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

SECURITIES AND EXCHANGE COMMISSION	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 3:09-CV-0721-N
	§	
STANFORD INTERNATIONAL BANK, LTD.,	§	
STANFORD GROUP COMPANY,	§	
STANFORD CAPITAL MANAGEMENT, LLC,	§	
R. ALLEN STANFORD, JAMES M. DAVIS, and	§	
LAURA PENDERGEST-HOLT,	§	
	§	
Defendants.	§	

RECEIVER'S RESPONSE AND OBJECTIONS TO PETITION FOR RECOGNITION OF FOREIGN MAIN PROCEEDING PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY CODE

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Court-appointed receiver, Ralph S. Janvey ("Receiver"), asks the Court to deny the request for recognition of the Antiguan liquidation of Stanford International Bank, Ltd. ("SIB" or the "Bank") as the "foreign main proceeding" pursuant to Chapter 15 of the Bankruptcy Code. As movants, the Liquidators[1] have the burden to prove that Antigua is the country where SIB had the "center of its main interests" ("COMI"). Although COMI is not defined in the Bankruptcy Code, courts have treated a determination of COMI as similar to a determination of a corporation's principal place of business.

Because the administrative and executive "nerve center" of the Bank was not in Antigua, the Antiguan proceedings should not be recognized as foreign main. *See Betcorp, Limited*, 400 B.R. 266, 273 (D. Nev. 2009). Chapter 15 precedent is clear that the location of those controlling, managing and providing services to the Bank, regardless of whether they are employees of the Bank or some other entity, is at the heart of the COMI inquiry. In this case, virtually all of the key decision makers for the Bank operated out of the U.S., and the Bank and the entities providing services to the Bank were all part of a scheme to defraud investors.

Moreover, this case presents compelling circumstances that require the Court to invoke Chapter 15's public policy exception and to deny the petition. Recognition of the Antiguan proceedings would violate more than 100 years of U.S. legal precedent appointing receivers in cases like this because they are best equipped to investigate fraud and fashion appropriate remedies. CDs bankrolled the entire Stanford network. If the Liquidators' are able to liquidate the Bank's U.S. assets through the Antiguan proceeding applying Antiguan law, and succeed with their plan to recover all CD proceeds from other Stanford entities, it would likely leave the Receivership Estate with virtually no assets to distribute. *See* May 13, 2009 Report of

[1] Movants Nigel Hamilton-Smith and Peter Wastell will be referred to as the "Liquidators."

Joint Liquidators, attached as Exhibit A. Granting recognition would run counter to the decades-long practice in virtually all circuits, including the Fifth Circuit, of using the vehicle of an equity receivership to accomplish the winding up of entities that were the subject of Ponzi schemes and other frauds.

I. SUMMARY OF ARGUMENT

A. The Bank's principal interests, assets, and management are not in Antigua.

The facts in the record demonstrate that Antigua was not the center of main interests for the Bank. Under Antiguan law, the Bank could not even accept deposits from Antiguans. *See* RSJ-4, at 4, ¶ (c). The parties agree that the solicitation of SIB's CD sales occurred overwhelmingly outside Antigua. Only a very small percentage of the 27,000+ account holders traveled to Antigua to purchase CDs; the majority purchased their CDs through their U.S. trained and supervised Stanford-employed financial advisors (i.e. brokers) in other countries, primarily their native countries or in the United States. *See* Hamilton-Smith Supp. Decl., Doc. 15, at ¶ 11. The Liquidators concede that Allen Stanford and confidants such as James Davis "exerted overall control" of the Bank. *Id*. at ¶ 9. That was certainly true as to the Bank's principal activities of selling CDs and investing (or otherwise spending) the sales proceeds. Those activities were directed and managed completely from the U.S. with no significant decision making by SIB employees in Antigua.

The CDs were sold using misinformation regarding SIB's financial strength and the value and makeup of its investments. This misinformation was disseminated, both directly and indirectly, by Stanford, Davis, and Laura Holt in and from the U.S. to brokers located in the U.S. and elsewhere. Janvey Decl., at ¶ 6(d). The CD sales proceeds (those not used to fund interest and redemption payments for pre-existing CDs, Stanford's lavish lifestyle and large salaries and bonuses for key Stanford confidants) were invested around the world at the direction

of Stanford, Davis and Holt. *Id*. at ¶ 6(g), (r). The CD sales proceeds were invested or otherwise spent outside Antigua. Only a very small percentage of assets are located in Antigua. *Id*. at ¶ 6(t). SIB's presence in Antigua had two principal functions: to take advantage of Antigua's lax regulatory enforcement and to give the CD sales a false appearance of legitimacy.

B. Use of the Bank as an Antiguan entity was simply part of the fraudulent scheme.

The Liquidators agree that SIB was part of a Ponzi scheme directed by Stanford and others from the U.S., yet they argue that what should control is the fact that the appearance of SIB's corporate separateness was maintained. Hamilton-Smith Supp. Decl., Doc. 15, at ¶ 4. The Liquidators in essence urge the Court to ignore substance and exalt form. However, the COMI analysis is intended to do the opposite – to cut through form to get to substance. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*., 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007) (COMI analysis seeks to determine the "real seat" of administration of interests on a regular basis). Moreover, no matter which jurisdiction's law is applied, the corporate form is to be disregarded when, as here, it was used to perpetrate a fraud. *See SSP Partners v. Gladstrong Invs. (USA) Corp*., 275 S.W.3d 444, 454 (Tex. 2008) ("We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when . . . the fiction is used as a means of perpetrating fraud"); *Kensington Int'l Ltd. v. Congo* [2006] 2 B.C.L.C. 296, 341-50 (Cooke, J.) (The Court should pierce the corporate veil where a group has been structured in a dishonest manner and used for a scheme of concealment.). Antigua purports to follow the common law of the United Kingdom.

Moreover, the COMI for SIB cannot be analyzed in isolation from the broader context of how the scheme operated. The fraud required the use and manipulation of a large number of entities. Stanford broker-dealer entities around the world (e.g., Stanford Group

Company here in the U.S.) sold the CDs, SIB issued them, and Stanford Financial Group Company and other Stanford entities funneled the proceeds into a wide variety of uses (and misuses). These activities were all directed, coordinated and controlled from the U.S. The Liquidators concede that Stanford owned, directly or indirectly, not only SIB but 130+ other entities, all of which were involved in the fraud, if not as direct instruments of wrongdoing, then as recipients and conduits of the funds or as entities that were used to provide a façade to imitate a legitimate financial services group. *See* Hamilton-Smith Supp. Decl., Doc. 15, at ¶ 9. This was one integrated $7.2 billion fraud on tens of thousands of people. Operations that were absolutely necessary to the Bank's existence and to the successful execution of Stanford's scheme – CD sales and the management of Bank assets – were directed by Stanford, Davis and Holt from the U.S. through many different Stanford Entities, most of them located in the U.S. To peel off just one of the instruments of fraud and have it liquidated in Antigua while the rest of the entities, just as essential to the scheme, are liquidated in the U.S. would be arbitrary and highly inefficient.

C. <u>The presumption that COMI is in the country of the registered office of SIB has been rebutted.</u>

The Liquidators rely on the presumption contained in section 1516(c)[2] that "*in the absence of evidence to the contrary*, the debtor's registered office . . . is presumed to be the center of the debtor's main interests." However, the introductory phrase highlighted in italics, as well as the uniform holdings of courts that have construed the presumption, make it clear that where there is contrary evidence (as there is here), the presumption carries no weight and the foreign representative seeking recognition has the burden of proving that the debtor's COMI was in the jurisdiction that appointed him or her. *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 635

[2] Unless otherwise indicated, all statutory citations are to the United States Bankruptcy Code, Title 11 of the United States Code.

(Bankr. E.D. Cal. 2006) (if there is evidence that COMI might not be in country of registered office, then the foreign representative has burden to prove that it is); *In re SPhinX, Ltd*., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007) (presumption that country of registered office is COMI was included in Chapter 15 for "speed and convenience of proof where there is no serious controversy"); *In re Betcorp Ltd.*, 400 B.R. at 285-86 (foreign representative had burden to persuade court by a preponderance of the evidence that COMI was in country of registered office in light of evidence to the contrary); *In re Bear Stearns*, 374 B.R. at 128 (Chapter 15 changed the Model Law standard from "proof" to "evidence" to "make it clearer . . . that the ultimate burden is on the foreign representative); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48-49 (Bankr. S.D.N.Y. 2008) (fact that debtor was "exempt" company, permitted only to "trade" with Cayman citizens in furtherance of business outside the Caymans, defeated presumption).

D. <u>COMI is not where third parties may have been tricked into thinking it was.</u>

The Liquidators are reduced to relying on Stanford's Antiguan restaurants, cricket grounds, and sponsorship of Antiguan Sail Week to support the conclusion that the Bank and Stanford were "integral components" of Antiguan economic life. These endeavors had nothing to do with "the administration of [the Bank's] interests on a regular basis." *In re Bear Stearns*, 374 B.R. at 129. Bank CDs were not sold, and investments were not directed, through the restaurants or newspaper in Antigua. These were frolics that Stanford financed with CD proceeds so as to establish a façade of prosperity and legitimacy in furtherance of his fraudulent scheme and to influence the Antiguan government. Moreover, none of the entities holding these assets was a subsidiary of SIB. Indeed, these entities themselves were separately directed, manipulated and controlled by Stanford as part of the fraudulent scheme.

The Liquidators contend that having SIB liquidated in Antigua would fulfill client expectations. That is far from the case. Client expectations – based on misrepresentations fed them, directly or indirectly, from the United States – were that SIB was a legitimate bank, with more than adequate assets to back its CD obligations, that was subject to effective arm's-length regulation by the Antiguan Financial Services Regulatory Commission. None of this was true. It was all made up to induce clients to part with their funds.

