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.	§	

REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR RELIEF FROM THE INJUNCTION CONTAINED IN PARAGRAPH 10(e) OF THE RECEIVERSHIP ORDER AND REQUEST FOR EXPEDITED HEARING

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PRELIMINARY STATEMENT

The Movants respectfully submit this reply brief in further support of their Motion for Relief From The Injunction Contained In Paragraph 10(e) Of The Receivership Order And Request For Expedited Hearing. The Receiver argues that the Movants are seeking this relief "prematurely," but simultaneously argues that it is too late because he already has amassed, "more than seven months of direct management of some 139 entities," and has "more knowledge than the Movants or anyone else about whether it is better to continue to administer this particular estate as a receivership or in bankruptcy." The Receiver cannot have it both ways. Nor can he substitute his judgment for the judgment of Congress, which has enacted a comprehensive statutory scheme for handling this type of case.

In all events, this request comes neither too early nor too late – the Movants timely sought to have this case proceed under title 11 of the United States Code (the "Bankruptcy Code") over five months ago.[1] This original request to lift the paragraph 11 injunction is now moot since the paragraph 11 injunction contained in the Receivership Order expired by its terms in September.

The Movants now urgently request that this Court lift the injunction contained in paragraph 10(e) of the Receivership Order, which prohibits the filing of an involuntary bankruptcy petition against any of the Defendants. This Motion is ripe for immediate determination. The Movants have diligently pursued their request to have this case administered under the Bankruptcy Code and should not be denied their substantive and procedural rights, at

[1] The Movants filed the 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 on May 11, 2009. [Dkt. 369]

least to a determination of this Motion. Stanford's creditors, including the Movants, are entitled to the benefits and protections of the Congressionally-established bankruptcy regime, and respectfully submit that they are also entitled to a hearing and decision on this important public policy issue of whether this case should continue to proceed as an equity receivership or should be administered under the Bankruptcy Code.

The Receiver also argues in opposition to the Motion that a bankruptcy proceeding will be unduly expensive – a shocking argument in light of the size of the Receiver's fee requests thus far. While the Receiver's Opposition argues that receiverships are efficient, it has become extraordinarily clear over the past eight months, and through the Receiver's three fee applications, among other things, that this receivership is anything but cost-efficient. It simply cannot be maintained that the benefits of this equity receivership continue to outweigh the benefits of a bankruptcy proceeding.

Moreover, while the Receiver argues that the complexity of this receivership is reason to avoid bankruptcy, courts have recognized that exactly the opposite is true: simple cases can be administered in an equity receivership; but complex cases should be handled in bankruptcy. For the reasons set forth below, and in the Movants' opening brief, the Motion should be granted. Should the Court disagree, the Movants should be entitled to timely appellate review of this Court's determination of this important question, which affects the interests of thousands of Stanford investors.

LEGAL ARGUMENT

I. The Receiver has miscalculated the costs and benefits of administering this case under the Bankruptcy Code.

While the Movants do not contest the fact that equity receiverships sometimes can be useful as an *interim* measure to preserve estate assets and to maintain the status quo, the Movants submit that an equity receivership is no longer the best way to administer *this* case. Indeed, the Movants seek leave to address that question on its merits because this equity receivership has outlived its usefulness.[2]

The Receiver's arguments to the contrary are entirely off-base. First, and most importantly, the fact that additional costs *may* be incurred in bankruptcy is *not* a reason to deny Stanford's victims the opportunity to directly participate in the case, object to relief sought by the Receiver, and to ask this Court to permit bankruptcy filings. "Justice" would always be swift and cheap if parties were simply denied the right to be heard when their property is taken and disposed of. But efficiency and economy cannot trump due process, which is why creditors have the *right* to present their arguments, even though affording them that right may marginally increase costs.[3]

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[2] Because the Movants seek to raise the issue of whether liquidation through an equity receivership would be appropriate in *this* case, the Receiver's citation to numerous cases that simply prove that liquidations were conducted in *other* cases, under *different* circumstances, Rec. Br. at 19-20, fn. 17, entirely misses the point. Significantly, the Examiner, who was appointed to give voice to the investors' interests, has long agreed that this Court should give the Movants the opportunity to argue that "the creditors would be better served by shifting some or all of the Stanford entities into bankruptcy proceedings." Brief of the Examiner Regarding the Motion to Intervene of Dr. Samuel Bukrinsky, *et al*. [Dkt. No. 424] at 7.

