cited above because Defendants' motions to compel arbitration, many of which very recently became ripe, are still pending. *See Positive Software Solutions Inc. v. New Century Mortg. Corp.*, 259 F. Supp. 2d 561, 563 (N.D. Tex. 2003) (distinguishing between granting injunctive relief while a motion to compel arbitration is pending and granting injunctive relief after a determination that the dispute is subject to arbitration). Due to the time-sensitive nature of the Receiver's requested relief, the Court finds itself in the position of having to decide whether to issue a preliminary injunction before it can resolve the myriad motions to compel arbitration now pending in this case.

The Court holds that it has the power to preserve the status quo pending a decision on the motions to compel arbitration. "[T]he weight of federal appellate authority recognizes some equitable power on the part of the district court to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel." *Merrill Lynch, Pierce, Fenner & Smith v. Salvano*, 999 F.2d 211, 214 (7th Cir. 1993) (citations omitted); *accord Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995) ("[W]e adopt the reasoning of the First, Second, Third, Fourth, Seventh, and arguably the Ninth, Circuits and hold that in a dispute subject to mandatory arbitration under the Federal Arbitration Act, a district court has subject matter jurisdiction under § 3 of the Act to grant preliminary injunctive relief . . . ."). These cases, which address whether a court may issue injunctive relief pending the resolution of an arbitration itself, do not specifically address whether a court may preserve the status quo pending its resolution of a *motion to compel* arbitration. However, the logical inference is that the greater includes the lesser: if a district court has the power to order interim relief pending the conclusion of an arbitration itself, surely it also has the power to do so pending a decision on a motion to compel.[5]

The Court has not decided whether: (1) the Receiver's claims are subject to arbitration, or (2) the parties' arbitration agreement contemplates preliminary injunctive

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[5]To hold otherwise would create a harsh procedural rule: in order to avoid irreparable injury, motions to compel arbitration where a request for injunctive relief is involved must be resolved before any temporary restraining order expires. Such a rule would be both burdensome for district courts and impracticable, given the time it takes motions to compel arbitration to become ripe for ruling, even if no discovery is required.

relief. Accordingly, if the Court rules in favor of Defendants on their motions to compel arbitration, Defendants may ask the Court to reconsider its preliminary injunction in light of Fifth Circuit law and the terms of the arbitration agreement.

III. A TUFTA INJUNCTION IS A DISTINCT REMEDY FROM A WRIT OF ATTACHMENT

The Employee Defendants also argue that, regardless of the form of the Receiver's request, the relief he really seeks is a writ of attachment and the Court must analyze it as such. *See* Defs.' Resp. at 7 [413]. The Court rejects this argument because "attachment" and "injunction" are distinct and alternative remedies under TUFTA. Texas courts analyze preliminary TUFTA injunctions under Section 24.008(3), which provides for "an injunction against further disposition the asset transferred or of other property." TEX. BUS. & COM. CODE ANN. § 24.008(3); *see, e.g.*, *Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 610 (Tex. App. — Houston [1 Dist.] 2002, no pet.) (distinguishing remedy of a TUFTA injunction from attachment in non-TUFTA cases). TUFTA's remedies provision also provides for an attachment as a provisional remedy. TEX. BUS. & COM. CODE ANN. § 24.008(2). Thus, the statute's plain terms make clear that "attachment" and "injunction" are distinct remedies. Accordingly, because the Court exercises its discretion to grant a preliminary injunction under TUFTA, it need not consider the Receiver's alternative request for a writ of attachment.

IV. THE COURTS GRANTS THE RECEIVER'S MOTION FOR PRELIMINARY INJUNCTION UNDER TUFTA

TUFTA provides various remedies for fraudulent transfer claimants, one being an injunction against "further disposition by . . . the transferee . . . of the asset transferred or of other property." TEX. BUS. & COM. ANN. § 24.008(3)(A). A court may grant a TUFTA injunction "subject to applicable principles of equity and in accordance with applicable rules of civil procedure." *Id.* The "applicable principles of equity" that determine when a district court may issue preliminary injunctive relief "are long-established in this circuit." *Libertarian Party of Tex. v. Fainter*, 741 F.2d 728, 729 (5th Cir. 1984). A party seeking preliminary injunctive relief must demonstrate:

> (1) a substantial likelihood that plaintiff will prevail on the merits,
> (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted,
> (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and
> (4) that granting the preliminary injunction will not disserve the public interest.

Id. (citing *Canal Auth. of the State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)). The party seeking the preliminary injunction must clearly carry the burden of persuasion on all four requirements. *Bluefield Water Assoc., Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009). The decision whether to grant preliminary injunctive relief lies within the sound discretion of the trial court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

A. Likelihood of Success on the Merits

"To determine the likelihood of success on the merits," a court must "look to the standards provided by the substantive law." *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990) (citing *Miss. Power & Light*, 760 F.2d at 622).[6] "Substantial likelihood" does not mean "more than negligible." *Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978). Something more than that is required. However, "[a] plaintiff is not required to prove its entitlement to summary judgment in order to establish 'a substantial likelihood of success on the merits' for preliminary injunction purposes." *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (citing *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 596 n.34 (5th Cir. 2003)); *see also* 11A CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2948.3 (2d ed. 1995) [hereinafter WRIGHT & MILLER] (noting that "[a]ll courts agree" that a "plaintiff must present a prima facie case but need not show that he is certain to win" (citing cases)).

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[6]In considering the likelihood of success on the merits, the Court looks to the evidence the parties have presented in this preliminary injunction proceeding. Defendants object to the Receiver's evidence as inadmissible on various grounds. *See* Defs.' Resp. at 2–3 [413]; Defs.' Resp. at 5–14 [417]. The Court overrules these objections. A preliminary injunction proceeding is not constrained by the same formal procedures as a trial. *See Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987). Indeed, "'inasmuch as the grant of preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be held . . . .'" *Id.* (quoting 11C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2949).

1. The Receiver's Prima Facie Case. — The Receiver creates a prima facie case for liability under TUFTA.[7] Under TUFTA, certain transfers are deemed invalid as to present and future creditors. Specifically, "[a] transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor." TEX. BUS. & COM. CODE ANN. § 24.005(a)(1).

Under the Uniform Fraudulent Transfer Act, "transfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception." *Quilling v. Schonsky*, 247 F. App'x 583, 586 (5th Cir. 2007) (citing *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006)). Thus, the Receiver may establish fraudulent intent by establishing that the Stanford enterprise operated as a Ponzi scheme. *See Warfield*, 436 F.3d at 558. A so-called "Ponzi scheme" is "'[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors.'" *Schonsky*, 247 F. App'x at 586 (citing BLACK'S LAW DICTIONARY 1180 (8th ed. 2004)). The transferee's knowledge is not relevant to determining whether transfers were made with an intent to defraud. *Id.*[8]

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[7]Defendants argue that the Court must deny the Receiver's preliminary injunction application because the Receiver failed to plead his fraudulent transfer claim with requisite particularity under Rule 9(b). *See* Defs.' Resp. at 18 [417]. The Court will address the sufficiency of the Receiver's complaint at a later date, when it rules on Defendants' pending motions to dismiss. The question before the Court today is whether the Receiver has shown a likelihood of success in the context of these preliminary injunction proceedings.

[8]Because no Texas Supreme Court cases address the requisite mental state for a transferee-defendant under TUFTA, the Fifth Circuit in *Schonsky* made its best "*Erie* guess" as to the proper construction of the statute. *See id.* This accords with the plain language of TUFTA, which posits that transfers are fraudulent "if the *debtor* made the transfer or incurred

The Court finds that the Receiver has properly demonstrated that: (1) the funds he seeks to freeze represent transfers of Stanford CD proceeds, and (2) that the Stanford enterprise operated as a Ponzi scheme (and thus that actual intent to defraud was present). As to the transfers, it is undisputed that the currently frozen funds represent amounts transferred from the Stanford entities to the Employee Defendants in the course of their employment.[9] The frozen funds represent: (1) loans made by SGC to the Employee Defendants; (2) commissions earned from the sale of SIB CDs; and (3) quarterly bonuses to financial advisors and managing directors. In other words, the frozen funds directly represent proceeds and profits that the Employee Defendants earned selling Stanford CDs.[10]

Second, the Receiver presents ample evidence that the Stanford scheme, within which the transfers occurred, was a Ponzi scheme. This creates a presumption of actual fraud on the part of the debtor-transferor (here, the Stanford entities). He relies on the plea agreement

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the obligation with actual intent . . . ." TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (emphasis added).

[9]Defendants also argue that the Receiver has not shown a likelihood of success on the merits of his claims because he has improperly "lumped" the Employee Defendants in his complaint and in this preliminary injunction proceeding. This is incorrect. The Receiver presents competent evidence that each individual Defendant received transfers of money representing CD sale proceeds from the Stanford Ponzi scheme. *See* App. to Receiver's Mot. for Prelim. Inj. at 8–12. He presents evidence of actual fraudulent intent on the part of the debtor-transferor, Stanford. Defendants do not dispute that Defendants received the transfers in question as proceeds from the Stanford scheme. Nor do they point the Court to authority indicating that some other, more individualized showing is required.

[10]As the Receiver notes, it is not important whether the currently frozen funds, which were commingled in the Employee Defendants' CD accounts with other amounts that have since been released, are the exact funds received in connection with the Stanford scheme. This is because TUFTA allows an injunction against further disposition of "the asset transferred or of other property." TEX. BUS. & COM. CODE ANN. § 24.008(a)(3)(A).

of James Davis, the chief financial officer of SGC. *See* App. to Notice of Filing [771], *SEC v. Stanford Int'l Bank*, Civil Action No. 09-CV-0298 (N.D. Tex. 2009) [hereinafter "Davis Declaration"]. Davis admitted that the Stanford enterprise took in billions of dollars in CD sales, most of which it diverted into illiquid and overinflated investments. *Id.* at 41–45. Davis himself admitted that the Stanford CD-selling enterprise was a "massive Ponzi scheme," in which investors could not be paid without money collected from later investors. *Id.* at 44–45. The Receiver presents an extensive report from a forensic accountant confirming Davis's admissions. *See* App. to Receiver's Reply [444-2 to 444-4]. He also provides a report from the inspector general of the SEC, which also confirms that the Stanford enterprise operated as a Ponzi scheme. App. to Receiver's Mot. for Prelim. Inj. at 28–184.

Defendants argue that the Receiver fails to demonstrate that the Stanford enterprise operated as a Ponzi scheme. *See* Defs.' Resp. at 12 [392]. They argue that, to the extent the Stanford enterprise had any legitimate revenue-generating activity, it was not a Ponzi scheme. This is incorrect. It is true that a Ponzi scheme "usually" lacks "any operation or revenue-producing activity other than the continual raising of new funds." BLACK'S LAW DICTIONARY, *supra*, at 1180. However, the term "usually" is an important qualifier in Defendants' definition. Just because the typical Ponzi scheme lacks any legitimate revenue-producing activity does not mean the Stanford scheme was not a Ponzi scheme. Even if Stanford maintained some legitimate investments in order to lure in more investors, the evidence indicates that they comprised a small fraction of his portfolio. *See* Davis Declaration at 43.

The Court finds that the Stanford enterprise operated as a Ponzi scheme, and that the frozen accounts hold proceeds of the fraudulent scheme transferred to Defendants by Stanford with an intent to hinder, delay, and defraud Stanford creditors.

2. Affirmative Defenses. — Because the Receiver showed he is likely to succeed on his prima facie case, Defendants can refute that he is likely to succeed on the merits only by showing that they are likely to succeed on an affirmative defense. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("[T]he burdens at the preliminary injunction stage track the burdens at trial."); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) ("[O]nce the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the non-moving party to show a likelihood that its affirmative defense will succeed.").

TUFTA includes a statutory affirmative defense, which provides that "[a] transfer or obligation is not voidable under Section 24.005(a)(1) of this code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." TEX. BUS. & COM. CODE ANN. § 24.009(a). A defendant invoking this defense has the burden to show *both* objective good faith and reasonable equivalence of consideration. *See, e.g.*, *Hahn v. Love*, 2009 WL 793637, at *6 (Tex. App. — Houston [1 Dist.] 2009, pet. denied).

Defendants fail to show that they are likely to succeed on an objective-good-faith defense. First, they present no evidence to indicate that they acted in objective good faith. As to the second prong of their good-faith defense, Defendants present no evidence that they provided equivalent value for the fraudulent transfers they received. Further, the Fifth

Circuit has held that, as a matter of law, services provided in the context of a Ponzi scheme do not constitute "reasonably equivalent value." *See Warfield*, 436 F.3d 558–60. Accordingly, the Court finds that Defendants fail to establish the elements of this affirmative defense, and that it does not preclude the Court's determination that the Receiver is likely to succeed on the merits.

B. Threat of Irreparable Harm

A party seeking a preliminary injunction must show that "the threatened harm would impair the court's ability to grant an effective remedy." 11A WRIGHT & MILLER § 2948.1. The party must also show that there is an actual likelihood that the suggested harm will occur. *See id.*

The Receiver successfully shows that the threatened harm — dissipation of the assets that are the subject of this suit — would impair the Court's ability to grant an effective remedy. Much of the relief the Receiver seeks under TUFTA is equitable in nature and involves the specific assets that are now frozen. *See* TEX. BUS. & COM. CODE ANN. § 24.008(a) (listing various equitable remedies available under TUFTA, including avoidance of the fraudulent transfer, injunction, and appointment of an equitable receiver). If Defendants were to dissipate or transfer these assets out of the reach of the Court, the Court would be unable to grant the equitable remedies the Receiver seeks.

Other Courts have reached a similar conclusion in both fraudulent transfer and analogous cases. In numerous fraudulent transfer cases,[11] courts have held that dissipation

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[11]As the statute itself makes clear, the Texas Legislature adopted TUFTA with the specific purpose that it be applied uniformly with other states' versions of the Act. TEX. BUS.

of assets would be an irreparable harm to a plaintiff. *See, e.g.*, *S. New Eng. Tel. Co. v. Global Naps, Inc.*, 595 F. Supp. 2d 155, 159 (D. Mass. 2009) ("This Court is persuaded that, absent an injunction, there is a substantial risk that Convergent or Gangi will dissipate, conceal or otherwise secrete assets thus causing irreparable harm to SNET."); *Seib v. Am. Sav. & Loan Ass'n of Brazoria County*, 1991 WL 218642, at *4 (Tex. App. — Dallas 1991, no writ) ("The property has been the subject of a scheme of fraudulent conveyances. If further transfers of such property are not enjoined, appellees will be forced to file lawsuits against subsequent transferees in an attempt to recover the property."). Courts have reached a similar conclusion in analogous contexts as well. *See, e.g.*, *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999) ("[A]bsent the continuation of the asset freeze, the Enjoined Defendants will conceal, dissipate, or otherwise divert their assets, thereby defeating the possibility of the Court granting effective final relief in the form of equitable monetary relief for consumers."); *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 707 (S.D. Tex. 2002) (holding that plaintiffs could obtain preliminary injunction if, inter alia, they could show that the defendants were "likely to dissipate the assets that may satisfy the equitable remedies" sought by plaintiffs).

Defendants argue that the Court cannot find irreparable harm because the Receiver has an adequate remedy in the form of money damages. It is true that courts generally do not find irreparable harm where money damages would be an adequate remedy. *See* 11A WRIGHT & MILLER § 2948.1 (citing cases). However, this rule does not inhere when "any

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& COM. CODE ANN. § 24.012 ("This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it."). Thus, the Court finds persuasive UFTA cases from other jurisdictions.

judgment ultimately obtained . . . would be unenforceable." *Productos Carnic, S.A. v. Central Am. Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980). For example, "when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the status quo pending judgment where the legal remedy might prove inadequate . . . ." *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 496–97 (4th Cir. 1999) (discussing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)). This is precisely the kind of case where preliminary injunctive relief is appropriate despite the fact that the suit is to recover money: the essence of a TUFTA claim is that the money now held by the transferee-defendant actually belongs to the creditor-plaintiff.

In addition to showing that the threatened harm would be irreparable, a party seeking a preliminary injunction must also show more than mere fear or speculation that the harm will occur. 11A WRIGHT& MILLER § 2948.1 (citing cases). Defendants argue that, in this case, that means that the Receiver must show a likelihood that each individual defendant would dissipate the frozen assets absent a preliminary injunction. They rely on a case from the Southern District of Texas, in which the court came to a similar conclusion. *See Newby*, 188 F. Supp. 2d at 707. There, the court noted that, although dissipation of asset could constitute irreparable harm to any "future equitable award entered by this court," the plaintiffs were required to show that "each defendant is likely to dissipate the assets that may satisfy the equitable remedies." *Id.*

However, the case on which Defendants rely is not a fraudulent transfer case. Various courts, including Texas courts, have found that a history of fraudulent transfer of an asset creates a presumption of its further dissipation. *See, e.g.*, *In re Focus Media*, 387 F.3d 1077, 1087 (9th Cir. 2004) (history of fraudulent transfer "raises the specter of irreparable harm to the bankruptcy estate if these funds are not frozen"); *Affordable Media*, 179 F.3d at 1236–37 (district court's finding of a risk of dissipation of assets, in light of defendants' "history of spiriting their commissions," was "far from clearly erroneous"); *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988) (district court had discretion to freeze assets of individual defendants in light of history of shifting assets from fraudulent entity to individual defendants); *Seib*, 1991 WL 218642, at *4 ("In cases such as this where there is a prior history of fraudulent conveyances, it is necessary to preserve the status quo of the subject matter of the suit pending a final trial of the case on its merits.").

Like the other courts that have inferred a likelihood of dissipation from a history of fraudulent conveyance, this Court is satisfied that the risk of harm to the Receiver absent the injunction is more than mere speculation. The assets in question have been the subject of prior fraudulent conveyances to the detriment of Stanford investors. Thus, the Court finds it is likely that, absent an injunction, the assets would again be dissipated or transferred out of reach of Stanford creditors and thus that the Receiver has adequately shown a threat of irreparable harm.