The Liquidators also contend that choice of law and submission to jurisdiction provisions contained in the CD subscription agreement that CD purchasers supposedly signed should control. First, the issue before the Court is where, for liquidation purposes, SIB had its center of main interests, not whether its boilerplate adhesion contracts specified application of Antiguan law and Antigua as a venue for lawsuits. The Receiver has been unable to find any Chapter 15 case in which the COMI determination turned on that point, especially where the basis of the claimants' claim is tort rather than contract. The claimants were defrauded. The fraud was committed either in the United States, where the misrepresentations were issued, or wherever the particular client's broker passed those misrepresentations on to the client, inducing him or her to part with funds. Because the United States was the nerve center of the fraud scheme, the courts of this country have a strong interest in overseeing efforts to recover assets and distribute them to victims. This interest far outweighs Antigua's interest in enforcing boilerplate provisions in contracts that in any event were fraudulently induced.

Moreover, if submission to jurisdiction is relevant, it is not the CD purchasers' submission that matters; rather, it is SIB's submission since it is the party that is the subject of the proceeding. To qualify its CDs for sale in the U.S., SIB filed forms with the securities regulatory agencies of all 50 states in which it consented to personal jurisdiction in every district

court in the United States. *See* RSJ-19. SIB also held itself out to creditors, borrowers, and the Internal Revenue Service as having locations in the United States. *See* Janvey Decl. ¶ 18; RSJ-18.

E. Recognition of the Antiguan liquidation would be contrary to public policy.

One of the express purposes of Chapter 15 is fostering greater international cooperation in cross-border insolvency cases. At the same time, however, Congress has provided that courts may refuse to take any action, including the recognition of a foreign proceeding, if to do so would be contrary to U.S. public policy. In this case, recognition of the Antiguan proceedings would be manifestly contrary to U.S. public policy for two reasons. First, decades of case law demonstrate that an equity receivership is the most efficient, effective method of managing an estate when the SEC has demonstrated a likelihood that defendants have engaged in securities fraud. Even though the Bankruptcy Code and the principles of equity receivership clearly are the recognized methods in the U.S. for addressing insolvencies, the particular mechanics of the Bankruptcy Code generally, including Chapter 15, are suited to the failure or troubles of legitimate businesses; not the collapse of fraudulent schemes. If the Liquidators' petition is granted, from this point forward every SEC equity receivership used to stop a fraud scheme run from an off-shore tax haven will be vulnerable to dissolution before assets have even been located.

Second, not only did Antigua, a large debtor of SIB, facilitate the export of fraud while protecting its own citizens from victimization, the Antiguan court that appointed the Liquidators refused to recognize this Court's Receivership Order. Janvey Decl. at ¶ 8; RSJ-5. The Antiguan court stated in its judgment (which the Liquidators failed to include in their evidence) that this Court's orders are "unenforceable" and have no force of law in Antigua because Antigua "has no reciprocal enforcement of Judgments or orders treaty with the U.S.A.";

therefore, Mr. Janvey had "no legal entitlement to standing in Antigua." *See* RSJ-5 at ¶¶ 41-44. This refusal to accord any recognition, let alone reciprocity, provides an ample basis for this Court to refuse recognition of the Antiguan order. As Judge Scirica of the Third Circuit recently wrote, "[e]ven in the context of a foreign court's judgment, we condition application of international comity on reciprocity." *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3rd Cir. 2006).

For these reasons, this Court should refuse to recognize the Antiguan liquidation as a "foreign main proceeding" pursuant to Chapter 15.

II. INTRODUCTION TO CHAPTER 15

Chapter 15 of the Bankruptcy Code was enacted in 2005 to implement the Model Law on Cross-Border Insolvency ("Model Law") formulated by the United Nations Commission on International Trade Law in a process in which the United States was an active participant. *In re Basis Yield*, 381 B.R. at 43. The express objectives of Chapter 15 are (1) cooperation between U.S. courts, trustees, examiners, debtors, and debtors in possession and the courts and other competent authorities of foreign countries; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities; (4) protection and maximization of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses. 11 U.S.C. § 1501 (a)(1) – (5).

Chapter 15 is fundamentally procedural and does not constitute a change in the basic approach of United States law, which has long been one of honoring principles of comity. *In re Basis Yield*, 381 B.R. at 43. A "foreign representative" is a person who has been appointed in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets. 11 U.S.C. § 101(24). To seek judicial assistance from a U.S. court a foreign representative

commences a case under Chapter 15 by filing a petition for recognition. 11 U.S.C. §§ 1504, 1515, 1509(a). The court may deny recognition because (1) the foreign proceeding is in a country that is not the debtor's COMI; (2) the foreign proceeding is in a country where the debtor does not have an "establishment"; or (3) because recognition would be contrary to U.S. public policy. *See In re Bear Stearns*, 374 B.R. at 132 (denying recognition as foreign main or nonmain proceeding), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008); *In re Basis Yield*, 381 B.R. at 55 (denying summary judgment seeking recognition as foreign main proceeding); *In re Ran*, 390 B.R. 257, 301-02 (Bankr. S.D. Tex. 2008) (denying recognition as foreign main proceeding); 11 U.S.C. § 1506 (public policy exception). If the court denies recognition, it may issue any order necessary to prevent the foreign representative from obtaining the cooperation of U.S. courts. 11 U.S.C. § 1509(d).

An order of recognition is predicated on a finding that the foreign proceeding is either "main" or "nonmain." *In re Bear Stearns*, 374 B.R. at 126 (recognition alone without specifying "main" or "nonmain" is insufficient to grant relief); 11 U.S.C. § 1502(7) (recognition defined as recognition of a foreign main proceeding or foreign nonmain proceeding). If the court grants *any* recognition, the foreign representative has capacity to sue and be sued in U.S. courts and may apply directly to U.S. courts for appropriate relief, and U.S. courts shall grant comity or cooperation to the foreign representative. 11 U.S.C. § 1509(b). Recognition as a foreign *main* proceeding may entitle the foreign representative to additional relief, including an automatic stay under section 362, restrictions on the ability to transfer assets under sections 363, 549 and 552, and the rights and powers of a trustee under sections 363 and 552. 11 U.S.C. § 1520. The relief sought by the Liquidators is recognition of the Antiguan liquidation of SIB as a foreign main proceeding with all attendant privileges identified in section 1520. Petition for Recognition of

Foreign Main Proceeding Pursuant to Chapter 15 of the Bankruptcy Code, Doc. 4 at 1. They do not alternatively seek recognition of a foreign nonmain proceeding.

Antigua has not enacted the Model Law or its equivalent. The Liquidators seek recognition of the Antiguan order appointing them, in which the court held that the Receiver's authority derives from an "unenforceable" U.S. Court order, and that he lacks standing as an "interested person" under Antigua's International Business Corporations Act. RSJ-5, Judgment of April 17, 2009 at ¶¶ 41-44. The Antiguan court has refused to extend comity to this Court's orders and has held that the Receiver lacks standing to intervene in the Antiguan proceeding because the U.S. receivership order has no effect there.

Outside the U.S., significant Bank assets are also located in Canada, Switzerland, and England, each of which applies standards similar to those contained in the Model Law. In the courts of each country, the Liquidators have petitioned for recognition as foreign representatives with the right to take possession of the assets located in those countries to the exclusion of the Receiver.

Because Antigua is not the center of main interests for the Bank, and because recognition of the Antiguan liquidation proceeding would be contrary to U.S. public policy, this Court should deny the Liquidators' request for recognition.

III. ARGUMENT & AUTHORITIES

A. The Antiguan liquidation is not a foreign main proceeding.

1. *Many factors are considered in the determination of the center of main interest.*

By definition, a foreign main proceeding is a "foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). In the absence of evidence to the contrary, the debtor's registered office is presumed to be the center of the debtor's main interests. 11 U.S.C. § 1516(c). However if, as in this case, there is evidence to

the contrary, then the foreign representative must prove by a preponderance of the evidence that the center of main interests is in the same country as the registered office. *In re Tri-Cont'l*, 349 B.R. at 635; *see In re Betcorp*, 400 B.R. at 285-86. The location of the registered office does not have special evidentiary value and does not shift the burden of proof away from the foreign representative seeking recognition of a main proceeding. *In re Tri-Cont'l*, 349 B.R. at 635.

The burden of proof for COMI is never on the party opposing "main" status; such an opponent has only a burden of going forward to adduce some evidence inconsistent with finding the country of the registered office is the COMI. *Id*. (citing Fed. R. Evid. 301). Even if no other party opposes the foreign representative's petition for recognition, the court must make an independent determination as to whether the foreign proceeding meets the requirements of Chapter 15. *In re Bear Stearns*, 374 B.R. at 125-26 (denying recognition although no party opposed foreign representative's petition for recognition as main or nonmain).

Neither Chapter 15, nor the Model Law on which it is based, defines COMI. Several courts have observed that COMI is analogous to the concept of a "principal place of business" in U.S. law. *In re Bear Stearns*, 374 B.R. at 129. However, courts do not apply any rigid formula or consistently find any one factor dispositive of COMI. *In re Betcorp*, 400 B.R. at 266, 290.[3]

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[3] The *Bears Stearns* court considered the following factors relevant to a determination of where the debtor's COMI lies:

(1) The location of the debtor's headquarters;

(2) The location of those who actually manage the debtor (which could be the headquarters of a holding company);

(3) The location of the debtor's primary assets;

(4) The location of the majority of the debtor's creditors or a majority of the creditors who would be affected by the case; and

(5) The jurisdiction whose law would apply to most disputes. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*., 374 B.R. 122, 128 (Bankr. S.D.N.Y. 2007).

(6) Where principal interests, assets and management are located. *Id*. at 130.

