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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:09-CV-0298-N
	§	
STANFORD INTERNATIONAL BANK, LTD., *et al.*,	§	
	§	
Defendants.	§	

BRIEF IN SUPPORT OF MOTION: (i) TO INTERVENE; (ii) TO AMEND OR MODIFY CERTAIN PORTIONS OF THIS COURT'S AMENDED RECEIVERSHIP ORDER; (iii) IN SUPPORT OF THE ANTIGUAN RECEIVERS-LIQUIDATORS' REQUEST TO COORDINATE PROCEEDINGS UNDER CHAPTER 15 OF THE BANKRUPTCY CODE; AND (iv) IN THE ALTERNATIVE, FOR EXTENSION OF TIME TO APPEAL

MORGENSTERN & BLUE, LLC

885 Third Avenue
New York, NY 10022
Telephone: (212) 750-6776
Facsimile: (212) 750-3128

LACKEY HERSHMAN, L.L.P.

3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219
Telephone: (214) 560-2201
Facsimile: (214) 560-2203

Attorneys for the Movants

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PRELIMINARY STATEMENT

The undersigned counsel represent a group of approximately 400 individuals and entities who hold Certificates of Deposit ("CDs") issued by, and/or who have funds on deposit at, Stanford International Bank, Ltd. ("SIBL"), and who collectively suffered more than $100 million of losses from the Defendants'[1] purported operation of one of the largest "Ponzi" schemes in history. This group's collective losses are staggering, and no pleading can begin to capture the devastating impact that this fraud has had on the lives of the individual members of the group and their families.

Unlike the intervention motions previously filed in this case by individuals seeking to unfreeze their brokerage accounts, this Motion seeks to vindicate the interests of *hundreds* of victims who, thus far, have effectively been shut out of these proceedings. Because these victims – many of them elderly, and many of whom have lost essentially everything they owned as a result of the Defendants' fraud – undeniably have a profound stake in the outcome of this case, their voices should be heard in these proceedings.[2]

The Movants[3] are seeking limited, but important, relief: they seek to intervene for the purposes of: (i) moving to amend or modify the portion of the Receivership Order[4] that enjoins

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[1] The "Defendants" are: Stanford International Bank, Ltd., Stanford Group Company, Stanford Capital Management, LLC, R. Allen Stanford, James M. Davis, and Laura Pendergest-Holt.

[2] To be clear: the Movants are not now requesting relief from ¶ 10(e) of the "Receivership Order" (as defined in footnote, 4, below), which enjoins creditors from filing a bankruptcy petition against the Defendants. Instead, the Movants are seeking relief from ¶ 11 of the Receivership Order, which currently enjoins creditors from seeking relief from ¶ 10(e) of the Receivership Order. Thus, the Movants recognize that, if this Motion prevails, a subsequent motion may be required in order to obtain relief from ¶ 10(e). Understandably, though, the legal issues with respect to obtaining relief from ¶¶ 10(e) and 11 of the Receivership Order necessarily overlap; the Movants thus would agree to forgo a second round of briefing on the propriety of a bankruptcy filing if this Court so desires. The Movants are taking this incremental approach in order to strictly abide by this Court's Receivership Order.

[3] As set forth in the accompanying Declaration of Peter D. Morgenstern executed on May 11, 2009 (Apx. at pp. 3 *et seq.*) the group being represented by the undersigned counsel is currently in the process of forming a steering committee or committees to act on their behalf. Pending that formal organization, and for the purposes of this Motion, the "Movants" are Dr. Samuel Bukrinsky, Jaime Alexis Arroyo Bornstein, and Mario Gebel. The Movants are members of the group represented by the undersigned but are, for the purposes of this Motion, acting in their individual capacities and on their own behalf, and not on behalf of the group.

[4] The "Receivership Order" refers to this Court's Order dated February 16, 2009, as amended March 12, 2009. [Apx. at pp. 45-56] The "Receiver" is Ralph Janvey, Esq.

them from asking this Court to lift its injunction against the filing of an involuntary bankruptcy petition against the Defendants; and (ii) supporting the Antiguan Receivers-Liquidators' ("AR-Ls")[5] request to coordinate proceedings here and in Antigua under chapter 15 of the Bankruptcy Code ("Chapter 15").[6]

There are compelling reasons for this Court to amend or modify paragraph 11 of the Receivership Order. Simply put, the Federal Rules of Civil Procedure ("FRCP"), and equity receiverships themselves, are not designed for, and are ill-suited to, this type of case. As has been recognized in this District, and by several Courts of Appeal, no matter how tirelessly this Court, the Receiver, the Examiner, and the SEC work to protect the Movants' interests, an equity receivership cannot afford victims the full measure of due process that Congress has determined must be afforded to creditors in complex liquidation proceedings such as this one. Conversely, a proceeding under the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, which are specifically designed to efficiently maximize recoveries for *all* classes of creditors, would afford the Movants, and all creditors, the full measure of their Congressionally-conferred rights to: elect a trustee; form committees to advocate for their interests; participate in the liquidation proceedings; receive notice of matters of importance; conduct discovery into the finances of the estates and potential third-party claims; have their claims resolved under processes set by Congress; and share in distributions according to established statutory priorities.

It is important that this Court consider whether to amend or modify paragraph 11 of the Receivership Order now because the Receiver recently announced his intention to begin an *ad hoc* claims process and liquidation of the estate. While the injunction may have been necessary at the outset of this case, the Movants have the right to have the Defendants' assets liquidated in bankruptcy court, and to be afforded all of the rights that Congress – not the Receiver – has

[5] The "Antiguan Receivers-Liquidators" (or, "AR-Ls") are Messrs. Nigel Hamilton-Smith and Peter Wastell.

[6] As explained below, in the event that this Court denies this relief, the Movants respectfully request, in an excess of caution, that this Court extend and/or reopen the Movants' time to appeal the Receivership Order.

determined should be granted to creditors in cases such as this one. Paragraph 11 therefore should be amended to permit the Movants to at least advocate for such a filing.

Undoubtedly, amending or modifying the Receivership Order to permit the Movants to file an involuntary bankruptcy petition against one or more of the Defendants would enable Stanford's victims to protect and vindicate their substantive rights in ways, and to an extent, that the Receiver simply cannot. This is not just because the Movants would gain enhanced rights of participation; it also is because the Receiver now labors under an inherent conflict of interest that prevents him from fully and effectively representing the Movants' interests.

