NO. 09-10325

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

***IN RE* ROBB A. NEN, *et al.*,**
Petitioners

RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND MOTION FOR EMERGENCY STAY OF ORDER

Concerning Proceedings Before the United States District Court for the Northern District of Texas, Dallas Division, Judge David C. Godbey, Presiding

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INTRODUCTION AND SUMMARY

The petition for writ of mandamus is procedurally defective and substantively unfounded. Petitioners first raised the issues in their petition by filing an "Emergency Motion for Reconsideration and Response" in the district court just seven days ago. *See* Pet. at 13. The Receiver's response in the district court is not even due until April 20, 2009. Petitioners can hardly show a clear abuse of discretion on a motion that has not yet been submitted to the district court.

Aside from being premature, the petition is void of merit. The district court proceedings involve claims under the United States securities laws against private defendants and have nothing to do with foreign sovereignty. The district court has subject matter jurisdiction of these claims based on the SEC's allegations of wire transfers and other securities-related activities that have harmed U.S. investors. Securities transactions that defraud U.S. citizens cannot evade judicial scrutiny under U.S. law merely because the transactions run through an offshore bank, especially one controlled by U.S. citizens acting within our borders.

Equally routine is the district court's adoption of procedures designed to manage thousands of claims – which would overwhelm a court if filed individually and delay resolution for all – and to facilitate the Receiver's scrutiny of accounts that might hold proceeds of fraudulent products or activities. The Receiver has been moving quickly to release accounts when doing so will not

compromise the objectives of the receivership, and the broad equitable powers of a receivership court plainly support the procedures at issue.

Finally, the issue of intervention has been fully briefed in the district court for all of two weeks as to the first intervenors and is not yet ripe for decision as to many others. Petitioners' assertion that the district court "refuses" to rule on intervention is thus hyperbole, at best.

BACKGROUND

On February 16, 2009, the SEC commenced the underlying lawsuit against R. Allen Stanford; James M. Davis; Laura Pendergest-Holt; Stanford International Bank, Ltd.; Stanford Group Company; and Stanford Capital Management, LLC. The SEC alleges that defendants perpetrated a $9 billion ponzi scheme primarily through sales of fraudulent CD's. App. 1 ¶¶ 3, 6.

The district court found good cause to believe that all defendants violated federal securities laws and appointed Respondent Ralph Janvey to act as receiver over all the assets of the Defendants and all the entities they own or control. It appears that Stanford Group Company had more than 32,000 customer brokerage accounts at Pershing and J.P. Morgan, with total assets in excess of $6 billion. The district court initially froze all of these accounts. App. 2 at 6, ¶ 6. Under the district court's supervision, however, the Receiver has already released over 28,000 (more than 85 percent) of those accounts, worth well over $4 billion.

But the Receiver has determined that approximately 4,000 accounts require closer scrutiny because they may either: (1) be associated with people who had involvement in the alleged fraud; or (2) contain assets associated with fraudulent activities or proceeds (and have a balance greater than $250,000). On March 27, the district court approved procedures that will permit these account holders to apply for review and potential release of these accounts. Contrary to petitioners' assertion – for which they cite nothing – the procedures do not require waiver of any complaints, but only a consent to jurisdiction in the receivership court. App. 3, ex. B; App. 4 at 4. The procedures are available online and by mail; most account holders appear content with the procedures; in fact, 225 initiated the review process in the first 24 hours; and some should gain access to their accounts this week. App. 4, 5. Petitioners comprise the few who object to the procedures.

ARGUMENT

I. Petitioners cannot show entitlement to relief or lack of adequate remedy because they have not presented their issues to the district court.

This Court should summarily deny the mandamus petition because the district court has not yet had an opportunity to consider petitioners' issues. Petitioners raised these issues for the first time in a motion filed on March 31, 2009. App. 6. The Receiver's response to this motion is not even due until April 20. Before this Court considers an extraordinary writ, the pending motion should be fully briefed, and the district court should have an opportunity to rule on it.

Petitioners distort these facts when they claim a right to mandamus "because the District Court has failed to rule on the threshold issues of jurisdiction and denied Petitioners their due process." Pet. at 17. The fact that petitioners have not even waited until the submission date on their underlying motion negates both the "clear and indisputable right" prong of their mandamus case and the "no other adequate remedy" prong. *See, e.g., Kerr v. U.S. Dist. Ct. N.D. Cal.*, 96 S.Ct. 2119, 2124-25 (1976) (denying mandamus because there was still a possibility that the district court would grant the relief petitioner sought from the appellate courts).