The *Basis Yield* court denied recognition on summary judgment and requested that the liquidators present evidence on the following factors at an evidentiary hearing:

(7) In what jurisdiction the debtor is organized and/or registered, and as what kind of business entity (e.g., corporation, limited liability company, general or limited partnership, business trust, etc.);

(8) To what extent the debtor is registered or qualified to do business in any jurisdictions other than the jurisdiction in which it was organized (e.g., as a foreign corporation);

(9) Where the debtor maintains offices, and what functions are performed at each such office;

(10) The number, locations, and functions of any personnel employed by debtor;

(11) The number, locations, and functions of any personnel who are not employed by debtor but who nevertheless perform services on its behalf;

(12) The extent to which other business entities (such as an investment advisor) exercise managerial control over debtor's operations, and if so, where any such entities are headquartered and conduct their business;

(13) The place or places at which investment or portfolio management for debtor is conducted, and the number, locations and functions of persons who are responsible for debtor's investment or portfolio management;

(14) The place or places at which any of debtor's administrative or back-office operations are conducted, and the number, locations and functions of persons who are responsible for any such operations;

(15) The place or places at which assets of the debtor estate are located, and the approximate value of the assets at each locale;

(16) The extent, if any, to which real property is leased or owned by debtor, and, if so, its location;

(17) The extent, if any, to which assets were transferred to or from the country where the registered office is located before or after the initiation of the liquidation proceedings in that country, and, if applicable, the circumstances surrounding any such transfers;

(18) The identity and location of the members of the debtor's governing body before the appointment of the foreign representatives, and the place or places at which the debtor's governing body met personally within the last several years – or, to the extent meetings were in whole or in part conducted telephonically, the place or places from which the members of the governing body called in;

(19) The number and location of debtor's creditors;

(20) The number and location of equity investors in debtor (or, if more applicable, in the debtor's feeder funds) and the relative percentages of the applicable equity that investors in each locale hold;

(21) The extent to which debtor had or now has contractual agreements with entities that (i) are organized under the laws of the country where debtor's registered office is located; (ii) have offices in that country; or (iii) employ residents in that country;

(22) The locale or locales at which debtor maintains its financial records and, if applicable, equity investor registries, and, if different, where they were maintained before the commencement of the foreign proceeding;

(23) The extent, if any, to which debtor is required to keep books or records in the country of its registered office; the extent to which debtor does so; and the extent to which books or records not required to be kept in that country are nevertheless maintained there;

(24) The locale or locales of obligors with respect to any of debtor's receivables;

(25) The extent to which debtor is a party to any contractual agreements that set forth the law to be applied in the event of any disputes thereunder;

A trio of recent cases involving offshore debtors illustrates the fact specific approach employed by U.S. courts. The first of these three cases, *SPhinX Ltd.*, demonstrates that the COMI analysis should include consideration of the location of non-employees who render services to the debtor. A Cayman Islands court appointed joint liquidators over the voluntary winding up of the SPhinX Funds. In addition to the registered office, the Funds' corporate books and records were located in the Caymans. *In re SPhinX, Ltd.*, 351 B.R. at 107, *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007). Investor subscriptions were sent to the Caymans for review in order to comply with Cayman anti-money laundering requirements. *Id*. at 108. That review was undertaken by employees of Derivatives Portfolio Management, Ltd. ("DPM"), a company that provided administrative services to the Funds. *Id*. at 108. However, the Funds were incorporated and registered in the Caymans as "exempted" companies, and so were prohibited from engaging in business in the Caymans except in furtherance of their business conducted outside of the Caymans. *Id. at* 107, n.2.

The Cayman liquidators petitioned for recognition of the proceedings as foreign main proceedings. Only one party, which was trying to enforce an earlier settlement agreement with the Funds in a U.S. court, objected to recognition. *Id*. at 108-09. The district court denied recognition of a "main" proceeding, but considered it problematic that there were no other receivership, bankruptcy, or liquidation proceedings pending anywhere else in the world. Because "*someone* needs to manage the Debtor's winding up," the court recognized the Caymans' proceedings as nonmain. *Id*. at 120.

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(26) The nature and extent of nontransitory economic activity carried out by debtor in the country of its registered office; and

(27) The extent, if any, to which debtor is subject to the prohibitions against doing business with citizens of the country in which its registered office is located. *In re Basis Yield Alpha Fund (Master),* 381 B.R. 37, 56-57 (Bankr. S.D.N.Y. 2008).

Ultimately, the court denied recognition of the Cayman proceedings as "main" because such recognition was sought for the improper purpose of staying the pending appeal of the previous settlement agreement. *Id*. at 121. However, the court also recited the following "important objective factors" indicating that the SPhinX Funds' COMI was located outside the Caymans:

- The Funds' hedge fund business was conducted by PlusFunds, a Delaware corporation located in New York City;
- Most of the Funds' back-office operations were conducted out of the Somerset, New Jersey office of DPM;
- The only business done in the Caymans was limited to those steps necessary to maintain the Funds in good standing as registered Cayman Islands' companies;
- There were no employees or managers in the Caymans;
- The Funds' boards, which contained no Caymans residents, never met in the Caymans;
- With the exception of corporate minute books and similar records, no assets were located in the Caymans;
- Most, if not all, of the creditors and investors were located outside the Caymans; absent their consent, the Caymans' court would have to rely on orders from other courts to bind them.

Id. at 119-20. The Funds had no employees in the U.S. and there were no allegations of fraud or an alter ego relationship between the Funds and PlusFunds or DPM, which were separate legal entities. The fact that the people actually managing the business were not the Funds' employees was irrelevant. Where these people were located when they provided services to the Funds was very relevant. The court's COMI analysis disregarded corporate formalities (even though there was no nefarious conduct or motive in the companies' arrangements) to look for the place where the Funds actually conducted the administration of their interests on a regular basis. *In re SPhinX Ltd*., 351 B.R. at 118. This is the purpose of the COMI inquiry. Notably, this case did

not involve an SEC investigation or receivership. If it had, the court might have denied even nonmain recognition because there would have been "*someone* [else] to manage the Debtor's winding up." *See In re SPhinX, Ltd.*, 351 B.R. at 120.

One year later, Judge Lifland, an author of the Model Law and Chapter 15, issued the *Bears Stearns* opinion denying recognition of Cayman liquidators in part because the debtor was statutorily barred from conducting business within the offshore jurisdiction in which it had its registered office. *In re Bear Stearns*, 374 B.R. at 127 n.3. Cayman liquidators of two Cayman Islands exempted limited liability companies with registered offices in the Caymans sought recognition of voluntary winding up proceedings as foreign main proceedings, or in the alternative, as foreign nonmain proceedings. *Id*. at 124. Deloitte & Touche (Cayman Islands), had signed off on the Funds' most recent audited financial statements. Two directors resided in the Caymans and two of the three investors in the Funds were Cayman companies. *Id*. at 129-30. Despite the absence of any objectors, recognition was denied. *Id*. at 129. COMI was held to be in the United States, in part, because the Funds' investment manager was a New York corporation and back-office operations were conducted in the U.S. by a Massachusetts corporation. *Id*. at 129-30. The court further denied recognition of nonmain proceedings, in part because the Funds were prohibited by Cayman law from engaging in business within the Cayman islands (just as Antiguan law prohibited SIB and its sister company, Stanford Trust Company, from engaging in business with Antiguans):

> If recognition is to be accorded to the Foreign Proceeding as nonmain, the eligibility requirements of section 1502(5) must be met. Specifically, there must be an "establishment" in the Cayman Islands for the conduct of *nontransitory* economic activity, i.e., a local place of business. *See* 11 U.S.C. § 1502(5) (emphasis added). Here the bar is rather high, especially in view of the Cayman Islands' statutory prohibition against "exempted companies" engaging in business in the Cayman Islands except in

> furtherance of their business otherwise carried on *outside* of the Cayman Islands. *See* Companies Law (2004 Revision) of the Cayman Islands § 193. As has been shown above, there is no (pertinent) nontransitory economic activity conducted locally in the Cayman Islands by the Funds; only those activities necessary to their offshore "business." *See id.*

Id. at 131. In addition, the fact that the Funds were managed from within the U.S., even though by separate legal entities and their employees, was highly relevant to the COMI analysis. As in the *SPhinX* case, there were no allegations of fraud against the Funds or their principals and there was no SEC investigation or receivership.

In 2008, the *Basis Yield* court denied an *unopposed* motion for summary judgment by Cayman liquidators seeking recognition of the Cayman liquidation proceeding as "main." This case stands for the proposition that the mere fact the debtor cannot conduct business within the country of its registered office defeats the presumption that such country is the debtor's COMI. *In re Basis Yield*, 381 B.R. at 37. Basis Yield was incorporated in the Cayman Islands and maintained its registered office there. *Id*. at 41. Its only two investors were feeder funds domiciled in the Caymans. *Id*. A Cayman company served as administrator to Basis Yield and both of its feeder funds. Basis Yield's investment manager, attorneys and auditors were all Cayman entities. *Id*. The financial books and records, including the investment register, were located in the Caymans. *Id*. at 41-42.

The liquidators moved for summary judgment based only on the section 1516(c) presumption that the debtor's COMI is in the country of its registration, coupled with the absence of any objections or facts in the record to the contrary. *Id*. at 48. The court denied summary judgment because there was "evidence to the contrary" that raised "red flags." That evidence was the fact that Basis Yield, an "exempted company" organized under the Cayman Companies Law, was prohibited from "trad[ing] in the Islands with any person, firm or corporation except in

furtherance of its business carried on outside the Islands." *Id*. at 48-49. The purely offshore nature of Basis Yield's business was, according to the court, enough to raise a genuine issue of material fact regarding Basis Yield's COMI.

The court requested that the Basis Yield liquidators present evidence at a hearing that would be sufficient for the court to make factual findings on matters such as the location of personnel who were not employed by Basis Yield, but who nevertheless performed services on its behalf; the location of other entities exercising managerial control over Basis Yield's operations; the location at which investment management was conducted; the location from which administrative operations were conducted; the location of creditors; and the extent to which Basis Yield was subject to statutory prohibitions on conducting business within the Caymans. *Id*. at 56-57. Rather than comply with the court order, the liquidators moved to dismiss their petition for recognition.

Like *SPhinX Funds* and *Bear Stearns*, *Basis Yield* was not a case of receivership or securities fraud. A legitimate company simply failed. The Cayman corporations that provided administrative and investment services to Basis Yield were unrelated; there is no mention of common ownership with Basis Yield, much less allegations of alter ego. But the actual location of the unrelated companies' offices and employees who provided services to Basis Yield was very relevant to determining the debtor's COMI. Because the record did not reflect where those personnel were located, the court denied the motion for summary judgment seeking recognition. Where, as here, the debtor and the entities rendering services to the debtor are all part of one fraudulent scheme, the case for considering the location of the persons rendering such services is that much more compelling.