Because the Receiver's ambit extends over *all* of the defendant entities and individuals, the Receiver cannot effectively prosecute claims that may benefit one of those entities (and, thus, that entity's creditors) at the expense of any other(s). To take only the most obvious example, creditors of SIBL have an interest in maximizing the value of the SIBL estate, and the Receiver has a fiduciary duty to help them do so. SIBL and its creditors, in turn, likely possess substantial claims against one or more of the other Defendants. But, because the Receiver has a fiduciary duty to creditors of *those* defendants as well, and the concomitant obligation to maximize the value of *those* estates, he cannot investigate such claims that would benefit SIBL without breaching his fiduciary duty to other creditors. Indeed, even if the Receiver could *identify* claims that SIBL has against other receivership entities, the Receiver cannot actually *assert* those claims against, in essence, himself. As a result, because he stands in the shoes of all of the receivership entities, he is unable to effectively represent the creditors of any one (or subset) of them. This conflict is, and will remain, an inherent and intractable problem of this equity receivership, until and unless it is addressed.

The time is also ripe for this Court to consider terminating the paragraph 11 injunction because, as this Court is aware, the AR-Ls have filed a petition under Chapter 15 (Case No. 3:09-cv-00721-N; *See* Notice of Filing of Petition for Recognition Pursuant to Chapter 15 of the U.S.

Bankruptcy Code, the "Chapter 15 Notice, Appendix ("Apx.") at 57-74). While the Receiver and the AR-Ls clearly differ as to whether the main proceedings should be conducted here or in Antigua, the AR-Ls' main point is well-taken: Stanford's creditors would benefit from the coordination of proceedings here and abroad. The Movants thus join in the AR-Ls' motion insofar as it seeks to coordinate proceedings under Chapter 15, and respectfully submit that such coordination would benefit *all* of the Defendants' creditors.

Finally, in order to protect their rights, Movants respectfully request that this Court permit them to intervene in this case pursuant to FRCP 24. The Movants have a tremendous stake in the outcome of this matter, the adjudication of claims, and the liquidation of the Defendants' estates. Even with the participation of the SEC, and the appointment of an Examiner, there is not currently a party to this case that has the power to protect the interests of SIBL's victims especially in connection with potential claims of the other estates. Intervention is essential to protect those interests, and will not unnecessarily burden or delay this case. For these reasons, and the reasons set forth below, the Movants respectfully request that this Court grant the Motion.

ARGUMENT[7]

I. This Court should amend or modify paragraph 11 of the Receivership Order.

A. Stanford's creditors, including the Movants, are entitled to the benefits and protections of the Congressionally-established bankruptcy regime.

The Receivership Order's injunction prohibiting creditors (including the Movants) from filing an involuntary bankruptcy petition against any of the Defendants, or from even making a motion seeking this Court's permission to do so, implicates compelling public policy and due process concerns; those concerns require that the injunction be amended or modified.

[7] Because this Court is intimately familiar with this case, the Movants will not burden this Court with a recitation of the procedural history. To the extent that facts about the Movants are referred to herein, they are supplied in the accompanying declaration of Peter D. Morgenstern.

The rights now sought by the Movants are significant in number, and fundamental in nature; if this case were transferred to the bankruptcy court, the Defendants' creditors would be able to exercise their Congressionally-established (yet currently-unavailable) rights to:

- elect a trustee (11 U.S.C. § 702);
- participate in a meeting of creditors (11 U.S.C. § 341);
- elect a committee to advocate their interests and, through that committee, participate in the proceedings on matters of importance (11 U.S.C. § 705);
- receive notice of motions, and have the opportunity to be heard (Fed. R. Bankr. Pro. 2002(i));
- conduct discovery into Defendants' assets and liabilities, and potential claims that may be brought for the creditors' benefit (Fed. R. Bankr. Pro. 2004);
- litigate their claims under procedures set forth by Congress (11 U.S.C. § 502); and
- share in distributions according to a statutory priority (11 U.S.C. § 726).

In a recent case similar to this one, *SEC v. Madoff*, 2009 U.S. DIST. LEXIS 30712 (S.D.N.Y. Apr. 10, 2009) [Apx. at 146], creditors of the infamous "Ponzi" schemer Bernard L. Madoff sought to lift an injunction that, like the one in effect here, had barred them from filing an involuntary bankruptcy petition. The SEC, the Department of Justice, and the Securities Investor Protection Corporation objected, arguing that they could best control and marshal Mr. Madoff's assets for the benefit of all claimants. Judge Stanton of the Southern District of New York, however, held that the benefits of the rights and procedures guaranteed to creditors in bankruptcy, such as the ones outlined above, outweighed all competing concerns, and required that Mr. Madoff's creditors be afforded the benefits of the Bankruptcy Code:

> No opponent to the relief sought by the motion offers as familiar, comprehensive, and experienced a regime as does the Bankruptcy Code for staying the proliferation of individual lawsuits against Mr. Madoff individually, marshaling his personal assets other than those criminally forfeitable, and distributing those assets among his creditors according to an established hierarchy of claims.
>
> A Bankruptcy Trustee has direct rights to Mr. Madoff's individual property, with the ability to maximize the size of the estate available to

> Mr. Madoff's creditors through his statutory authority to locate assets, avoid fraudulent transfers, and preserve or increase the value of assets through investment or sale, as well as provide notice to creditors, process claims, and make distributions in a transparent manner under the procedures and preferences established by Congress, all under the supervision of the Bankruptcy Court.

Id. at *3-4. Judge Stanton considered, and rejected, the argument that concerns of efficiency trumped the creditors' rights under the Congressionally-established bankruptcy system. He opined that, "[t]he concern that appointment of a Bankruptcy Trustee will increase administrative costs or delay recovery by victims is speculative, and outweighed by the benefits to [the] victims of a Bankruptcy Trustee's orderly and equitable administration of his individual estate." *Id*. at *4. The *Madoff* court therefore concluded that, other than assets subject to criminal forfeiture or liquidation under the Securities Investor Protection Act, "movants should be able to seek the familiar and established relief set by Congress in the Bankruptcy Code." *Id*.