[3] The Receiver cites *SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 670 (6th Cir. 2001) ("*Basic Energy*"), *SEC v. Hardy*, 803 F.2d 1034 (9th Cir. 1986) ("*Hardy*"), and *SEC v. Elliott*, 953 F.2d 1560 (11th Cir. 1992) ("*Elliott*"), for the proposition that "receiverships are required to and do protect the due process rights of creditors and investors." Rec. Br. at 8. In *Basic Energy*, however, investors were "provided with a full evidentiary hearing, [were] represented by counsel at motion hearings addressing their objections [and] had ample opportunities to rebut the Receiver's characterization of the facts." 273 F.3d at 669. In *Elliott*, the court held that "[d]ue process requires notice and an opportunity to be heard." *Id.* 953 F.2d at 1566-67. In *Hardy*, the court held that, summary procedures in that equity receivership "were a reasonable and practicable attempt to administer the receivership *without depriving the creditors of fair notice and a reasonable opportunity to respond*." *Id.* at 1040 (emphasis added). The Receiver's view of due process falls far short not only of the due process that Congress determined should be afforded to creditors, but also of that afforded to creditors in the cases he himself cites as authority.

Second, while the Receiver makes liberal use of phrases like "efficiency" with regard to costs, Rec. Br. at 3, etc., to describe receiverships in general, *this* receivership is anything but cost-efficient. The Receiver has utilized *more than 100 attorneys*, and has requested tens of millions of dollars to pay for approximately eight months of work.[4] It is no wonder that the Receiver is attempting to prevent Stanford's victims from even objecting to his fees. In light of the enormous sums requested by the Receiver, the Court should no longer simply defer to the Receiver's judgment that administering this case under the Bankruptcy Code would result in costs materially greater than the amounts being charged by the Receiver himself.

Third, the Receiver has overstated the potential costs of a bankruptcy filing. For example, the Receiver argues that, in a bankruptcy case, the estate necessarily will incur "substantial additional costs" for the professionals "whose fees and expenses would be charged to the bankruptcy estate as administrative expenses." Rec. Br. at 3. But the bankruptcy court has the power to disapprove any fee arrangements that are not reasonable, 11 U.S.C. § 328, and the Bankruptcy Code affords the court considerable flexibility in crafting fee arrangements appropriate to the circumstances, "on any reasonable terms and conditions of employment." *Id.* Because the Receiver is dismissive of the ways in which a bankruptcy court can and *must* control professional costs (or, perhaps, fails to appreciate that an estate fiduciary can more efficiently administer a case such as this one), Stanford's victims should not be forced to rely solely upon the Receiver's "best judgment," Rec. Br. at 3, concerning the potential costs of a bankruptcy proceeding.[5]

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[4] Receiver's Motion for Approval of Interim Fee Application and Procedures for Future Compensation of Fees and Expenses and Brief in Support [Dkt. 384]; Receiver's Motion for Approval of Second Interim Fee Application and Brief in Support [Dkt. 669]; and Receiver's Motion for Approval of Third Interim Fee Application and Brief in Support [Dkt. 820].

[5] The Receiver's contention that he, and he alone, is in a position to exercise the "best judgment" as to whether a bankruptcy filling is appropriate is also belied by his own erroneous reading of the Bankruptcy Code. In his Response To Bukrinsky Motion To Intervene And Amend Or Modify Certain Portions Of The Court's Amended Receivership Order [Dkt. 422], the Receiver argued that CD holders would receive "a much lower recovery" in bankruptcy "[b]ecause their claims are related to the sale or purchase of a security, [and section 510(b) of] the Bankruptcy Code mandates that their claims be subordinated." *Id.* at 3. That is simply not true. CD holders have claims against the estate based upon the obligation represented by the CD itself. As a matter of basic bankruptcy (*continued*)

Most importantly, the Receiver has not rebutted the Movants' argument that the Bankruptcy Code and Bankruptcy Rules amount to a Congressional mandate requiring that creditors be afforded a comprehensive bundle of substantive and procedural rights, and that the statutory scheme should not be displaced by *ad hoc* procedures that fail to afford creditors the same protections. Thus, while it is undoubtedly true that this Court has the *power* to appoint a receiver, *see Jordan v. Indep. Energy Corp.*, 446 F. Supp 516 (N.D. Tex 1978) ("*Jordan*"), there nevertheless remains an extremely strong, Congressionally-established, presumption that creditors should not be stripped of their rights under the Bankruptcy Code. *See Jordan*, *SEC v. Madoff*, 2009 U.S. Dist. LEXIS 30712, *4 (S.D.N.Y. Apr. 10, 2009).