2. *The Bank's center of main interest is not Antigua.*

The Liquidators endorse a view of COMI that elevates form over substance. Under their reasoning the COMI for the Funds in the *SPhinX*, *Bear Stearns* and *Basis Yield* cases would clearly have been the Caymans because those Funds had no employees in the U.S. and they conducted some operations and kept some assets or records in the Caymans. To the contrary, the clear import of those cases is that the debtor cannot artificially manipulate where COMI resides by registering in one jurisdiction, performing in that jurisdiction the minimum functions required by law to be conducted there, and then contracting away the key components of its business operations to separate companies in another jurisdiction. What matters is the location where the primary business determinations are made and the actions are taken that create liabilities and assets. What does not matter is the nature of the employment relationship between the people performing those functions and the debtor. Moreover, the cases also point out that there is an inherent contradiction in arguing that a debtor's center of main interest, where it "conducts the administration of [its] interests on a regular basis" is a country within which the debtor is statutorily barred from conducting local business.

As already noted above, the section 1516(c) presumption only arises "*in the absence of evidence to the contrary*." Here, there is an abundance of evidence to the contrary, even within the evidence presented by the Liquidators. Without even considering the SEC's allegations, evidence that the Stanford entities were operated in concert to perpetrate a fraud, or the Liquidators' conclusion that the Bank was part of a Ponzi scheme, this Court can readily find that Antigua is not the Bank's COMI based on an objective analysis of the evidence regarding the true seat of power. *See In re Bear Stearns*, 374 B.R. at 128.

(a) The Bank was managed by Stanford, Holt, and Davis from within the U.S.

The Bank is owned 100% by Stanford Bank Holdings Limited, which is owned 100% by Robert Allen Stanford. The principal source of funding for the Bank, as well as all the Stanford entities, was the sale of the Bank's CDs. Sales were by (and to) non-Antiguans, with more CD sales (by dollar amount) purchased by citizens of the U.S. than by citizens of any other country. Janvey Decl., at ¶¶ 6(n), (l); Van Tassel Decl., at ¶ 14. The Bank was managed from the U.S. by Stanford, Davis, and Holt. Stanford is a native Texan and U.S. citizen with a U.S. residence. He spent little time in Antigua, spending most of his time in Houston, Miami, and Christiansted, St. Croix (part of the U.S. Virgin Islands).[4] Van Tassel Decl. at ¶ 8; Janvey Decl.

[4] At one point, the Liquidators assert that the location from where Stanford directed the Bank's activities "should not be a key factor in determining the COMI." Liquidators' Memorandum of Law, Doc. 2-3, at 18 n.5. This is contrary to the very cases the Liquidators cite. *See e.g., id*. at 13, (*citing Bear Stearns*, 374 B.R. at 128 for proposition that court should consider the location of those who actually manage the debtor).

Alternatively, the Liquidators assert that "Antigua, at least as much as any other place, served as [Stanford's] base of operations" and conclude that it is "difficult to attribute his actions to a particular jurisdiction." Supplemental Declaration of Nigel Hamilton-Smith, Doc. 15, at ¶ 10. Stanford's Antiguan citizenship and residence were, at most, a matter of convenience. The International Business Corporations Act required the Bank to have at least one director who was a citizen and resident of Antigua. IBCA § 61, RSJ-20. Stanford was able to fill that role himself; there were no other Antiguans on the Bank's Board.

Moreover, under the case law, Stanford's domicile has always been the United States. An individual's domicile persists until a new one is acquired or the old one is abandoned. *In re Ran*, 390 B.R. 257, 281 (Bankr. S.D. Tex. 2008), *aff'd*, 2009 WL 890387 (S.D. Tex. 2009). A new domicile is acquired when physical presence is accompanied by the intention to remain in a place indefinitely. *Id*. at 281. Courts look to all evidence of intention, including the places where the individual exercises civil and political rights, pays taxes, owns real and personal property, has driver's and other licenses, maintains bank accounts, belongs to clubs and churches, has places of business or employment, and maintains a home for his family. *Id*. at 282 (debtor's intention to abandon domicile in Israel for new domicile in U.S. evidenced by facts, among others, that he had not returned to Israel since emigrating ten years earlier and his wife and children were all U.S. citizens).

The facts do not evidence Stanford's intent to abandon his domicile in the U.S. or to acquire a new one in Antigua. During the entire period of his dual citizenship, Stanford continuously maintained a home (owned by a Stanford entity) in Houston for his wife. Janvey Decl. at ¶ 7(b). Their adult daughter also lives in Houston, in a condominium owned by another Stanford entity. Stanford's wife and children are all U.S. citizens, and his minor children attend school in the U.S. Stanford personally, and through his various U.S. companies, has extensive business operations, real and personal property in the U.S. When the SEC filed this lawsuit, Stanford left Antigua and has not returned since; he is residing in Texas. Stanford's conduct in Antigua was carefully orchestrated to promote his illicit business endeavors. He

at ¶ 7(a). Davis and Holt are also U.S. citizens, with U.S. residences, and performed their roles principally from within the U.S. Thus, the key witnesses and actors are subject to this Court's jurisdiction for various purposes, including the location and retrieval of assets. All three – Stanford, Davis, and Holt – have made appearances in U.S. courts.

In particular, financial advisors, most of whom were employed by other Stanford-controlled entities, persuaded their clients to purchase CDs using misinformation given to them in training materials, training sessions, and corporate "pep talks." Van Tassel Decl. at ¶ 54. This misinformation came from Stanford, Davis, and Holt, directly or through persons acting at their direction or on their behalf, principally within the U.S. It included misrepresentations regarding the value of SIB's investments and history of consistently high earnings, Stanford's purported infusion of capital into SIB to strengthen it, the security of customers' deposits with SIB, and other similar matters. The centrality of the U.S. is evident from the transcript of a video of Stanford addressing Stanford financial advisers in Miami in October 2008. KVT-16.

The central involvement of Stanford, Davis, and Holt in the U.S. was widely-known to the community of investors. Financial advisers (who sold the Bank's CDs in several countries) came to the U.S., not Antigua, for information about the Bank's purported investments. Stanford provided (inaccurate) information to financial advisers about SIB's performance from within the U.S. Janvey Decl. at ¶ 6(d); Van Tassel Decl. at ¶ 57.

(b) *Head office and management functions were located in the U.S.*

All of the Bank's head office and management functions were located within the U.S. The Liquidators accept that "certain" decisions at a strategic level were made by Stanford

spent and lent a lot of money in a country where the GDP per capita in 1998 was US$8,559. RSJ-6; *see also* Janvey Decl. at ¶ 9(a). He created an illusion of opulence and magnanimity in Antigua. He was knighted by the Antiguan government, and built an Antiguan fiefdom, complete with $4 million wine cellar, Antiguan Cricket Hall of Fame, and dock for his yacht. He curried favor with the government and it paid off, at least until February of this year. *See supra*, pages 36 - 41.

and Davis (for example as to the nature of the products to be offered by SIB). *See* Hamilton-Smith Supp. Decl., Doc. 15, at ¶ 10. In fact, all strategic decisions were made by Stanford and Davis, and perhaps Stanford's personal accountant Harry Failing, and were implemented in the U.S., not Antigua.

The Bank had only a few employees in Antigua. Van Tassel Decl. at ¶¶ 30, 32(a). Contrary to the Liquidators' position, in addition to Stanford, Holt and Davis, the Bank was run mostly by employees of other Stanford entities from within the U.S.:

- All crucial decisions concerning SIB's marketing, investments, and operations were made in the U.S. Van Tassel Decl. at ¶¶ 12, 25.

- The great majority of SIB's reported expenses were attributed to management agreements with other Stanford entities, which provided services from within the U.S. (or U.S. territories) and without which the Bank could not have effectively operated – legal, accounting, tax, investment, management, human resources, information technology, compliance, public relations and sales services were provided from within the U.S. Van Tassel Decl. at ¶ 31.

- SIB had 88 employees in Antigua (including its titular president, who was paid from Stanford's U.S. based operations). Janvey Decl. at ¶ 6(f), (q); Van Tassel Decl. at ¶¶ 30, 38.

- Of the 88 employees in Antigua, only three were in the accounting staff, three were in quality control, seventeen dealt with coordination with financial advisors (who were themselves supervised from within the U.S.), twenty two accomplished the mechanics of transactions and seven (including five "junior associates") were involved in the mechanics of opening accounts. Janvey Decl. at ¶ 6(f); RSJ-2.

- Contrary to the Liquidators' contention that the Bank's Antiguan employees "managed" Tier 1 cash until it was transferred to Tiers 2 and 3, this management all occurred within the U.S. with little or no involvement of the Antiguan employees.

(c) *The directors, and senior management of SIB, had little or no presence in Antigua.*

The Liquidators assert that the Bank's president worked full time in Antigua, hosted an annual visit by the investment committee, and dealt with important investors. In fact,

Mr. Rodriguez-Tolentino was more of a commuting social director than a functioning Bank president, Van Tassel Decl. at ¶ 40:

- He resided in either Puerto Rico or Florida, not Antigua.
- His role was to provide social entertainment to the investment committee (whose members came to the Bank from outside Antigua) and certain high rollers on the rare occasions when they came to Antigua. Janvey Decl. ¶ 6(s).
- His salary was paid from the U.S. (and other senior Antiguan Bank employees, Mr. Persaud and Mr. Rodriguez were paid by a Stanford entity in St. Croix) by other Stanford entities located in the U.S. or the U.S. Virgin Islands. Van Tassel Decl. at ¶ 38; Janvey Decl. at ¶ 6(q).
- He, like all Bank employees, was paid from a bank account located in Houston, Texas. Van Tassel Decl. at ¶ 38.

Jim Davis, CFO of the Bank, is a U.S. citizen and resident. All but two of the Bank's directors were U.S. citizens. Neither of the non-U.S. directors was an Antiguan. One was a resident of Montserrat and the other a resident of Barbados. Janvey Decl. at ¶ 6(k); Van Tassel Decl. at ¶ 10.

(d) *The Bank's principal place of business was the U.S.*

The Bank's principal business activities were selling CDs and "investing" the proceeds of those sales. Both activities were controlled from within the U.S., with no meaningful management input from Antigua.

The CDs were sold through financial advisors, most of whom were employed by Stanford-owned broker dealer entities located outside Antigua, in the U.S. and elsewhere:

- For the year ending December 21, 2007, between 42% and 48% by dollar amount of CD sales were made from within the U.S. Janvey Decl. at ¶ 6(m). Only a very small fraction of CDs were sold from within Antigua. Janvey Decl. at ¶ 6(n); Van Tassel Decl. at ¶¶ 14, 37.
- Misinformation regarding investment strategy, investment earnings, investment safety, and other matters that brokers used to sell the CDs came from the U.S. Janvey Decl. at ¶ 6(d); Van Tassel Decl. at ¶ 15.