Because Stanford's and Mr. Madoff's victims are (unfortunately) so similarly situated, Judge Stanton's reasoning is compelling here. Stanford's victims, like Mr. Madoff's, are entitled to the rights afforded creditors under the Bankruptcy Code. This Court therefore should amend or modify the Receivership Order to permit Stanford's creditors to seek relief from paragraph 10(e) of the Receivership Order.[8]

In another similar situation, Judge Porter of this District also concluded that creditors should not be denied their rights under the bankruptcy system. In *Jordan v. Indep. Energy Corp*., 446 F. Supp. 516 (N.D. Tex. 1978) , Judge Porter "resolve[d] a question of first impression in this circuit by deciding under what conditions a federal district court may prevent the filing of a voluntary or involuntary petition in bankruptcy by the issuance of a federal blanket

[8] By Order dated April 20, 2009, on the motion of federal prosecutors, Judge Denny Chin, also of the Southern District of New York, who is presiding over the criminal case against Mr. Madoff, issued an order restraining Mr. Madoff's assets. Judge Chin's order protects the right of the United States Attorney's Office to seek forfeiture, but does not change Judge Stanton's correct conclusion that the adjustment of general creditor claims and liquidation of an estate should not take place outside of bankruptcy court. [Apx. 145] The case is proceeding in bankruptcy court, which issued an Order for Relief and Order to File Schedules and Other Documents on May 7, 2009. [Apx. 148]

receivership injunction."[9] *Id.* at 518-19. In *Jordan*, plaintiffs sued defendant Independent Energy Corporation ("IEC") for securities law violations. The District Court appointed a temporary receiver to take control of IEC's "business operations and assets," *id*. at 520, and "stayed all persons, firms or corporations from 'commencing, prosecuting, continuing or enforcing any suit or proceeding, or from executing or issuing or causing the execution or issuance of any court attachment…or other proceedings for the purpose of impounding or…interfering with any property owned by or in the possession of defendant.'" *Ibid.*[10]

After concluding that federal courts have the power to issue such injunctions, Judge Porter turned to the question of whether to keep that particular injunction in place. The blanket receivership order, the *Jordan* court concluded, "was in the nature of a preliminary injunction and should be tested by the prerequisites for the extreme relief of a preliminary injunction." *Id*., at 529. Specifically, the *Jordan* court considered whether there was:

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

Id. (citing *Louisiana Envtl. Soc'y, Inc. v. Coleman*, 524 F.2d 930 (5th Cir. 1975)). Then, applying this well-established test, Judge Porter found that:

> **An injunction limiting access to the bankruptcy courts will never satisfy this test**. Congress has enacted a uniform federal bankruptcy policy and has granted the bankruptcy courts power to fairly adjudicate and administer disputes between debtors and creditors. The debtor would be irreparably harmed by the denial of his voluntary access to the rights conferred by the Bankruptcy Act, and **creditors would be irreparably harmed by their inability to secure access to the rights afforded creditors under the Act**. An order restricting access to the bankruptcy

[9] Given its broad language and scope, the injunction that the Movants now seek to have modified is operatively identical to the "blanket receivership injunction" at issue in *Jordan*. *See Jordan*, 466 F. Supp. at 519 n.2.

[10] Although the order did not expressly "restrain a bankruptcy court from proceeding to adjudge IEC a bankrupt and liquidating its assets," *id*. at 523, n. 7, the order "contained two provisions which could be interpreted as prohibiting the filing of an involuntary or voluntary petition in bankruptcy." *Id.* at 520, n. 5.

court…would not be in the public interest.

Id. at 529-30 (emphasis added). Judge Porter therefore lifted the bankruptcy receivership order and transferred the case to bankruptcy court. *Id*. at 530. Movants respectfully submit that the same result is appropriate here. No less so than in *Jordan*, the Movants here "would be irreparably harmed by their inability to secure access" to their rights under the Bankruptcy Code.[11] Thus, this Court should amend or modify its paragraph 11 injunction, which currently prohibits the Movants from even seeking to exercise their Congressionally-granted rights to have this matter resolved in bankruptcy court.

B. This Court should consider whether to modify or amend the injunction now, before the benefits of transferring the case to bankruptcy court are lost.

While this Court's appointment of the Receiver initially may have been in the best interests of the estates' creditors, in a case such as this one, a receivership should be an *interim* step, not a permanent one. Otherwise, creditors' rights will be irreparably prejudiced.

The Second Circuit Court of Appeals, which repeatedly has addressed this issue, has approved of the short-term use of receiverships to preserve the *status quo*, as this Court has done to date here, but, in doing so, has "'expressed strong reservations as to the propriety of allowing a receiver to liquidate [an estate].' In addition, because receiverships should not be used as an alternative to bankruptcy, [that court has] disapproved of district courts using receiverships as means to process claim forms and set priorities among various classes of creditors." *Eberhardt v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008) (quoting *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 63 (2d Cir. 1965) and citing *SEC v. Am. Bd. of Trade, Inc.*, ("*Board of Trade*") 830 F.2d 432, 437-38 (2d Cir. 1987)).

In *Board of Trade, supra*, (a case, like this one, in which the individual defendants were alleged to have operated a "Ponzi" scheme, and in which the district court appointed a receiver) the Second Circuit expressed its very strong disfavor for liquidation in an equity receivership.

[11] Although decided under the Bankruptcy Act, *Jordan*'s reasoning equally applies under the Bankruptcy Code.

While acknowledging the occasional necessity of appointing a receiver as an interim measure, the Court explained that it was "disturbed by the subsequent use of the receivership to effect the liquidation of the [defendant] entities." *Id*. at 436. The *Board of Trade* court emphasized that there is "no reason why violation of the Securities Act should result in the liquidation of an insolvent corporation via an equity receivership instead of the normal bankruptcy procedures, which are much better designed to protect the rights of interested parties." *Ibid*. (quoting *Esbitt v. Dutch-Am. Mercantile Corp*., 335 F.2d 141, 143 (2d Cir. 1964)).

