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

U.S. SECURITIES AND EXCHANGE COMMISSION	§	
	§	
Plaintiff,	§	
	§	**CIV. ACTION NO.3-09CV0298-N**
v.	§	
	§	
STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT R. ALLEN STANFORD'S RESPONSE IN OPPOSITION TO RECEIVER'S MOTION FOR APPROVAL OF THIRD INTERIM FEE APPLICATION (REC. DOC. 820)

COMES NOW, through undersigned counsel, Defendant R. Allen Stanford who files this Response in Opposition to the Receiver's Motion for Approval of Third Interim Fee Application, and respectfully states the following:

INTRODUCTION

The Receiver files his Motion for Approval of Third Interim Fee Application ("Fee Application") seeking $8.9 million for three months of work from June 1 through August 31, 2009. The Receiver files this Fee Application on the heels of his first and second interim fee applications,[1] which sought over $27.5 million in fees and expenses, one-third of the alleged value of the Receivership Estate (the "Estate"), for less than four months of work in this matter. The fruit of his current expenditure is the recovery of a mere additional $11.8 million in Estate

[1] See Rec. Doc. 384, *Receiver's Motion for Approval of Interim Fee Application and Procedures for Future Compensation of Fees and Expenses and Brief in Support* and Rec. Doc. 669, *Receiver's Motion for Approval of Second Interim Fee Application and Brief in Support.* Defendant Stanford has appealed the Court's ruling on these two fee applications. See Rec. Doc. 835, *Notice of Interlocutory Appeal*.

assets. Furthermore, the expenditures do not account for amounts, if any, he has paid out of the Estate – to depositors, creditors or anyone else.[2]

To break down the amount requested in this Fee Application, the Receiver seeks approval for payment of fees and expenses totaling over $96,000 per day. Indeed, even were the Receiver and his team of thirteen law, accounting and consulting firms working 24 hours a day, the requested amount equates to over **$4,000 per hour.** Under no analysis can this amount be deemed reasonable. In fact, application of the factored analysis utilized by the courts in the Receiver's own cited cases militates against approval of his application.

The Receiver provides no real explanation to support the excessive fees and expenses incurred, and his declarations that "[f]ees and expenses have consequently been reduced…by more than 65% per week as compared to the initial fee application and 21% per week as compared to the second fee application,"[3] and that his team of firms "have continued to discount their fees by at least 20% each (representing an overall reduction of $2.6 million for this period),"[4] add nothing to justify the Receiver's request.

In his initial interim fee application, the Receiver reported that "[t]he Estate ha[d] $69.3 million of cash on hand as of May 14, 2009."[5] In his second interim fee application, the Receiver claimed that his team's efforts during the seven-week period of April 14 through May 31 "permitted the Receiver to secure $81.1 million of cash on hand as of July 30, 2009."[6] Thus, the Receiver essentially reported that it has cost the Receivership Estate ("Estate") over $27 million to recover or preserve just $69.3 million of cash on hand, as of May 31, 2009. Further, it

[2] It is unknown whether the Receiver is meeting all Estate obligations.

[3] Rec. Doc. 820 at p. 1-2.

[4] *Id.* at p. 1.

[5] See Rec. Doc. 384, Receiver's Motion for Approval of Interim Fee Application and Procedures for Future Compensation of Fees and Expenses, at p. 6.

[6] Rec. Doc. 669 at p. 3.

is presumed that a significant portion of the $8.9 million sought in this Fee Application was expended in efforts to recover the additional $11.8 million of cash on hand between May 31st and July 30, 2009. Under any circumstance, this is not a productive use of the Estate's assets no matter how the Receiver states it. Therefore, the Receiver's Fee Application should be denied in its current form, and the fees requested should be substantially discounted to an amount reasonable in relation to the services rendered and the results achieved.

ARGUMENT AND AUTHORITIES

The instant Fee Application for fees and expenses incurred for three months of work seeks payment of nearly $8.9 million as follows:

Krage & Janvey (the Receiver and his firm):	$ 138,044.96
Baker Botts L.L.P.:	2,997,211.46
Thompson & Knight LLP:	577,192.50
FTI Forensic and Litigation Consulting, Inc.:	2,901,513.81
Ernst & Young:	697,753.60
Financial Industry Technical Services, Inc.:	591,745.73
Strategic Capital Corporation:	65,757.44
Pierpont Communications Inc.:	46,789.08
3-4 South Square:	285,470.45
Roberts & Co.:	27,160.26
Altenburger:	73,762.79
Osler, Hoskin & Harcourts LLP:	461,066.05
Dudley, Topper and Feuerzeig, LLP:	859.22
	$8,864,327.34

As the cases relied upon by the Receiver establish, in awarding a Receiver his attorneys' fees and expenses, courts will "(1) determine the nature and extent of the services rendered; (2) determine the value of those services; and (3) consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)."[7] Courts must "carefully examine the fee

[7] *SEC v. Aquacell Batteries, Inc.*, No. 6:07-cv-608-Orl-22DAB, 2008 WL 276026, at *2 (M.D. Fla. Jan. 31, 2008); *SEC v. Megafund Corp.*, No. 3:05-CV-1328-L, 2008 WL 2839998, at *2 (N.D. Tex. June 24, 2008).

application to determine whether the time spent, services performed, hourly rates charged, and expenses incurred by the Receiver are justified under the [*Johnson*] factors."[8]

A. The Requested Fees and Expenses are Not Reasonable

Because "[n]o receivership is intended to generously reward court-appointed officers,"[9] the receiver and his hired professionals "must exercise proper billing judgment in seeking fees from the receivership estate, and should limit their work to that which is reasonable and necessary."[10]

As in the previous interim fee applications, the Receiver's supporting documentation once again shows multiple law firms billing for the same tasks, and using lawyers with hourly rates of well over $500 to accomplish such duplicative tasks. Likewise, duplicative tasks appear to be once again undertaken by the multiple accounting professionals and other consultants hired by the Receiver to assist him with the management of the Estate.

As sole support for the "reasonableness" of the fees and expenses incurred by him in this case, the Receiver once again baldly asserts, without any explanation, that "[t]his case is one of the largest and most complex of its kind, it requires a wide variety and depth of knowledge in both domestic and international law, and requires full time attention from key professionals on Receiver's team."[11] Missing once again from the Receiver's attempted justification, however, is any explanation for the need of all the lawyers and professionals listed to perform these tasks. In sum, "[b]illing judgment means more than just deleting duplicative entries [which does not appear to have been done by the Receiver's firms here] and discounting the fee by [20%]; it

[8] *Megafund Corp.*, 2008 WL 2839998, at *2.

[9] *SEC v. W.L. Moody & Co.*, 374 F. Supp. 465, 483 (S.D. Tex. 1974).

[10] *Aquacell Batteries*, 2008 WL 276026, at *2. ("Part of 'determining the nature and extent of the services rendered' … includes an analysis as to the *reasonableness* of the services rendered," and the expenses for which reimbursement is sought must have been "actual and [ ] necessarily incurred.").

[11] Rec. Doc. 820 at p. 4.

includes knowing how to properly staff a matter, in proportion to the task at hand."[12] Bald declarations of "complexity" involved in a case is not enough – unless and until the Receiver can explain how and why its duties required the assistance of hundreds of lawyers and consultants performing duplicative tasks, he has failed to establish the requisite "billing judgment" to justify the requested fees and expenses.

Although the Receiver trumpets that his fees and expenses sought in the instant fee application are "reduced … by more than 65% per week as compared to the initial fee application and 21% per week as compared to the second fee application,"[13] the "reduction" in claimed fees and expenses means little when the amounts sought in the previous applications were themselves excessive and unreasonable. Even assuming these percentages are accurate, the fees and expenses sought in the instant application are still excessive and unreasonable.

That the fees and expenses sought in the instant Fee Application are less than what has been sought in prior fee applications does not warrant abrogation of the Receiver's duty to manage its affairs in a manner most beneficial and cost effective to the Estate. As the Court noted at the September 10, 2009 oral hearing regarding the Receiver's first two interim fee applications, "the Receiver and the professionals for the Receiver have got to be cognizant of the overall size of the Receivership Estate as it now exists."[14] The Court further noted the Receiver, "…ha[d] to start looking differently at the operation of the Receivership and the amount of resources that are going to professionals. And of course, every dollar that goes to the

[12] *Aquacell Batteries*, 2008 WL 276026, at *4.

[13] Rec. Doc. 820 at p. 1-2.

[14] 9/10/09 hearing transcript at p. 40, l. 9-12.

professionals is not available to ultimately be distributed to investors or, in the event the defendants prevail, to be returned back to the defendants."[15]

As noted in the first two fee applications, the Receiver expended $27.5 million dollars of Estate assets to preserve $67.3 million of cash on hand. Essentially, the Receiver expended at that time one-third (1/3) of the Estate to preserve the other two-thirds. The Receiver's model and method for recovery of Estate assets is not in keeping with the best interests of the Estate in light of its size. With his additional request for Estate assets in the instant Fee Application, it appears that the Receiver once again fails to comprehend the effect that his excessive fees and expenses have on the Estate. It is presumed that that a majority of the $8.9 million sought by the Receiver in the instant Fee Application was spent trying to recover the additional $11.8 million of cash on hand available to the Estate as of July 30, 2009. The Receiver does not state in his Fee Application if additional cash on hand has been recovered by the Estate through August 31, 2009. In any event, the amounts being expended by the Receiver are clearly not cost-efficient and are ultimately not beneficial to the Estate.