- The Bank had no external marketing or sales personnel of its own. All marketing and sales were done by financial advisors employed primarily by other Stanford entities. These financial advisors, perhaps unwittingly, made the misrepresentations that induced investors to purchase CDs.

- CDs were sold to people from all over the world, although in terms of both dollar amount and number of investors, sales to citizens of the U.S. and Venezuela predominated. By dollar amount, more CDs were purchased by U.S. citizens than by citizens of any other country. Persons residing in the U.S. accounted for 37% of total CDs by dollar amount and 25% of all CD holders. Janvey Decl. at ¶ 6(l); Van Tassel Decl. at ¶ 46.

- Few CD sales were to Antiguans (and any such sales to Antiguans appear to have violated the statutory prohibition on such sales). Janvey Decl. at ¶ 6(n).

- The International Business Corporations Act of Antigua and Barbuda does not permit Antiguan international business corporations such as SIB to serve Antiguans. Janvey Decl. at ¶ 6(n); RSJ-4, at 4, ¶ (c). SIB's Training and Marketing Manual stated that SIB could not accept deposits from Antiguan residents. Van Tassel Decl. at ¶ 16.

- As the Antiguan Liquidators concede, the CD sales that appear to have been made to Antiguans were in fact made to Stanford Trust Company, Limited which was involved only in handling "international trusts" (i.e. not for Antiguans). See Hamilton-Smith Decl. at ¶ 28.

- There was minimal contact between investors and Bank employees in Antigua. Bank customers' primary contact was their financial advisor in their native country. SIB's "client services" department was of minimal relevance to customers.

- Sales proceeds largely bypassed Antigua and went directly to accounts in Canada, the U.S. and England, from where they were disbursed among many other Stanford entities and accounts. Customers were told to wire their money for the purchase of CDs to Toronto Dominion Bank in Canada or to HSBC Bank plc, rather than to any bank in Antigua. Janvey Decl. at ¶ 6(o); Van Tassel Decl. at ¶ 49.

- Although documentation was sent to the Bank for "acceptance," this so-called "approval" process was a pure formality required by Antiguan law. Janvey Decl. at ¶ 18.

The Bank was marketed as part of a global financial services group headquartered in the U.S. Janvey Decl. at ¶ 18. The Bank's marketing materials gave customers the

impression that they were investing in a global, U.S.-based enterprise of which the Bank was but a part.

- Marketing materials tie SIB directly to the Stanford family in Texas, and emphasize that connection. Janvey Decl. at ¶ 6(e).

- References to Antigua are limited. There is an express reference to Antigua in the last numbered paragraph of a multi-page set of terms and conditions (either paragraph 23 or 24 of the General Terms and Conditions of the CDs). However, these terms and conditions were separate from the Certificates of Deposit and the Account Application for SIB.

- Although an Antiguan address was provided in written materials, communications were routinely made through non-Antiguan offices. Janvey Decl. at ¶ 18.

The Bank held itself out to creditors, borrowers and other obligees, and even in Internal Revenue Service tax forms, as having locations in the U.S. Janvey Decl. at ¶ 18.

As for "private banking" services, the personal attention that is the hallmark of private banking was provided primarily by the financial advisors and other professionals outside Antigua. As an example, records show that there were about 28,000 Bank customers, but only eighteen client-facing staff in Antigua. Without the involvement of the U.S. employees who were actually running SIB, that would have meant that each of the Antiguan employees would have had, on average, more than 1,550 clients. And the Liquidators have identified only a few hundred "private banking" customers – a very small number of such customers for a bank that billed itself as providing broad services to an affluent and discriminating clientele. *See* Hamilton-Smith Supp. Decl., Doc. 15, at ¶ 21.

(e) *The majority of the Bank's books and records are in the U.S.*

Most of the Bank's substantive, detailed information was kept in the U.S. Van Tassel Decl. at ¶¶ 26, 26(b). Investment records were kept primarily (and with respect to Tier 3 exclusively) in the U.S. SIB's management in Antigua received only periodic summaries from

Davis's office in the U.S., but nothing detailed, and no underlying documents. Van Tassel Decl. at ¶¶ 29, 32(c). Antiguan-based auditors were not permitted to see the documents supporting the investment summaries provided by Davis's office, as is clear from internal Stanford audit reports. Van Tassel Decl. at ¶¶ 24, 41, 42.

SIB's financial statements were not prepared by Bank employees. They were prepared by employees of other Stanford companies located in the U.S. and U.S. Virgin Islands. Statements from financial institutions in which SIB had investments or accounts were often delivered both to SIB in Antigua and to decision makers in the U.S. Van Tassel, at ¶ 26(a), 31. Although some client files were maintained in Antigua, duplicates were kept in the U.S. and were available electronically in the U.S. Van Tassel Decl. at ¶ 26(d).

(f) *The vast majority of SIB assets are outside Antigua.*

The assets of SIB are located principally in jurisdictions other than Antigua, such as the U.S., Canada, the United Kingdom, Switzerland, Panama, Venezuela, and Mexico. Janvey Decl. at ¶ 6(u). Many Stanford properties in Antigua are not owned by the Bank. Even the Bank's Antiguan "headquarters" were leased from another Stanford entity. Van Tassel Decl. at ¶ 44.

Non-investment assets are located in Antigua, but they are negligible in value; apart from loans, they constituted only 0.26% of SIB's total assets as of December 31, 2008. The Bank's principal operating account was maintained at the Bank of Houston, in Houston, Texas. Van Tassel Decl. at ¶ 18.

- Although $10 million of Tier 1 assets were held in Antigua on the date this case was filed, that was a recent development. Only a small percentage of Stanford funds were kept on deposit in Antigua at all times in 2008 prior to the end of November 2008. Van Tassel Decl. at ¶ 18.

- Most funds from customers were received by wire. Less than a third of the checks (27% in the years from 2003 to 2009) were physically received

in Antigua, and even those were deposited into banks outside of Antigua, principally in the U.S. and Canada. Janvey Decl. at ¶ 6(o). As a matter of U.S. law, this receipt of monies is treated as having been made in the U.S.

- Payments made by SIB were drawn on banks in the U.S. Van Tassel Decl. at ¶ 38.

- The Receiver's investigation to date indicates that most significant dollar denominated redemptions were made using SIB accounts at Toronto Dominion Bank. Janvey Decl. at ¶ 6(o).

Equity position purchases with SIB investment funds principally concern companies located in the U.S. and other countries outside of Antigua. The making of loans was a very small part of SIB's business:

- Loans were restricted to advancements against a depositor's CD that was not yet due. The most a depositor could receive on a loan was 80% of his CD balance. Janvey Decl. at ¶ 6(w); Van Tassel Decl. at ¶ 53.

- At SIB's closing, such loans consisted of only approximately $97 million, with approximately $23 million of that amount owed by depositors from the U.S. Janvey Decl. at ¶ 6(w); Van Tassel Decl. at ¶ 53.

- The loans made available by SIB may have been managed and approved in Antigua, but significant advances appear to have required specific approval from Stanford and Davis. Moreover, the documentation functions performed in Antigua for such loans were perfunctory; they consisted of checking documents against a list.

- Approximately 25% of SIB loans were made to U.S. customers. Van Tassel Dec. at ¶53.

(g) *The majority of creditors are outside Antigua.*

Victims of Stanford's fraud were almost exclusively residents and citizens of countries other than Antigua. Victims who suffered the largest losses by dollar amount were from the U.S., 37% of total CDs by dollar amount and 25% of all CD holders; with Venezuela a close second. Janvey Decl. at ¶ 6(l); Van Tassel Decl. at ¶ 46.

(h) The Liquidators' evidence indicates that SIB's COMI was outside Antigua.

The *Bear Stearns* case may have provided the most succinct description of COMI yet: the location of the debtor's "principal interests, assets and management." *In re Bear Stearns*, 374 B.R. at 130. Nigel Hamilton-Smith's declarations in support of the Liquidators' petition are consistent with the evidence already described herein and indicate that SIB's principal interests, assets and management are located outside of Antigua. He states that (1) Stanford and a small group of confidants exerted **overall control** of the Bank, Doc. 15 at ¶ 9; (2) Stanford and Davis made **strategic decisions** for the Bank, *id*. at ¶ 10; (3) the **majority of the Bank's business** was introduced by financial advisors outside Antigua, *id*. at ¶ 11 – this was "inevitable" for an offshore bank, *id*. at ¶ 13; (4) **marketing and management services** were provided from within the U.S., *id*. at ¶ 14; (5) **valuations** of Tier 2 and Tier 3 investments were calculated within the U.S., *id*. at ¶ 15; (6) "**significant managerial functions**" and "**significant investment decisions**" relating to the Bank's investment portfolios were completed within the U.S., *id*. at ¶ 17; (7) Tier 1 investments were ultimately **transferred outside Antigua** to Tier 2 and Tier 3 (and thus to U.S. control) for investment, *id*.; (8) most **Board meetings** were not in Antigua, *id*. at ¶ 19; (9) the **largest financial institutional holdings** are located outside Antigua, doc. 3 at ¶ 27; and (10) more than **80% of Bank deposits** were made by non-Antiguans; the "Antiguan" deposits were actually made by another Stanford entity, *id*. at ¶ 28.

Because the Liquidators have failed to satisfy their burden to prove by a preponderance of the evidence that the Bank's "administrative and executive nerve center" was in Antigua, their petition for recognition must be denied. *See In re Betcorp Ltd.*, 400 B.R. at 272.

3. *Stanford operated all Stanford companies as one integrated network in order to execute a fraud; the COMI for the Stanford network is not Antigua.*

A basic proposition of corporate law provides another basis for considering the location of other Stanford entities, personnel, and assets in an analysis of the Bank's COMI. The SEC has alleged and evidence has been adduced that the network of 130+ Stanford entities was used for the purpose of perpetrating a massive fraud.