Noting that, "[o]n several other occasions [the Second Circuit has] repeated [its] view that equity receiverships should not be used to effect the liquidation of defendants in actions brought under the securities laws," *ibid*, the Court of Appeals held that the district court's actions in the *Board of Trade* case demonstrated why district courts should *quickly* transfer cases like this one to a bankruptcy court:

> [T]he functions undertaken by the district court in this case demonstrate the wisdom of not using a receivership as a substitute for bankruptcy…the district court essentially transformed itself into a court of bankruptcy aided by a receiver performing the tasks of a bankruptcy trustee. For example, the court has taken upon itself the burden of processing proof-of-claim forms filed by thousands of noteholders and other creditors, of setting priorities among classes of creditors, and of administering sales of real property, all without the aid of either the experience of a bankruptcy judge or the guidance of the bankruptcy code.

830 F.2d at 437-38. Here, the Receiver recently announced his intention to begin *the very same process* of "using a receivership as a substitute for bankruptcy" that the *Board of Trade* court warned against. The Receiver has explained that he intends to develop his own claims submission and review processes, liquidate the estates without the protections afforded to creditors under the Bankruptcy Code, and distribute estate assets according to an as-yet unknown priority scheme. Thus, the Receiver is about to initiate a process that, according to the *Board of Trade* court, must be conducted under the Bankruptcy Code, and in a bankruptcy court.

This Court should no longer enjoin the parties from raising the issue of whether a

bankruptcy filing is appropriate. The lesson of *Board of Trade*, *Esbitt*, and similar cases, is that an equity receivership becomes entrenched, making transfer to the bankruptcy court increasingly difficult after too much time has elapsed.[12] Most importantly, however, the Second Circuit explained that it wanted to make sure that it would *never again* face a situation in which an equity receivership in an SEC enforcement action remained in place for so long that it made a bankruptcy filing impractical:

> We now state, however, that in actions of the present kind brought in the future by the SEC, we expect counsel for the agency, as an officer of the court and as part of his or her individual professional responsibility, to bring our views, as stated in this and other decisions, to the attention of the district court before the court embarks on a liquidation through an equity receivership.[13]

Id, at 438. The same concerns about having this Court "essentially transform[] itself into a court of bankruptcy aided by a receiver performing the tasks of a bankruptcy trustee," *id*. at 437-38, are as present – and compelling – in this case as they were in *Board of Trade*. The Movants therefore respectfully submit that this Court should amend or modify its paragraph 11 injunction to allow a full hearing on the issue "before th[is] court embarks on a liquidation through an equity receivership." *Id.* at 438.

Other Courts of Appeals that have considered the issue have agreed with the Second Circuit that cases such as this one belong in bankruptcy courts, which are designed and equipped to handle such proceedings. These courts also concur that the issue should be addressed early in the proceedings. For instance, in *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 601 (9th Cir. 1978)

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[12] The Second Circuit in *Board of Trade* made clear that it did not order the transfer of the case to bankruptcy court only because, by the time that case had reached the Court of Appeals, the substantial benefits of proceeding under the Bankruptcy Code and Rules already had been lost. As the Second Circuit explained, "because it appears once again that the liquidation is well underway…we conclude, as we did in *Esbitt*, that it 'would ... not be in the interests of the parties to direct that further proceedings be diverted into bankruptcy channels.'" *Id*. at 438. In this case, the receivership clearly has not progressed to the late stage of liquidation that forced the result in *Board of Trade* and *Esbitt*. The Movants are seeking relief at this early stage so that this Court has sufficient time to reach the *right* result, rather than a result that is compelled simply because it is too late to do otherwise.

[13] The Second Circuit's admonition to the SEC is not, on its face, limited to cases in the Second Circuit, and can reasonably be read to require the SEC to raise the issue in all similar cases, wherever filed.

("*Lincoln Thrift*"), the Ninth Circuit considered an appeal from the denial of a motion by creditors "to wind up a [SEC-] initiated receivership, and to transfer the pending proceedings to a bankruptcy court." The Court explained that, "[t]here are sound policy reasons for allowing liquidation to take place only in a court of bankruptcy," the most prominent of which are: the appointment of a creditors' committee; the requirement that creditors be notified of proposed property sales and have an opportunity for a hearing; and the existence of an "established system" for the distribution of assets. *Id*. at 605. The Ninth Circuit was reluctant, however, to actively manage the receivership by "giving specific orders to the district court as to the method of conducting an equity receivership," and believed that it should not reverse the district court's order "in the absence of clear abuse of discretion." *Id.* at 608-09. As was the case in *Board of Trade*, the Court held that it could not find that abuse of discretion in light of how long the equity receivership had remained in place. *Id.* at 609. The Ninth Circuit, however, made abundantly clear – as did the Second Circuit in *Board of Trade* – that district courts should address very early in the case the issue of whether to transfer a receivership case to the bankruptcy court:

> Our decision is to a large extent controlled by the consideration that the liquidation proceedings were in an advanced stage before appeal was brought to this Court. We do not, therefore, view this case as precedent for approving receivership liquidations under the supervision of the district court rather than under the jurisdiction of the court in bankruptcy. *If the issue arises in future cases, the district court should, at an early stage in the liquidation, set forth in express terms the justification for retaining its equity jurisdiction, indicating why the exercise of its jurisdiction is preferable to a liquidation in bankruptcy court.*

Id. (emphasis added).

The Fourth Circuit also has explained that a complex liquidation, with assets in multiple jurisdictions, should be conducted in the bankruptcy court, and not in an equity receivership. In *Gilchrist v. Gen. Elec. Capital Corp*., 262 F.3d 295 (4th Cir. 2001), the district court appointed a receiver for all of the assets of Spartan International, Inc. ("Spartan"). A week later, more than fifty creditors filed an involuntary bankruptcy petition against Spartan. "The district court in

South Carolina declined to recognize the automatic stay of all judicial proceedings imposed by 11 U.S.C. § 362(a) with the filing of the bankruptcy petition." *Id.* at 297. On appeal, the Fourth Circuit recognized "that the district court has within its equity power the authority to protect its jurisdiction over a receivership estate through the All Writs Act, 28 U.S.C. § 1651, and through its injunctive powers, consistent with Federal Rule of Civil Procedure 65." *Id*. at 302. But, the Court explained, the district court could not simply ignore the bankruptcy court's Congressionally-conferred jurisdiction over the bankruptcy case, and should *not* have exercised its equitable power under the All Writs Act to, in essence, preempt the bankruptcy proceedings:

> We cannot agree [that the equity receivership should be given priority]. Our examination of the Bankruptcy Code reveals that Congress intended that the bankruptcy process be favored in circumstances such as these….
>
> [W]e do not believe that the equities favor the common-law receivership process over the highly developed and specific bankruptcy process. The procedural requirements for liquidating a large corporation with thousands of creditors…present a task that would push the receivership process to its limits. *See Baldwin-United*, 765 F.2d at 348 ("To whatever extent a conflict may arise between the authority of the Bankruptcy Court to administer this complex reorganization and the authority of the District Court to administer consolidated pretrial proceedings, the equities favor maintenance of the unfettered authority of the Bankruptcy Court"). In this case it can be seen, even from the initial transactions in the receivership, that the customized receivership mechanisms are wanting in comparison with established bankruptcy process…
>
> To resolve the claims involving a large corporation with…thousands of creditors, a bankruptcy court has judicial tools better suited and more specifically tailored to the task…While it is true that the district court has broad equity power, any attempt to use that power to supervise a complex corporate liquidation…would ultimately be more clumsy and expensive than long-established bankruptcy procedures…we are persuaded that in the circumstances of this case, the district court should have recognized the stay provisions of § 362(a).

262 F.3d at 303-4. Given these strong statements from Courts of Appeals in similar cases, the Movants respectfully submit that this Court should amend or modify its injunction. By so doing, this Court would have the opportunity to address this issue when it should: at an early stage of

these proceedings. *See Board of Trade, Lincoln Thrift*.

C. Coordination under Chapter 15 will provide substantial benefits.

As discussed above, the Receiver thus far has not been able to effectively coordinate his actions with those of the AR-Ls. In fact, there appears to be considerable conflict between them. *See* Report Of The Receiver Dated April 23, 2009 (the "Report") at pp. 18-22 [Apx. at 105-109]; Chapter 15 Notice at p. 5. However, there is an opportunity for cooperation arising from the fact that the AR-Ls have themselves recognized the utility of Chapter 15. In their Chapter 15 Notice [Apx. at. 71-72], they explain that Chapter 15 itself:

> describes its purpose as "provid[ing] effective mechanisms for dealing with cases of cross-border insolvency with the objectives of (1) cooperation between (A) courts of the United States…and (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases." 11 U.S.C. § 1501(a)(1) (2006). Indeed, Congress mandated that the U.S. court "shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee." 11 U.S.C. § 1525 (2006).

The AR-Ls argue that Antigua is the "center of the debtor's main interests," and seek to invoke Chapter 15 to assist them in what they call a "foreign main proceeding" in Antigua.[14] Chapter 15 Notice, p. 13. The important point underlying this Motion, though, is that Chapter 15 provides a useful framework for cooperation whether the "center of the debtor's main interests" is in this District, Antigua, or elsewhere.[15] Thus, no matter where the "center of the debtor's main interests" is, administering this case under the Bankruptcy Code would provide *all* of Defendants' creditors with the benefits of coordination under Chapter 15.[16]

The Movants, as ultimate beneficiaries of the net assets available for distribution from the

[14] The Movants do not now take a position regarding where the primary liquidation proceedings should be held.

[15] Chapter 15 applies where: (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding; (2) assistance is sought in a foreign country in connection with a case under this title; (3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title. 11 U.S.C. § 1501(b).

[16] The AR-Ls agree that, "[a]lthough this Court may enter injunctions to aid its jurisdiction, it may not simply disregard the policy choices Congress has made." Chapter 15 Notice at p. 10.

receivership estates, have an acute interest in minimizing receivership expenses and, thus, are concerned about the ongoing costs of the turf battle between the Receiver and the AR-Ls. Because the AR-Ls acknowledge the applicability and efficacy of Chapter 15 in cases such as this, conducting a liquidation pursuant to the Bankruptcy Code likely would reduce the conflict between the competing proceedings in different jurisdictions and, accordingly, reduce receivership expenses. This prospect, too, weighs in favor of modifying the Receivership Order to permit the filing of an involuntary bankruptcy petition.

In light of the above-referenced factors, this Court should amend or modify paragraph 11 of the Receivership Order to permit the Movants to seek relief from the injunction against filing an involuntary bankruptcy petition. *See SEC v. Byers*, 592 F. Supp. 2d 532, 537 (S.D.N.Y. 2008) (in which the court found that "the best way to maintain the status quo is to permit [the receiver] to carry on with his investigation," but nevertheless modified its own order "to permit any party or non-party to apply to this Court on three days' notice for an order seeking permission to file an involuntary bankruptcy petition upon a showing that such a petition is appropriate.")

II. The Movants should be granted leave to intervene.

The Movants' timely request to intervene should be granted because they cannot protect their stake in the outcome of this case while they are barred from participating; and because those interests are not being adequately protected by the existing parties. Intervention is governed by Rule 24 of the FRCP; section (a) of Rule 24 provides for mandatory intervention, and section (b) allows for permissive intervention. The Movants should be permitted to intervene under either (or both) Rule 24(a)(2) and/or Rule 24(b)(1)(B).

A. The Movants meet the test for intervention as of right under Rule 24(a)(2).

The Rule 24(a)(2) inquiry "is a flexible one, which focuses on the particular facts and circumstances surrounding each application…[and] intervention of right must be measured by a practical rather than technical yardstick." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir.

1996) ("*Edwards*") (citation omitted). "For the purposes of passing upon the [Movants'] right to intervene, [Movants'] allegations are accepted as true." *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 57 (5th Cir. 1977).

To intervene as of right under Rule 24(a)(2), "(1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit." *Edwards*, 78 F.3d at 999 (citations and quotation omitted). The Movants here satisfy each of those requirements.

1. The Movants' application to intervene is timely.

Four factors are used to determine whether an application for intervention is timely:

> (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994) ("*Sierra Club*").