II. The district court has subject matter jurisdiction of claims arising under the U.S. securities statutes.

Petitioners baldly assert that the "courts of the United States have no jurisdiction over the affairs of an Antiguan entity." Pet. at 20. First, this is an argument about personal jurisdiction, not subject matter jurisdiction. The Supreme Court long ago rejected the proposition that a foreign corporation is not subject to the jurisdiction of U.S. courts. *E.g., Perkins v. Benguet Cons. Mining*, 72 S.Ct. 413 (1952). And the Bank long ago filed a Form U-2 Uniform Consent to Service of Process, in which the Bank consented to jurisdiction in all 50 states for suits arising out of alleged violations of state securities laws related to its CDs. App. 5, 7.

Second, petitioners' argument is baseless. Federal securities legislation expressly grants the district courts of the United States subject matter jurisdiction over alleged violations. 15 U.S.C. §§ 77v(a), 78aa, 80a-43 & 80b-14.

Pursuant to these provisions, district courts have subject matter jurisdiction over foreign defendants whenever there has been activity related to securities, in the U.S. or abroad, that has harmed U.S. investors. *SEC v. Batterman*, No. 00 Civ.4835, 2002 WL 31190171, at* 4 (S.D.N.Y. 2002) (subject matter jurisdiction existed where five U.S. investors residing in U.S. received communications regarding defendant foreign company); *SEC v. Banner Fund Intern'l*, 211 F.3d 602, 609 (D.C. Cir. 2000) (U.S. courts have jurisdiction under the Exchange Act when a U.S. resident is defrauded in the U.S. in connection with the sale of securities in a foreign company); *SEC v. Marimuthu*, 552 F. Supp. 2d 969, 971-72 (D. Neb. 2008) (court possessed subject matter jurisdiction over claims against Indian national, a resident of Malaysia, arrested in Hong Kong and extradited to U.S., because his overseas conduct had a substantial effect upon U.S. citizens).

One court summarized as follows the two tests for determining subject matter jurisdiction under the securities laws when there are "transnational" issues:

> Under the effects test, courts sustain jurisdiction over conduct occurring in foreign countries when that conduct causes foreseeable and substantial harm to interests within the United States, that is, when there is a substantial impact on domestic investors or on the domestic market. . . . .
>
> The conduct test bases jurisdiction on conduct occurring within the United States. The residence or citizenship of the parties and the foreign or domestic nature of the securities involved, while relevant, is not the focus of inquiry; instead the courts concentrate on the

> relative importance of activities within the United States to the success of the alleged scheme to defraud.

Tamari v. Bache & Co. (Lebanon) S.A.L., 547 F. Supp. 309, 311, 313-14 (N.D. Ill. 1982) (citations omitted). The *Tamari* court held that both tests were satisfied even though none of the parties was a U.S. citizen or resident. *Id.* at 313-15.

Both the conduct and effects in the U.S. are far more significant here than in *Tamari*. The SEC has alleged that the offer and sale of the Bank's CDs were violations of U.S. securities statutes. App. 1 ¶¶ 18-30. The following are just a few indicia that the Bank engaged in substantial conduct within the U.S., and its conduct caused substantial harm to U.S. investors:

- The named Defendants and all but two Bank directors were U.S. citizens. App. 8 ¶¶ 12-14; App. 9 ¶ 11. Managing investments, directing fund flows and devising investment strategy were all directed from the U.S. App. 9 ¶ 11, 23-24.
- The Bank sold CDs to U.S. investors exclusively through Stanford Group Company ("SGC"), a Texas corporation with offices throughout the U.S. App. 10 at 5.
- Substantially more CD sales, by dollar amount, were generated from the U.S. than from any other country, including Antigua. App. 9 ¶ 25. During 2008, almost one-half of CD sales were generated by Stanford brokers located in the U.S. *Id.*
- The Bank's CDs were sold in the U.S. pursuant to a Regulation D private placement. In connection with the private placement, the Bank filed a Form D with the SEC. App. 10 at 7 n.4.
- In its Form D Notice of Sale of Securities, the Bank described its CD Program as "(for U.S. Accredited Investors only)." App. 7. The Bank included all 50 states among locations in which it solicited purchasers for up to $200,000,000 in CDs. *Id.*

- Between 2006 and December 12, 2008, Pershing sent the Bank 1,635 wire transfers from the U.S., totaling over $500 million, from approximately 1,199 customer accounts. App. 10 at 14.

Because defendants conducted significant Bank operations from within the U.S. and sales of Bank CDs have caused substantial harm to U.S. investors, the district court has subject matter jurisdiction over the SEC's claims against the Bank.