The Texas Supreme Court recently restated the long-standing rule that a court will disregard corporate separateness where the corporate form has been used for a fraudulent purpose:

> We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. Specifically, we disregard the corporate fiction:
>
> (1) when the fiction is used as a means of perpetrating fraud;
>
> (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation;
>
> (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
>
> (4) where the corporate fiction is employed to achieve or perpetrate monopoly;
>
> (5) where the corporate fiction is used to circumvent a statute; and
>
> (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.
>
> Each example involved an element of abuse of the corporate structure, including example (2), alter ego; in that situation, we specifically stated, "holding only the corporation liable would result in injustice."

SSP Partners, 275 S.W.3d at 454 (quoting *Castelberry v. Branscum*, 721 S.W.2d 270, 271-72 (Tex. 1986)); *see also id*. at 455 (quoting Article 2.21 of Texas Business Corporations Act). The same rule is observed in England, whose common law Antigua purports to follow.[5] In this case, the Court placed defendants, and all entities they owned or controlled, into receivership because they were used as a means of perpetrating a fraud. Evidence uncovered by the Receiver bears this out:

- Stanford, Davis, and Holt provided misinformation regarding the Bank's investment strategy, earnings, and safety to financial advisors, who then used it to induce customers to purchase CDs. Janvey Decl. at ¶ 6(d).
- Bank earnings were determined monthly by Davis, artificially pegged at whatever amount was needed to give the Bank an acceptable financial performance and capital ratios. Van Tassel Decl. at ¶ (b)(iv).
- There were a number of material related-party transactions that were not disclosed in the Bank's annual financial statements.
- Assets, such as real estate, would be acquired by one Stanford entity and after several transfers to other Stanford entities would be booked at several times their original value without any evidence of capital improvements or independent appraisal.

The Liquidators also say their investigative findings are consistent with the SEC's allegation that the Stanford entities, including the Bank, were operated as a Ponzi scheme. Because each of the Stanford entities was "organized and operated as a mere tool or business conduit" of each other Stanford entity, and of Stanford himself, this Court should disregard the separate corporate structure of the companies and consider them collectively in the COMI analysis. Because the "executive and administrative nerve center" for the entire Stanford house of cards was not Antigua, recognition should be denied.

[5] The Court should pierce the corporate veil where a group has been structured in a dishonest manner and used for a scheme of concealment (*Kensington Int'l Ltd. v. Congo* [2006] 2 B.C.L.C. 296, 341-50, ¶¶ 199 & 200 (Cooke, J.)).

4. *COMI is not where third parties may have been duped into thinking the debtor's principal place of business is located.*

The Liquidators also rely on a number of elements that propped up Stanford's fraud by giving the illusion of success. For example, the Liquidators describe SIB's rented 30,000 square foot Georgian-style headquarters sitting atop a hill outside Antigua airport. In close proximity, and built by Stanford, are the Bank of Antigua, Pavilion Restaurant, Stanford Cricket Ground, and the Sticky Wicket restaurant and bar. Stanford was also in the midst of developing a marina, shopping and entertainment complex. Stanford owned Antigua's largest newspaper and sponsored Antiguan Sail Week. The Receiver does not dispute that Stanford constructed a very impressive façade behind which he carried out his fraudulent scheme. All of the U.S brokerage offices – where the CDs were marketed and sold to U.S. and other investors – were likewise quite lavish.

However, the Liquidators do not even attempt to explain how restaurants, sport facilities, Sail Week or a $4 million wine cellar were integral to the conduct of the Bank's business of selling CDs or investing sales proceeds. The answer is that these amenities had nothing whatsoever to do with the Bank's business. Moreover, it is disingenuous for the Liquidators to argue that these other businesses are evidence of the Bank's COMI in Antigua, when they argue that other far larger Stanford entities located in the U.S. and directly involved in the CD sales and investments should not be considered for purposes of determining SIB's COMI in the U.S. They want the Court to count these businesses "in" for the purpose of finding the Bank's COMI in Antigua, but "out" for all other purposes so that they can drain the assets out of them for distribution to the Bank's claimants alone.

The Liquidators also recount several other facts that purportedly weigh in favor of an Antiguan COMI for the Bank: Stanford was granted an Antiguan citizenship (along with a

"knighthood") and claimed a residence in Antigua (although he never lived there)[6]; the Bank President attended Board meetings telephonically from within Antigua[7]; the registered office, along with certain Bank records, is in Antigua[8]; accounting records are in Antigua and the annual audit was conducted in Antigua by an Antiguan firm[9]; the Bank filed quarterly statements with the Antiguan Financial Services Regulatory Commission ("FSRC")[10]; a small amount the Bank's cash assets (Tier 1) were maintained in Antigua.[11] But these are simply the technical requirements of the Antiguan statute under which the Bank was organized. As the case law demonstrates, conducting perfunctory operations that are required by law to occur in Antigua is not probative of COMI. *In re SPhinX, Ltd*., 351 B.R. at 107; *In re Bear Stearns*, 374 B.R. at 131; *In re Basis Yield Alpha*, 381 B.R. at 48-49.

Congress cannot have intended that recognition of foreign proceedings be determined by the degree of success in using smoke and mirrors to deflect attention away from a debtor's true seat of power. The Bank's COMI is not in Antigua and the Liquidators' petition for recognition must be denied.

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6 *See* IBCA § 61 (required one director to be a citizen and resident of Antigua) at RSJ-20.

7 *See* IBCA § 79(1) (telephonic Board meetings considered in Antigua if at least one member in Antigua) at RSJ-20.

8 *See* IBCA § 128(1) (requiring registered agent to keep records and registers at registered office in Antigua), at RSJ-20.

9 *See* IBCA §§ 132(1); 132(2) (requiring accounting records at registered office); 147 (requiring auditor approved by Director of Antiguan FSRC), at RSJ-20. "Auditing activities and preparation of incorporation papers performed by a third party do not in plain language terms constitute "operations" or "economic activity" by the Funds. *In re Bear Stearns*, 389 B.R. at 339.

10 *See* IBCA § 259(1) (requiring annual Bank exam by FRSC), at RSJ-20.

11 *See* Statutory Instruments 1998, No. 42, 4(1) (requiring international banks to maintain minimum capital , $1.5 million of which "shall be deposited in a licensed financial institution in Antigua), at RSJ-20.

B. Recognition would be contrary to U.S. public policy.

1. *Receivership, and not an Antiguan liquidation, is the appropriate vehicle for investigating fraud and compensating all Stanford victims.*

There is more than 115 years of U.S. legal precedent for appointing equity receivers upon a showing that a corporation has been used to perpetrate a fraud upon investors. *See e.g.*, *Tyler v. Savage*, 12 S. Ct. 340, 143 U.S. 79 (1892).[12] The Bankruptcy Code, including Chapter 15, on the other hand was designed as a framework for the orderly reorganization or liquidation of legitimate businesses (both solvent and insolvent); not as a means for investigating and disassembling massive fraud. Granting recognition to the Antiguan proceedings would run counter to the decades-long practice approved in decisions of virtually all federal circuits, of using an equity receivership to accomplish the winding up of entities that were the subject of Ponzi schemes and other frauds.[13]

None of the Chapter 15 cases cited by the Liquidators involved an SEC investigation or equity receivership; none are factually comparable to this case.[14] The Liquidators seek, in essence, to wrest the Bank from this Court's jurisdiction during the early stages of this large and complicated fraud case. They further seek, on the Bank's behalf, to bring claims against other Stanford entities for any CD proceeds, or assets purchased with CD proceeds, transferred to those entities. Ex. A. Because CDs bankrolled the entire Stanford

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[12] This Court has already found that the SEC has shown a substantial likelihood that it will prevail on the merits of its case. Pursuant to the Court's order, the Receiver has been providing the SEC and other governmental agencies with all information and documentation they have sought in connection with their investigations. Amended Order Appointing Receiver, Doc. 157 ¶ 5(k).

[13] *See infra* notes 15 &16 and accompanying text.

[14] For example, although *Tri-Continental* involved fraud, it was nowhere near the scope of the fraud here. *In re Tri-Continental*, 349 B.R. 627 (Bankr. E.D. Cal. 2006) ($45 million in false insurance policies sold). And there was a great deal of international cooperation between officials conducting a criminal investigation the U.S. and officials in St. Vincent and the Grenadines.

network, the Liquidators' success in this regard would likely leave the Receivership Estate with virtually no assets to distribute. *Id*.

Distribution of an insolvent defendant's assets by a receiver is a common remedy, especially in fraud cases like this one. *See, e.g.*, *SEC v. Ross*, 504 F.3d 1130, 1133 (9th Cir. 2007) (observing that "the district court appointed a receiver . . . to manage the corporation and preserve its assets for eventual distribution to the injured investors"); *In re SEC*, 296 Fed. Appx. 637, 640 (10th Cir. 2008) (unpublished opinion) (noting that the receiver had been "carrying out his duties of marshaling and liquidating assets for the benefit of defrauded investors and creditors"); *SEC v. Cobalt Multifamily Investors I, Inc.*, 542 F. Supp. 2d 277, 282-83 (S.D.N.Y. 2008) (adopting a distribution plan proposed by the SEC); *SEC v. AmeriFirst Funding, Inc.*, No. 3:07-CV-1188-D, 2008 WL 919546, at *6 (N.D. Tex. Mar. 13, 2008) (approving receiver's interim distribution plan, under which over $25 million would be disbursed to investors); *SEC v. Megafund Corp.*, No. 3:05-CV-1328-L, 2008 WL 2856460, at *1, 3 (N.D. Tex. June 24, 2008) (approving receiver's proposed distribution plan, under which over $1.5 million would be disbursed to claimants on a pro rata basis); *SEC v. Funding Res. Group*, No. 3:98-CV-2689-M, 2004 WL 2964992, at *1 (N.D. Tex. 2004) (approving receiver's proposed distribution plan, under which over $1.6 million would be disbursed to claimants on a pro rata basis). District courts routinely order liquidation by receivers.[15]