First, this case is only in its early stages. During that time, the Movants – who are located almost entirely in foreign jurisdictions [Apx. at 10] – have acted quickly to gather information concerning these proceedings; educate themselves concerning their rights and obligations in what is, to them, a foreign proceeding; consult with American counsel concerning their options; and, as swiftly as possible, intervene in this action. [*Id.*] Movants submit that, given the complexity of this matter and the international issues involved, the relatively short amount of time that has elapsed since this action began is a factor that weighs strongly in favor of intervention. Moreover, this Motion is timely because the Movants are seeking to intervene

before the claims and liquidation processes have been irrevocably fixed, or even proposed, by the Receiver. The Report indicates the Receiver's intention to soon shift his focus from locating and preserving estate assets to performing the functions of, essentially, a trustee in bankruptcy; thus, it is timely for the Movants to seek intervention before this new phase of the receivership begins.

Second, while the existing parties may oppose the relief sought by the Movants, they cannot reasonably argue that the *timing* of the Movants' request has caused (or may cause) them cognizable prejudice. The parties simply have not taken any actions that must be undone, or redone, in order to accommodate the Movants as additional parties to this case. Indeed, the Receiver acknowledges that "asset recovery efforts are still in an early stage," and that he "cannot at this time estimate when he will be able to propose a plan." [Apx. at 118] Given the early stage of this case, the Movants cannot be said to have waited too long to make this Motion, or to have prejudiced the existing parties in any manner.

Third, and most importantly, the Movants will suffer substantial prejudice if they are not permitted to intervene at this time. The Movants plainly have interests in: (a) the pursuit of claims on behalf of SIBL against the other Defendants; (b) the assertion of claims against third-parties for the benefit of SIBL's creditors, which neither the Receiver, the SEC, nor the Examiner are able to pursue; (c) minimizing the costs to the estate that are accruing from the turf battle between the Receiver and the AR-Ls; and (d) filing an involuntary bankruptcy petition against one or more of the Defendants in order to protect the rights of CD holders. The Movants will be prevented from protecting those interests if they are not permitted to intervene in this case.

Fourth, to the extent that there are "unusual circumstances militating either for or against a determination that the application is timely," (the fourth *Sierra Club* factor) those circumstances weigh most heavily in favor of a finding that the Movants' application is timely. As discussed above, the Movants are members of a group comprised primarily of foreign

residents, many of whom do not speak English as a first language, but who have, through extraordinary diligence, moved quickly to participate in these proceedings. (Apx. at 10) The Movants submit that the short time that has elapsed since this action began is a reasonable amount of time given the amount of work and coordination that was required of them in order to make this Motion.

2. The Movants clearly have an interest in the property at issue.

"To demonstrate an interest relating to the property or subject matter of the litigation sufficient to support intervention of right, the applicant must have a 'direct, substantial, legally protectable interest in the proceedings'." *Edwards*, 78 F.3d at 1004 (quoting *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.) ("*UGPLC*"), *cert. denied*, 469 U.S. 1019 (1984)). The interest test "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Sierra Club*, 18 F.3d at 1207.

Here, the Movants purchased CDs from SIBL. The Receiver, under the authority of this Court, has asserted control over all of SIBL's assets, including any assets that would be available to repay the Movants. As holders of CDs at the heart of Defendants' fraudulent scheme, the Movants have an interest relating to the transaction that is the subject of this action.

3. Disposition of this matter in this Court will impair and impede the Movants' ability to protect their interests.

The Movants also must be permitted to intervene in order to protect their interests. "The disposition of the action, because it is likely to use up all remaining assets of the [receivership] entities, may, as a practical matter, impair the [Movants]' ability to protect their interests in the property in other forums." *Ibid.* (defrauded investors satisfied the requirement of showing that "disposition of the action may impair or impede the applicant's ability to protect the interest"). *See also SEC v. Navin*, 166 F.R.D. 435, 440 (N.D. Cal. 1995) (investors seeking to intervene in SEC enforcement action showed that their interests would be affected because they were

"seeking to obtain remedies different from those sought by the original plaintiffs.")

4. The Movants' interests are not adequately represented by the existing parties.

Finally, the Movants should be permitted to intervene as of right because their interests are not adequately being represented by the existing parties to this case. The Supreme Court has held that the adequacy of representation requirement "is satisfied if the applicant shows that representation of his interest *may* be inadequate; and the burden of making that showing should be treated as *minimal*." *Edwards*, 78 F.3d at 1005 (*quoting Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630 n.10) (emphasis added).

With respect to this prong of the test, the Movants are cognizant of this Court's April 20, 2009, Order denying a number of motions to intervene (the "Intervention Order") on the ground that those movants' interests were adequately represented by the existing parties:

> [A]dequate representation is presumed because of the involvement of the SEC as Plaintiff…*see also Johnson v. City of Dallas*, 155 F.R.D. 581, 586 (N.D. Tex. 1994) (holding that "where, as here, the existing representative in the suit is the government, there is a presumption of adequate representation which may be overcome…only upon a showing of adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative").

[Apx. at 79] The Movants respectfully submit, however, that they are situated differently – and are seeking substantially different relief – than the proposed intervenors who sought to unfreeze their brokerage accounts; that the existing parties do not adequately represent the Movants' interests; and, that the presumption that the Movants are adequately represented is overcome with respect to the specific relief that they seek on this Motion.

a. This Court should consider a number of factors in determining whether the Movants' interests are adequately represented.

Movants respectfully submit that this Court should take a broad view, and consider a variety of factors, in determining whether the Movants' interests are adequately represented by the existing parties. While *Johnson v. City of Dallas*, 155 F.R.D. 581, 586 (N.D. Tex. 1994),

relied upon by this Court in its Intervention Order, held that the presumption could be overcome "only upon a showing of adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative," other courts – including courts considering motions to intervene in SEC enforcement actions – have taken considerably more expansive views.

For example, in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104 (1st Cir. 1999) ("*Daggett*"), the First Circuit Court of Appeals directly addressed the question of whether the presumption of adequate representation could be overcome *only* by a showing of "adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative," (*Johnson*, *supra*, at 586) and concluded that the three-item list was *not* exclusive:

> This trilogy—'adversity of interest, collusion or nonfeasance'—may trace back to a decision by then-Judge Blackmun. [citation omitted.] Judge Blackmun evidently did not intend this to be an exclusive list, nor did we in [*Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979)]. As Wright, Miller & Kane point out (in criticizing the courts that have misread the statement as exclusive), "the wide variety of cases that come to the courts would make it unlikely that there are three and only three circumstances that would make representation inadequate." Wright, Miller & Kane, *supra*, § 1909, at 318.

172 F.3d at 111. Thus, in *Daggett*, because the district court had not considered factors other than "adversity of interests, collusion or nonfeasance" in determining whether the proposed intervenors overcame the presumption of adequate representation, the Court of Appeals vacated the order denying intervention and remanded for further proceedings.[17]

[17] On remand, the district court denied the motion to intervene but: (1) ordered that "[n]otice and service of all documents and events shall be given to the would-be intervenors' counsel just as if they were parties in the case"; (2) offered the movants the opportunity to examine or cross-examine witnesses if the Attorney General consented; and (3) admonished the Attorney General's office to "take full advantage of the would-be intervenors' offers of resources, evidence or assistance where to do so will help the Attorney General." *Daggett v. Webster*, 190 F.R.D. 12, 14 (D. Me. 1999). The court also granted the movants leave to renew their motion "if and when the[y] have evidence that the case is not being fully and properly presented by the Attorney General." *Id.* In the event this Court denies the main relief sought in this Motion, the Movants respectfully submit that this Court should, as in *Daggett*, grant the Movants rights of participation that enable them to meaningfully obtain information from the parties, offer input into the course of the proceedings, and leave to renew as new developments may warrant.

In so doing, the First Circuit reinforced its view that proposed intervenors could overcome the presumption in a variety of circumstances. For example, as the *Daggett* court explained, "one can imagine cases where – even in the absence of any conflict of interest – a refusal to present obvious arguments could be so extreme as to justify a finding that representation by the existing party was inadequate." *Id.* at 112. The First Circuit further expounded that there was no rigid test for overcoming the presumption of adequate representation. "The reality is that, as courts have moved from formalistic restrictions to a practical 'interest' requirement for intervention as of right, so tests of 'inadequacy' tend to vary depending on the strength of the interest. Courts might require very little 'inadequacy' if the would-be intervenor's home were at stake and a great deal if the interest were thin and widely shared." *Id.*, at 113-114. Quoting Judge Friendly, the *Daggett* court further explained that:

> [N]ot all interests are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness….A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for granting intervention.

Id., at 114 (quoting *U.S. v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984)).

Other courts considering the adequacy of government representation in SEC enforcement actions also have not required investors seeking to intervene to show "adversity of interests, collusion or nonfeasance." For example, in *SEC v. TLC Invs. & Trade Co.*, 147 F. Supp. 2d 1031 (C.D. Cal. 2001), the court found that, in considering a motion to intervene, it had to "consider: (1) whether the Receiver's interests are such that he will 'undoubtedly' make all the Applicants' arguments; (2) whether the Receiver is capable of and willing to make such arguments; and (3) whether the Applicants 'would offer any necessary elements to the proceedings that' the Receiver would otherwise 'neglect'." 147 F. Supp. 2d at 1041 (quoting *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)). Likewise, in *SEC*

v. Navin, *supra*, the court permitted an investor to intervene in an SEC enforcement action because the investor showed that the SEC would "not make all of the arguments that the proposed intervenor would make" and that the intervenor "offer[s] a necessary element to the proceedings that the other parties would neglect." 166 F.R.D. at 441.

For these reasons, the Movants respectfully submit that they should not be required to demonstrate "adversity of interest, collusion or nonfeasance" in order to overcome the presumption that the SEC is adequately representing their interests.

b. The Movants' interests are not adequately represented in this matter.

As shown above, the analysis as to adequacy of representation is substantially different on this Motion than it was on the Court's Intervention Order. In deciding the earlier motions to intervene, this Court noted that the Receiver already has established a process for the review of frozen individual brokerage accounts, and is working toward unfreezing assets as to which the estates have no claim. Thus, this Court concluded that "[t]he Receiver's interest is therefore not adverse to the interests of the putative [individual] intervenors insofar as they are possible creditors of Stanford or potential victims of fraud." Intervention Order, at p. 6.

Here, by contrast, the Movants are seeking specific relief that is *directly adverse* to the Receiver's stated position. The Receiver not only is opposed to allowing creditors to file an involuntary bankruptcy petition, but he actually sought and obtained an injunction in order to prevent Defendants' victims from exercising their creditors' rights under the bankruptcy laws. Thus, unlike the situation with the frozen brokerage accounts, the Receiver and the Movants are not working toward the same goal; they are, instead, directly adverse on this significant issue. Simply put, the Receiver *cannot* be an advocate for the victims' interests on this point, because he has taken, and is maintaining, the opposite position: that creditors must be enjoined from obtaining the relief that they seek.

Moreover, the Receiver cannot adequately represent the Movants' interests due to his

inherent conflict. As noted above, the Receiver cannot prosecute claims on behalf of SIBL's creditors where those claims would adversely affect the value of the other entities in receivership or reduce recoveries for those entities' creditors. No matter how hard he tries, the Receiver cannot simultaneously discharge his fiduciary duty to all of the creditors. *See In re Adelphia Communications Corp*., 336 B.R. 610, 669-71 (Bankr. S.D.N.Y. 2006) (requiring management for multiple debtor estates to stay neutral in disputes between those estates, and to permit those estates' creditors to litigate among themselves, because "if the Debtors actually took sides in a way that injured one or another of the estates to whom they owed their duties of loyalty, that would result in at least the appearance of impropriety, and, the Court fears, the reality as well.")

Neither the participation of the SEC, nor this Court's appointment of an Examiner, changes this analysis. First, neither the SEC nor the Examiner has sought to place the receivership entities in bankruptcy. The SEC has long been aware of the injunction preventing creditors from filing an involuntary bankruptcy petition, but has not sought to modify or amend either the paragraph 11 injunction or the paragraph 10(e) injunction, even as the Receiver prepares to undertake the tasks traditionally performed in a bankruptcy proceeding.

This Court's appointment of an Examiner also does not change this analysis. First, and most importantly, the Examiner has not, thus far, suggested transfer this case to the bankruptcy court. Second, the Examiner, like the Receiver, cannot act on behalf of any one creditor to the exclusion of the others; as this Court ordered, the Examiner must convey information to this Court concerning "the interests of the investors in any financial products, accounts, vehicles or ventures sponsored, promoted or sold by *any* Defendants in this action." This Court's April 20, 2009, Order appointing Examiner at p. 1 (emphasis added). [Apx. at 84] Because the Examiner thus has no power to investigate or prosecute claims solely for the benefit of SIBL or SIBL's creditors, he is not an adequate substitute for the rights granted by Congress to creditors –

including, specifically, the Movants – under the Bankruptcy Code.[18]

Because the Movants have an interest in filing an involuntary bankruptcy petition against the Defendants, and because no existing party is an effective advocate for that position, the Movants are not currently being adequately represented in this case. The Movants therefore respectfully submit that they meet the test for mandatory intervention under Rule 24(a)(2).

B. Alternatively, the Movants should be permitted to intervene under Rule 24(b).

In the alternative, the Movants request permissive intervention, which is permitted by Rule 24 when an applicant's claim and the main action share a common question of law or fact. "Permissive intervention lies within the discretion of the Court and 'in exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties'." *Huron Envtl. Activist League v. EPA*, 917 F. Supp. 34, 43 (D. D.C. 1996) (quoting FRCP 24(b)).

The Movants submit that permissive intervention is warranted here. "In acting on a request for permissive intervention, it is proper to consider…whether the intervenors' interests are adequately represented by other parties and whether they will significantly contribute to full development of the underlying factual issues." *UGPLC*, *supra*,, 732 F.2d 452, 472 (5th Cir. 1984) (citation and quotation omitted). As explained above, the Movants' interests are not adequately represented by the existing parties.

Moreover, permitting the Movants to intervene will not "cause needless inefficiencies and delay in the adjudication of the underlying dispute between the SEC and the Defendants," as was the basis for this Court's Intervention Order. Here, the Movants seek to vindicate a discrete right: the right to have their claims adjudicated, and Stanford's assets liquidated, pursuant to the

[18] Although the AR-Ls have sought to coordinate proceedings pursuant to Chapter 15, and the Movants support that request, the AR-Ls clearly are not parties who adequately represent the Movants' interests in this litigation. Among other things, they are not currently parties to this case and, like the Receiver, have conflicts of interest arising from the fact that they owe duties to multiple entities and their creditors.

Bankruptcy Code. The Movants' participation in this proceeding will not impede the SEC's enforcement action. In fact, as noted above, it may well lead to *greater* efficiencies due to the bankruptcy court's proficiency in dealing with complex liquidations involving hundreds of creditors, and the utility of chapter 15 in streamlining multi-jurisdictional cooperation. For these reasons, the Movants respectfully request intervention under Rule 24(b).

III. In the alternative, and in an excess of caution, this Court should extend and/or reopen the time for the Movants to appeal the Receivership Order.

If this Court denies the above-requested relief, the Movants, in an excess of caution, respectfully request that this Court: (1) grant the Movants leave to intervene for the limited purpose of prosecuting an appeal; and (2) to the extent it may be necessary, extend and/or reopen the time for Movants to appeal the Receivership Order.[19]

First, the Movants respectfully submit that, pursuant to Fed. R. App. Pro. 4(A)(5), "good cause" exists for this Court extend the time for the Movants to file a notice of appeal from the Receivership Order because the Movants: (1) are primarily residents of foreign jurisdictions who do not speak English as a first language; (2) are non-parties who were never formally served with a copy of the Receivership Order; (3) acted promptly to retain counsel and participate in these proceedings; (4) have a significant interest in the proceedings; and (5) may be deprived of substantive and procedural rights if they are denied the right to appeal at this time.

Alternatively, the Movants request that, should the timing of this Court's decision on this Motion so require, this Court reopen the time to file an appeal pursuant to Fed. R. App. Pro. 4(A)(6), on the grounds that: (1) the Movants "did not receive notice under Federal Rule of Civil

[19] Any denial of either the request to intervene or to amend or modify the Order would be immediately appealable under 28 U.S.C. §§ 1292(a)(1) and/or (a)(2). *See, e.g. Lincoln Thrift*, 577 F.2d at 603 (holding that, although creditors who moved to wind up SEC receivership and transfer case to bankruptcy court could have "moved to intervene and then appealed from the denial of that motion," those creditors *also* had the right to an immediate appeal in order to permit the Court of Appeals to "adjudicate the authority of the receiver to act under the supervision of the district court"). This alternative relief therefore is being requested only in an excess of caution, and in order to avoid a potential "procedural box" that *may* prevent an appeal. *See Jenkins v. Missouri*, 967 F.2d 1245, 1247 (8th Cir. 1992) (appeal dismissed on ground that putative appellants filed first notice of appeal before intervention was granted, and thus were not parties, and second notice of appeal after the time to do so had run).

Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry"; (2) this Motion is being "filed within 180 days after the [Receivership Order was] entered"; and (3) no party would be prejudiced by reopening the time for the Movants to appeal.

CONCLUSION

For the reasons set forth above, the Movants respectfully request that this Court:

1. grant the Movants' motion to intervene;
2. amend or modify paragraph 11 of the Receivership Order to permit the Movants to seek relief from paragraph 10(e) of the Receivership Order;
3. in the alternative, (a) grant the Movants leave to intervene for the limited purpose of prosecuting an appeal; and (b) to the extent it may be necessary, extend and/or reopen the time for the Movants to appeal the Receivership Order; and
4. grant such other relief as this Court deems just and proper.

Dated: May 11, 2009

MORGENSTERN & BLUE, LLC

Peter D. Morgenstern (*pro hac vice pending*)
Gregory A. Blue (*pro hac vice pending*)
Rachel K. Marcoccia (*pro hac vice pending*)
885 Third Avenue
New York, NY 10022
Telephone: (212) 750-6776
Facsimile: (212) 750-3128

LACKEY HERSHMAN, L.L.P.

By: /s/ Paul Lackey
Paul Lackey
State Bar Number 00791061
Scott S. Hershman
State Bar Number 00793205
Michael P. Aigen
State Bar Number 24012196

3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219
Telephone: (214) 560-2201
Facsimile: (214) 560-2203

Counsel for the Movants

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2009, 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/ Paul Lackey
Paul Lackey