Indeed, there is no reason to supplant the Bankruptcy Code in this case. While the Receiver argues that the complexity of this receivership is reason to avoid bankruptcy, courts have recognized that exactly the opposite is true: simple cases can be administered in an equity receivership; but complex cases should be handled in bankruptcy:

> The procedural requirements for liquidating a large corporation with thousands of creditors…present a task that would push the receivership process to its limits… To resolve the claims involving [such] a large corporation…, 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…

Gilchrist v. Gen. Elec. Capital Corp., 262 F.3d 295, 303-04 (4th Cir. 2001) (emphasis added). *See also SEC v. Am. Board of Trade*, 830 F.2d 432, 437-38 (2d. Cir. 1987) ("*Board of Trade*").[6]

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law, those claims are *not* subordinated. *See* COLLIER ON BANKRUPTCY (15th Rev. Ed.) ¶ 510.04 ("Of course, all claims of security holders are not subordinated under section 510(b). For example, claims…based upon the instrument itself, are not claims 'for damages arising from the purchase or sale of such a security' and are accordingly not subject to subordination.") The fact that the Receiver and his team of over 100 lawyers held this flawed view seriously calls into question the Receiver's ability to determine, in his sole discretion, and without any creditor input, whether a bankruptcy filing would be in the best interests of creditors, and demonstrates the wisdom of an open, participatory process.

[6]The Receiver argues that the complexity of this case, and the fact that assets are located in different jurisdictions, distinguishes this case from the facts in *Jordan*, and dictates a different result. (Rec. Br. at 9-11). As described above, though, the fact that this case is more complex than *Jordan* only means that the argument for administering the case under the Bankruptcy Code is even stronger here than it was in *Jordan*. *See, Gilchrist.* The Receiver also argues that allowing an involuntary bankruptcy "would unnecessarily complicate" the Chapter 15 Action. In fact, the opposite is true: this Court can, and should, take into account the ways in which ending the (*continued*)

The Movants respectfully submit that the Receiver cannot, merely by generalizing about equity receiverships on the one hand, and bankruptcy on the other, justify his continued effort to foreclose all discussion on the subject. As in the *Madoff* case, "[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." *Madoff*, *supra* at *4.[7]

II. The time is ripe to consider administering this case under the Bankruptcy Code.

Despite the clear authority from Courts of Appeals holding that district courts should consider, at the earliest possible time, whether a case such as this one should be administered under the Bankruptcy Code, the Receiver essentially argues that this Court should *never* undertake that inquiry. In his Response, the Receiver argues that the Movants are seeking this relief too "prematurely" in the case, Rec. Br. at 7, but simultaneously argues that it is too late because he already has amassed "more than seven months of direct management of some 139 entities," and has "more knowledge than the Movants or anyone else about whether it is better to continue to administer this particular estate as a receivership or in bankruptcy." *Id.* at 3. The Receiver is essentially declaring to the Court that there is *never* a correct time to seek the benefits of bankruptcy. But it was *exactly* that sort of "creeping receivership"[8] that so troubled the Second Circuit in *Board of Trade* and *Esbitt*.[9] In order to avoid such a "creeping receivership," the parties and this Court must address the issue now.

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receivership and administering this case under the Bankruptcy Code will enhance multi-jurisdictional cooperation – something that has been lacking in the case thus far.

[7] The Receiver's attempt to distinguish the *Madoff* case on the ground that Mr. Madoff's assets were not subject to a receivership, Rec. Br. at 17-18, is entirely without merit. The *Madoff* court recognized the importance of proceeding under the Bankruptcy Code, which offers a "familiar, comprehensive, and experienced…regime…for staying the proliferation of individual lawsuits…and distributing those assets among…creditors according to an established hierarchy of claims." The court stressed the importance of utilizing "the procedures and preferences established by Congress, all under the supervision of the Bankruptcy Court." Whatever minor differences may exist between the cases, affording victims those statutory rights is no less important in this case than it was in *Madoff*.

[8] The phrase "creeping receivership" comes from the article *SEC Receivers vs. Bankruptcy Trustees: Liquidation by Instinct or Rule*, by Marcus F. Salitore, 22-8 AM. BANKR. INST. J., at 8 (Oct. 2003).

[9] *Esbitt v. Dutch-Am. Mercantile Corp*., 335 F.2d 141 (2d Cir. 1964) ("*Esbitt*").

While the Receiver argues that there is no "per se rule against" liquidating a company outside of bankruptcy, Rec. Br. at 22, the cases make clear – at the very least – that there also is no "per se rule" requiring liquidation in an SEC enforcement proceeding to be conducted through an equity receivership. *See, e.g., Board of Trade*. This Court thus should no longer presume that an equity receivership is superior (or rely solely upon the Receiver's "best judgment" that it is superior), and should instead address and determine the issue on the merits.

CONCLUSION

The Movants respectfully request that this Court: (1) grant the Movants' motion for relief from the injunction contained in paragraph 10(e) of the Receivership Order; (2) grant the Movants' request for an expedited hearing; and grant such other relief as this Court deems just and proper.

Dated: October 15, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 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/ Gregory A. Blue
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