C. Balance of Interests and Service of Public Interest

Further, the potential harm to the Receiver absent a preliminary injunction outweighs the potential harm to Defendants. Defendants argue that "the mere pennies that an investor may receive in a theoretical distribution from a successful recovery by the Receiver does not outweigh the [financial advisors'] interest in their own assets." The Court disagrees. The

Court must weigh, on one hand, the harm to Defendants of not being able to spend or use the frozen assets pending resolution of the merits of this case, and, on the other hand, the harm to investors as a whole if no injunction issues. For them, the harm is the possible dissipation of one of the few remaining assets that may eventually be available to Stanford's victims. On balance, the Court finds that this potential harm to the investors outweighs the harm of Defendants not being able to access their assets during the pendency of this case.

Finally, the preliminary injunction will not disserve the public interest. In fact, the opposite is true. The Receiver seeks to enjoin removal of frozen funds because he believes they are fraudulently transferred assets that properly belong to innocent Stanford creditors. If the funds are dissipated, they may be transferred out of the reach of the Receiver — and thus the investors — forever. To risk dissipation of one of the few assets potentially available to Stanford's fraud victims before this case can be decided on its merits would substantially disserve the public interest.

V. The Receiver's Calculations

Defendants advance various arguments that this injunction should not issue because the *amount* of the Receiver's requested freeze is flawed. First, Defendants argue that their IRA accounts are exempt under Texas law from attachment, execution, and seizure for the satisfaction of debts. *See* Defs.' Resp. at 18–19 [417]. However, not every IRA is automatically exempt from creditors' claims. "A party claiming an exemption under section 42.0021 bears the burden of proving that he or she is entitled to it." *Jones v. Am. Airlines, Inc.*, 131 S.W.3d 261, 270 (Tex. App. — Fort Worth 2004, no pet.) (citations omitted). Specifically, the party claiming an exemption must show that she has a legal right to the funds in the account. *See id.* Defendants fail to carry this burden, especially in light of tremendous evidence and the Court's finding that the funds in the IRA accounts represent fraudulently transferred Ponzi scheme proceeds.

Second, Defendants argue that the freeze should not extend to pre-tax amounts because Defendants already paid taxes on their earnings. In response, the Receiver points the Court to one case in which a federal court declined an offset for taxes paid. *See Donell v. Kowell*, 533 F.3d 762, 779 (9th Cir. 2008). There, the Ninth Circuit held that

> if we permit offsets for taxes, logic suggests we should also permit offsets for bank transfer fees and other fund management fees. . . . There is simply no principle by which to limit such offsets . . . . If each net winner could shield his gains in their entirety in this manner, the purpose of UFTA would be defeated, and the multitude of victims who lost their entire investment would receive no recovery.

Id. The Court is compelled enough by this reasoning to decline the request for offset with respect to the preliminary injunction.

Third, Defendants argue that they are entitled to offset of: (1) amounts they lost on their own personal Stanford investments, and (2) amounts of unpaid compensation owed to Defendants. Defendants provide no legal authority indicating that they would be entitled to such an offset. These amounts are essentially unsecured claims Defendants have against the Stanford entities. Like all other Stanford creditors, Defendants may seek these amounts through the Receiver's claims process.

Fourth, Defendants argue that some of the frozen funds predate TUFTA's four-year statute of limitations period and that those amounts must be excluded from the freeze. However, Defendants make no effort to establish which frozen funds are subject to the statute of limitations. Further, as the Receiver correctly notes, even if some of the specific funds now frozen were transferred prior to the limitations period, the total amount of his claims far exceeds the frozen amounts. Because TUFTA allows an injunction on the asset transferred or "other property," the Court overrules Defendants' statute-of-limitations objection.

Fifth, Defendants allege several problems with the Receiver's calculations of employee loans and severance payments. The Court overrules this objection because loan and severance payments are not part of the current account freeze that the Receiver seeks to continue. *See* Order of Apr. 6, 2010 at 1; Receiver's Reply at 7 n.13 [444]; *see also* App. to Receiver's Mot. for Prelim. Inj. at 3–12 (declaration of forensic accountant Karyl Van Tassel, listing loan and severance payments separately from the three categories of funds the Receiver seeks to enjoin).

VI. BOND

Although Rule 65's security requirement is generally thought to be mandatory, a district court has discretion to determine the appropriate amount of bond. 11A WRIGHT & MILLER § 2954 (noting that "[t]he mandatory nature of the security requirement is ameliorated by" the qualification that the security will be "'in such sum as the court deems proper.'"). Thus, the Fifth Circuit, along with other federal courts of appeals, has held that a court may dispense with the security requirement if the grant of an injunction carries no risk of monetary loss to the defendant. *See, e.g, Steward v. West*, 449 F.2d 324, 325 (5th Cir. 1971) ("We think, though, that so long as the petitioner continues to pay her rent, it is very unlikely that the defendant will suffer any harm during the pendency of Mrs. Steward's efforts to protect herself and her children from eviction."); *see also* 11A WRIGHT& MILLER

§ 2954 ("Indeed, it has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant." (citing cases)). Here, the Receiver has shown that the frozen accounts are safely in the custody of the financial institutions where they are held. Employee Defendants will be entitled to any interest that accrues on their accounts in the event they eventually prevail on the merits at trial. Further, Defendants fail to show that they would suffer any other monetary harm from lack of access to the frozen accounts if the preliminary injunction issues, let alone the possible value of such harm so as to allow the Court to calculate an appropriate security. In light of Defendants' failure to demonstrate a specific monetary harm that will befall them if the injunction issues, the Court finds that no bond is necessary at this time.

CONCLUSION

Because the Court finds that the Receiver satisfies all the requirements to obtain a preliminary injunction under TUFTA, the Court grants his application for preliminary injunction. The Court enjoins the Employee Defendants from removing funds currently frozen in accounts located at Pershing LLC and JP Morgan Clearing Corp., unless funds in the accounts exceed the total of: (1) commissions earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation. *Id.* at 1.[12]

It is further ordered that this Order is binding upon the parties to this action, their officers, agents, servants, employees and attorneys and upon persons in active concert or

[12]For a totals for each category of funds for each defendant, see the declaration of forensic account Karyl Van Tassel. App. to Receiver's Mot. for Prelim. Inj. at 3–12 [393].

participation with them who receiver actual notice of this Order by personal service or otherwise.

Signed June 10, 2010.

David C. Godbey
United States District Judge

APPENDIX A: LIST OF STANFORD EMPLOYEE DEFENDANTS

1. Jeffrey E. Adams
2. Paul Adkins
3. Jeannette Aguilar
4. James R. Alguire
5. Peggy Allen
6. Orlando Amaya
7. Victoria Anctil
8. Tiffany Angelle
9. Susana Anguiano
10. James F. Anthony
11. Sylvia Aquino
12. Juan Araujo
13. Monica Ardesi
14. George Arnold
15. John Michael Arthur
16. Patricio Atkinson
17. Mauricio Aviles
18. Donald Bahrenburg
19. Brown Baine
20. Timothy Bambauer
21. Isaac Bar
22. Elias Barbar
23. Stephen R. Barber
24. Jonathan Barrack
25. Robert Barrett
26. Jane E. Bates
27. Timothy W. Baughman
28. Marie Bautista
29. Oswaldo Bencomo
30. Teral Bennett
31. Lori Bensing
32. Andrea Berger
33. Marc H. Bettinger
34. Norman Blake
35. Stephen G. Blumenreich
36. Michael Bober
37. Nigel Bowman
38. Brad Bradham
39. Fabio Bramanti
40. Fernando Braojos
41. Alexandre Braune
42. Charles Brickey
43. Alan Brookshire

44. Nancy Brownlee
45. Richard Bucher
46. George Cairnes
47. Fausto Callava
48. Robert Bryan Cannon
49. Frank Carpin
50. Rafael Carriles
51. Scott Chaisson
52. James C. Chandley
53. Naveen Chaudhary
54. Jane Chernovetzky
55. Susana Cisneros
56. Ron Clayton
57. Neal Clement
58. Christopher Collier
59. Jay Comeaux
60. Michael Conrad
61. Michael Contorno
62. Bernard Cools-Lartigue
63. Don Cooper
64. Jose Cordero
65. Oscar Correa
66. James Cox
67. John Cravens
68. Ken Crimmins
69. Shawn M. Cross
70. James Cross
71. Patrick Cruickshank
72. Greg R Day
73. William S. Decker
74. Michael DeGolier
75. Andres Delgado
76. Pedro Delgado
77. Ray Deragon
78. Arturo R. Diaz
79. Ana Dongilio
80. Matthew Drews
81. Carter W. Driscoll
82. Abraham Dubrovsky
83. Torben Garde Due
84. Sean Duffy
85. Christopher Shannon Elliotte
86. Neil Emery
87. Thomas Espy
88. Jordan Estra

89. Jason Fair
90. Nolan Farhy
91. Evan Farrell
92. Marina Feldman
93. Ignacio Felice
94. Bianca Fernandez
95. Freddy Fiorillo
96. Lori J. Fischer
97. Rosalia Fontanals
98. James Fontenot
99. Juliana Franco
100. John Fry
101. Roger Fuller
102. Attlee Gaal
103. Miguel A. Garces
104. Gustavo A. Garcia
105. David Braxton Gay
106. Gregg Gelber
107. Mark Gensch
108. Gregory C. Gibson
109. Michael D. Gifford
110. Eric Gildhorn
111. Luis Giusti
112. Steven Glasgow
113. John Glennon
114. Susan Glynn
115. Larry Goldsmith
116. Ramiro Gomez-Rincon
117. Joaquin Gonzalez
118. Juan Carlos Gonzalez
119. Russell Warden Good
120. John Grear
121. Jason Green
122. Stephen Greenhaw
123. Mark Groesbeck
124. Billy Ray Gross
125. Vivian Guarch
126. Donna Guerrero
127. John Gutfranski
128. Rodney Hadfield
129. Gary Haindel
130. Jon Hanna
131. Dirk Harris
132. Virgil Harris
133. Kelley L. Hawkins

134. Charles Hazlett
135. Roberto T. Helguera
136. Luis Hermosa
137. Daniel Hernandez
138. Martine Hernandez
139. Patrica Herr
140. Alfredo Herraez
141. Helena M. Herrero
142. Steven Hoffman
143. Robert Hogue
144. John Holliday
145. Nancy J. Huggins
146. Charles Hughes
147. Wiley Hutchins, Jr.
148. David Innes
149. Marcos Iturriza
150. Charles Jantzi
151. Allen Johnson
152. Susan K. Jurica
153. Marty Karvelis
154. Faran Kassam
155. Joseph L. Klingen
156. Robert A. Kramer
157. David Wayne Krumrey
158. Bruce Lang
159. Grady Layfield
160. James LeBaron
161. Jason LeBlanc
162. William Leighton
163. Mayra C. Leon De Carrero
164. Robert Lenoir
165. Humberto Lepage
166. Francois Lessard
167. James C. Li
168. Gary Lieberman
169. Jason Likens
170. Trevor Ling
171. Christopher Long
172. Robert Long, Jr.
173. Humberto Lopez
174. Luis Felipe Lozano
175. David Lundquist
176. Michael MacDonald
177. Anthony Makransky
178. Megan R. Malanga

179. Manuel Malvaez
180. Maria Manerba
181. Michael Mansur
182. Iris Marcovich
183. Janie Martinez
184. Claudia Martinez
185. Aymeric Martinoia
186. Bert Deems May, Jr.
187. Carol McCann
188. Francesca McCann
189. Douglas McDaniel
190. Matthew McDaniel
191. Pam McGowan
192. Gerardo Meave-Flores
193. Lawrence Messina
194. Nolan N. Metzger
195. William J. Metzinger
196. Donald Miller
197. Trenton Miller
198. Hank Mills
199. Brent B. Milner
200. Peter Montalbano
201. Alberto Montero
202. Rolando H. Mora
203. David Morgan
204. Shawn Morgan
205. Jonathan Mote
206. Carroll Mullis
207. Spencer Murchison
208. David Nanes
209. Jon Nee
210. Aaron Nelson
211. Gail Nelson
212. Russell C. Newton, Jr.
213. Norbert Nieuw
214. Lupe Northam
215. Scott Notowich
216. Monica Novitsky
217. Kale Olson
218. John D. Orcutt
219. Walter Orejuela
220. Alfonso Ortega
221. Zack Parrish
222. Tim Parsons
223. William Peerman

224. Beatriz Pena
225. Ernesto Pena
226. Roberto Pena
227. Roberto A. Pena
228. Dulce Perezmora
229. Saraminta Perez
230. Tony Perez
231. James D. Perry
232. Lou Perry
233. Brandon R. Phillips
234. Randall Pickett
235. Eduardo Picon
236. Edward Prieto
237. Christopher Prindle
238. A. Steven Pritsios
239. Arturo Prum
240. Maria Putz
241. Judith Quinones
242. Sumeet Rai
243. Michael Ralby
244. Leonor Ramirez
245. Nelson Ramirez
246. David Rappaport
247. Charles Rawl
248. Syed H. Razvi
249. Kathleen M. Reed
250. Steven Restifo
251. Walter Ricardo
252. Giampiero Riccio
253. Jeffrey Ricks
254. Juan C. Riera
255. Alan Riffle
256. Randolph E. Robertson
257. Steve Robinson
258. Timothy D. Rogers
259. Eddie Rollins
260. Peter R. Ross
261. Rocky Roys
262. Thomas G. Rudkin
263. Julio Ruelas
264. Nicholas P. Salas
265. Tatiana Saldivia
266. John Santi
267. Christopher K. Schaefer
268. Louis Schaufele

269. John Schwab
270. Harvey Schwartz
271. William Scott
272. Haygood Seawell
273. Leonard Seawell
274. Morris Serrero
275. Doug Shaw
276. Nick Sherrod
277. Jon C. Shipman
278. Jordan Sibler 50,000
279. Rochelle Sidney
280. Brent Simmons
281. Edward Simmons
282. Peter Siragna
283. Steve Slewitzke
284. Nancy Soto
285. Paul Stanley
286. Sanford Steinberg
287. Heath Stephens
288. William O. Stone Jr.
289. David M. Stubbs
290. Mark V. Stys
291. Timothy W. Summers
292. Paula S. Sutton
293. William Brent Sutton
294. Ana Tanur
295. Juan Carlos Terrazas
296. Scot Thigpen
297. Christopher Thomas
298. Mark Tidwell
299. Yliana Torrealba
300. Jose Torres
301. Al Trullenque
302. Audrey Truman
303. Roberto Ulloa
304. Eric Urena
305. Miguel Valdez
306. Nicolas Valera
307. Tim Vanderver
308. Jaime Vargas
309. Pete Vargas
310. Ettore Ventrice
311. Mario Vieira
312. Evely Villalon
313. Maria Villanueva

314. Chris Villemarette
315. Frans Vingerhoedt
316. Daniel Vitrian
317. Charles Vollmer
318. James Weller
319. Bill Whitaker
320. Donald Whitley
321. David Whittemore
322. Charles Widener
323. John Whitfield Wilks
324. Thomas Woolsey
325. Michael Word
326. Ryan Wrobleske
327. Ihab Yassine
328. Bernerd E. Young
329. Leon Zaidner

No. 12-5286

SECURITIES AND EXCHANGE COMMISSION,
Petitioner-Appellant,

v.

SECURITIES INVESTOR PROTECTION CORPORATION,
Respondent-Appellee

AMICUS CURIAE BRIEF OF THE COURT-APPOINTED EXAMINER, THE OFFICIAL STANFORD INVESTORS COMMITTEE, AND THE STANFORD VICTIMS COALITION

EXHIBIT 2

Chapter 15 Order

Doc. No. 176 in *In re Stanford International Bank Ltd.*,
Civil Action No. 3:09-CV-0721-N (N.D. Tex.July 30, 2012),
appeal dismissed subj. to reinstatement,
No. 12-10836 (5th Cir. Nov. 26, 2012)

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

IN RE:	§	
	§	
STANFORD INTERNATIONAL BANK, LTD.,	§	Civil Action No. 3:09-CV-0721-N
	§	
	§	
Debtor in a Foreign Proceeding.	§	

ORDER

This Order addresses the Joint Liquidators' motion for substitution as Plaintiff *nunc pro tunc* to May 12, 2011 [125], request that the Court take judicial notice [103], and objections to direct testimony and exhibits [149]; the Receiver's objections to the Joint Liquidators' evidence [152]; and the former Joint Liquidators' petition for recognition of foreign main proceeding pursuant to Chapter 15 of the Bankruptcy Code [4]. For the reasons that follow, the Court grants the Joint Liquidators' motion for substitution as Plaintiff *nunc pro tunc* and grants in part and denies in part their request that the Court take judicial notice. The Court overrules the parties' objections to each others' evidence. Finally, the Court grants in part and denies in part the Joint Liquidators' petition for recognition, holding that the Antiguan Proceeding is a foreign nonmain proceeding under Chapter 15 of the Bankruptcy Code.

I. ORIGINS OF THE SUIT

On February 17, 2009, the United States Securities and Exchange Commission ("SEC") filed a securities enforcement action, 3:09-CV-0298-N, *SEC v. Stanford*

International Bank, Ltd., et al. (filed Feb. 17, 2009) ("SEC Action"), in this Court, alleging that R. Allen Stanford, through and/or with his associates and various entities under his control (the "Stanford Entities"), perpetrated a massive Ponzi scheme. As part of that litigation, the Court "assume[d] exclusive jurisdiction and t[ook] possession" of the "Receivership Assets"[1] and the "Receivership Records"[2] (collectively, the "Receivership Estate") and appointed a Receiver to oversee the Receivership Estate, of which Stanford International Bank ("SIB") is a part. *See* Second Am. Order Appointing Receiver, July 19, 2010, at 2-3 [1130] (the "Receivership Order"), *in* SEC Action.