[15] *See, e.g.*, *SEC v. Merrill Scott & Assoc., Ltd.*, 2008 WL 2787401, *3–5 (D. Utah 2008) (unpublished opinion) (noting that the court had "approved SEC's proposed Plan of Partial Distribution" of the receivership estate, and predicting that "the interim distribution under the Plan likely will not be the last"); *SEC v. Tanner*, 2007 WL 2013606, *3 (D. Kan. 2007) (unpublished opinion) (approving receiver's "general distribution plan," under which several million dollars would be distributed to claimants); *SEC v. Alanar, Inc.*, 2007 WL 2479318, *11–12 (S.D. Ind. 2007) (unpublished opinion) (approving receiver's proposed distribution plan subject to minor modifications); *SEC v. Lewis*, 173 Fed. Appx. 565, 566 (9th Cir. 2006) (unpublished opinion) (noting that the district court had approved a distribution plan for the receivership estate); *SEC v. Euro Sec. Fund*, 2006 WL 1461776, *1 (S.D.N.Y. 2006) (unpublished opinion) (noting that the court had approved a distribution plan for disgorged funds and the appointment

The Fifth Circuit repeatedly has affirmed orders providing for liquidation by receivers. *See, e.g., SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 327 (5th Cir. 2001) (affirming district court's distribution plan, under which over $1.1 million would be disbursed on

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of a receiver to implement the plan); *Marwil v. Grubbs*, 2004 WL 2278751, *1, 5 (S.D. Ind. 2004) (unpublished opinion) (noting that, "under supervision by this court and [the receiver]," the defendant has "undertaken a plan to liquidate its assets to meet as many obligations to creditors as possible"); *SEC v. TLC Inv. & Trade Co.*, 147 F. Supp. 2d 1031, 1034–36 (C.D. Cal. 2001) (declining to adopt the bankruptcy code's procedures for a receivership liquidation); *SEC v. The Better Life Club of Am., Inc.*, 1998 WL 101727, *2 (D.D.C. 1998) (unpublished opinion) (directing that the defendants' "assets shall be distributed to defrauded investors pursuant to a plan of distribution to be proposed by the Commission subject to approval by this Court"); *SEC v. Custable*, 1996 WL 745372, *6 (N.D. Ill. 1996) (unpublished opinion) (granting "SEC's Motion for an Order Requiring the Receiver to Distribute Disgorgement Funds to Investors," and granting "the Receiver's Motion for Approval of the Plan of Distribution"); *SEC v. Parkersburg Wireless LLC*, 1995 WL 79775, *4 (D.D.C. 1995) (unpublished opinion) (adopting distribution plan under which over $3 million would be disbursed to claimants, largely on a pro rata basis); *SEC v. Vision Commc'ns, Inc.*, 1994 WL 326868, *2–3 (D.D.C. 1994) (unpublished opinion) (ordering receiver to "marshal the assets of [defendants] at the maximum value attainable, through liquidation or otherwise, and distribute them in accordance with a Plan of Distribution to be submitted by the [SEC] and approved by the Court"); *SEC v. Alpine Mut. Fund Trust*, 824 F. Supp. 987, 989 (D. Colo. 1993) (noting that "[t]he Receiver was empowered to . . . take whatever actions were necessary, subject to approval of the Court, for the protection of shareholders of the Funds and their assets, and to liquidate the Funds' assets"); *SEC v. Sunco Res. & Energy, Ltd.*, 1990 WL 128232, *2 (S.D. Fla. 1990) (unpublished opinion) (approving receiver's proposed distribution plan, under which roughly $87,000 would be disbursed to claimants, largely on a pro rata basis); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1540 (11th Cir. 1987) (noting that receiver in SEC fraud suit had made two interim distributions of assets); *SEC v. Elliot*, 1987 WL 46231, *1 (S.D. Fla. 1987) (unpublished opinion) (denying motion to permit filing of bankruptcy petition where "the receivership is in the process of filing a plan of partial distribution and is approaching completion of such plan"); *SEC v. Martin*, 1983 WL 1364, *2 (W.D. Wash. 1983) (unpublished opinion) (ordering individual defendant to turn over all his assets, except those protected under bankruptcy laws, to a receiver charged with proposing a distribution plan); *SEC v. United Fin. Group, Inc.*, 404 F. Supp. 908, 910 (D. Or. 1975) (noting that, in a related SEC fraud suit, "the receivership estate was ordered to be liquidated and distributed as if the entire estate were in bankruptcy" (internal quotation omitted)); *SEC v. Moody*, 374 F. Supp. 465 (S.D. Tex. 1974) (observing that receiver was appointed "to marshal and liquidate Bank's assets to the extent necessary in order to pay its depositors"); *SEC v. Gray Line Corp.*, 1972 WL 3981, *2 (S.D.N.Y. 1972) (unpublished opinion) (approving receiver's proposed distribution plan); *SEC v. Raffer*, 1970 WL 248, *4 (S.D.N.Y. 1970) (unpublished opinion) (granting SEC's motion for appointment of receiver because a receiver "is needed . . . to locate, preserve, and distribute the remaining assets"); *SEC v. Ark. Loan & Thrift Corp.*, 294 F. Supp. 1233, 1247 (W.D. Ark. 1969) (refusing to transfer case to bankruptcy court for liquidation where receivership already pending); *SEC v. Gulf Intercont'l Fin. Corp.*, 223 F. Supp. 987, 996 (S.D. Fla. 1963) (granting SEC's motion for appointment of receiver because "the best interests of public investors is served by the appointment of a receiver and the prompt liquidation of all assets within the jurisdiction of the court, and through proper legal procedure the pro-rata return of monies to the public investors, wherever situated"); *SEC v. Fiscal Fund, Inc.*, 48 F. Supp. 712, 715–16 (D. Del. 1943) (appointing a receiver to "wind up and liquidate" the defendant based on the "well-established power in the Federal Court sitting as a court of equity to order liquidation of a solvent corporation where there is no other course available to remedy a situation which is inequitable to the stockholders").

a pro rata basis); *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 proceeding in the receivership court); *SEC v. Tipco, Inc.*, 554 F.2d 710, 710–11 (5th Cir. 1977) (noting that "[t]his case arises from the receivership proceedings against and liquidation of [the defendant corporation]").

Other courts of appeals have done so also. *See, e.g., SEC v. Enter. Trust Co.*, 559 F.3d 649, 650 (7th Cir. 2009) (affirming district court's distribution plan, under which over $30 million would be disbursed to claimants); *SEC v. Infinity Group Co.*, 226 Fed. Appx. 217, 218–19 (3rd Cir. 2007) (unpublished opinion) (affirming district court's distribution plan, under which disbursements would be made to investors on a pro rata basis); *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 737 (9th Cir. 2005) (affirming district court's distribution plan, under which over $250 million would be disbursed to claimants, with investors compensated on a pro rata basis).[16]

[16] *See also United States v. Payne*, 62 Fed. Appx. 648, 649 (7th Cir. 2003) (unpublished opinion) (reciting that "a receiver was appointed by the court [in an civil enforcement action brought by the SEC] to oversee the liquidation of [the defendant's company's] inventory/assets and to make distributions to the company's investors and creditors"); *SEC v. First Choice Mgmt. Serv., Inc.*, 66 Fed. Appx. 652, 653 (7th Cir. 2003) (unpublished opinion) (noting that "the district court authorized the receiver to marshal and liquidate all available assets and present a plan of distribution"); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 82 (2nd Cir. 2002) (affirming district court's distribution plan, under which funds would be disbursed on a pro rata basis); *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 660 (6th Cir. 2001) (observing that "[t]he district court appointed [a receiver] and charged him with marshaling [the defendant's] assets and devising a plan for the disgorgement of the proceeds to [the defendant's] investors"); *SEC v. Elliott*, 953 F.2d 1560, 1565, 1584 (11th Cir. 1992) (affirming vast majority of district court's distribution plan); *SEC v. Hardy*, 803 F.2d 1034, 1035–36 (9th Cir. 1986) (reciting that "[t]he district court appointed an equity receiver . . . to take ownership and liquidate the assets of the [defendant] entities to satisfy the claims of Investors"); *SEC v. First Sec. Co. of Chicago*, 507 F.2d 417, 419 (7th Cir. 1974) (reviewing classifications made by receivership court "in anticipation of the [defendant's] liquidation"); *SEC v. Bartlett*, 422 F.2d 475, 478–79 (8th Cir. 1970) (affirming district court's denial of a motion to vacate the receivership of three insolvent corporations and refer interested parties to bankruptcy court); *SEC v. Charles Plohn & Co.*, 433 F.2d 376, 379 (2nd Cir. 1970) (affirming district court's appointment of receiver because New York Stock Exchange had ceased to oversee defendant's liquidation and receivership was necessary to protect the property of defendant's customers).

Granting recognition to the Liquidators effectively would put an end to the long-used effective and efficient tool of equity receiverships for winding up entities that have been used to perpetrate fraud. It is contrary to public policy to allow an SEC equity receivership to be supplanted by a foreign proceeding from a jurisdiction that made the fraud possible.

2. *The Liquidators' conduct in Canada evidences their disregard for this Court's jurisdiction and the Receiver's authority.*

On March 27, employees of Vantis, the Liquidators' firm, entered SIB's Montreal office and "wiped" all data from that office's servers. By coincidence, an employee of FTI arrived at the Montreal office as that activity was nearing completion. (*See* RSJ-15, the April 15, 2009 affidavit of Dan Roffman, previously submitted in the Canadian proceeding.). The Receiver demanded an explanation. The Liquidators' Canadian counsel replied with the assurance that the data that had been on the servers is safe because Vantis imaged it and *sent the images to Antigua*. (*See* RSJ-16, letter from Julie Himo, the Liquidators' Canadian counsel). In other words, the Liquidators moved all SIB electronic data that had existed in Canada out of Canada and to Antigua which boasts a particularly stringent financial secrecy law. There is no reason to believe that the Liquidators would not do the same in the U.S. if given the chance.

Only after gathering and sending relevant data outside of Canada did the Liquidators (then still Antiguan receivers) bother to obtain an ex parte Canadian registrar's order recognizing the Antiguan receivership order. They did so without disclosing their previous data destruction, without giving notice to the Receiver, and without advising the registrar (whose jurisdiction, extends only to hearing uncontested matters absent consent) that a U.S. Receiver

exists and claims rights in the Stanford Canadian assets.[17] The Receiver is presently challenging the registrar's order and, in addition, seeking recognition of this Court's order in Canada.