B. Consideration of the *Johnson* Factors

In the Fee Application, the Receiver lists the twelve *Johnson* factors to be considered by the Court, notes there is no requirement that a court "address fully each of the 12 factors,"[16] and then fails to provide any discussion or application of *any* of those factors to this case, reducing the discussion to a single sentence in which he summarily concludes that "[a]ll of the factors considered in [cited] cases weigh heavily in favor of approving the request for fees and expenses in this case."[17]

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[15] *Id.* at p. 40, l. 15-21.

[16] Rec. Doc. 820 at p. 3, footnote 2.

[17] *Id.* at p. 3-4 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

Several of these factors merit discussion – the first of which is "the time and labor required for the litigation."[18] Although the Receiver provides no rationale for the vast amounts of time and labor expended in this litigation, the Fifth Circuit has provided some guidance:

> If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.[19]

In addition, although the Receiver cites authority for "considerable weight" to be given to "the fact that the receiver 'devoted more than full time' to the matter and was prevented 'from undertaking any other full time assignment,'"[20] this factor speaks only to the *Receiver's* full-time efforts. In any event, none of the Receiver's hired professionals has provided any evidence or even claimed that he or she has experienced "foreclosed business" as a result of the work on this case.

Likewise missing from the Receiver's Fee Application is any evidence that the fees charged by his hired professionals are the "usual and customary fees" charged by others for similar work. And while the Receiver claims that the fee discounts applied by his hired firms "reflect substantial reductions of the rates the firms understood they would receive at the outset of this engagement," there is no evidence proffered of those "understood" rates or, for that matter, the rates customarily charged by those firms and discounted here.

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[18] *Id.* at p. 3, footnote 2 (*Johnson*, 488 F.2d at 717).

[19] *Johnson*, 488 F.2d at 717.

[20] Rec. Doc. 820 at p. 4.

Finally, "the amount involved and the results obtained" should also be considered.[21] Whether a receiver merits a fee is based on the circumstances surrounding the receivership, and results are always relevant.[22] In this case, the Receiver expended an unreasonable amount of fees and expenses in his efforts to recover additional Estate assets. The amount recovered by the Receiver does not warrant the fees and expenses incurred. As discussed above, the Receiver's initial interim fee application reported that he had secured cash on hand in the Receivership Estate's account in the amount of $69.3 million as of May 14, 2009. The second interim fee application revealed that it cost the Estate more than $27 million (over 1/3 of the cash on hand secured by the Receiver) to achieve that balance.[23] The instant Fee Application seeks $8.9 million in fees and expenses incurred through August 31, 2009 securing an additional $11.8 million in cash. The Receiver fails to state what amount, if any, the $8.9 million spent in fees and expenses has returned in benefits over and above the $11.8 million of cash on hand, in the form of additional cash on hand or other benefit to the Estate. In previous interim fee applications, the Receiver had not reported any amounts he has paid out of the Estate – to depositors, creditors or anyone else – and it could not be disputed that the realization ratio achieved by the Receiver was very far off from those achieved by the receivers in the cases his Motion relies upon.[24] Here, if based upon the recovery of $11.8 million of cash on hand, the results of the Receiver's work is clearly not commensurate with the $8.9 million in fees and

[21] *Aquacell Batteries*, 2008 WL 276026, at *3

[22] *Id.* (quoting *SEC v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992)); *SEC v. W.L. Moody & Co.*, 374 F. Supp. 465, 480 (S.D. Tex. 1974).

[23] In the second interim fee application, the Receiver indicated approximately $7.5 million in additional fees and expenses would likely be expended to secure additional Estate assets. See Rec. Doc. 669 at 37. The Receiver has reported recovery of an additional $11.8 million in cash on hand between May 15, 2009 and July 30, 2009. *Id.* at 3.

[24] *See Moody*, 374 F.Supp. at 482 (concluding that Receiver's efficient recovery and disbursements to depositors and creditors totaling $24,216,629.51; *Aquacell*, 2008 WL 276026 (where best potential total recovery was approximately $1.5–2 million, court further discounted receiver's fees to total approximately $250,000)).

expenses sought from the Estate as the Receiver has expended approximately seventy-five percent of the value recovered in his efforts to recover it.

CONCLUSION

For the foregoing reasons, Defendant R. Allen Stanford respectfully requests that the Receiver's Motion for Approval of Third Interim Fee Application be denied in its current form, and that the fees requested be substantially discounted to an amount reasonable in relation to the services rendered and the results achieved.

Dated: October 22, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent those indicated as non-registered participants on October 22, 2009.

/s/Ruth Brewer Schuster