Despite the Receivership Order, on February 26, 2009, the Eastern Caribbean Supreme Court in the High Court of Justice of Antigua and Barbuda ("Antiguan Court"), at the request of the Financial Services Regulatory Commission ("FSRC") of Antigua and Barbuda ("Antigua") – an entity that purported to license and regulate SIB – appointed Nigel Hamilton-Smith and Peter Wastell (the "Former Joint Liquidators) as receivers-managers of SIB. *See* 105-17, at 4.[3] On April 17, 2009, the Antiguan Court placed SIB into liquidation

[1]"The assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located, and the legally recognized privileges (with regard to the entities), of the Defendants [in the SEC Action] and all entities they own or control."

[2]"The books and records, client lists, account statements, financial and accounting documents, computers, computer hard drives, computer disks, internet exchange servers telephones[,] personal digital devices and other informational resources of or in possession of the Defendants [in the SEC Action], or issued by Defendants and in possession of any agent or employee of the Defendants."

[3]For the sake of brevity, the Court refers to testimony and appendices by docket numbers in place of document titles.

and appointed the Former Joint Liquidators as SIB's liquidators (the "Antiguan Proceeding"). *See id.* at 12-13. Soon thereafter, on April 20, 2009, the Former Joint Liquidators filed a petition for recognition in this Court pursuant to Chapter 15 of the U.S. Bankruptcy Code.

On June 8, 2010, while the petition was still pending in this Court, the Antiguan Court removed the Former Joint Liquidators as SIB's liquidators (the "Antiguan Removal Order"), holding, among other things, that they had engaged in improper conduct with respect to recognition proceedings in Canada. *See* 105-19, at 85. The Antiguan Removal Order allowed the Former Joint Liquidators to remain as SIB's caretakers until the Antiguan Court appointed new liquidators. *See id.* at 86. The Antiguan Court did so on May 12, 2011 ("JL Appointment Order"), appointing Hugh Dickson and Marcus Wide (the "Joint Liquidators").[4] *See* 105-20, at 5. Counsel for the Joint Liquidators first appeared in this action in August 2011 [74, 75].

After extensive briefing by the parties and parties in interest,[5] the Court held an evidentiary hearing on the petition for recognition on December 21, 2011.[6] After disagreement regarding whether the Joint Liquidators could, in essence, stand in as Plaintiffs

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[4]The Antiguan Court also appointed Dickson and Wide as Receivers of Stanford Trust Company Limited ("STCL") in November 2011. Here, they only seek recognition of the Antiguan Proceeding involving SIB.

[5]The SEC, the Examiner whom the Court appointed to represent the interests of the Stanford Entities' alleged victims, and the Official Stanford Investors Committee ("OSIC") have submitted briefs and appeared at hearings in this matter.

[6]Prior to the hearing, the Joint Liquidators moved the Court to take judicial notice of certain facts, information, and materials. The Court did not rule on this motion at the hearing.

for the Former Joint Liquidators on their petition for recognition, the Court asked the Joint Liquidators to file a written motion. Accordingly, the Joint Liquidators moved for substitution as Plaintiff *nunc pro tunc*. Thereafter, the Court allowed the Receiver and the Joint Liquidators an opportunity to file written objections to the evidence presented at the hearing.

II. The Court Grants the Joint Liquidators' Motion to Substitute

The dispute over whether the Joint Liquidators may proceed on the Former Joint Liquidators' petition for recognition began when the Receiver argued that the Court should not consider the petition for recognition to have been filed until August 2011, the date on which the current Joint Liquidators appeared in the suit. Jt. Br. of Receiver, Examiner, & Investors Comm. in Resp. to Joint Liquidators' Suppl. Br. in Supp. Their Pet. for Ch. 15 Recognition 9 n.11 [119] [hereafter Receiver's Resp. to JL Suppl. Br.]. He reasoned that because Chapter 15 of the Bankruptcy Code requires the petition for recognition to identify the foreign representatives, *see* 11 U.S.C. § 1515, and because the petition referenced only the Former Joint Liquidators, the petition was deficient. *See* Receiver's Suppl. Resp. to JL Suppl. Br. at 9 n.11, 14. In response, at the December 2011 evidentiary hearing, the Joint Liquidators orally moved the Court to substitute them as party Plaintiffs.[7]

On their current briefing of the issue, the Joint Liquidators argue that the Court should substitute them under Federal Rule of Civil Procedure 25(c) because they hold the same interests as and positions of the Former Joint Liquidators. *See* Joint Liquidators' Mot. Subst.

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[7]The Court asked the Joint Liquidators to brief the issue.

as Pl. *Nunc Pro Tunc* to May 12, 2011, at 2-3. The Receiver requests that the Court refrain from considering the petition for recognition and instead order the Joint Liquidators to file an amended petition for recognition asserting themselves as the foreign representatives.[8] *See* Receiver's Resp. to JL Mot. for Subst. 6.

Despite the way the parties have framed the issue, at first blush the question before the Court appears to be one of mootness. *See, e.g., Qimonda AG v. LSI Corp.*, --- F. Supp. 2d ---, 2012 WL 777494, at *3 (S.D. Tex. 2012) (describing Supreme Court's distinction between standing and mootness). It is undoubtedly true that as foreign representatives of SIB at the time of the commencement of the action, the Former Joint Liquidators had standing

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[8]The Receiver states that "the U.S. Receivership Parties have no objection to the Court allowing the J[oint]L[iquidator]s to file an 'amended' petition, provided that the amendment does not relate back to the date of the filing by the [F]ormer [J]oint [L]iquidators." Jt. Resp. of Receiver, Examiner, Investors Comm., & SEC to Joint Liquidators' Mot. for Subst. as Pl. *Nunc Pro Tunc* to May 12, 2011, at 6 [146] [hereinafter Receiver's Resp. to JL Mot. for Subst.]. The Receiver reveals that his interest in having the Joint Liquidators replead to a later date is motivated by an understanding that, as per *Lavie v. Ran (In re Ran) (Ran IV)*, 607 F.3d 1017, 1025 (5th Cir. 2010), the time for determining SIB's center of main interest ("COMI") – a main point of contention in the recognition analysis – is at the time the foreign representative files the petition for recognition and, therefore, having a later COMI-determinant date will work in his favor. *See, e.g.*, Receiver's Resp. to JL Suppl. Br. 14-15 & n.15.

The Court notes that a later petition date would similarly seem to aid the Receiver's arguments regarding nonmain recognition because "[t]he use of the present tense [in the statute] implies that the court's [nonmain] establishment analysis should focus on whether the debtor has an establishment in the foreign country when the foreign representative files for recognition . . . ." *Lavie v. Ran (Ran III)*, 406 B.R. 277, 284-85 (S.D. Tex. 2009), *aff'd*, *Ran IV*, 607 F.3d at 1027. The Court surmises that the reason the Receiver does not wish for the Court to dismiss the action entirely is because of the number of years he has spent litigating the suit and because of the inevitability of dealing with the issue at some point during the pendency of the Stanford multi-district litigation ("MDL").

to bring their petition for recognition.[9] *See* 28 U.S.C. § 1334(a). Thus, at the time the Former Joint Liquidators filed their petition, the Court properly had subject matter jurisdiction over the suit. The Court must go on to analyze, however, whether the Antiguan Court's removal of the Former Joint Liquidators as foreign representatives divested them of the personal interest necessary to continue the suit, thus rendering the action moot.[10] *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-92 (2000) (articulating the difference between standing and mootness).

The Fifth Circuit has stated that "[s]ubject matter jurisdiction, once it validly exists among the original parties, remains intact after substitution." *Ransom v. Brennan*, 437 F.2d 513, 516 (5th Cir. 1971). However, this assertion is based on the idea that a valid Rule 25

[9]In his briefing, the Receiver made the additional argument that the Antiguan Order appointing the Joint Liquidators vested all SIB's property in them as of April 15, 2009, thus retroactively divesting the Former Joint Liquidators of their rights and duties over SIB at any point in time so that the petition was deficient even when the Former Joint Liquidators filed it. *See* Receiver's Resp. to JL Mot. for Subst. 3. A foreign court order cannot *retroactively* divest this Court of jurisdiction. And the Joint Liquidators aver that the JL Appointment Order "did not render the activities of the Former [Joint Liquidators] null and void, nor did it treat such Former [Joint Liquidators] as if they had never existed." New Joint Liquidators' Reply in Further Supp. of Mot. Subst. as Pl. *Nunc Pro Tunc* 6 [148] [hereinafter JL Reply to Mot. Subst.]. Rather, the JL Appointment Order stated that it was entered "without in any way altering or affecting the legal rights of the estate of S.I.B. or of its past, present or future Liquidators" and vests the Joint Liquidators with authority over SIB "as successors to and in substitution for the [Former Joint Liquidators]." 106-4, at 2, 4. Thus, the Receiver's argument holds no water.

[10]It seems that the Receiver's arguments lead to an outcome more severe than that for which he bargained. If the Court finds that the current petition is moot, it cannot direct the Joint Liquidators to file an amended petition for recognition. Rather, a finding of mootness forces the Court to dismiss the action entirely, thus negating three years of effort on both sides.

substituted party "steps into the same position of the original party." *Id.* Thus, it follows that if subject matter jurisdiction is lost among the original parties to the action before the substitution occurs, substitution cannot cure the jurisdictional defect. However, the plain language of Rule 25 specifically contemplates that a case may continue where an original party has lost an interest in the action. *See* FED. R. CIV. P. 25. So, the Court goes on to analyze whether Rule 25 cures the jurisdictional defect.[11]

Federal Rule of Civil Procedure 25 provides that a Court may substitute a party for another in the event of a transfer of interest, a former party's death or incompetency, or, if the former party was a public officer, his/her death or separation from office. *See id.* Rule 25 is procedural and thus does not provide for the survival of rights or liabilities. *See* 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1952, at 655 (3d ed. 2007). Accordingly, once a former party loses capacity via one of the methods named above, the action abates unless the action is one that survives

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[11]The Receiver argues that Rule 25 does not apply to this proceeding because "[t]his is not a lawsuit in which the [F]ormer [Joint L]iquidators filed an action on behalf of SIB, and the J[oint]L[iquidators] are seeking to continue that action . . . ." Receiver's Resp. to JL Mot. for Subst. 3. Rather, the Receiver continues, the Joint Liquidators "are representing . . . their own[]interest"; "Rule 15(c) has no application to these circumstances," the Receiver argues, "particularly given the specific direction that is provided by Chapter 15 of the Bankruptcy Code." *Id.* at 4.

However, the Receiver is mistaken. Rule 1001 of the Federal Rules of Bankruptcy Procedure provides that the rules of bankruptcy procedure apply to cases under the Bankruptcy Code. *See* FED. R. BANKR. P. 1001. Bankruptcy Rule 7025 provides that, subject to Bankruptcy Rule 2012, which the Court discusses below in the text, Federal Rule of Civil Procedure 25 applies in adversary proceedings. *See* FED. R. BANKR. P. 7025. And Bankruptcy Rule 1018 provides that Rule 7025, among others, applies to Chapter 15 cases. *See* FED. R. BANKR. P. 1018.

as a matter of substantive law. *See id.* at 655-56. In a federal question case, courts apply federal law to determine whether the action survives the event. *See id.* at 656.

There are numerous instances in American jurisprudence in which courts have substituted successor trustees for former trustees. For example, in the context of trusts and estates, "it is hornbook law that an action brought by a trustee 'is not ordinarily abated by his failure to continue in his office[;]' [w]hen a trustee party leaves office, 'an action is ordinarily revived in the name of the successor representative.'" *Corbin v. Blankenburg*, 39 F.3d 650, 653 (6th Cir. 1994). Based on this principle, courts have substituted successor ERISA trustees for their former counterparts. *See id.* (stating that nothing in ERISA statute suggests that civil action brought by ERISA trustee is personal to particular individual who held office upon filing suit). Additionally, the U.S. Bankruptcy Code provides that where a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code, his/her successor is automatically substituted as a party in the pending matter. FED. R. BANKR. P. 2012(b). Thus, these courts do not have a mootness issue because substantive law allows for the action to continue despite the shift in the original parties' interests. In other words, courts throughout the country rely on the legal fiction that a party's standing is not lost where substantive statutory law allows courts to substitute in a successor party. In this vein, the Court examines whether Chapter 15 of the Bankruptcy Code allows an action to proceed in this manner.[12]

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[12]The Court acknowledges that mootness is a constitutional issue and that Congress cannot construct laws that expand the jurisdiction of the federal courts beyond the limits imposed by the Constitution. However, the Court is also mindful of the necessity of legal

Admittedly, the Court cannot decide the issue at hand solely based on the above jurisprudence because the Former Joint Liquidators were not trustees under United States law, but were rather "Foreign Representatives" under the Bankruptcy Code. However, the above jurisprudence informs the Court's substitution analysis by revealing (a) that courts may continue suits by substituting a new party in interest for a party who has lost an interest in the action if authorized by substantive law, and (b) that Congress' intention in cases involving trustees is to continue the suit by substituting the new trustee for the old.

Section 101(24) of the Bankruptcy Code defines a foreign representative as "a person or body, *including a person or body appointed on an interim basis*, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24) (emphasis added). "The 'interim' appointment language was designed to accommodate insolvency systems which have a two stage process for commencement. [For example,] England and many of the British Commonwealth countries provide for interim or provisional fiduciaries

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fictions to deal with the practical needs of litigation. Such is the case here where a change in office could have the potential to negate three years of extensive briefing and hearings on the issue. To extinguish this possibility, courts have interpreted a party not to lose standing because of his/her removal from office. In a sense, courts – with the support of Congress – treat such suits as suits against/brought by an office, not an individual person. The Court will not disrupt this legal fiction because doing so would go against the weight of the caselaw, would cause impractical and inefficient results, and would go against the Supreme Court's doctrine of constitutional avoidance. *See, e.g.*, *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008) (citing the doctrine of constitutional avoidance from several Supreme Court authorities). Thus, the Court goes on to analyze whether substantive bankruptcy law authorizes the non-abatement of Chapter 15 suits during a shift in a foreign representative office.

at the outset of a proceeding who almost always become permanent appointees." 8-1501 COLLIER ON BANKRUPTCY ¶ 1501.03 (16th ed. 2012). Because the Code does not guarantee an interim appointee fiduciary status past the interim period, the plain language of the Code indicates that Congress contemplated the possibility of having both a "former foreign representative" – the interim fiduciary – and a "successor foreign representative" – the fiduciary post-interim period. Further, Collier on Bankruptcy teaches that the U.S. analog of the interim foreign representative is the "interim trustee" under the Bankruptcy Code's section 303(g) prior to entry of an order for relief in an involuntary case or under section 701 in a liquidation case. *Id.* Chapter 3 of the Code governs U.S. interim trustees, *see* 11 U.S.C. § 322(a) (referring to trustees appointed under section 701),[13] and section 325 specifically states that "[a] vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding," 11 U.S.C. § 325. Further, as discussed above, the Code specifically states that Federal Rule of Civil Procedure 25 applies to Chapter 15 cases, and, as the Joint Liquidators point out, Congress decidedly pointed Chapter 15 at recognizing foreign proceedings, not foreign representatives. *See generally* 11 U.S.C. § 1501, *et seq.*

Given all of the above and the fact that foreign representatives generally play the same role as trustees in U.S. bankruptcy proceedings – that of estate representatives – the Court is satisfied that Chapter 15 of the Bankruptcy Code provides the authority for an action to

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[13]Interim trustees appointed under section 303(g) are appointed pursuant to section 701. *See* 11 U.S.C. § 303(g).

survive the removal of a foreign representative from office. Accordingly, the Court grants the Joint Liquidators' motion to substitute *nunc pro tunc*. The Court substitutes the Joint Liquidators as party Plaintiffs *nunc pro tunc* as of June 8, 2010.

III. THE COURT GRANTS IN PART AND DENIES IN PART THE JOINT LIQUIDATORS' MOTION TO TAKE JUDICIAL NOTICE

The Joint Liquidators request that the Court take judicial notice of several items. The Court grants in part and denies in part the motion to the following extent: First, pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of the filings and defenses raised in the Stanford MDL cases listed in Exhibit 1 to the Joint Liquidators' motion. Second, the Court declines to take judicial notice of the summary of defenses raised in the Stanford MDL cases, attached in chart form as Exhibit 2 to the Joint Liquidators' motion, because it is duplicative of what the Court has judicially noticed in Exhibit 1. Third, the Court takes judicial notice of the first two U.S. State Department publications listed in Exhibit 3 to the Joint Liquidators' motion, but declines to take judicial notice of the third U.S. State Department publication, as the hyperlink is non-functional. Lastly, the Court declines to take judicial notice of the various international organization and other commercial/media publications listed in Exhibit 4 to the Joint Liquidators' motion because they are publications that are subject to reasonable dispute.

IV. THE COURT OVERRULES THE PARTIES' OBJECTIONS

At the hearing in December 2011, the Court reserved judgment on several evidentiary points and asked the parties to brief their objections. Based upon the parties' briefing, the Court overrules all objections.

The Joint Liquidators first object to various exhibits attached to the Receiver's expert witness Karyl Van Tassel's written direct testimony as irrelevant, lacking foundation/authentication, and hearsay. The Court is satisfied that Van Tassel's exhibits are admissible under Rule 703 to demonstrate what she relied upon to form her opinions. *See generally* FED. R. EVID. 703.[14]

The Joint Liquidators next object to various exhibits attached to the Receiver's written direct testimony as irrelevant, lacking foundation/authentication, hearsay, and unfairly prejudicial. In response to the hearsay objection, the Receiver argues that his exhibits are admissible as statements of a public office under Federal Rule of Evidence 803(8). *See* Receiver's Resp. to JLs' Objections 1-2 [161]. While the Court finds the Receiver's argument to be erroneous, it holds that the exhibits are admissible because they are relevant, do not lack foundation/authentication, their probative value substantially outweighs any prejudice to the Joint Liquidators, and are admissible as an exception to the hearsay rule under Rule 807. *See* FED. R. EVID. 807 (residual hearsay exception).[15]

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[14]*See infra* note 57.

[15]*See* Tr. of Evidentiary Proceedings, Dec. 21, 2011, at 283-84 [hereinafter Hr'g Tr.] (Court overruling Joint Liquidators' objection to Receiver's testimony, stating "I'm going to admit this under the residual hearsay exception. I think this is very familiar or very similar to the exception for reports of governmental entities on conclusions they've reached in the discharge of their duties. And as the Receiver, Mr. Janvey has some obligations on behalf of the Court to sort through and try and determine what's been done and has devoted considerable time and money towards that end and I believe, under the residual exception, is entitled to testify regarding what conclusions he reached. In determining what, if any, weight I give to that, I will of course take into account the fact that this is kind of secondhand news coming from him. But I do think he's entitled to report to the Court his conclusions based on the work he's done as Receiver and the work the professionals on his behalf have

Next, the Joint Liquidators object to various portions of Stanford investor-victim Dr. John R. Wade's direct testimony as hearsay statements and under the best evidence rule. The Court holds that the alleged hearsay statements are not hearsay because the Receiver offered them to show the effect the statements had on Dr. Wade – that he *believed* SIB's headquarters was in the United States, not for the truth of the matter asserted – that SIB's headquarters *actually was* in the United States. The Court also overrules the Joint Liquidators' best evidence objection because the Receiver did not seek to prove the content of writings. *See generally* FED. R. EVID. 1002.

Lastly, the Joint Liquidators object to the December 20, 2011 letter from the Department of Justice to this Court as irrelevant and hearsay. The Court holds that the letter is relevant and admissible under the residual hearsay exception. *See* FED. R. EVID. 807.

The Court overrules the Receiver's objections for substantially the same reasons that it overrules the Joint Liquidators' objections. Moreover, the Court notes that, as the Receiver recognizes, the Court disregards any evidence that would otherwise be inadmissible.

V. THE ANTIGUAN PROCEEDING IS A FOREIGN NONMAIN PROCEEDING

The Joint Liquidators ask the Court to recognize the Antiguan Proceeding as a foreign main proceeding. In the alternative, the Court may recognize the Antiguan Proceeding as a foreign nonmain proceeding[16] or decline to grant recognition at all.[17]

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done and reported to him"). *See infra* note 57.

[16]Although the Receiver protests that the Joint Liquidators have requested that the Antiguan Proceeding be recognized only as a foreign main proceeding, the Court is free to consider foreign nonmain status because under the Code, foreign representatives apply to

A. Chapter 15's Framework

Congress enacted Chapter 15 of the Bankruptcy Code via the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") "so as to provide effective mechanisms for dealing with cases of cross-border insolvency." *Ran IV*, 607 F.3d at 1020 (quoting 11 U.S.C. § 1501(a)). The Chapter's stated purpose is to incorporate the Model Law on Cross-Border Insolvency into United States jurisprudence to ensure (a) cooperation among courts and interested parties in different national jurisdictions, (b) greater legal certainty for trade and investment, (c) fair and efficient administration of cross-border insolvencies that protect the interests of all creditors and other interested entities, (d) protection and maximization of the value of debtors' assets, and (e) facilitation of the rescue of financially troubled businesses in order to protect investment and preserve employment. *See* 11 U.S.C. § 1501.

Chapter 15 permits a representative in a foreign bankruptcy proceeding to petition a U.S. court for recognition of the foreign proceeding under the Bankruptcy Code. *See Lavie v. Ran (Ran I)*, 384 B.R. 469, 470 (S.D. Tex. 2008); 11 U.S.C. § 1515. In order for a court

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U.S. courts "for recognition," and U.S. courts then make the determination as to what kind of recognition to grant if they determine that recognition is warranted under Chapter 15. *See* 11 U.S.C. § 1515(a) ("A foreign representative applies to the court *for recognition* of a foreign proceeding . . . ." (emphasis added)); *id.* at § 1517(b) ("Such foreign proceeding shall be recognized – (1) as a foreign main proceeding . . . ; or (2) as a foreign nonmain proceeding . . . .").

[17]*See generally* Daniel M. Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, AM. BANKR. INST. J. 44, 45 (Dec./Jan. 2007) (coauthor of the model act on which Chapter 15 is based explaining Chapter 15 framework in detail).

to recognize a foreign proceeding, (a) it must be a foreign main proceeding or a foreign nonmain proceeding, (b) the foreign representative must be a person or body, and (c) the petition must meet the requirements of section 1515.[18] *See* 11 U.S.C. § 1515. A foreign proceeding is a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt where the debtor's assets and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation. 11 U.S.C. § 101(23). Chapter 15 distinguishes a main proceeding from a nonmain proceeding as follows: the former is pending in the country where the debtor has its center of main interests ("COMI"), whereas the latter is pending in a country where the debtor merely has an establishment. *See* 11 U.S.C. § 1502.

Notwithstanding the above, a U.S. court may not recognize a foreign proceeding at all "if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. This exception, however, "is intended to be invoked only under exceptional circumstances concerning matters of fundamental importance for the United States." *Ran IV*, 607 F.3d at 1021. "[C]hapter 15 contemplates recognition of not more than one main proceeding and any combination of nonmain proceedings for the same debtor." *In re British*

[18]The petition must be accompanied by (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, (2) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative, or (3) in the absence of evidence under the above prongs, any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative. The petition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor of which the foreign representative is aware, and the above-referenced documents shall be translated into English. 11 U.S.C. § 1515.

Am. Ins. Co. Ltd., 425 B.R. 884, 908 (Bankr. S.D. Fla. 2010); *see also In re Chiang*, 437 B.R. 397, 399 (Bankr. C.D. Cal. 2010) (holding that debtor can only have one COMI and therefore only one main proceeding).

If the U.S. court recognizes the foreign proceeding – subject to any limitations it may impose consistent with Chapter 15's policy – the foreign representative gains the capacity to sue and be sued in United States courts and the authority to apply directly to a U.S. court for other appropriate relief. *See* 11 U.S.C. § 1509; *Ran I*, 384 B.R. at 470 (quoting *Iida v. Kitahara (In re Iida)*, 377 B.R. 243, 257 (B.A.P. 9th Cir. 2007)). If the court grants recognition as a foreign main proceeding,

> (a) the automatic stay under Bankruptcy Code section 362 (as well as the creditors' right to adequate protection and relief from the automatic stay under sections 361 and 362(d) of the Bankruptcy Code) applies with respect to the debtor and its property within the territorial jurisdiction of the United States, (b) sections 363, 549 and 552[[19]] of the Bankruptcy Code apply to restrict the ability to transfer such property absent court approval, and (c) unless the court orders otherwise, the foreign representative may operate the debtor's business and exercise the rights and powers of a trustee under Bankruptcy Code sections 363 and 552.

In re SPhinX, Ltd. (SPhinX I), 351 B.R. 103, 115 (Bankr. S.D.N.Y. 2006); *see* 11 U.S.C. § 1520.

Such relief does not automatically accompany recognition as a foreign nonmain proceeding. Rather, for foreign nonmain proceedings, the court has the *discretion* to order "appropriate relief" including (a) staying the commencement or continuation of actions

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[19]One court has noted that the reference to section 552 is a typographical error, stating that the legislative history reveals that the text should have referred to section 542. *See Chiang*, 437 B.R. at 402 n.13.

concerning the debtor and its assets; (b) suspending the right to transfer, encumber, or otherwise dispose of the debtor's assets; (c) granting the authority to examine witnesses, take evidence, or deliver information concerning the debtor; (d) granting the authority to administer or realize the debtor's assets; and (e) granting any additional relief available to a U.S. trustee with certain exceptions. *See* 11 U.S.C. § 1521. Such discretionary relief is additionally available to foreign main proceedings.

On the other hand, if a court denies recognition, it may issue "any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States." 11 U.S.C. § 1509. Thus, "a decision as to recognition is a serious matter." *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 45 (Bankr. S.D.N.Y. 2008).

B. The Antiguan Proceeding Satisfies Chapter 15's Procedural Requirements

The Antiguan Proceeding meets Chapter 15's preliminary requirements for recognition. First, it is a "foreign proceeding" because it is collective,[20] judicial, in a foreign

[20]Courts have interpreted the term "collective" to mean "one that considers the rights and obligations of all creditors." *In re Betcorp Ltd.*, 400 B.R. 266, 281 (Bankr. D. Nev. 2009). In other words, the action must have been "instituted for the benefit of creditors generally rather than for a single creditor or class of creditors." *British Am. Ins. Co. Ltd.*, 425 B.R. at 902; *see also In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *4 (Bankr. S.D.N.Y. 2011) ("The notion of a 'collective' insolvency proceeding is based on the ability of a single insolvency representative to control the realization of assets for the purposes of pro rata distribution among all creditors (subject to domestic statutory priorities), as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process designed for some purpose other than to address the insolvency of the debtor.").

The Joint Liquidators are correct in pointing out that specific provisions of the Antiguan International Business Corporation Act ("IBCA"), which governs the Antiguan Proceeding, highlight the collective nature of liquidations under it. *See, e.g.*, 105-2, IBCA country, under a law relating to insolvency,[21] and the debtor's assets and affairs are subject to supervision by a foreign court for the purpose of liquidation. *See* 11 U.S.C. § 101(23). Next, the Joint Liquidators are "person[s]." *See* 11 U.S.C. 1515. And finally, the petition meets the requirements of section 1515.[22] *See id.* Accordingly, the Court proceeds to analyze whether the Antiguan Proceeding satisfies the Code's substantive recognition requirements.

C. The Stanford Entities' COMI is Not in Antigua

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§§ 286, 289. The Joint Liquidators are further correct in noting that the JL Appointment Order states that the proceeding is "a collective insolvency proceeding intended to marshal in and recover all assets and value owned by, or owed to, [SIB]," and that "[a]ll creditors, depositors and investors in [SIB] shall have the right to seek to prove [their claims] in the estate of [SIB] no matter where such parties are resident or located in the world." 106-4, at 6. Although admittedly the Antiguan Proceeding is only concerned with SIB creditors and investors rather than those of *all* the Stanford Entities, the Court believes that it is still collective under Chapter 15 because it is the type of proceeding to which the Chapter was intended to apply.

The Court notes language in other U.S. court opinions that contrasts a collective proceeding to a receivership, which they state is non-collective. *See, e.g.*, *Betcorp*, 400 B.R. at 281. However, those courts describe receiverships as "remed[ies] instigated at the request, and for the benefit, of a single secured creditor." *Id.* This is not the type of receivership in place here. Rather, the Court instituted this Receivership at the request of the SEC for the benefit of all Stanford Entities' investor-victims and creditors. Thus, although the Court does not need to find that the Receivership is collective in nature, it does so.

[21]The IBCA. *See supra* note 20.

[22]The petition for recognition is accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the Former Joint Liquidators, *see* discussion *supra* Part II (substituting Joint Liquidators as plaintiffs for Former Joint Liquidators), a statement identifying all foreign proceedings with respect to SIB of which the Former Joint Liquidators were aware, *see* Decl. of Nigel Hamilton-Smith in Supp. of Pet. Recogn. Foreign Main Proceeding Pursuant to Ch. 15 of Bankr. Code 16 [3], and the above-referenced documents are in English. *See* 11 U.S.C. § 1515.

The principal issue in dispute between the parties is whether SIB's COMI is in Antigua. If so, the Court must grant the Antiguan Proceeding foreign main recognition, but if not, the Court must determine whether SIB has an establishment in Antigua, which would lead the Court to grant foreign nonmain recognition.

1. The Court Aggregates the Stanford Entities for COMI Purposes. – At the outset, the Court must determine whether to aggregate the Stanford Entities. The Receiver contends that because SIB was but one of many entities in Stanford's elaborate Ponzi scheme,[23] the Court's COMI analysis should center on the aggregated Stanford Entities. As the SEC expands,

> SIB was window dressing, part of an effort to mask from United States regulatory scrutiny the massive securities fraud Stanford and others orchestrated from the United States. The law does not give effect to legal trappings that are designed for a fraudulent purpose, and, therefore, Stanford's operations should be viewed in their entirety.

SEC's First Suppl. Opp'n to Pet. Recogn. Pursuant to Ch. 15 Bankr. Code 1-2 [59]. In response, the Joint Liquidators argue that the issue of aggregation is not ripe for review because the Receiver has not moved to substantively consolidate the Stanford Entities in the

[23]The Court has previously stated that Stanford operated a Ponzi scheme. *See, e.g.*, Order, Mar. 31, 2011 [1310], *in* SEC Action ("The Court previously determined that the Stanford Defendants operated a Ponzi scheme." (citing Order Granting Prelim. Inj., June 10, 2010 [456], *in Janvey v. Alguire*, Civil Action No. 3:09-CV-0724 (N.D. Tex. filed Apr. 20, 2009), *aff'd*, 628 F.3d 164 (5th Cir. 2010))). Although the Court acknowledges that it may have been inconsistent in recent orders by sometimes referring to the scheme as an "alleged Ponzi scheme," *see, e.g.*, Order Denying Stanford's Mot. Dismiss, at 13 ("Stanford's alleged Ponzi scheme spanned at least a decade an involved myriad actors and entities largely owned or controlled by Stanford."), the Court here clarifies that it holds that Stanford operated a Ponzi scheme.

SEC Action, that the language of Chapter 15 contemplates a single entity, and that aggregation is not in the best interests of Stanford's victims and creditors. *See* Joint Liquidators' Resp. in Opp'n to Suppl. Briefs by Receiver Parties to Pet. Recogn. Pursuant to Ch. 15 Bankr. Code 11-13 [120] [hereinafter JL Resp. to Suppl. Briefs].

It is axiomatic that a corporation is a legal entity existing separate and apart from the persons composing it and entities related to it. However, courts equally accept that they should disregard the corporate form where that form was the means to a subversive end. *See, e.g.*, 18 AM. JUR. 2D *Corporations* § 46 (2012). Indeed, the Fifth Circuit has applied corporate disregard doctrines in numerous instances, including to determine principal place of business. *See, e.g., Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290-91 (5th Cir. 1989); *J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401, 412-13 (5th Cir. 1987) (stating that courts cannot apply alter ego doctrine to impute parent company's principal place of business to subsidiary in effort to avoid diversity jurisdiction, but that "a corporation may, through consolidation with another entity or the alter ego doctrine, *gain* additional places of citizenship" and stating that "a corporation's nerve center does not have to be located within the corporate shell, but can be found wherever the nerve center exists . . . . We therefore consider substance over form in determining the nerve center"); *Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553, 557 (5th Cir. 1985) ("[C]ourts will not permit themselves to be blinded or deceived by mere forms of the law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." (quoting *Chi., Milwaukee, & St. Paul Co.*

v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 501 (1918))); *cf. Frazier v. Ala. Motor Club, Inc.*, 349 F.2d 456, 460 (5th Cir. 1965) (imputing nondefendant parent corporation's situs of "doing business" for venue purposes to defendant subsidiary corporations because subsidiaries were not actually separate corporate entities).

Other circuits agree that courts should disregard formal separateness for principal place of business purposes where facts warrant piercing the corporate veil. *See, e.g.*, *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 61-63 (1st Cir. 1993); *Danjaq, S.A. v. Pathe Commc'ns Corp.*, 979 F.2d 772, 775 (9th Cir. 1992) ("The only recognized exception to [the rule that courts look to the principal place of business of the subsidiary] is where the subsidiary is the alter ego of the parent corporation."); *Fritz v. Am. Home Shield Corp.*, 751 F.2d 1152, 1153 (11th Cir. 1985) ("Determining a corporation's principal place of business may require a complex analysis of business relationships among a hierarchy of corporate entities, an inquiry sometimes necessitating the use of an alter ego theory."); *see also Leach Co. v. Gen. Sani-Can Mfg. Corp.*, 393 F.2d 183, 186 (7th Cir. 1968) (personal jurisdiction);[24]

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[24]The Fifth Circuit has held that rationales for piercing the corporate veil in personal jurisdiction cases apply with equal force to diversity analyses. *Freeman*, 754 F.2d at 557-58 ("Although these cases refer to *in personam* rather than subject matter jurisdiction, their rationale applies with equal force to the latter. Indeed, it would be irrational to hold that a parent and a subsidiary have been refused for purposes of *in personam* jurisdiction, but remain separate for purposes of subject matter jurisdiction. Recognizing fusion as fusion for all jurisdictional purposes makes good sense . . . ." (internal citations omitted)).

13F CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3625, at 127-31, 134 (3d ed. 2009).[25]

It is appropriate to extend these corporate disregard doctrines to the Chapter 15 context. First, the COMI analysis is essentially a principal place of business analysis. *See, e.g.*, *In re British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 720 (Bankr. S.D. Fla. 2010); *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 64 (Bankr. S.D.N.Y. 2010), *aff'd*, 2011 WL 4357421 (S.D.N.Y. 2011); *British Am. Ins. Co.*, 425 B.R. at 908-09; *Basis Yield*, 381 B.R. at 48; *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (Bear Stearns II)*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), *aff'd*, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (Bear Stearns III)*, 389 B.R. 325 (S.D.N.Y. 2011); *In re Tri-Cont'l Exch.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006). As such, federal principal place of business doctrines should apply.[26] Second, two other Chapter 15 cases applied corporate disregard doctrines to their COMI analyses. *See In re Ernst & Young, Inc.*, 383 B.R. 773, 780-81 (Bankr. D. Colo. 2008) (2008) ("While not making a final determination on the issue [of alter ego], the Court finds, based on the evidence presented,

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[25] Although most courts agree that piercing the corporate veil is appropriate only to add an additional state of citizenship in order to destroy diversity, *see, e.g.*, *Panalpina Welttransport GMBH v. Geosource, Inc.*, 764 F.2d 352, 354-55 (5th Cir. 1985), this requirement centers on an interpretation of 28 U.S.C. § 1332, which is inapplicable here.