3. *The Antiguan government protected its own interests while giving Stanford carte blanche to defraud the rest of the world.*

One of the authors of Chapter 15, Professor Jay Westbrook, has written that one of the policy factors that should influence a COMI analysis is the likelihood of the selection of an acceptable substantive law. Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 Brook. J. Int'l L. 1019, 1020 (2007). Westbrook observed that legal havens – tax havens, bank secrecy havens, and the like – have laws that are attractive to "exempted" corporations that do no real business in the country of incorporation. *Id*. at 1029. "One great source of abuse with havens, of course, is that they regulate conduct that has no effect on the regulating jurisdiction or its citizens, so they are free to accept results that no polity would be likely to permit as applied to its own citizens or its own economy." *Id*. at 1030.

Westbrook identifies at least three dangers in permitting these "outlier" jurisdictions to become "a worldwide default" for COMI purposes: (1) substantive law is often difficult to locate, much less interpret, which does not serve the purposes of predictability; (2) haven law is "too likely to fall outside that range of acceptable outcomes"; and (3) haven law may lack essential procedural characteristics, such as sufficient transparency and an acceptable judicial system. *Id*. at 1032. These concerns are very salient in this case.

[17] The Liquidators' Canadian application for recognition did not mention the U.S. Receivership. One of the exhibits to the application, the Antiguan Liquidators' report to the Antiguan Court, did mention the existence of a U.S. Receivership, although the Receiver understands that a reference buried in the middle of one of multiple exhibits does not constitute adequate disclosure under Canada's requirement of candor that applies when a party is presenting an ex parte motion.

(a) The Bank's Antiguan "regulators" provided Stanford cover.

The Financial Services Regulatory Commission (the "FSRC") is the Antiguan agency charged with regulating "international banks" such as SIB. The Antiguan Liquidators were initially appointed receivers by the FSRC and then later, at the FSRC's request, appointed by the Antiguan court as court-appointed receivers and then as liquidators. Therefore, the FSRC has a substantial role in the SIB liquidation proceeding. That is troubling because the FSRC appears to have been so under the influence of Allen Stanford that it gave Stanford and/or certain of his employees advance peeks at – and in at least one case, the opportunity to significantly redraft – the FSRC's replies to inquiries from other regulators regarding SIB. Janvey Decl. at ¶ 9(b). t also appears that the FSRC's chief administrator, Leroy King, sent Allen Stanford personal notes – most of them addressed to "Big B", apparently how the administrator referred to Stanford – concerning internal FSRC issues that could potentially affect SIB. *Id*.

For example, the FSRC and its general counsel debated how the FSRC should respond to the East Caribbean Central Bank's inquiries regarding SIB. *Id*. at 9(b)(i); RSJ-9. Among Allen Stanford's personal papers in St. Croix were found several documents that originated with the FSRC. Stanford possessed what appears to be a September 2006 draft of the FSRC's proposed reply to an inquiry made by the SEC. Janvey Decl. at ¶ 9(b)(ii); RSJ-10. This document assures the SEC that "[t]he FSRC confirmed that SIBL is in full compliance with all applicable laws and in good standing with the FSRC, and that there are no outstanding matters or issues of concern to date." RSJ-10.

Also found among Stanford's papers at the St. Croix office, are documents which appear to be correspondence to Stanford from the FSRC's administrator, Leroy King. King wrote, "'Big B' — Just a little teaser. Keeping you updated. Nothing to worry." and enclosed a note on King's personal notepad stationery in which he discussed an FSRC employee (identified

as "the person who wrote #11" or simply as "#11") who apparently drafted two memos that describe a variety of problems at the FSRC. These are some of the problems mentioned in the memos. Janvey Decl. at ¶ 9(b)(iii); RSJ-11.

- "faulty judgment that could potentially ruin the reputation of the jurisdiction"
- "the lack of a formal examination framework"
- "difficulties faced in enforcing compliance"
- "the absence of a comprehensive tool set to perform examinations"
- "The FSRC does not require work papers for review and to support findings and conclusions made by examiners. The only requirement is to produce a 'good' report."
- "Except for very serious infractions, off-shore banking does not face very serious sanctions in the jurisdiction."
- "[I]t is even more difficult and serious when political and business relations exist between the bank and upper management of the Commission. This situation can taint or even override the supervisory process. This can lead to supervision to become almost impossible."
- "There are a number of steps that the Commission can take to address these issues and challenges: . . . adopt an appropriate and formal code of professional ethics, and adopt and stringently enforce legislations to address banks' non-compliance."

Handwriting in the margins of this memo, apparently in the same hand as the note on the Leroy King stationery, seem to be instructions to FSRC staff: "Mrs. Cherebin (Instructor) — I would like you not to discuss #11. We will strike it from the Record and Mrs. Richardson will deal with it internally. NB: Claudette — We have to identify who #11 and #5 are. We have a serious problem. Thanks, Lee." RSJ-11.

Last month, the FSRC terminated Leroy King, its long-time administrator. Janvey Decl. at ¶ 9(b)(iv).

(b) The Antiguan court has refused to recognize this Court's orders.

After this Court had appointed the Receiver, the FRSC, without notice to the Receiver, applied to the Antiguan court to place SIB into liquidation. The Receiver sought to intervene in that action and was rebuffed. The Antiguan court stated that (1) this Court's orders are "unenforceable" and have no force of law in Antigua; (2) Antigua does not recognize orders of U.S. courts; (3) the Receiver "has no legal entitlement to standing in Antigua"; and (4) the Receiver, whose authority derives from an "unenforceable" U.S. Court order, lacks standing as an "interested person" under Antigua's International Business Corporations Act.[18] Judgment of April 17, 2009 at ¶¶ 41-44, RSJ-5. The Antiguan court, in its comments from the bench, went so far as to describe the Receiver as a "stranger" to the Antiguan proceedings.[19]

It is clear that the Antiguan Liquidators seek only one-way recognition. Antigua "has no reciprocal enforcement of Judgments or orders treaty with the U.S.A." *Id*. at ¶ 41. For the Antiguan court, SIB's Antiguan registration was dispositive; there was no analysis of SIB's presence, operations, sales, or effect in the U.S. In other words, this Court's subject matter, in personam, and in rem jurisdiction are irrelevant in Antigua.

(c) The Antiguan government is a debtor of the Receivership Estate.

Antigua is a small island nation. GDP has ranged from less than $700 million in 2000 to approximately $1.6 billion in 2007. *See* Antiguan economic statistics at RSJ-6; CIA Fact Sheet for Antiguan GDP, at RSJ-7. In 2008, the entire national gross domestic product was only US $1.126 billion.[20] In other words, the fraud that was perpetrated through SIB and other Stanford entities was bigger than the entire Antiguan economy. Janvey Decl. at ¶ 9(a).

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[18] The Antiguan court did permit the Receiver's Antiguan counsel to address the court as Amicus Curiae. Amicus status, of course, is no substitute for party status.

[19] There is no transcript of the Antiguan hearing because there was no court reporter.

[20] http://www.economywatch.com/economic-statistics/country/Antigua-and-Barbuda/.

Allen Stanford was an extremely prominent figure. He was the largest private employer on the Island and made huge loans to the government. Through some of his wholly-owned entities, he made one loan in the amount of $40 million and another in the amount of EC$300 million (about US$100 million).[21] The government has yet to repay either loan and the Antiguan Liquidators have not given any indication that they will pursue collection of these debts for the benefit of Stanford victims.

(d) *The Antiguan Liquidators have not challenged the Antiguan government's intended expropriation of valuable Estate assets that should be liquidated for the benefit of all Stanford victims.*

The Antiguan Liquidators may be from the UK, but they are administering a liquidation proceeding in Antigua, and Antiguan politics, the Receiver submits, cannot help but seep into their administration of the liquidation. For example, the failure of the Stanford entities, collectively the largest private employer behind the government, sparked such a public outcry that the Antiguan parliament, evidently as a show of solidarity with the people, authorized the government's expropriation of Stanford real estate that had been valued at $150 million. The parliamentary resolution authorizing the expropriation cites *this Court's order as the reason for the taking*:

> . . . Whereas the appointment by the U.S. District court for the Northern District of Texas of a Receiver to take control of the assets of Stanford International Bank Ltd., the Stanford Group of Companies, and Sir Allen Stanford (among others) threatens the financial viability of the Bank of Antigua, the prompt payment by the Stanford Group of companies of the massive outstanding debt to local suppliers, and the continued employment of over eight hundred employees at a time of global financial crisis.[22]

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[21] *See* Loan Agreement between Stanford Financial Group Company and the Government of Antigua and Barbuda, RSJ-12. Evidence of the EC $300 loan is attached as RSJ-13.

[22] *See* the "Resolution Authorising the Secretary to the Cabinet to Cause a Declaration to be Made for the Acquisition of the Lands Described in the Schedule for a Public Purpose," attached as RSJ-14.

The resolution mentions nothing about compensation to SIB or the Estate and none has been offered, even though such compensation is required by the nation's constitution.[23] These are assets that, but for the government's taking, would be available for liquidation for the benefit of defrauded claimants. The Antiguan Liquidators have not even spoken out against the intended expropriation, much less taken steps to challenge it in court.

IV. CONCLUSION & PRAYER

Because the Bank's center of main interest was not in Antigua, the Antiguan proceedings should not be recognized as foreign main. Moreover, recognition of the Antiguan proceedings would violate public policy contained in more than 100 years of receivership case law and would cede authority to a jurisdiction that provided many of the ingredients that were necessary for Stanford to successfully carry out such a massive scheme for so long. For these reasons, the Receiver ask this Court to deny the Liquidators' request for recognition of the Antiguan proceedings as foreign main proceedings pursuant to Chapter 15 of the Bankruptcy Code.

[23] According to the U.S. Secretary of State's website entry for Antigua, this is not Antigua's first expropriation. "In 2002 the government expropriated property of a private citizen, who filed an injunction that alleged abuse of power, harassment, and threats by the government to acquire the property. The Eastern Caribbean Court of Appeal upheld a lower court's decision that refused to bar the expropriation. In June, the Privy Council rejected the owner's appeal. At year's end the government had not provided prompt, adequate, and effective compensation to the claimant, as stipulated under law." U.S. Department of State, Antigua and Barbuda, March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100624.htm.

Dated: June 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 9, 2009 I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served the Court-appointed Examiner, all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler
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