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II. FACTUAL BACKGROUND

A. STANFORD'S RECEIVER SUBMITS AN INTERIM PLAN FOR APPROVAL ALTHOUGH HE PREVIOUSLY ACKNOWLEDGED THE OVERRIDING NEED TO RESOLVE ALL CLAIMS.

The Stanford Receiver proposes to distribute \$55 million to CD investors, with no payment or reservation of funds to pay secured or priority claims. The Stanford Receiver has refused to make the claims register public¹ and has failed in his Motion to specify the submitted claims that he has received, much less processed. Significantly, the Stanford Receiver has previously stated in court pleadings that he

cannot structure a pro rata distribution proposal, . . . unless and until he has processed all submitted claims and knows what claims will be allowed. . . . [T]he Receiver will make claim determinations on a rolling basis as they are submitted and then submit a proposed distribution plan after all claims are processed [. . .].²

Yet well before the completion of the claims process or even minimal disclosure of existing claims, the Stanford Receiver now has submitted the Interim Plan for approval.³

B. TRUSTMARK OWNS SECURED AND PRIORITY CLAIMS.

1. Trustmark entered into a secured transaction with Stanford Venezuela.

In 2007, Stanford Corporate Services (Venezuela), C.A. ("Stanford Venezuela") requested that Trustmark issue a letter of credit for its benefit. Pursuant to arms-length and commercially reasonable banking practices, Trustmark obtained a cash deposit from Stanford Venezuela, and then issued the letter of credit.

¹ See January 13, 2013 e-mail from counsel for the Stanford Receiver to counsel for Trustmark, declining to publicly disclose a listing of submitted claims (attached as Exhibit A, App. pp. 1-2).

² See Receiver Reply to Response to the Amended Claim Motion, p. 4 (Docket No. 1577).

³ Compared with the process by which other receivers have sought court approval for distribution, the Receiver's proposed Interim Plan appears facially deficient in a variety of ways. See, e.g., *S.E.C. v. Funding Resource Group*, No. 3:98CV2689-M, 2001 WL 1335802 (N.D. Tex. Oct. 19, 2001) (interim plan disclosed total receivership funds, total claims, and total reserves and was ordered to be fully posted on receiver's web site, with opportunity for objection) (attached as Exhibit B, App. pp. 3-7).

In particular, on November 1, 2007, Stanford Venezuela deposited \$1,986,745 in Trustmark Deposit Account No. 9300849232 3010040 (the "Deposit Account"). On the same date, Trustmark provided Stanford Venezuela with a Book Entry Certificate of Deposit Receipt (the "CD Receipt") for the deposit. Trustmark then issued a Transferable Irrevocable Standby Letter of Credit to Stanford Venezuela in favor of HP Financial Services Venezuela, C.C.A ("HP") as beneficiary, numbered 07-180-SF in the amount of USD \$1,986,745 (the "HP Letter of Credit"). The HP Letter of Credit secured Stanford Venezuela's obligations under a lease between Stanford Venezuela and HP.

On the same date and as part of the same transaction, Trustmark and Stanford Venezuela executed an Assignment of Deposit Account (the "Assignment") whereby Stanford Venezuela assigned the Deposit Account to Trustmark and granted Trustmark a security interest in the Deposit Account. The Assignment granted set-off rights to Trustmark against Stanford Venezuela and also secured Stanford Venezuela's indebtedness to Trustmark. Among other things, the Assignment secured Trustmark's right to repayment if HP ever properly presented under the HP Letter of Credit, and Trustmark paid HP under the HP Letter of Credit.

Trustmark would not have issued the HP Letter of Credit for HP's benefit if Stanford Venezuela did not execute the Assignment and grant Trustmark a security interest in the Deposit Account. As a result of this transaction, Trustmark became a secured creditor of Stanford Venezuela with set off rights against the funds in the Deposit Account.⁴

⁴ Under Section 9.312(b)(1) of the Texas Business and Commerce Code, "a security interest in a deposit account may be perfected only by control under § 9.314." TEX. BUS. & COMM. CODE § 9.312(b)(1) (Vernon 2011). A secured party has control of the deposit account "if the secured party is the bank with which the deposit account is maintained." *See id.* at § 9.104(a)(1) (Vernon 2011). Moreover, a party perfecting its security interest by control retains control even if the debtor retains the right to direct the disposition of funds from the deposit account. *See id.*

2. Law of the case establishes Trustmark's secured status.

The U.S. Court of Appeals for the Fifth Circuit has confirmed that "[by] issuing these letters [of credit], Trustmark became a secured creditor with set-off rights against cash collateral that Stanford has placed on deposit with Trustmark."⁵ And, in its specific rulings, this Court has noted Trustmark's secured creditor status by stating that Trustmark is "a secured creditor with set-off rights against cash collateral in its possession. The [cash] collateral secures Trustmark's right to reimbursement in the event it becomes obligated to pay on one of the Stanford entities' letters of credit."⁶ The Court has further stated that Trustmark "has a perfected, but essentially unexercisable, security interest."⁷ The Court has also observed that, "[a]lthough the property is subject to Trustmark's perfected security interest, Trustmark cannot assert that interest outside of the Receivership claims process."⁸ Accordingly, the Court (along with the Fifth Circuit) has recognized Trustmark as a perfected secured creditor, but has relegated payment to the Receivership's claims and distribution process.

3. The Stanford Receiver now holds Trustmark's collateral.

Despite Trustmark's secured status, the Court ordered that Trustmark surrender to the Stanford Receiver the funds that served as Trustmark's cash collateral. Pursuant to the Turnover Order, on August 13, 2012, Trustmark transferred cash collateral to the Stanford Receiver totaling \$2,121,943.20.⁹ In doing so, Trustmark demanded that the Stanford Receiver hold the

⁵ See Order dated April 4, 2012 [Doc. No. 1563], p. 3.

⁶ See Order dated January 5, 2010 [Doc. No. 947], p. 3.

⁷ See Order dated March 31, 2011 [Doc. No. 1310], p. 7.

⁸ See Order dated July 24, 2012 [Doc. No. 1655], p 6 n. 2.

⁹ See July 24, 2012 Order [Doc. No. 1655]. See also August 13, 2012 letter to the Stanford Receiver's attorney from Trustmark's counsel (attached as Exhibit C, App. p. 9).

collateral as required by 28 U.S.C. § 959(b),¹⁰ applicable law, and various court orders. Thus, the Stanford Receiver holds the collateral in accordance with the contracts between Trustmark and Stanford Venezuela.

4. Trustmark made a payment under the HP Letter of Credit and became a priority creditor.

As part of a negotiated settlement,¹¹ after proper presentation by HP, Trustmark has now actually funded the HP Letter of Credit in the amount of \$1,262,500. HP has now transferred to Trustmark all right, title and interest in and to HP's equipment lease claim against the Receivership estate in the aggregate amount of \$1,981,939.08 plus costs and attorneys' fees, as reflected by the Proof of Claim filed by HP (the "HP Claim").¹² As such, Trustmark now asserts the HP Claim. After submitting the payment under the HP Letter of Credit, an administrative priority amount of \$719,439.08 remains due given the aggregated Stanford entities use of or failure to surrender HP's equipment during the pendency of the Receivership.

C. TRUSTMARK FILED A VARIETY OF PROOFS OF CLAIMS AGAINST THE INDIVIDUAL AND AGGREGATED STANFORD ENTITIES.

Trustmark also timely submitted proofs of claims showing its secured status, as well as priority and other unsecured claims, as follows:

¹⁰ Section 959(b) requires Stanford's Receiver to manage the Property "according to the requirements of . . . State law . . . in the same manner that [Trustmark] would be bound to do if in possession thereof." Under Section 959(b) and applicable law, once the Stanford Receiver took possession of the principal and interest, the Stanford Receiver does not have the right to use such principal and interest. The Stanford Receiver may not—without specific order of court—dissipate the principal and interest, or dispose of or convert the principal and interest because of Trustmark's liens and property interests. In the event that the Stanford Receiver violates Trustmark's rights absent specific court authority, then the Stanford Receiver will be liable to Trustmark in his individual capacity. *U.S. to Use of Merch. to Mfrs. Sec. Co. v. Johnson*, 98 F.2d 462, 466–67 (8th Cir. 1938).

¹¹ This settlement, achieved in mediation, resolves the disputes in the litigation styled *HP Financial Services Venezuela, C.C.A. v. Trustmark National Bank*, Civil Action No. 3:11-cv-02750-N-BL (in the United States District Court for the Northern District of Texas, Dallas Division). Trustmark invited the Stanford Receiver and the Examiner to participate in such mediation on behalf of the Receivership Estate, but both declined to participate. See e-mail communications dated November 15, 2012 (attached as [Exhibit D](#), App. pp. 12-14).

¹² See January 30, 2013 letter from Trustmark's counsel and enclosures (attached as [Exhibit E](#), App. pp. 15-29).

Claim No.	Stanford Entity	Type of Claim	Amount of Claim
1015093-5 ¹³	Bank of Antigua Ltd.	Secured	\$403,164.66 plus other amounts as described in the proof of claim.
1015229-6 ¹⁴	Stanford Corporate Services (Venezuela), C.A.	Secured	\$2,121,943 plus other amounts as described in the proof of claim. ¹⁵
1015287-3 ¹⁶	Stanford International Bank, Ltd. and all aggregated entities, as described in the proof of claim.	Secured	\$2,840,464.40 plus other amounts as described in the proof of claim. ¹⁷
1015270-9 ¹⁸	Stanford International Bank, Ltd. and all aggregated entities, as described in the proof of claim.	Administrative Priority	\$2,136,943.25 plus other amounts as described in the proof of claim.
1015410-8 ¹⁹	Stanford Corporate Services (Venezuela), C.A.	Administrative Priority	\$2,136,943.25 plus other amounts as described in the proof of claim.
1015268-7 ²⁰	Stanford Group Holdings, Inc.	Unsecured	\$315,356.74 plus other amounts as described in the proof of claim.

¹³ See Proof of Claim attached as Exhibit F, App. pp. 30-66.

¹⁴ See Proof of Claim attached as Exhibit G, App. pp. 67-95.

¹⁵ Trustmark will amend this proof of claim given the settlement with HP noted above.

¹⁶ See Proof of Claim attached as Exhibit H, App. pp. 96-167.

¹⁷ Trustmark will amend this proof of claim given the settlement with HP noted above.

¹⁸ See Proof of Claim attached as Exhibit I, App. pp. 168-175.

¹⁹ See Proof of Claim attached as Exhibit J, App. pp. 176-182.

²⁰ See Proof of Claim attached as Exhibit K, App. pp. 83-206.

As of the date of this response, the Stanford Receiver has not served Trustmark with any notices of deficiency or determination regarding these proofs of claims.

On July 30, 2012, this Court ordered substantive consolidation, referencing its "aggregat[ion] of the Stanford Entities" into this Receivership case.²¹ Now that the Stanford entities have been consolidated, certain cross-collateral provisions result in hypothecation of all cash collateral surrendered to the Stanford Receiver. At this juncture, and subject to amendment, Trustmark's aggregate secured claim amounts to at least \$2,840,464.40, plus additional attorney's fees and expenses.²²

III. ARGUMENT & AUTHORITIES

A. THE INTERIM PLAN IS NEITHER FAIR NOR REASONABLE.

1. The Stanford Receiver takes subject to the rights of secured creditors.

A receiver's power to take control and possession of, operate, manage and preserve the assets of an entity in receivership is not unlimited.²³ A receiver has no greater rights or powers than the entity in receivership, and a receiver stands in the shoes of that entity and can assert only those claims, which the entity in receivership could have asserted.²⁴ Indeed, while enforcing and preserving the *status quo*, receivers remain subject to existing rights of creditors.²⁵ All valid, existing liens on receivership property continue despite the receivership. Pre-existing contractual

²¹ See Order dated July 30, 2012 in the litigation styled *In re: Stanford International Bank, Ltd., Debtor in a Foreign Proceeding*, Civil Action No. 3:09-cv-00721-N (in the United States District Court for the Northern District of Texas, Dallas Division) [Doc. No. 176], p 36.

²² See Claim No. 1015287-3 (App. p. 101).

²³ *Eberhard v. Marcu*, 530 F.3d 122, 131-32 (2d Cir. 2008).

²⁴ *Id.* at 132.

²⁵ *Modart, Inc. v. Penrose Indus. Corp.*, 293 F. Supp. 1116, 1119 (E.D. Pa. 1967).

rights and remedies between a creditor and a debtor will bind the receiver and control a court's exercise of discretion in any receivership proceeding.²⁶

With respect to secured creditors, longstanding precedent applicable in federal receiverships supports the principle that a receiver's rights in estate property remain subject to the rights of secured creditors.²⁷ Accordingly, the Stanford Receiver remains subject to Trustmark's perfected security interests.²⁸

Even the cases cited in the Receiver's Motion afford priority to secured claims. For example, in *S.E.C. v. Byers*, the court confirmed the priority of secured claims and listed a "priority of claims" that subordinated the "unsecured creditors and defrauded investors" to both the secured and priority claimants.²⁹ In *S.E.C. v. Credit Bancorp*, the court stated "[s]o long as

²⁶ *Id.*

²⁷ See *Marshall v. People of New York*, 254 U.S. 380, 385 (1920)(federal court receiver takes property "subject to all liens, priorities, or privileges existing or accruing under the laws of the state."); *S.E.C. v. Credit Bancorp, Ltd.*, 386 F.3d 438, 447 (2d Cir. 2004) (federal court receiver takes property "subject to all liens, priorities, or privileges existing or accruing under the laws of the [s]tate.") (quoting *Marshall v. People of New York*, 254 U.S. 380, 385 (1920)); *S.E.C. v. Madison Real Estate Group, LLC*, 647 F.Supp.2d 1271, 1277 (D. Utah 2009) (same); *In re Real Property Located at Jupiter Drive, Salt Lake City, Utah*, 2007 WL 7652297 at *4 (D. Utah 2007); see also *Quincy, M. & P. R. Co. v. Humphreys*, 145 U.S. 82, 98 (1892) (holding that a "receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property."); *Modart, Inc. v. Penrose Indus. Corp.*, 293 F. Supp. 1116, 1119 (E.D. Pa. 1967) (holding that while enforcing and preserving the status quo, receivers are subject to the existing rights of creditors).

²⁸ While the various case law cited by the Stanford Receiver in his Motion may hold generally that a federal receivership court has discretion to allow priority status to fraud victims over the class of general creditors, none of these cases support the subordination of secured or priority creditors to such fraud victims. For the Stanford Receiver to argue otherwise would not only ignore longstanding precedent, it would also ignore the fundamental difference between secured and unsecured creditors. As to a secured creditor's collateral, courts do not treat secured and unsecured creditors alike. The Supreme Court has long recognized the distinction, stating:

to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution.

Ticonic Nat'l Bank v. Sprague, 303 U.S. 406, 412-13 (1938).

²⁹ *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 171-72 (S.D.N.Y. 2009) (stating "[b]oth types of secured creditors have recourse against specific collateral, and must be paid out of the proceeds of that collateral").

adequate provisions are made to protect the broker-dealers' security interests," plan approval is appropriate.³⁰ In *S.E.C. v. Vescor Capital Corp*, the court explicitly stated that "typically, secured creditors have recourse against specific collateral, and must be paid out of the proceeds of that collateral," "secured claims are superior to those of general creditors," and "[t]he receiver's actions to this point do not invalidate or otherwise impact any party's perfected security interest."³¹ Other cases cited implicitly assume these principles, perhaps because they are so obvious.³² But ignoring these established legal principles, the Stanford Receiver subordinates secured and priority claims to unsecured investor claims in his Interim Plan—a result that is far from fair and reasonable.

2. The Stanford Receiver merely speculates as to future distributions.

The Interim Plan would distribute \$55 million to Investor CD Claimants, with either no payment made or reservation for payment to secured creditors. Instead, the Stanford Receiver merely speculates that:

[t]he Estate would retain sufficient cash and other assets to fund the Receiver's remaining wind-down activities and ongoing asset recovery efforts;³³

and

[d]epending on the outcome of those efforts, the Receiver anticipates making future distributions [but] proposes to defer any distributions to claimants other than the Investor CD Claimants until the time of such future distributions.³⁴

The Stanford Receiver further speculates that:

³⁰ *S.E.C. v. Credit Bancorp*, No. 99-CIV-11395, 2000 WL 1752979 at *33 (S.D.N.Y. Nov. 29, 2000).

³¹ *S.E.C. v. Vescor Capital Corp*, 599 F.3d 1189, 1194-95 (10th Cir. 2010).

³² *See, e.g., S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992) (discussing the "perfected security interest" of a secured creditor).

³³ *See* Receiver's Motion [Doc. No. 1766], p. 2.

³⁴ *Id.*

the extent of any distributions to other claimants (including purported secured creditors and general creditors other than Investor CD Claimants) will be determined in connection with future distribution plans, taking into account the result of the Receiver's asset recovery efforts and the final reconciliation of those creditors' claims.³⁵

The Stanford Receiver also states that he:

anticipates that future distributions will be made using amounts from the Estate's retained funds and additional amounts ultimately recovered through litigation, class action settlements, and other asset recovery efforts, including a possible settlement with the Antiguan Joint Liquidators.³⁶

The Stanford Receiver provides no specifics as to these future distribution plans, nor does he provide any confirmation that funds will remain available in the future to secured or priority creditors. The Stanford Receiver merely stated that:

[s]ufficient cash will remain on-hand to fund the winding down of the Receivership, ongoing administrative responsibilities with respect to assets and evidence, and the Receiver's (and the expenses of the Investors Committee's) ongoing asset recovery efforts, which the Receiver expects will result in additional amounts for distribution to claimants.³⁷

The Stanford Receiver concludes in his Motion:

If the Court can deny general creditors any compensation at all, which may ultimately be the appropriate result in this case, it can surely postpone a decision on whether and upon what basis to compensate them until the time is ripe for considering future distributions. . . . [T]he Receiver anticipates that the aggregate Allowed Claim Amount for all purported secured claims filed with the Estate will be far less than the value of the assets retained by the Receivership Estate, even without any future increase in the assets of the Receivership Estate. Whether any particular secured claim is valid and whether any valid secured claim should be paid or subordinated to Investor CD Claims are issues that can thus be addressed in a future distribution plan without prejudice to the purported secured claimants.³⁸

³⁵ See Receiver's Motion [Doc. No. 1766], p. 10.

³⁶ See Receiver's Motion [Doc. No. 1766], p. 9.

³⁷ See Receiver's Motion [Doc. No. 1766], p. 14.

³⁸ See Receiver's Motion [Doc. No. 1766], pp. 25-26.

Other than these vague and speculative statements, the Stanford Receiver provides no adequate protection to secured creditors at all—a result that is, again, far from fair and reasonable.

3. The Interim Plan should reserve for secured and priority claims.

The Interim Plan makes payment only to the investor CD Claimants. The Stanford Receiver proposes no payment be made to secured or priority creditors. And although the Stanford Receiver has "restricted" certain specific amounts for other purposes,³⁹ he makes no reserve for secured or priority claims in the Interim Plan.⁴⁰ In the event that the Court determines that an interim distribution should be made before the Stanford Receiver completes his claims process as promised,⁴¹ any Interim Plan should reserve sufficient amounts in order to pay Trustmark's and other secured and priority claims in the future. In the absence of reservation for these claims, the Court should not approve the Interim Plan as fair and reasonable.

4. Unsecured investors cannot trump secured claims.

The Stanford Receiver appears to promote equality of distributions among the investors (who are unsecured creditors) through a suggested *pro rata* distribution method within that investor class in the Interim Plan.⁴² However, in pursuing this approach, the Stanford Receiver must respect the rights of secured creditors. "Even when the public welfare is invoked as an excuse," "the incidents that give attractiveness and value to collateral security" may not be destroyed.⁴³ Thus, just because the Stanford Receiver "believes that the interim distribution

³⁹ The Stanford Receiver has restricted funds in this Receivership for certain purposes. See Appendix in Support of Receiver's Fourth Interim Report Regarding Status of Receivership, Asset Collection, and Ongoing Activities dated June 22, 2012 showing \$17.3 million in "restricted cash" [Doc. No. 1631], p.4.

⁴⁰ Courts have reserved funds before approving a *pro rata* distribution. See, e.g., *S.E.C. v. Funding Resource Group*, No. 3:98CV2689-M, 2001 WL 1335802 at *3 (N.D. Texas, Oct. 19, 2001).

⁴¹ See Receiver Reply to Response to the Amended Claim Motion, p. 4 (Docket No. 1577).

⁴² See Receiver's Motion [Doc. No. 1766], pp. 15-23.

⁴³ *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60-62 (1935).

should direct resources where they are needed most—to the Investor CD Claimants"⁴⁴ it does not mean he can do so without first adequately protecting the secured and priority claimants. The Stanford Receiver sponsors a plan that contains no payment to secured or priority creditors, and claims that such a plan is fair and reasonable. It is not. The Stanford Receiver plainly ignores longstanding secured creditor law⁴⁵ as well as the federal equity receivership cases in which secured and priority claimants are protected in plans, interim or otherwise, for distribution of receivership funds.⁴⁶ Again, without fully protecting secured and priority creditors such as Trustmark, the Court should not approve the Interim Plan as fair and reasonable.

IV. CONCLUSION

For the foregoing reasons, Trustmark makes its limited objection requesting that any plan for Interim Distribution approved by the Court contain provisions reserving sufficient amounts to pay Trustmark's secured and priority claims in a future distribution, and further requests any other relief to which Trustmark is justly entitled.

⁴⁴ See Receiver's Motion [Doc. No. 1766], p. 25.

⁴⁵ See n. 23, *supra*.

⁴⁶ See n. 24-28, *supra*.

Respectfully submitted,

KANE RUSSELL COLEMAN & LOGAN PC

By: /s Kenneth C. Johnston

Kenneth C. Johnston
State Bar No. 00792608
Karin M. Zaner
State Bar No. 00791183
Catherine E. Gaither
State Bar No. 24059793

1601 Elm Street
3700 Thanksgiving Tower
Dallas, Texas 75201
Telephone: (214) 777-4200
Facsimile: (214) 777-4299

**ATTORNEYS FOR INTERVENOR
TRUSTMARK NATIONAL BANK**

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2013, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s Kenneth C. Johnston

Kenneth C. Johnston