[26] The Former Joint Liquidators argued that piercing the corporate veil is inappropriate where the party advocating piercing does not seek to hold the parent liable. *See, e.g.*, Antiguan Liquidators' Second Supplemental Br. Supp. of Their Pet. Recogn. Pursuant to Ch. 15 of U.S. Bankr. Code 17-18 [55] [hereinafter Former JL 2nd Suppl. Br.]. However, as just discussed, courts pierce corporate veils for other purposes, such as to determine principal places of business.

there is a reasonable probability [company 1] and [company 2] were operated as one for purposes of perpetrating a fraud on investors.");[27] *British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. at 721-22 (court considered veil-piercing issue in its Chapter 15 COMI analysis but did not pierce veil because of lack of evidence).

Finally, it would defy logic and run afoul of equity to treat a fictitious corporation as a real entity for Chapter 15 purposes. The purpose of Chapter 15 recognition is to determine the jurisdiction that is most closely associated with the debtor entity; disallowing corporate disregard doctrines would proliferate recognition of foreign proceedings that have no real or rightful interest in liquidating the real estate. Proliferating corporate fictions in the Chapter 15 context would also protect sinister characters such as Ponzi schemers who may target offshore jurisdictions to run their fraudulent empires.[28] Thus, the Court holds that corporate disregard doctrines apply in the Chapter 15 context.[29]

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[27]Notably, the alter ego finding in *Ernst & Young, Inc.* was largely overlooked in subsequent treatises, law reviews, and legal periodicals, seemingly indicating that it was uncontroversial. The subsequent literature instead focused on the court's public policy exception analysis.

[28]Indeed, the truth of Stanford's scheme belies the Former Joint Liquidators' argument that veil piercing is not available here because it is not "necessary to prevent an injustice," *see* Former JL 2nd Suppl. Br. 18. Not aggregating the entities, in this instance, would perpetuate an injustice.

[29]The Joint Liquidators' argument that the statutory language's use of the singular throughout the Chapter bars corporate disregard doctrines, *see, e.g.*, JL Resp. to Suppl. Briefs 12, holds no water. The Court concedes that Chapter 15 refers to a debtor as an "entity," and not "entities." *See* 11 U.S.C. § 1502. However, the Court is fairly certain that Chapter 15 is also meant to apply to *real* entities and not *fictitious* entities. It would be absurd to implement a law that would encourage U.S. courts to cooperate with foreign proceedings directed at fanciful organizations. The Court will not engage in semantics that obfuscate the

Courts have explained that piercing the corporate veil for jurisdictional purposes is unwarranted in many instances, even where the corporate separation between a parent and a subsidiary is merely formal. The key is whether the corporate entities maintained their separate natures – that makes the separation "real" for jurisdictional purposes. *See, e.g.*, *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-37 (1925) (personal jurisdiction). For diversity purposes, courts consider such factors as the degree of control by the parent corporation, the relationship of the activities of the subsidiary to the activities of the parent, the overlap in membership of the board of directors, and the maintenance of separate corporate books. WRIGHT, MILLER & COOPER, *supra* at 135. This Court has previously applied that standard, *see Burnside v. Sanders Assocs.*, 507 F. Supp. 165, 166 (N.D. Tex. 1980) (Hill, J.), *aff'd*, 643 F.2d 389 (5th Cir. 1981), although it later applied a more minimalist standard, stating that veil piercing depended upon "the existence on paper of the two entities, and whether they kept separate books of accounting." *See Bennett v. Steak 'N Shake Operations, Inc.*, 2010 WL 2400160, at *1 (N.D. Tex. 2010) (Lynn, J.) (discussing *Amarillo Oil Co. v. Mapco, Inc.*, 99 F.R.D. 602, 606 (N.D. Tex. 1983) (Robinson, J.)).

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purpose of the statute.

In further support of their argument that aggregation is inappropriate in the Chapter 15 context, the Joint Liquidators point to *Fairfield Sentry Ltd.*, 440 B.R. 60, where the court granted recognition to a feeder fund established as an investment vehicle in the Madoff Ponzi scheme. The Court finds it surprising that the parties in that case were silent regarding the effect the Ponzi scheme may have had on the debtor's COMI. However, the Court is not persuaded that the absence of veil-piercing analysis in that case should influence its decision here.

Jurisdictional veil-piercing is substantively different from veil piercing for nonjurisdictional purposes. For example, in nonjurisdictional contexts, the Court pierces the corporate veil where the owner is "using the corporate entity as a sham to perpetrate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations." *Bell Oil & Gas Co. v. Allied Chem. Corp.*, 431 S.W.2d 336, 340 (Tex. 1968) (quoting *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 202 (Tex. 1962)).[30] "There must be something more than mere unity of financial interest, ownership and control for a court to treat the subsidiary as the alter ego of the parent and make the parent liable for the subsidiary's tort." *Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 374 (Tex. 1984) (quoting *Hanson Sw. Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d 712 (Tex. App. – San Antonio 1966, writ ref'd n.r.e.)) (italics omitted). Indeed, in tort cases, the party seeking to pierce the corporate veil must show that the subsidiary "is organized and operated as a mere tool or business conduit of [its parent] corporation," *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986), *superseded in part on other grounds by* TEX. BUS. CORP. ACT art. 2.21 *as recognized in W. Horizontal Drilling, Inc. v. Jonnet Energy Corp.*, 11 F.3d 65, 68 (5th Cir. 1994),[31] so that "there exists such unity between [the two corporations] that [they] cease[] to

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[30]Federal common law and state law regarding the corporate disregard doctrines are substantively the same, *see United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 690 n.6 (5th Cir. 1985), so the Court recites the Texas standard as the law of the forum.

[31]On January 1, 2010, the Texas Business Corporation Act art. 2.21 was recodified as the Texas Business Organizations Code §§ 21.223-21.226. Via these provisions, in 1989 the Texas legislature abrogated *Castleberry* to the extent that veil-piercing analysis now requires a showing of actual fraud in cases involving a corporation's contractual obligations. *See, e.g.*, *Acceptance Indem. Ins. Co. v. Maltez*, 619 F. Supp. 2d 289, 301 (S.D. Tex. 2008)

be separate," *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990) (citing *Castleberry*, 721 S.W.2d at 272). And in contract cases, courts require a showing of actual fraud. *See* TEX. BUS. ORGS. CODE § 21.223(b); *see also* discussion *supra* note 31. Ultimately, under substantive veil-piercing analyses, alter ego liability is appropriate where "holding only the [subsidiary] corporation liable would result in injustice." *SSP Partners v. Gladstrong Inv. (USA) Corp.*, 275 S.W.3d 444, 454 (Tex. 2008) (quoting *Castleberry*, 721 S.W.2d at 272).

Regardless of the standard the Court employs, the Court is of the opinion that the evidence supports piercing SIB's corporate veil. First, the Court takes judicial notice that on March 6, 2012, a jury in Houston, Texas convicted Stanford of four counts of wire fraud, one count of conspiracy to commit wire and mail fraud, five counts of mail fraud, one count of conspiracy to obstruct an SEC proceeding, one count of obstruction of an SEC proceeding, and one count of conspiracy to commit money laundering, all related to his Ponzi scheme.[32]

(discussing the Texas legislature's response to *Castleberry*).

[32]Specifically, the jury convicted Stanford of: (1) Count 1: conspiring to commit wire fraud and mail fraud by soliciting and obtaining billions of dollars of investors' funds through false pretenses, representations, and promises, all in order to obtain substantial economic benefits for himself and others through the payment of fees, wages, bonuses, and other monies, and unauthorized diversions, misuse, and misappropriation of funds; (2) Count 3: sending wire transfer of approximately $2.9 million from Stanford Financial Group ("SFG") account in Switzerland to Stanford's personal checking account; (3) Count 4: sending wire transmission of approximately $700,000 from Stanford Group Company ("SGC") account in Houston, Texas to SIB account in Houston, Texas regarding an investor's purchase of SIB CDs; (4) Count 5: sending email from Mark Kuhrt, Global Controller of SFG Global Management, to Gilberto Lopez, Chief Accounting Officer for SFG, in Houston, Texas, attaching a spreadsheet concerning artificial "roundtrip" real estate transaction to transfer interests in island properties back to SIB; (5) Count 6: sending email

See Verdict [808] *in United States v. Stanford*. The District Court for the Southern District of Texas issued a final judgment in that case on June 14, 2012. *See* Judgment [878] *in United States v. Stanford*. Further, this Court has previously recognized that Stanford and his affiliates operated as one,[33] and there is substantial evidence in the record in this action to support that finding.

The evidence demonstrates that SIB was nothing like a typical commercial bank. Although it officially offered six deposit products,[34] it had one principal product line –

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from Stanford to SFG employees in Houston, Texas; Memphis, Tennessee; and elsewhere, representing that SIB "remains a strong institution" and that he had recently made "two capital infusions" into the bank; (6) Counts 7-11: sending packages of documents, including investor subscription information, from SGC in Houston, Texas, to SIB in Antigua; (7) Count 12: conspiring to corruptly influence, obstruct, and impede the SEC's investigation of SFG, including the SEC's efforts to ascertain SIB's true financial condition and the content and value of SIB's investment portfolio, all in an effort to, among other things, perpetuate and prevent detection of an ongoing fraud and continue receiving economic benefits from the fraud; (8) Count 13: obstructing the SEC investigation; and (9) Count 14: conspiring to commit money laundering by causing the movement of millions of dollars of fraudulently obtained investors' funds from and among bank accounts located in the Southern District of Texas and elsewhere in the United States to various bank accounts located outside of the United States. Superseding Indictment [422], May 4, 2011, *in United States v. Stanford*, Criminal Action No. 4:09-CR-00342-001 (S.D. Tex. 2012) [hereinafter *United States v. Stanford*].

[33]*See, e.g.*, Order Granting Receiver's Mot. Summ. J., June 22, 2011, at 56 [109] *in Janvey v. Dem. Senatorial Campaign Comm., Inc.*, Civil Action No. 3:10-CV-0346-N (2011) ("The evidence further demonstrates that the Ponzi scheme was comprised of over 100 interrelated entities whose primary, if not exclusive, source of funding was derived from SIB CDs . . . ."); Order Denying Stanford's Mot. Dismiss, Nov. 30, 2011, at 13 [1483] *in* SEC Action ("Stanford's alleged Ponzi scheme spanned at least a decade and involved myriad actors and entities largely owned or controlled by Stanford.").

[34]Beverly Jacobs, SIB's Vice President of Customer Support, testified that SIB offered three types of CDs and three types of accounts, as well as credit card services, loan facilities, letters of credit, letters of guarantee, and private banking services. 110-1, at 13, 18-23; Hr'g

certificates of deposit ("CDs") – and one principal source of funds – customer deposits from CD purchases. 115-1, at 7; *see also* 107-1, at 11. Although SIB did invest some proceeds from CD sales, the amount it invested was grossly inadequate to cover redemptions or interest payments to investors and was far less than the amount it represented that it invested to customers and the public. 115-1, at 9. SIB had been insolvent since at least 1999 and remained in business by operating as a Ponzi scheme. *See* 115-1, at 7. In other words, SIB relied on the proceeds from the sale of new CDs to make purported interest and principal payments to existing CD investors. *See id.*

Stanford was the sole owner, directly or indirectly, of more than 130 separate Stanford Entities, including SIB, in more than 14 countries. *See id.* at 7; 62, at 10-13. The Stanford Entities comprised a single financial services network referred to as SFG. *See* 115-1, at 7. As to SIB specifically, Stanford owned 100% of Stanford Bank Holdings Limited, which in turn owned 100% of SIB. *See* 62, at 12. Funds from the Stanford Entities, consisting primarily of CD proceeds, *see* 115-3, at 8, almost exclusively comprised Stanford's reported income from at least 1999 onward. *See* 115-1, at 7. Stanford controlled the Stanford Entities with substantial assistance from James Davis, Chief Financial Officer ("CFO") of Stanford Financial Group Company ("SFGC") and SIB, and Laura Pendergest-Holt, Chief Investment Officer ("CIO") of SFGC. *Id.*

The evidence demonstrates that Stanford, Davis, and Pendergest-Holt provided misinformation regarding SIB's investment strategy, earnings, and safety to financial

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Tr. 92.

advisors at various Stanford Entities, who then used it to induce customers to purchase CDs. *See id.* at 8; *see also* 21-3, at 5. Davis determined bank earnings monthly, artificially pegging the amount at the number necessary to give the Bank an acceptable financial performance and capital ratios. 115-1, at 14.

Although in many instances Stanford and others doctored SIB's paperwork to look reassuringly like the paperwork of a real financial institution,[35] the reality is that SIB did not observe corporate formalities in all respects. For example, the SIB CD proceeds did more than just keep the bank afloat. Stanford Entities and Stanford himself received large disbursements of the proceeds. *Id.* at 9, 32-33. The evidence demonstrates, for instance, that SIB made a $1.8 billion loan payment to Stanford. *Id.* at 14; 107-1, at 19. Additionally, there were a number of material related-party transactions that SIB did not disclose in its annual financial statements. For example, a Stanford Entity would acquire real estate assets, and it would later transfer those assets among the SFG network entities, recorded at several times their original value without any evidence of capital improvements or independent appraisal. *See* 115-1, at 14, 32. Additionally, the Court notes that both the Former Joint Liquidators and the current Joint Liquidators were in agreement that Stanford operated all

[35]The Joint Liquidators state that "SIB entered into contracts with a number of Stanford-related entities for the provision of services, including certain oversight, marketing, investment and financial advisory, and treasury and accounting functions, and for customer, referral based services. These contracts were used as a mechanism to remove funds from SIB." New Joint Liquidators' Proposed Findings of Fact & Concs. of Law With Respect to Pet. Recogn. Pursuant to Ch. 15 U.S. Bankr. Code 23 [154] [hereinafter JL Proposed Facts & Law] (citing 106-1, at 24-26; 115-1, at 20-21; Hr'g Tr. 44-45, 131, 178). Joint Liquidator Wide also testified that the contracts "certainly weren't between arm's length parties. They were certainly related parties, yes." Hr'g Tr. 44.

of the Stanford Entities as a Ponzi scheme. 15, at 2 (Former JL Hamilton-Smith's affidavit stating "Although I do not dispute that SIB and other Stanford entities were likely engaged in a Ponzi scheme – indeed, my own findings to date are consistent with that allegation – I take issue with the assertion that the companies in the Stanford group were in fact operating as a single entity, at least so far as SIB is concerned."); Hr'g Tr. 38-39 (JL Wide stating that on August 11, 2011 he certified to the Antiguan Court that "SIB operated a business model which was a Ponzi scheme"); *id.* at 114-15 (JL Wide stating that he had not withdrawn or amended the above statement); *id.* at 142 (JL Dickson testifying that he "hesitate[s] to use the word 'Ponzi scheme' simply because [he] do[es not] think it's a defined term" but stating that he's "already agreed that the vast majority of – of the activity appears to be fraudulent and new monies are used to pay existing depositors").[36]

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[36]During the hearing, Joint Liquidator Wide attempted to backtrack from his previous statement that SIB was run as part of a Ponzi scheme:

> A. [JL Wide:] As our investigations have continued and we've tracked the flow of funds and we've looked at how money was removed from control of the depositor, if you like, it became clear to me that the funds were being stripped out of SIB, partly through those contracts that were spoken about earlier and partly by simply removing them, putting them into other Stanford entities and then onwards for the benefit of either Mr. Stanford or other persons unknown.
> Q. [Receiver's counsel:] And how is that different than a Ponzi scheme? Why did you make that distinction?
> A. From our view, it looked like the bank's money was being stolen rather than the bank was running a Ponzi itself.

Hr'g Tr. 90.

> Q. Are you telling this Court that since August of 2011 when you signed a claim saying SIB was run under a business model that was a Ponzi scheme, you have changed your mind and come to a different conclusion in the last 90 days and it's – and concluded it's not a Ponzi scheme?
> A. I'm concluding there was a fraud committed, yes. And I'm concluding that,

Further, SIB's purported president, Juan Rodriguez-Tolentino, had an extremely limited role at the bank – Rodriguez-Tolentino had no control over the control, trajectory, or investment of SIB's funds, 115-1, at 27; Hr'g Tr. 181 (Jacobs stating that she believed that Rodriguez-Tolentino had no power to "free up" SIB funds to meet backlog of customer demand for their money); he referred all questions regarding SIB to Pendergest-Holt and Davis at SFG, *see* 115-1, at 27-29; his only role in the sale of CDs was to present slideshows, provided by Stanford, about SIB to potential large investors, *see id.* at 27; and he has described himself as Stanford and Davis's "puppet," in charge of only administrative tasks such as day-to-day management of basic operations, system account reviews, SIB client accounts, and customer service. *See id.* at 26-29. And, although SIB employed approximately ninety people, the evidence demonstrates that employees of other Stanford Entities largely ran SIB, as its employees[37] had no authority to make any significant managerial decisions and no access to SIB's records of investment values and income. *See id.* at 10, 15, 18, 22. Besides, the Court questions whether ninety employees could sufficiently operate a multibillion dollar bank. *See id.*

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for SIB's point of view, its money was stolen through these variety of contracts and sometimes just outright stolen by Mr. Stanford, yes, or his other companies.

Q. Have you taken any steps to withdraw or amend your statement under oath to the Antiguan [C]ourt stating that SIB operated a business model that was a Ponzi scheme?

A. Not as yet, no.

Id. at 114-15.

[37]Other than James Davis.

In attempting to speak against this overwhelming evidence, the Joint Liquidators argue that the Court should instead analyze the Receiver's aggregation request as a request to substantively consolidate the Stanford Entities and that the Receiver has failed to meet the requisite showing for substantive consolidation. *See, e.g.*, JL Proposed Fact & Law 66-68. However, the Joint Liquidators' argument lacks merit.

First, substantive consolidation is inapplicable. Substantive consolidation is a mechanism for administering the bankruptcy estates of multiple, related entities. *See In re Babcock & Wilcox Co.*, 250 F.3d 955, 958 (5th Cir. 2001). This seems to presuppose that the entities to be consolidated are already in bankruptcy proceedings. Here, the only entity in a bankruptcy proceeding is SIB in Antigua. The remainder of the entities are subject to an equitable receivership – not a bankruptcy. Thus, substantive consolidation is impossible under these facts, so veil-piercing is the applicable doctrine. *See Peoples State Bank v. GE Capital Corp. (In re Ark-La-Tex Timber Co., Inc.)*, 482 F.3d 319, 327 (5th Cir. 2007) (holding that bankruptcy judge's order did not substantively consolidate three juridical persons because two of the persons had not been placed into bankruptcy).[38]

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[38]The Court notes that some courts have held that they can order consolidation of a debtor with a nondebtor. *See* 2-105 COLLIER ON BANKRUPTCY ¶ 105.09 (16th ed. 2012). Indeed, courts are split on this issue. *See, e.g.*, *In re Pearlman (Pearlman II)*, 462 B.R. 849, 854 (Bankr. M.D. Fla. 2012) (noting split and refusing to substantively consolidate debtor entities with nondebtor entities); *Kapila v. S&G Fin. Servs., LLC (In re S&G Fin. Servs. of S. Fla., Inc.)*, 451 B.R. 573 (Bankr. S.D. Fla. 2011) (noting that only the Ninth Circuit has substantively consolidated debtor entities with nondebtor entities). Although the Fifth Circuit has held in at least one instance that it is inappropriate to do so, *see Peoples State Bank*, 482 F.3d at 327, one court in this Circuit has held that substantive consolidation of debtor entities with nondebtor entities is appropriate where the nondebtors are the debtor's alter egos, *see Roberts v. Bass & Assocs., Inc. (In re Bass)*, 2011 WL 722384 (Bankr. W.D.

If substantive consolidation were appropriate between a debtor and nondebtor, however, the Receiver's showing would warrant it. Although courts have not developed a universally accepted standard for substantive consolidation, they frequently consider the following factors: (1) the degree of difficulty in segregating and ascertaining individual assets and liabilities, (2) the presence or absence of consolidated financial statements, (3) the profitability of consolidation at a single physical location, (4) the commingling of assets and business functions, (5) the unity of interests and ownership between the various corporate entities, (6) the existence of parent and intercorporate guarantees on loans, (7) the transfer of assets without formal observance of corporate formalities, and (8) whether other remedies, such as the doctrines of alter ego and fraudulent conveyance, are available.[39] *In re E'Lite*

Tex. 2011); *see also Soviero v. Franklin Nat'l Bank*, 328 F.2d 446 (2d Cir. 1964) (substantively consolidating debtor with nondebtor); *Helena Chem. Co. v. Circle Land & Cattle Corp. (In re Circle Land & Cattle Corp.)*, 213 B.R. 870, 876 (Bankr. D. Kan. 1997) (collecting cases but ultimately refusing to substantively consolidate debtor with nondebtor). And "[i]n circumstances that would justify piercing the corporate veil, . . . courts have also substantively consolidated the assets and liabilities of the nondebtor shareholder with the estate of the debtor subsidiary where the misconduct has been sufficiently egregious." 2-105 COLLIER ON BANKRUPTCY, *supra*.

[39]*See also In re AHF Dev't, Ltd.*, 462 B.R. 186, 195-96 (Bankr. N.D. Tex. 2011) (Jones, Bankr. J.) (providing a comprehensive list of factors: "the presence or absence of consolidated financial statements; the unity of interests and ownership between the various corporate entities; the existence of parent and intercorporate guaranties on loans; the degree of difficulty in segregating and ascertaining individual assets and liabilities; the transfer of assets without formal observance of corporate formalities; the commingling of assets and business functions; the profitability of consolidation at a single physical location; parent corporation owns all or a majority of the capital stock of the subsidiary; parent and subsidiary have common officers and directors; parent finances subsidiary; parent is responsible for incorporation of subsidiary; subsidiary has grossly inadequate capital; parent pays salaries, expenses, or losses of subsidiary; subsidiary has substantially no business except with parent; subsidiary has essentially no assets except for those conveyed by parent; parent refers to

Eyewear Holding, Inc., 2009 WL 349832, at *3 (E.D. Tex. 2009) (citing *Wells Fargo Bank of Tex., N.A. v. Sommers*, 444 F.3d 690, 697 n.5 (5th Cir. 2006); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 518 (W.D. Tex. 2000); and *In re Vecco Indus., Inc.*, 4 B.R. 407 (Bankr. E.D. Va. 1980)). Many of these factors overlap with the veil-piercing considerations discussed above.[40]

To put it shortly: (1) as a Ponzi scheme, all assets and liabilities are difficult to segregate and ascertain, (2) the absence of consolidated financial statements matters not because Stanford and/or his associates doctored the financial statements, (3) it makes economic sense to consolidate the entities, *see* Hr'g Tr. 255, (4) commingling of funds among the Stanford Entities was the norm, (5) Stanford directly or indirectly owned all

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subsidiary as department or division of parent; directors or officers of subsidiary do not act in interests of subsidiary, but take directions from parent; formal legal requirements of the subsidiary as a separate and independent corporation are not observed; the transfer of assets without formal observance of corporate formalities;" and noting the different substantive consolidation tests).

[40]*But cf. In re Owens Corning*, 419 F.3d 195, 206 (3d Cir. 2005) (noting that veil piercing and substantive consolidation doctrines have subtle differences).

For examples of cases where courts have substantively consolidated the estates of entities involved in Ponzi schemes, see *In re New Times Secs. Servs., Inc.*, 371 F.3d 68, 73 (2d Cir. 2004); *Levy v. Kozyak (In re Fin. Federated Title & Trust, Inc.)*, 347 F.3d 880, 882 (11th Cir. 2003); *In re Bonham*, 229 F.3d 750, 763-71 (9th Cir. 2000); *Wesbanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 106 F.3d 1255, 1258 (6th Cir. 1997); *Sender v. Simon*, 84 F.3d 1299, 1302 (10th Cir. 1996); *Grassmueck v. Am. Shorthorn Ass'n*, 365 F. Supp. 2d 1042, 1043 (D. Neb. 2005); *In re Pearlman (Pearlman I)*, 450 B.R. 219 (Bankr. M.D. Fla. 2011); *Barclay v. Swiss Fin. Corp. Ltd. (In re Midland Euro Exch. Inc.)*, 347 B.R. 708, 711 (Bankr. C.D. Cal. 2006); *Jacobs v. Matrix Capital Bank (In re Apponline.com, Inc.)*, 315 B.R. 259, 267 (Bankr. E.D.N.Y. 2004); *Breeden v. L.I. Bridge Fund, LLC (In re Bennett Funding Grp., Inc.)*, 232 B.R. 565, 567 (Bankr. N.D.N.Y. 1999); and *Henderson v. Allred (In re W. World Funding, Inc.)*, 54 B.R. 470, 472 (Bankr. D. Nev. 1985).

Stanford Entities, (6) SIB "loaned" Stanford $1.8 billion without a guaranty, (7) Stanford and his associates transferred assets among the Stanford Entities in disregard of corporate formalities, and (8) other remedies are available. On balance, the evidence overwhelmingly supports substantive consolidation were it to apply.[41]

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[41]The Joint Liquidators argue that substantive consolidation is unwarranted because it is not in the best interest of the creditors. *See, e.g.*, JL Proposed Facts & Law 67-68. In support, they point to a balancing test adopted by certain courts. *See id.* at 67. The Second Circuit has simplified the test into two factors: (1) whether creditors dealt with the entities as a single economic unit and did not rely on the debtors' separate identity in extending credit, and (2) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. *Permian Producers Drilling*, 263 B.R. at 518 (citing *Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir. 1988)). Notably, "[t]he presence of either factor provides a sufficient basis to order consolidation." *Id.* (citing *Bonham*, 229 F.3d at 765-66).

First, the Court notes that it is not substantively consolidating the Stanford Entities. However, even if it were, this test would not bar substantive consolidation. One cannot plausibly read the Second Circuit's second factor to mean that every single creditor must benefit from consolidation. Consolidation of entities inherently entails the addition of more creditors who attempt to stake a claim to the bankruptcy pot. So, in effect, each consolidation harms creditors to the extent that it dilutes each creditor's individual recovery. Rather, prong two of the Second Circuit test focuses on whether "'the time and expense necessary even to attempt to unscramble the[] [entities] [is] so substantial as to threaten the realization of any net assets for all the creditors,' or where no accurate identification and allocation of assets is possible." *Augie/Restivo*, 860 F.2d at 519 (last bracket in original) (citing *Chem. Bank NY Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966)). Courts have found the requisite level of entwinement where "the debtor corporations were operated as a single unit with little or no attention paid to the formalities usually observed in independent corporations, . . . the officers and directors of all, so far as ascertainable, were substantially the same and acted as figureheads for [the owner], . . . funds were shifted back and forth between the corporations in an extremely complex pattern and in effect pooled together, loans were made back and forth, borrowings made by some to pay obligations of others, freights due some pledged or used to pay liabilities and expenses of others, and withdrawals and payments made from and to corporate accounts by [the owner] personally not sufficiently recorded on the books." *Kheel*, 369 F.2d at 846. This is clearly analogous to the facts here. Additionally, the Receiver and his expert, Karyl Van Tassel, have declared that aggregation will not seriously dilute investors' recovery as SIB investor claims will comprise the vast majority of claims against the Stanford Entities, *see* Hr'g Tr. 221-22; Receiver's Resp. to

The Receiver has shown that Stanford operated the entire network of Stanford Entities as an integrated unit in order to perpetrate a massive worldwide fraud. Each Stanford Entity either participated in the scheme, derived benefit from the scheme, or lent the appearance of legitimacy to the entirety of Stanford's fraudulent enterprise. To ignore these findings would elevate form over substance – thereby legitimizing the corporate structure that Stanford utilized to perpetrate his fraud and running afoul of Fifth Circuit precedent cautioning courts to look beyond the surface. Thus, because SIB did not observe corporate formalities and because all the Stanford entities were "operated as one for purposes of perpetrating a fraud on investors," *Ernst & Young, Inc.*, 383 B.R. at 781, the Court pierces SIB's corporate veil and aggregates the Stanford Entities.

2. The Stanford Entities' COMI is in the United States. – Chapter 15 of the Bankruptcy Code states that "in the absence of evidence to the contrary, the debtor's registered office, . . . is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). However, the Receiver has presented evidence to the contrary, which rebuts the presumption, and, as always, the burden rests on the Joint Liquidators to establish that Antigua is the Stanford Entities' COMI.[42]

Antiguan Liquidators' Dec. 3 Suppl. Br. 61 [61]. *But see* Hr'g Tr. 226-32 (Joint Liquidators questioning Van Tassel about the effect of the addition of Stanford's U.S. tax liabilities as well as other Stanford Entities' claims upon aggregation). Moreover, there is evidence to support prong one of the test. *See* discussion *infra* regarding SIB's marketing materials referring to a global network of entities.

[42]As Judge Lifland, coauthor of the model act underlying Chapter 15, explained in the seminal case, *Bear Stearns II*:

> Section 1516(c) provides that "[i]n the absence of evidence to the

Although Chapter 15 does not define COMI, courts have looked to a variety of factors

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> contrary, the debtor's registered office, . . . is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c); *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 635 (Bankr.E.D.Cal.2006) (["]In effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, 'center of main interests.' The registered office, however, does not otherwise have special evidentiary value and does not shift the risk of nonpersuasion, i.e., the burden of proof, away from the foreign representative seeking recognition as a main proceeding.").
>
> The legislative history to section 1516(c) further explains that "the presumption that the place of the registered office is also the center of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy." *See* H.R.REP. NO. 31, 109th Cong., 1st Sess 1516 (2005), U.S.Code Cong. & Admin.News 2005, pp. 88, 175. This presumption "permits and encourages fast action in cases where speed may be essential, while leaving the debtor's true 'center' open to dispute in cases where the facts are more doubtful." *See* [Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1033 (2007)]. This presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat. *Id.*
>
> Chapter 15 changed the Model Law standard that established the presumption in "the absence of *proof* to the contrary," to a presumption in "the absence of *evidence* to the contrary." The legislative history explains that the word "proof" was changed to "evidence" to make it clearer using United States terminology that the ultimate burden is on the foreign representative. *See* H.R.REP. NO. 109-31, 112-13 (2005). According to one commentator, "[w]hatever may be the proper interpretation of the EU Regulation, the Model Law and Chapter 15 give limited weight to the presumption of jurisdiction of incorporation as the COMI." *See* Westbrook[, *supra*, at 1033-34]. Accordingly, "[i]f the foreign proceeding is in the country of the registered office, and if there is evidence that the center of main interests might be elsewhere, then the foreign representative must prove that the center of main interest is in the same country as the registered office." *See In re Tri-Continental Exchange Ltd.*, 349 B.R. at 635; *see also In re Petition of Lloyd*, Case No. 05-60100(BRL), Verified Petition under Chapter 15 for Recognition of a Foreign Proceeding, ¶ 9 ECF # 2, *www.nysb.uscourts.gov* (Debtor was mutual insurance company registered in France but demonstrated that center of main interest was located in the United Kingdom ("UK")).

Bear Stearns II, 374 B.R. at 127-28 (footnotes omitted).

to make the determination, including:

> [T]he location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or a majority of the creditors who would be affected [by] the case; and/or the jurisdiction whose law would apply to most disputes.

Ran IV, 607 F.3d at 1023 (citing *SPhinX*, 351 B.R. at 117).

The Fifth Circuit has stated that "*[a]dditionally*, it is important that the debtor's COMI be ascertainable by third parties." *Id.* at 1025 (emphasis added). It explains that "[t]he presumption [underlying the ascertainability factor] is that creditors will look to the law of the jurisdiction in which they perceive the debtor to be operating to resolve any difficulties they have with that debtor . . . ." *Id.* at 1026; *see also Betcorp*, 400 B.R. at 286 ("The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction . . . be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."). The above caselaw seems to contemplate that, although important, ascertainability is but one of many factors to consider in the COMI analysis. *See, e.g.*, *Betcorp*, 400 B.R. at 286 ("This [COMI] inquiry examines the debtor's administration, management, and operations *along with* whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions." (emphasis added)); *In re Millennium Global Emerging Credit Master Fund Ltd.*, --- B.R. ---, 2012 WL 2403406, at *3 (S.D.N.Y. 2012) ("Courts *also* take into consideration the expectations of creditors and other interested parties . . . . In order to protect the expectation interests of creditors, investors and other interested third parties, courts ask whether the debtor's COMI would have been 'ascertainable' to interested third parties." (emphasis added)).[43]

Ultimately, the COMI determination is analogous to a principal place of business analysis under U.S. law. *See, e.g.*, *British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. at 720; *Fairfield Sentry Ltd.*, 440 B.R. at 64; *British Am. Ins. Co.*, 425 B.R. at 908-09; *Basis Yield*, 381 B.R. at 48; *Bear Stearns II*, 374 B.R. at 129; *Tri-Cont'l Exch.*, 349 B.R. at 634. In 2010, the Supreme Court substantially clarified the law concerning "principal place of business" in adopting the "nerve center" test. Specifically, it stated: "'Principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192.

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[43] *But see, e.g.*, *Bear Stearns III*, 389 B.R. at 335 ("[The COMI] concept derives from the European Union Convention on Insolvency Proceedings . . . . The regulation adopting the EU Convention explains 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.'"); *Krys v. Official Comm. of Unsecured Creditors of Refco Inc. (In re SPhinX, Ltd.) (SPhinX II)*, 371 B.R. 10, 19 (S.D.N.Y. 2008) (affirming bankruptcy court's opinion, which stated that "COMI must be identified based on criteria that are: (1) objective; and (2) ascertainable by third parties."); *Chiang*, 437 B.R. at 403 ("[T]he location of the COMI is an objective determination based on the viewpoint of third parties . . . ."); *Tri-Cont'l Exch.*, 349 B.R. at 634-35 ("[T]he key question is the situs of the conduct of the administration of the debtor's business on a regular basis that is known to third parties.").

These decisions do not sway the Court. Rather, it believes that it would be illogical for an ascertainability requirement to strictly apply to all Chapter 15 cases. Although the purpose of Chapter 15 is to ensure cooperation among bankruptcy proceedings around the world, Congress cannot have intended to grant formal recognition to letterbox companies merely because the schemers were adept at pulling the wool over investors, creditors, and regulators' eyes. Surely, it is against U.S. public policy to reward such gamesmanship and manipulation.

Although it stated that this will "normally be the place where the corporation maintains its headquarters," it cautioned that this is only the case where "the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings [for example] . . . ." *Id.* The Court explained that the shorthand headquarters approach is useful because "[t]he public often (though not always) considers it the corporation's main place of business." *Id.* at 1193. The Supreme Court was thus mindful that the location of a registered office or headquarters might provide insight into a company's principal place of business, although that location is not necessarily indicative of the business' locus of control, or nerve center. This is where the Court begins its analysis.[44]

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[44]The Joint Liquidators contend that the Court should adopt the rulings of foreign authorities regarding recognition either under principles of res judicata or comity. Antigua, Switzerland, and the United Kingdom have refused this Receivership recognition. In contrast, Canada has recognized the Receiver as a foreign representative and the Receivership as the foreign main proceeding.

As a practical matter, res judicata is inappropriate in this instance because the foreign decisions are inconsistent. However, even if they were consistent, the decisions do not bind this Court. Particularly problematic are the following: In the United Kingdom, (a) the court placed the burden of proof on the Receiver, whereas under U.S. law the burden is on the Joint Liquidators, (b) the court limited its analysis to objectively ascertainable factors, whereas in U.S. jurisprudence it is one of many factors, and (c) the court analyzed the time period from the time that the Antiguan court instituted the foreign liquidation proceeding, whereas under U.S. law the relevant time period to analyze is at the time the representative files the Chapter 15 petition. The Swiss decision did not apply the Model Law upon which Chapter 15 is based and thus did not make a COMI determination. The Antiguan decision similarly did not analyze the Model Law because Antigua has not adopted it. Finally, the Canadian decision rested on the Former Joint Liquidators' unclean hands, an issue that is not before the Court in the same way.

The Court also cannot adopt any of the foreign decisions under the doctrine of comity. "[C]omity is not an element of recognition; it is rather, a consideration once recognition is granted." *In re Ran (Ran II)*, 390 B.R. 257, 292 (Bankr. S.D. Tex. 2008), *aff'd*, *Ran III*, 406

As explained in more detail above, R. Allen Stanford, a dual U.S. and Antiguan citizen,[45] was the sole owner, directly or indirectly, of the more than 130 Stanford Entities. 115-1, at 7. He controlled the Stanford Entities with substantial assistance from Davis and Pendergest-Holt, both U.S. citizens. *Id.* Stanford lived and worked principally in Houston,

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B.R. 277, *aff'd*, *Ran IV*, 607 F.3d 1017; *see also Bear Stearns III*, 389 B.R. at 334 ("Both the plain language and legislative history of Chapter 15 . . . require[] a factual determination with respect to recognition before principles of comity come into play."); *In re Loy*, 380 B.R. 154, 164 (Bankr. E.D. Va. 2007) ("[T]he foreign representative must first pass through the bankruptcy court by way of a foreign proceeding recognition *prior* to applying to a court in the United States for relief requiring the comity or cooperation of that court." (emphasis added) (citing *Iida*, 377 B.R. at 257)); Westbrook, *supra* note 42, at 1024 ("A central point of the Model Law was meant to be adoption of a structure less amorphous than comity and a procedure more suited to bankruptcy than the ancient machinery of judgment recognition."). U.S. courts have specifically chosen to conduct their own COMI analyses despite prior foreign court COMI determinations. *See, e.g.*, *Ran II*, 390 B.R. at 267 ("Chapter 15 does not provide for recognition of an insolvency proceeding based on a foreign court's determination that it has jurisdiction as the location of the debtor's [COMI]. Indeed, Chapter 15 requires the U.S. court to make an independent evaluation of the location of the debtor's [COMI] at the time a petition for recognition is presented." (internal citation omitted)); *SPhinX I*, 351 B.R. at 120 n.22 ("[N]otwithstanding the respect that this Court has for the Cayman Court, even if the Cayman Court had made such a [foreign main proceeding] determination[,] it would not be binding on this Court."), *aff'd*, *SPhinX II*, 371 B.R. 10. Accordingly, the Court declines to apply or adopt the rulings of any authorities in the United Kingdom, Switzerland, Antigua, or Canada regarding recognition of the Antiguan Proceeding.

[45] Antigua granted Stanford citizenship and knighthood. *See* 116-11, at 4; 117-6, at 19-48.

The Former Joint Liquidators argued that the Court is bound to find that Stanford's residence was not in the United States because Judge Hittner, who oversaw Stanford's criminal proceeding, decided as much in June 2009. *See* Order [52], June 30, 2009, *in United States v. Stanford*. However, Judge Hittner did not base his decision on the entirety of this record, and suffice it to say that interests weighed in a pretrial detention proceeding are different than the interests weighed here. Thus, on this record the Court reaches a different conclusion than Judge Hittner. The evidence before the Court reveals that Stanford initially resided on the mainland United States and later also resided in St. Croix, U.S.V.I. *See* 116-1, at 3-4.

Texas; Miami, Florida; and Christiansted, St. Croix, U.S.V.I. *Id.* Davis and Pendergest-Holt lived in Mississippi and had offices in Houston, Texas; Tupelo, Mississippi; and Memphis, Tennessee. *Id.* The Stanford Entities' headquarters was in Houston, Texas. *See id.* at 37. Stanford never lived in Antigua, and Antigua did not serve as the base of the Stanford Entities' operations. 116-11, at 3.

Most of the Stanford Entities' revenue came from selling CDs. CD sales largely bypassed Antigua, as depositors wishing to deposit funds were usually introduced to SIB through their financial advisors, who maintained primary if not sole contact with the depositor and were often located where the depositor resided. *See* 115-1, at 33-34; Hr'g Tr. 124-26. U.S. investors exclusively purchased CDs through broker-dealers in the United States at SGC. 110-1, at 19; Hr'g Tr. 189. All financial advisors, regardless of location, would send client applications and requisite paperwork to Antigua, *see* 110-1, at 14, and SIB would then deposit the funds into U.S., Canadian, and English banks, *see id.* at 15; Hr'g Tr. 186-87. Investors wired money to Canadian banks or English banks. *See* Hr'g Tr. 186-87. Those who wished to pay via check provided checks to their financial advisors at a non-Antiguan location.[46] *See* 115-1, at 31; Hr'g Tr. 186. Financial advisors would send the checks to SIB in Antigua, and, after endorsing them, SIB would send the checks to Houston,

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[46]Jacobs testified that "SIB maintained a handful of financial advisors at its offices in Antigua who obtained customers directly, sold CDs, provided financial advice to customers, and other such similar services, if requested by the customer." 110-1, at 23. However, this "handful" of financial advisors pales in comparison to the advisers located outside of Antigua. The Court also notes that Antiguan law and SIB's own policies prohibited SIB from serving Antiguans. *See* Hr'g Tr. 39.

Texas for deposit in Canada or the United Kingdom. *See* Hr'g Tr. 186-87; 110-1, at 15.[47] After deposit, Davis would then disburse the funds among the Stanford Entities. *See* 115-1, at 9.

Stanford's broker-dealers included SGC in the United States, Stanford Bolsa y Banca S.A. in Mexico, Comisionista de Bolsa in Colombia, and others. *Id.* at 33. Stanford overwhelmingly marketed his CDs through Stanford broker-dealers in non-Antiguan territories. *Id.* In fact, the Joint Liquidators concede that "[t]he vast majority of SIB products were not sold from Antigua."[48] JL Proposed Facts & Law 20. In reality, broker-dealers in the United States generated substantially more CD sales, by dollar amount, than broker-dealers in any other country, and no other country approached the magnitude of the United States as a generator of CD sales. 115-1, at 34; *see also* Hr'g Tr. 127-28 (JL Dickson stating that he couldn't disagree with Van Tassel's testimony that financial advisors at SGC in United States were responsible for 42-48% of SIB CD sales in 2007 and 2008). According to the Receiver, U.S. residents hold more CDs, in terms of number and dollar amount, than

[47]SIB kept a small amount of funds at the Bank of Antigua, another Stanford Entity. $9 million was deposited into the Bank of Antigua at Davis' direction in November and December 2008, just before the February 2009 freeze. The timing of the transfers could indicate that this was meant to be a "flight fund." *See* 21-20, at 6, 8.

[48]The Joint Liquidators go on to explain that "SIB had a number of non-exclusive referral agreements with authorized financial advisory offices in several countries throughout the world who referred customers to SIB, in exchange for referral fees." JL Proposed Facts & Law 20-21 (citing 106-1, at 26-27; 106-14; 111-1, at 15; Hr'g Tr. 125; 115-1, at 32). They state that the amounts invoiced to SIB in Antigua and referral fees paid by SIB, either through TD Bank in Canada or Trustmark Bank in the United States, ranged from approximately $18 million in 2000 to approximately $157.7 million in 2008. 107-1, at 20; 107-2.

the residents of any other country in the world, including Antigua. 115-1, at 35 (showing that the United States comprised 7,072 clients, which accounted for 25.26% of clients, and $2,660,676,142 in deposit amount, which accounted for 37% of dollar amounts).[49]

Stanford employees managed and directed the CD enterprise from the United States with no meaningful input from Antigua. Although SIB, the issuing bank, was chartered and registered in Antigua, 106-1, at 16-17, Stanford and Davis controlled it – with assistance from Pendergest-Holt – from various places within the United States. *See, e.g.*, 115-1, at 7-8; Hr'g Tr. 178-181. And Davis facilitated several millions of dollars in transfers of CD proceeds among the Stanford Entities. *See* 115-1, at 9, 30, 32-33. Antiguan employees were excluded from decisions regarding SIB's self-professed primary business:[50] CD-proceed investments.[51] *See, e.g.*, *id.* at 15, 17-18. Other Stanford Entities managed and directed the

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[49]According to the Receiver, the next highest client and dollar amount belonged to Mexico, with 2,801 clients (10%) and $605,649,240 (8.42%). 115-1, at 35. The Joint Liquidators argue that customers in Latin America constituted approximately 71.7% of total customers and 58.56% of the total amount of deposit. 124-2. Regardless of whether this is true, the Court is concerned with client statistics by country – not region of the world. Further, the Court finds the Receiver's tabulation to be more credible than the Joint Liquidators' competing numbers.

[50]In SIB's disclosure statement for the U.S. Accredited Investor Certificate of Deposit Program, it stated: "Our primary business is the investment of funds deposited with us by depositors." 3, at 52.

[51]Indeed, the Joint Liquidators state that "[d]ecisions and implementation of decisions as to the use and investment of the funds generated by the sale of SIB CDs and SIB deposits, to the extent invested at all, were made by Stanford related entities, Stanford, Davis, or [Pendergest-Holt]." JL Proposed Facts & Law 23 (citing 110-1, at 12; Hr'g Tr. 115, 179, 181, 284).

SIB employees were paid with funds administered from Houston. 115-1, at 26. CFO Davis and President Rodriguez-Tolentino were paid by other Stanford Entities in the United investment accounts, and, although those entities sent bank statements to SIB in Antigua, personnel from other Stanford Entities reviewed and processed them. *See* Hr'g Tr. 179; 111-1, at 4; 115-1, at 11-18. Only Stanford, Davis, and Pendergest-Holt were primarily responsible for investments and investment accounting. 115-1, at 18.

Stanford and his associates in the United States generated and maintained SIB's financial information. Stanford, Davis, Pendergest-Holt, and other U.S. residents disseminated false information regarding SIB's financial strength, profitability, capitalization, investment strategy, investment allocation, value of its investment portfolio, and other matters to financial advisors around the world for use in inducing potential investors to purchase CDs. *Id.* at 39-42. Indeed, Davis managed the Stanford Entities Tier 1 assets – cash and cash equivalents – via the Treasury Department in Houston, Texas. *Id.* at 10-11. SIB invested its Tier 2 assets – investments and a small amount of cash or cash equivalents – with outside money managers at banks in the United Kingdom and Switzerland. *Id.* at 11-13. Pendergest-Holt and her team of research analysts in Memphis

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States. *Id.* Although SIB employees performed limited administrative, bookkeeping, and operating functions in Antigua, these functions were heavily dependent upon Stanford's global human resources, accounting, and information technology ("IT") groups. *Id.* at 18, 22. SIB's Antiguan employees were primarily responsible for keeping client accounting records current, generating client statements, and performing certain private banking functions such as paying credit card bills. *Id.* at 22. Although the Joint Liquidators aver that the following departments were operational at SIB: operations, client services, general affairs, systems operations, accounting, compliance, quality control, human resources, protocol, and internal audit, *see* 106-1, at 18, 21; 110-1, at 9-12, the Receiver's evidence reveals that SIB's workforce of ninety employees could not have handled anything more; the SIB workforce was simply insufficient to operate SIB's CD business, much less the multi-billion dollar Stanford Entities enterprise. *See* 110-1, at 8 (stating that there were ninety SIB employees at SIB's peak).

oversaw these investments. *Id.* Finally, Stanford and Davis, with assistance from Pendergest-Holt and her team, managed Tier 3 assets – illiquid real estate, private equity investments, and undisclosed sham loans to Stanford. *Id.* at 13-14. Davis provided the fallacious investment earning amounts for Tier 3 assets; Stanford and his U.S. employees, consulting with outside U.S. counsel, created the inflated $3.174 billion real estate figure, representing a 50-fold baseless inflation of the properties; $1.8 billion of Tier 3 assets were notes receivable from Stanford, representing sham loans to him that he funneled to Stanford Entities, 76% of which were outside Antigua; and finally, an inflated $1.2 billion value was assigned to "merchant banking" assets, consisting mostly of equity and debt investments in private and public companies, most of which were headquartered in the United States. *Id.*[52]

Additionally, extensive SIB client records exist in the United States, and records regarding SIB's investments and cash balances were kept outside of Antigua, predominantly generated (i.e., fancifully created) and maintained in the United States by Stanford and Davis. *See id.* at 19.[53] Davis and other Houston-based Stanford employees – such as Harry Failing, Stanford's longtime accountant in Houston – also generated false reports to disseminate to

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[52]As of February 2009, SIB reported that it had: $31.8 million in cash – approximately $8 million located in Antigua; $345 million in investments by outside money managers in Canada, Switzerland, and the United Kingdom; $1.2 billion in merchant banking in the United States; $1.8 billion in notes receivable by Stanford (i.e., loans to Stanford); and $3.174 billion in real estate in Antigua. 115-1, at 14. All of these assets were purportedly directed and managed from the United States. *Id.* at 9-13. And, as stated above, Stanford and his associates doctored most, if not all, of the numbers.

[53]Documents and records also exist in Antigua, *see* JL Proposed Facts & Law 29-32 (describing the files in detail), although, as explained above, many were based on doctored numbers provided by Stanford, Davis, and other associates outside of Antigua.

Stanford Entity investors and potential investors regarding SIB's assets and liquidity.[54] *Id.* at 20-21. Stanford Entity employees in the United States wrote SIB's purported internal audit reports. *Id.* at 23. Although an Antiguan audit firm, C.A.S. Hewlett & Co. Ltd. also performed audits, the Receiver has shown that these were of minimal utility and veracity given that the firm did not review the records in the United States.[55] *Id.* at 23-24.

As for SIB, Stanford Entity employees in the United States fulfilled most of its core operational needs. *Id.* at 7-8, 15, 21-22. This includes, but is not limited to, legal, training, investment, accounting, human resources, compliance, IT, and public relations services. *See id.* at 14-15, 21-22. All of SIB's directors were non-Antiguans, and all but two were U.S. citizens. *Id.* at 7. The Board met via tele- or video-conference or in person in Antigua, and once in Miami, Florida. 106-1, at 23; 115-1, at 7-8. Stanford Entity employees in the United States also received vastly more monetary compensation than employees in Antigua. Management, administrative, and marketing fees paid to Stanford Entities in the United States and the U.S.V.I. – $268 million in 2008 – compared to total salary and benefits paid to SIB's Antiguan employees – $3.6 million in 2008 – illustrate this disparity. 115-1, at 24-25. Indeed, the Joint Liquidators agree "that the amount of money that [SIB] was paying its employees was a tiny fraction of the millions and millions it was paying to these other Stanford [E]ntities." *See* Hr'g Tr. 45, 132-33.

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[54]Failing, in particular, had a significant role in the structure of the Stanford Entities. 115-1, at 8.

[55]Additionally, there is evidence that Charlesworth Hewlett, SIB's "independent" auditor, received funds from SFG over and above his audit fees. *See* 42, at 3-4.

Stanford and his associates similarly managed and controlled other Stanford Entities from the United States. As discussed above, SFG and SGC were both U.S. companies, and at least approximately sixty-six other Stanford Entity companies were incorporated in the United States. *See* 62, at 10-13. STCL's core function, trust administration of mostly SIB CDs, was conducted in the United States, even though its physical structure was in Antigua, 115-1, at 25-26; its records were held in the United States, *id.* at 19; and its management and staff were paid from the United States, *id.* at 26. Of the remaining Stanford Entity companies not specifically incorporated in the United States, Stanford or a U.S. Stanford Entity owns 100% or nearly 100% of approximately forty-three of them; Stanford or a U.S. Stanford Entity owns 100% or nearly 100% of approximately twenty-eight more as a second-level parent; Stanford owns 100% of approximately eight more companies as a third-level parent; and finally, Stanford owns 100% or nearly 100% of the approximately three remaining companies as the ultimate parent. *See* 62, at 10-13.

Mixed evidence exists regarding third parties' expectations. Although much of the depositor opening documentation refers to SIB's domicile in Antigua and contains Antiguan law and jurisdiction clauses, *see* 110-1, at 26-36, and the marketing materials refer to SIB's Antiguan headquarters, *see id.* at 36, there is also evidence that many third parties were made to believe that the Stanford Entities were either U.S. enterprises, were U.S.-regulated, or had a substantial U.S. presence. For example, SIB held itself out to creditors, borrowers, other obligees, and the U.S. Internal Revenue Service ("IRS") as having locations in Memphis, Tennessee and Houston, Texas. 115-1, at 25.[56] SIB solicited or intended to solicit CD purchasers in all fifty U.S. states, and it made regulatory filings with state securities regulatory agencies in the United States. *Id.* Even the Antiguan government stated that Stanford ran SIB from Houston, Texas – referring to Antigua as a mere transit point. *Id.* at 115.

Most CD purchasers never saw or interacted with Antiguan employees, and notably, only a small number actually went to SIB's Antiguan location to attempt to redeem their CDs. *See* 106-1, at 19-20 (reporting that approximately 150 customers went to Antigua to demand return of their funds around the time SIB was shut down). Investors instead dealt only with their financial advisors, few of whom were based in Antigua. *See* 115-1, at 33-34. *But see* Hr'g Tr. 28-31, 35-36 (two SIB investors stating that in addition to contact with their non-Antiguan financial advisors, they had some contact with SIB employees in Antigua and/or believed SIB's headquarters to be in Antigua). These financial advisors were essentially the face of the Stanford enterprise to investors, providing CD applications, CD investment managing, and Stanford brokerage accounts. *See, e.g.*, 115-1, at 33-34. The financial advisors disseminated reports prepared by Stanford, Davis, Pendergest-Holt, and others, *id.* at 39-42, which portrayed a global group of companies under the name SFG, headquartered in the United States, *id.* at 37-41. SIB's marketing materials, in fact, advertised that it was able to pay higher interest, in part, because of "synergies" and cost-

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[56]This is in contrast to the Joint Liquidators' argument that SIB only had offices in Antigua and Canada. 106-1, at 20, 22.

savings that resulted from it being part of SFG and because of a globally diversified investment strategy. *Id.* at 38.

Ultimately, it is manifestly clear from the Court's findings of fact in this section and in Part V.C.1 above that the Stanford Entities' COMI was in the United States. In summary: (1) SIB, the Bank of Antigua, and STCL were only nominally headquartered in Antigua, and SIB's major activities, CD sales and investment of funds, took place outside of Antigua; a substantial number of the other aggregated Stanford Entities were headquartered outside of Antigua; (2) Stanford, Davis, Pendergest-Holt, and others who actually managed the Stanford Entities did so largely from the United States; (3) Stanford Entities and banks outside of Antigua primarily held the Stanford Entities' primary assets; (4) the vast majority of the Stanford Entities' investor-victims and creditors reside outside of Antigua; (5) although the Court does not here decide that U.S. law applies to all disputes, this Court is the jurisdictional locus of the entire Stanford Entities enterprise and estate, *see* Receivership Order; and (6) the Stanford Entities' nerve center (center of direction, control, and coordination) is in the United States. Thus, under the *SPhinX* COMI factors and under the U.S. principal place of business analysis, the Stanford Entities COMI is in the United States.[57]

Accordingly, the Antiguan Proceeding is not a foreign main proceeding, and the Court goes on to analyze whether it is a foreign nonmain proceeding.

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[57]The Court notes that even if the Stanford Entities were not aggregated, it would still find that SIB's COMI is in the United States given the above factual findings, which largely center on CD sales and SIB's activities. The Court also notes it would reach this same result if it sustained the Joint Liquidators' hearsay objections to Van Tassel's exhibits and the Receiver's exhibits.

D. The Stanford Entities Have an Establishment in Antigua

The Court notes again that the Joint Liquidators have not requested foreign nonmain recognition. Indeed, their petition only requests foreign main recognition. However, this technicality makes no difference. Chapter 15 specifically contemplates that a foreign representative applies for recognition generally. *See* 11 U.S.C. § 1509(a) ("A foreign representative may commence a case under section 1504 by filing directly with the court *a petition for recognition* of a foreign proceeding under section 1515." (emphasis added)); 11 U.S.C. § 1515(a) ("A foreign representative applies to the court *for recognition* of a foreign proceeding in which the foreign representative has been appointed by filing a *petition for recognition*." (emphases added)). It is for the Court to then decide whether the proceeding qualifies for recognition as either a foreign main or foreign nonmain proceeding. *See generally* 11 U.S.C. § 1517. Thus, having decided that the Antiguan Proceeding is not a foreign main proceeding, the Court analyzes whether the Antiguan Proceeding is a foreign nonmain proceeding.

A foreign nonmain proceeding means a proceeding "pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5). Chapter 15 defines an "establishment" as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). Courts have likened this to a "local place of business." *See Bear Stearns II*, 374 B.R. at 131. A bankruptcy court in this Circuit has defined a "place of operations" as '"a place from which [commercial] economic activities are exercised on the market (i.e. externally) . . . ,' in the country in which the foreign proceeding is maintained." *Ran III*, 406 B.R. at 285 (bracketed text inserted).

As discussed above, the Stanford Entities had at least two physical structures in Antigua registered as separate businesses – SIB and Bank of Antigua. Although Antiguan law barred the Stanford Entities from doing business in Antigua, *see* Hr'g Tr. 39, the Stanford Entities could and did do business with its Antiguan employees and Antiguan trust companies. This resulted in 578 Antiguan clients: 31 individuals and 547 trust and corporate entities,[58] for a total of two percent of the total SIB customers and four percent of the total monies invested in SIB according to the Joint Liquidators. *See* 124-1, at 2-3. Additionally, SIB employees carried out functions related to three types of accounts, credit card services, loan facilities, letters of credit, letters of guarantee, and private banking services at SIB's facility according to Jacobs, *see supra* note 34, and at the time the Former Joint Liquidators filed their petition, SIB still had some employees at its facility, *see* JL Proposed Facts & Law 78-79 (stating that to this day four employees work at the SIB facility, fielding calls and inquiries from investor-victims). Bank of Antigua held at least some of SIB's purported funds. And finally, the Stanford Entities issued loans to the Antiguan government.[59] Thus,

[58]The Court notes that it is unclear whether the trusts included in the number above have Antiguan residents as ultimate beneficiaries. *See* Hr'g Tr. 122-23 (JL Dickson testifying eight days prior to the filing of this evidence that there were about 500 trusts where ultimate beneficiary residence information was unanalyzed).

[59]The Court notes but does not here consider Stanford's personal relationship with Antigua: Stanford used CD proceeds to influence Antiguan Prime Minister Lester Bird and his government for several years. *See* 116-11, at 6-7. Later, when the United Progressive Party came to power in 2004, Stanford immediately sought to foster close relations with the

the Stanford Entities conducted a measurable amount of local business in Antigua sufficient to have an establishment there, so the Court grants the Antiguan Proceeding foreign nonmain recognition.

E. The Court Grants Limited, Conditional Relief

Section 1509 states that recognition generally entails that (1) the foreign representative has the capacity to sue and be sued in a U.S. court, (2) the foreign representative may apply directly to a U.S. court for appropriate relief in that court, and (3) a U.S. court shall grant comity or cooperation to the foreign representative. 11 U.S.C. § 1509. However, section 1509 also states that this automatic relief "is subject to any limitations that the court may impose consistent with the policy of this chapter." *Id.* Section

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Party's members through favorable deals with the new government – for example, Stanford paid the government $1 million for the construction of an Antiguan national library, $10 million for an Antiguan entrepreneurial fund, and $25 million for the construction of a higher education complex. *See id.* at 7-8. He also agreed to write off $50 million in debt that Antigua owed to the Stanford Entities. *See id.* Concurrent with these payments, the Antiguan government ratified Stanford's acquisition of a piece of real estate in Antigua. *See id.* at 8.

Additionally, Stanford had an extremely close personal relationship with Leroy King, the former administrator and chief executive officer of the FSRC (SIB's purported Antiguan regulator), where, in addition to cash payments amounting to hundreds of thousands of dollars, Stanford provided King with the use of his fleet of private jets to travel throughout the United States and Caribbean and the use of a SIB corporate car. *See id.* at 13. In exchange, King facilitated Stanford's fraud by obstructing the SEC investigation and abdicating FSRC's oversight responsibilities. *Id.* The Receiver specifically outlines King's actions in his direct testimony, *see* 116-11, at 12-21, which included providing confidential SEC communications to Stanford, falsely telling the SEC that the FSRC had investigated SIB and that any further investigation was unwarranted, replying to SEC communications as dictated by Stanford, Davis, and SFG's general counsel, and posting on the FSRC's website that the FSRC performed continuous off-site supervision of SIB in the form of analyses of quarterly returns and annual audited financial statements, *id.*

1521 allows a court, "at the request of the foreign representative,"[60] to "grant any [additional] appropriate relief" in order to "effectuate the purpose of this chapter and to protect the assets of the debtors or the interests of the creditors." *See* 11 U.S.C. § 1521. A court should similarly condition that relief as it considers appropriate. *See* 11 U.S.C. § 1522(a-b).

This action has a peculiarly worrying history. Notwithstanding the Antiguan institution of proceedings despite this Court's Receivership Order, *see supra* p.2, the long account of happenings in the life of this suit demonstrates that the Joint Liquidators' repeated interference with the Receivership has been the norm. For example, early on in the action, without notice to the Receiver or the Canadian court, the Former Joint Liquidators entered one of the Stanford Entities in Canada and wiped its computer systems clean of information.[61] Second, the current Joint Liquidators have attempted numerous times to unseat the Receiver from his role as the recognized foreign representative in Canada. Further, the Joint Liquidators have actively objected to criminal seizure proceedings by the U.S. Department of Justice ("DOJ") in Canada, the United Kingdom, and Switzerland, 92, at 11-16, and have taken affirmative steps to block the repatriation of Estate assets generally in the United Kingdom and Canada, Hr'g Tr. 50. Fourth, the Joint Liquidators have proven to be extremely litigious and calculating in this Court, filing multiple notices of objection to

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[60]Because in their petition for recognition the Former Joint Liquidators asked the Court to grant "other and further relief as is appropriate under the circumstances," *see* Pet Recogn. of Foreign Main Proceeding Pursuant to Ch. 15 of Bankr. Code 5, the Court considers section 1521's additional relief.

[61]The Antiguan Court thereafter removed the Former Joint Liquidators, rebuking them for their actions.

the Receiver's requests in this and other Stanford MDL suits, and filing motions to pursue claims the Receiver was already pursuing.[62] The Joint Liquidators have admitted that they seek funds first and foremost to fund their current operations, which include challenging the Receiver's authority worldwide, not to distribute to investor-victims and creditors. *Id.* at 50-53.

Finally, the Joint Liquidators have similarly been vocal about their preference that the Stanford Entities – or at least SIB – be placed in U.S. bankruptcy proceedings rather than continue as an equity receivership. *See, e.g.*, Tr. of Hr'g on Receiver's Mot. Entry Claims Procedure, Apr. 25, 2012, at 26 [1579], *in* SEC Action ("Frankly, our belief is [SIB] should have been put in a bankruptcy, those particular entities, or just – just liquidate, just shut down."). Although the Court does not here opine on the propriety of bankruptcy proceedings

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[62]The Court also notes that the Receiver has presented evidence that Stanford had illicit dealings with and undue influence over the government of Antigua and Barbuda. For example, (a) SFGC and the Bank of Antigua, two Stanford Entities, loaned the Antiguan government more than $90 million that remains unpaid, *see* JL Proposed Facts & Law 53 ("It is undisputed that loans were made by Stanford or Stanford related entities, other than SIB, that are estimated to amount to an aggregate of approximately US$150 million." (citing 115-1, at 41-42)); *see also* 115-1, at 42-44; (b) the Antiguan Offshore Financial Sector Planning Committee, with Stanford as the chairman, successfully influenced Antigua to remove the offenses of "false accounting," "fraud," and "illegal deposit-taking" from its Money Laundering Prevention Act, *see* 116-11, at 9-12, causing the U.S. Department of Treasury Financial Crimes Enforcement Network to issue an advisory requiring financial institutions to give enhanced scrutiny to all transactions involving Antiguan offshore banks, *id.* at 12-13; and (c) King, the former administrator and chief executive officer of the FSRC, received monetary and nonmonetary benefits from Stanford in apparent exchange for obstructing the SEC's investigation of the Stanford Entities and abdicating the FSRC's oversight responsibilities, *see id.* at 13-22. The Court notes that the FSRC fired King in May 2009, King is under indictment in Texas, and he is currently appealing extradition proceedings in Antigua. 106-1, at 28; 116-11, at 21. Perhaps relatedly, the Joint Liquidators have strangely made no efforts to assert any claims against the Antiguan government.

for the Stanford Entities, it notes that the collective wisdom of the Receiver, the Examiner, OSIC, and the SEC is that an equity receivership is preferable to bankruptcy,[63] and notes further that the current equity Receivership consists of more than 100 actions – more than 90 of which are active and have been pending for years – and an active claims process readying for an initial distribution to investor-victims and creditors. Thus, any future attempts to involuntarily place the Stanford Entities into bankruptcy proceedings would severely disrupt the current Receivership and result in untold expenditures of funds currently earmarked for Stanford investor-victims and creditors. Given this history, the Court's findings of fact, and the potential for duplication of effort and resulting diminution of funds for Stanford investor-victims and creditors, the Court believes that only strictly limited, conditional relief is warranted under its holding of foreign nonmain recognition.

Specifically, the Court limits the relief granted under section 1521 to "the examination of witnesses [and] the taking of evidence or the delivery of information concerning [SIB's] assets, affairs, rights, obligations or liabilities." 11 U.S.C. § 1521(a)(4). This limited relief facilitates the Joint Liquidators' U.S. discovery needs related to the Antiguan liquidation

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[63]The SEC reminds the Court that

> [R]eceivership proceeding[s] . . . [are] well-recognized vehicle[s] for ensuring the preservation, management, and, if appropriate, distribution of assets secured in a securities enforcement matter. Indeed, courts recognize that . . . the appointment of receivers in enforcement actions furthers the policies of the federal securities laws. *See SEC v. Wen*[*c*]*ke*, 622 F.2d 1363, 1373 (9th Cir. 1980). The policies are particularly implicated in a case like this one where the evidence is overwhelming that Stanford's fraud (and, in fact, [SIB] even if viewed in isolation) was orchestrated from the United States.

SEC's Second Suppl. Opp'n to Pet. Recogn. Pursuant to Ch. 15 of Bankr. Code 2 [101] [hereinafter SEC 2nd Suppl. Opp'n].

proceeding. The Court then conditions all relief on (a) the Joint Liquidators' making available to the Receiver, the Examiner, OSIC, and the SEC all of SIB and STCL's records, documents, data, and any other relevant information regarding SIB and STCL under their control, possession, or knowledge, wherever located; (b) requiring the Joint Liquidators to use best efforts to acquire reciprocal rights for the Receiver in Antiguan courts; (c) precluding the Joint Liquidators from taking any action to disrupt, interfere, or otherwise prevent efforts related to the Receivership by the U.S. DOJ, the SEC, any other U.S. government agency, the Receiver, the Examiner, and OSIC absent approval of this Court; (d) precluding the Joint Liquidators from duplicating efforts by the Receiver, the Examiner, and OSIC, including playing any role – unless consented to by the Receiver, Examiner, and OSIC – in the prosecution of claims or actions that the Receiver and/or OSIC have already commenced prior to the date of this Order; (e) precluding the Joint Liquidators from filing any litigation or other proceeding in the United States, unless approved by this Court; (f) precluding the Joint Liquidators from filing U.S. bankruptcy petitions without the consent of the Receiver, the Examiner, OSIC, the SEC, and this Court; (g) requiring the Joint Liquidators to consult with the Receiver, the Examiner, OSIC, and the SEC and use best efforts to adopt a common claims and/or distribution process; (h) requiring the Joint Liquidators to apply to this Court for the authority to make any payment from SIB or STCL assets for any activity undertaken by them in the United States or to any U.S. person; and (i) requiring the Joint Liquidators to apply to this Court for the authority to take any action whatsoever in the United States except for "the examination of witnesses [and] the taking of evidence or the delivery of information concerning [SIB's] assets, affairs, rights, obligations or liabilities."

To the extent that the Joint Liquidators require a court order from Antigua to comply with the above conditions, the Court leaves it up to the Joint Liquidators to attempt to obtain one. This Court will not modify its conditions simply because the Joint Liquidators are unable to secure the authority to comply.

In fashioning the above relief, the Court is careful to strike a "balance between relief that may be granted to the foreign representative and the interests of persons that may be affected by such relief." *See In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010). Particularly, the Court seeks to instill reciprocal cooperation between the Antiguan and U.S. parties and parties in interest, as well as provide for checks on the Joint Liquidators' activity similar to the way that this Court oversees the Receiver, Examiner, and OSIC's activities. In this way, the Court balances the needs of the parties in interest with the needs of Stanford's investor-victims and creditors.

F. Any Public Policy Problem is Resolved by the Court's Conditional Relief

The Receiver and the SEC ardently argue that the Court should not grant the Antiguan Proceeding foreign recognition of any kind because doing so would be against the public policy of the United States. *Cf. In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009) (refusing to grant recognition on public policy grounds). Specifically, they argue that recognition is against U.S. public policy because (a) the Antiguan Proceeding violates this Court's Receivership Order, (b) Stanford's influence in Antigua created favorable Antiguan

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banking laws by which Stanford was able to perpetrate his fraud, (c) the FSRC and the Antiguan government were intimately involved and/or implicated in Stanford's fraud, (d) the Antiguan government has failed to cooperate with the Receiver and has expropriated Receivership assets, including real estate and Bank of Antigua's assets, (e) the Joint Liquidators' goal is to take full control of the Receivership Estate to the detriment of Stanford investor-victims and creditors, (f) the Antiguan Proceeding and Stanford Entities' documents in Antigua are subject to Antiguan secrecy laws, (g) the distribution scheme under the IBCA is inappropriate, and (h) the Joint Liquidators have made no showing that recognition would provide any benefit or advantage to the Receivership Estate or its investor-victims and creditors. *See* Receiver's Proposed Facts & Law 49-50; JL Proposed Facts & Law 47. The Court holds that recognition as granted here is not against U.S. public policy because the conditions imposed by the Court adequately address the concerns of the Receiver and SEC.

CONCLUSION

The Court grants the Joint Liquidators' motion for substitution as Plaintiff *nunc pro tunc* to June 8, 2010 and grants in part and denies in part their request that the Court take judicial notice. The Court overrules the parties' objections to each others' evidence. Finally, because the Stanford Entities' COMI is in the United States and they have an establishment in Antigua, the Court grants the Antiguan Proceeding foreign nonmain recognition, granting in part and denying in part the Joint Liquidators' petition for recognition. The Court grants the Joint Liquidators limited, conditional relief under Chapter 15.

In accordance with this Order, the Court orders the Clerk of the Court to terminate Peter Wastell and Nigel Hamilton-Smith as Plaintiffs and add Marcus Wide and Hugh Dickson as Plaintiffs.

Signed July 30, 2012.

David C. Godbey
United States District Judge