Rather than apply the conduct and effects tests, Intervenors argue that Antigua's sovereignty somehow deprives the district court of subject matter jurisdiction merely because the Bank is chartered in Antigua, some Bank property is located there, and an Antiguan court appointed a receiver over the Bank after the district court did. But Antigua is not a party, and none of Petitioners' cases holds that assertion of subject matter jurisdiction over a privately owned, foreign company invades the sovereignty of the foreign nation. Nor is the Bank an Antiguan instrumentality. *Peterson v. Islamic Republic of Iran*, 563 F. Supp. 2d 268, 270 (D.D.C. 2008) (banks immune from jurisdiction of U.S. courts under the Foreign Sovereign Immunities Act because they were owned by foreign governments). The Bank is an instrumentality of a U.S. citizen – Allen Stanford.

In support of their jurisdiction argument, Petitioners also cite cases discussing the discretionary principle of comity. But comity does not defeat jurisdiction; it only requires a balancing of interests regarding whether to exercise judicial power. *Hilton v. Guyot*, 159 U.S. 113, 124 (1895); *see Pravin Banker*

Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 853 (2d Cir. 1997) (refusing to defer on the basis of comity, even though the Peruvian government argued that permitting the case to proceed would cause a "creditor stampede" and unreasonably disrupt the country's structural economic reform efforts). Petitioners have not even attempted to articulate a comity argument comparable to that of the Peruvian government in *Pravin*, much less explain how considerations of comity could ever deprive the court of subject matter jurisdiction.

III. The receivership orders do not violate due process.

With the district court's oversight, the Receiver was able to release more than 85% of the Stanford customer accounts within 24 days after this litigation was filed. To determine which of the remaining accounts hold assets tainted by fraud, the Receiver requires additional information from the account owners, many of whom have actually requested the opportunity to provide such information. The district court orders provide an efficient process to accomplish this goal, and the Receiver's response to Petitioners' due process challenge is not even due in the district court until April 20.

Courts have broad power to mold equitable relief to the particular circumstances of each case. *Fed. Savings & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 563 (5th Cir. 1987) (because the receiver is concerned "with the savings of many depositors, the investments of numerous stockholders . . . equity's powers to

aid [the receiver] in its endeavors are even broader than for private claims"). These powers include the ability to enjoin non-parties to protect the public interest. *SEC v. Hickey*, 322 F.3d 1123, 1131 (9th Cir. 2003) (the district court was authorized to freeze the assets of a non-party "so long as doing so was necessary to protect and give life to" other orders entered against the defendants).

Maintaining a temporary freeze on 15% of customer accounts while the Receiver has the opportunity to properly scrutinize each of them protects the both the public and individual customers.[1] Some of the frozen accounts are owned by Defendants or others who may have participated in or benefited from the fraud. Other accounts may include funds in redemption of Bank CDs or from interest on Bank CDs. The Receivership Estate is entitled to recover such funds and share them equitably with other Estate claimants, including people who were not able to redeem Bank CDs before the receivership.[2] Petitioners cite no case sustaining a

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[1] *See Hickey*, 322 F.3d at 1131; *Dixon*, 835 F.2d at 563; *SEC v. SBM Inv. Certificates, Inc.*, No. 2006-866, 2007 WL 609888, at *19 (D. Md. Feb. 23, 2007) (any harm that investors "may suffer as a result of the inability to sell [the] assets . . . [was] outweighed by the irreparable harm some investors [would] suffer if no assets remain[ed] when the time [came] for repayment of their investments"); *SEC v. Thorn*, No. C:01-CV-290, 2001 WL 1678787, *5-6 (S.D. Ohio Nov. 16, 2001) (proper to continue asset freeze over accounts owned and controlled by individual investors while SEC analyzes account balances and determines account ownership).

[2] *SEC v. George*, 426 F.3d 786, 798-99 (6th Cir. 2005) (upholding disgorgement order against investors who "received ill-gotten funds and had no legitimate claim to those funds"); *Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191-92 (4th Cir. 2002) (noting that federal courts "may order equitable relief" against third party who "(1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds"); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998) (same).

due process challenge to such equitable orders for the orderly determination of customer rights in the context of a massive fraud such as this.

IV. The district court has not refused to rule on the motions to intervene.

Petitioners admit that only some of the 40+ motions to intervene are even ripe for decision in the district court and that opposition briefs with respect to the initial motions were not filed until March 16, 2009. Pet. at 26 n. 3, 10. At best, therefore, petitioners complain that the district court has taken a couple weeks after full briefing to resolve dozens of contested motions. If this constituted a "refusal to rule," this Court would have time for little else but mandamus petitions.

Petitioners fail to cite any case in which a court issued a writ of mandamus based upon such a short "delay" or in remotely similar circumstances.[3] In contrast, petitioners' only case involves an order indefinitely refusing to determine a labor union's motion to dissolve an injunction. *See Local 391, Int'l. