IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	§	

SECURITIES AND EXCHANGE COMMISSION'S
OPPOSITION TO PETITION FOR RECOGNITION
PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY CODE

PRELIMINARY STATEMENT

Petitioner's request for recognition arises in the context of a civil enforcement action instituted by an agency of the United States seeking to vindicate a public interest, namely the appropriate enforcement of the federal securities laws. The Commission alleges that R. Allen Stanford, a United States citizen and native Texan, and Jim Davis, a United States citizen and resident of Mississippi, used companies they controlled, including, but not limited to, Stanford International Bank, Ltd. ("SIB" or "SIBL") to engage in a massive fraudulent scheme that stole billions of dollars from investors.

Consistent with long-standing and widely-approved precedent in securities enforcement actions, the Commission sought the appointment of an equity receiver in order to secure, manage and preserve assets to maximize potential recovery for investors. The fact that Stanford created a sham bank in Antigua to help mask the fraud he and others were running out of the United States is of little consequence to the importance of the equity receivership. There is no basis, under the facts of this case, to place SIB, a primary vehicle for defrauding investors in the United States and around the world of billions of dollars, into a separate proceeding. Doing so will only add to

what is already a complex undertaking, impair this enforcement proceeding, and further reduce investor recovery.

FACTUAL BACKGROUND

The fraud at issue in this case arises from decisions made and actions taken in the United States by United States citizens. Stanford, like many who violate the federal securities laws, manipulated a variety of entities he owned to conduct his scheme. These entities included SIB, which was organized as an "offshore bank" under the laws of Antigua.

The fact that SIB was incorporated in Antigua pales when compared to its extensive connection to the United States. Stanford, the sole shareholder and chairman of SIB, is a United States citizen and native Texan. [See Defendant R. Allen Stanford's Pro Se Answer to First Amended Complaint at p. 1 (admitting that both his "home office" and one of his residences are in Houston, Texas.)][1] In addition to his home office in Houston, Stanford lived and worked principally in the U.S. Virgin Islands and Miami. [Van Tassel Aff at ¶ 11][2] Aside from ownership and control by Stanford, all SIB directors (including Stanford) were United States citizens except two, and neither of the non-American directors were Antiguans. [Van Tassel Aff.

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[1] While Stanford may have also claimed citizenship in Antigua, the United States does not recognize dual citizenship.

[2] Karyl Van Tassel is an agent working on behalf of the U.S. Receiver. In a previous pleading, the U.S. Receiver submitted an Affidavit from Ms. Van Tassel. For the Court's convenience, a copy of that Affidavit is attached as Exhibit A. References to Affidavit will be "Van Tassell Aff. at ____." It is the Commission's understanding that additional evidence may be submitted by the U.S. Receiver. To the extent more recently submitted evidence makes it necessary, the Commission will supplement this opposition.

In addition, the Commission refers occasionally herein to the Memorandum of Law in Support of Motion For Ex Parte Temporary Restraining Order, Preliminary Injunction and Other Emergency Relief ("SEC's Memo of Law") and the Appendix In Support of Application for Ex Parte Temporary Restraining Order, Preliminary Injunction and Other Emergency Relief filed with the District Court ("TRO Appendix") and a supplemental appendix filed in support of Application for Preliminary Injunction and Other Emergency Relief.

Finally, the Commission incorporates by reference the materials submitted in opposition to the Antiguan Liquidators' Motion to Amend, Modify or Vacate Certain Portions of the Court's Amended Receivership Order [Civil Action No. 3:09-CV-0298-N] and Motion to Refer Petition for Recognition Pursuant to Chapter 15 [Civil Action No. 3:09-CV-0721-N].

at ¶11] Jim Davis, a U.S. citizen working in Mississippi and Memphis, served as SIB's Chief Financial Officer. Likewise, Laura Pendergest-Holt served as a member of SIB's investment committee from her offices in the United States, supervising a group of analysts in Memphis, Tupelo and St. Croix. [TRO App. at 31, 74-75, 80-81, 524].

Moreover, the management of SIB's investments, the directing of fund flows, investment strategies, and managing legal and human resources were directed from the United States. [Van Tassell Aff. ¶11]. Without these services, SIB could not have operated. In addition, SIB sold CDs to U.S. investors exclusively through Stanford Group Company ("SGC"), a Texas corporation, ultimately owned by Stanford, with offices throughout the U.S. that was registered with the Commission as a broker-dealer. [TRO App. at 585, 928, 945, 46, 586, 942] The principal business of SGC consisted of the sales of SIB's CDs. [See Preliminary Injunction and Other Equitable Relief As to R. Allen Stanford at ¶8].

Through these efforts, SIB generated more CD sales, by dollar amount, from the U.S. than from any other country, including Antigua. [Van Tassel Aff. at ¶25.] In the course of offering its CDs to U.S. investors, SIB assured them in its disclosure documents that "[b]y making this offering to Accredited Investors in the United States, [SIB] and its officers are subject to certain laws of the United States, including the anti-fraud provisions of the U.S. federal securities laws and similar state laws." [SEC's Memo of Law. at p. 21] SIB's CDs were sold in the U.S. pursuant to a Regulation D private placement. In connection with the private placement, the Bank filed a Form D with the SEC. [SEC's Memo. of Law (Doc. No. 6) at 9]. SIB also routinely held out to investors its close connection to Stanford and its affiliation with the Stanford Financial Group in an effort to provide investors with a false sense of confidence.

To the extent Stanford's fraud touched on areas outside the United States, the connection to Antigua is tenuous. While the Antiguan Liquidators are focused on SIB, that entity is only one of many that were used to perpetrate the fraud scheme. Stanford-related entities spanned the globe, including 15 states within the United States and at least 13 countries in Europe, the Caribbean, Canada and Latin America. These various entities, like SIB, were – regardless of where they were incorporated – controlled and managed by the key management team in the United States. Moreover, the Commission and the U.S. Receiver are working extensively in collaboration with regulators around the world, especially in Latin America, to help ensure a proper distribution of recovered assets to wronged investors.

Most of SIB's CD sale proceeds did not even pass through Antigua and those that did were promptly sent out of the country. [Van Tassel Aff. at ¶7]. Instead, CD sale proceeds largely went directly to accounts in Canada, the United States and England and then onto various Stanford-related accounts. Even checks sent by investors directly to SIB's address in Antigua were bundled and sent daily to Trustmark Bank in Houston for deposit. [*Id*.] Moreover, although Stanford's victims are located around the world, sales to citizens of the United States and Venezuela predominated. Finally, Antiguan law prohibits offshore "banks" such as SIB from serving Antiguans – there are, at best, few direct Antiguan victims of Stanford's fraud.

This fact stands out when the Antiguan Liquidators' mandate is considered. For example, the Order appointing the Antiguan Liquidators ("the Antiguan Liquidation Order") provides that SIB is to be dissolved, not under this Court's supervision with the benefit of familiarity with the facts underlying this case, but under the supervision of The Eastern Caribbean Supreme Court In the High Court of Justice Antigua and Barbuda ("the Antiguan Court") and the Antiguan Liquidators are to "collect and gather all such assets for the general

benefit of [SIB's] creditors and as may be directed by [the Antiguan Court]. [See Antiguan Liquidation Order at paragraph 5][3] The Antiguan Order further provides that SIB's assets are to be "held for the benefit of the depositors, creditors and investors of [SIB] as their interests appear in accordance with the laws of Antigua and Barbuda, subject to the payment of the fees, expenses, and costs of the receivership and liquidation. [Id. at para. 7]

The Order then provides a priority for distributing those assets. First priority is given to fees and expenses of the Antiguan Liquidators, the cost of the receivership and liquidation, and *severance payments to former employees of SIB.* [Id. at 7.1-7.3] After those debts are paid, the Antiguan Order provides that "[t]he balance to be paid on account of the claims of creditors and depositors of the [SIB] as at the date of th[e] Order and in accordance with their priority under the [International Business Corporations Act, Cap. 222, as amended, of the Laws of Antigua and Barbuda] and other laws of Antigua and Barbuda, or as may be ordered by [the Antiguan Court] with the remaining balance, if any, to be distributed to the shareholders of [SIB] in accordance with their entitlement. [Id. at 7.4][4]

ARGUMENT

A. EQUITY RECEIVERSHIPS ARE WELL-EQUIPPED TO REPRESENT ALL CLAIMANTS IN SECURITIES ENFORCEMENT ACTIONS.

"The Supreme Court has repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest." *SEC v. Wenke*, 622 F.2d 1363, 1371 (9th Cir. 1980) (citations omitted). A necessary corollary to that power is the authority of federal

[3] The Antiguan Liquidation Order was attached as an exhibit to the Declaration of Nigel Hamilton-Smith In Support of the Petition for Recognition of a Foreign Main Proceeding Pursuant to Chapter 15 of the Bankruptcy Code. See Docket Entry No. 3, Case No. 3-09-CV-0721.

[4] Although the priority described in Paragraph 7.4 (in contrast to Paragraph 5) does not identify investors, but only creditors and depositors, the Antiguan Liquidators have indicated to the Court that investors are treated the same as depositors in this priority scheme.

courts to appoint equity receiverships. Courts recognize that that the appointment of receivers in enforcement actions furthers the policies of the federal securities laws. *See Wenke*, 622 F.2d at 1373 (noting that receivership furthers subsidiary purposes of federal securities laws, including preservation of assets and the fact that the receiver and his staff could conduct independent investigation of claims the entities might have against former management or other parties, prosecution of which would benefit investors and deter future violations).

Distribution of defendants' assets through an equity receivership subject to Court approval is commonly used in securities enforcement actions. See e.g., *SEC v. AmeriFirst Funding, Inc*., No. 3:07-CV-1188-D, 2008 WL 919546, at *6 (N.D. Tex March 13, 2008) (approving receiver's interim distribution plan disbursing $25 million to investors); *SEC v. Megafund Corp.*, No. 3:05-CV1328-L, 2008 WL 2856460, at *1, 3 (N.D. Tex. June 24, 2008) (approving receiver's proposed distribution plan to disburse $1.5 million to claimants on pro rata basis).

Moreover, the inability of a receivership estate to meet all of its obligations is typically the *sine qua non* of the receivership *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551-53 (6th Cir. 2006). "The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary. . . . The district court may require all . . . claims to be brought before the receivership court for disposition pursuant to a summary process consistent with the equity purpose of the court…" *Id.*. Where "rightful claims to assets exceed the assets available, the court, with the help of the receiver, must determine how to distribute the assets equitably. . . . [D]istributing . . . the assets [of the entity placed in receivership] is one of the central purposes of the receivership." *Securities Exchange*

Commission v. Capital Consultants LLC, 453 F.3d 1166, 1172 (9th Cir. 2006); *see United States Securities Exchange Commission v. The Infinity Group Company*, 226 F. App. 217, 2007 WL 1034793 (3d Cir. 2007). In short, it is well-recognized that equity receiverships are well-equipped to liquidate an insolvent defendant's assets in securities enforcement actions. *See, e.g.*, *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 327 (5th Cir. 2001) (affirming a distribution plan); *SEC v. Funding Res. Group*, No. 99-10980, 2000 WL 1468823, at *4 n.9 (5th Cir. 2000) (suggesting that claims can be presented in a future liquidation proceedings in the receivership court); *SEC v. Enter. Trust Co*. 559 F.3d 649, 650 (7th Cir. 2009) (affirming distribution plan).

B. THERE IS NO BASIS TO RECOGNIZE THE ANTIGUAN LIQUIDATION PROCEEDING AS A FOREIGN MAIN PROCEEDING UNDER CHAPTER 15.

The Antiguan Liquidators seek recognition of the Antiguan proceedings as a foreign main proceeding under Chapter 15 of the Bankruptcy Code. If other statutory requirements are met, the foreign proceeding shall be recognized as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests ("COMI"). *See* 11 U.S.C. §§ 1502(4), 1517. However, nothing in Chapter 15 prevents the court from refusing to take action governed by Chapter 15 if the action would be manifestly contrary to the public policy of the United States. 15 U.S.C. §§ 1506, 1517(a).[5]

1. SIB's COMI is not Antigua.

Courts look to a variety of factors to determine an entity's COMI. COMI has been described as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. In more familiar terminology, courts have

[5] As a threshold matter, Section 1501(c) and 109(b) indicate that Chapter 15 relief is not available to a foreign bank that has a branch or agency in the United States. As noted in the Examiner's Brief Regarding the Motion to Modify or Vacate Certain Portions of the Court's Amended Receivership Order [Docket 368], additional evidence may shed light on the application of that requirement here.

indicated this generally equates with the concept of a "principal place of business." *See In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 47-48 (S.D.N.Y. 2008).

Although courts may presume that a debtor's COMI is in the place of its registered offices, this presumption may be rebutted by evidence to the contrary, even in the case of an unopposed petition for recognition. *See In re Bear Stearns High Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 336 (S.D.N.Y. 2008) (discussing 11 U.S.C. §1516(c)). Therefore, if the foreign proceeding is in the country of the registered office, and if there is evidence that the COMI might be elsewhere, then the foreign representatives must prove that the COMI is in the same country as the registered office.[6] Here, there is ample evidence rebutting any presumption created by the fact that SIB's registered office is in Antigua. For example, as noted above, its sole shareholder is a United States citizen based in the United States; its Chief Financial Officer is a United States citizen who worked from the United States; these individuals made the key decisions regarding SIB's activities, and all important management functions were provided by personnel located in the United States. These facts, along with other evidence, not only rebut the presumption arising from the location of SIB's registered office, they conclusively show that SIB's COMI is not Antigua.

In determining a debtor's COMI, courts have considered several potential factors, including: 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 of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes. *See Bear Stearns*,

[6] Courts have recognized that the legislative history of Chapter 15 indicates that the statutory presumption of Section 1516(c) may be of less weight in the event of a serious dispute: "[t]he 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." *Basis Yield Alpha Fund*, 381 B.R. at 53.

389 B.R. at 336.

In *Bear Stearns*, the court rejected an argument similar to that raised in this case by the Antiguan Liquidators. There, the Court affirmed a finding by the bankruptcy court that the COMI of open-ended investment companies ("the Funds") incorporated in the Cayman Islands was in the United States. *Bear Stearns*, 389 B.R. 325 at 337. The court noted several facts, including the fact that the investment manager and the person that ran the back office operations of the Funds were in New York, along with the Funds' books and records, and that the Funds' liquid assets were in New York. *Id.* Similarly, here, SIB was, in all significant respects, run by Stanford and Davis from the United States. Key books and records are located in the United States and SIB used primarily U.S. banks to maintain its liquid assets. Notably, the Bear Stearns court found evidence that the Funds used Cayman Islands attorneys and auditors was outweighed by the other substantial contacts to the United States. *Id.* at 338.

The Antiguan Liquidator's arguments focus on, at best, ministerial "day to day" level activities in Antigua and gloss over the crucial fact of Stanford's control of SIB. For example, in his Supplemental Declaration, Nigel Hamilton-Smith states he has found nothing in his investigation "to suggest that any substantial management services – in terms of IT, human resources, accounting or the running of the business" were provided to SIB from persons outside the United States." Perhaps the limited records in Antigua do suggest that. But, it is not possible to discuss the management of SIB without focusing on the decisions made or controlled by Stanford, Davis and others acting with them in the United States concerning how SIB invested billions taken from investors and how those investments were disclosed to investors.

In short, any activities in Antigua were, at best, peripheral to SIB's business of selling CDs, and the key management and operation of SIB flowed from the United States.

Accordingly, the Antiguan proceeding is not a foreign main proceeding.[7]

2. Recognition Under These Facts Is Against Public Policy.

Even if Antigua is found to be the location of SIB's COMI, the Court is not required to recognize the Antiguan proceeding as a foreign main proceeding. Under Section 1506, the Court is not required to take action that would be "manifestly contrary to the public policy of the United States." The few courts to address this exception have indicated that the statute's legislative history suggests the exception is to be applied narrowly, and should be invoked only when the most fundamental policies of the United States are at risk. *See Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Col. 2008).

This case raises questions significantly different questions than have been considered in most cases applying Chapter 15. For example, the foreign proceeding itself arose only after the Commission's enforcement action was initiated and the U.S. Receiver appointed. The Commission, as part of its responsibilities to enforce the federal securities laws, requested the appointment of an equity receivership as a means to help protect investors. As discussed above, equity receiverships have long been recognized as being well-equipped to identify, marshal, and ultimately, if appropriate, distribute subject to this Court's supervision, the assets of entities that have become insolvent as a result of their involvement in a securities fraud.

These policy considerations are particularly important here, where this Court, and through its supervision, the Receiver, are able to properly address *all* relevant assets, not merely those of SIB and ensure investors are able to recover assets to the extent possible. In contrast, as noted above, it appears that the Antiguan Liquidators flexibility in distributing assets will be

[7] The petition has not requested Chapter 15 recognition as a non-main proceeding and therefore the Commission has not addressed that issue. If the Court believes it appropriate to consider the possibility of recognition as a non-main proceeding, the Commission requests the opportunity to supplement this Opposition accordingly.

limited. Accordingly, the Commission believed, and continues to believe, that the equity receiver is in the best position to manage, and ultimately, if necessary, disburse for the benefit of investors the remaining Stanford-related assets.[8]

For the reasons expressed above, the petition for recognition should be denied.

Dated: June 9, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2009, I electronically filed the foregoing document with the Clerk of the court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ David B. Reece

[8] At the same time, the Receiver has the authority to seek the procedures available by the bankruptcy code should doing so be in the best interests of the estate. In contrast, if SIB is removed from the equity receivership and placed within a foreign bankruptcy proceeding, it is impossible to predict how SIB assets will be distributed and which creditors will obtain beneficial treatment at the expense of investors.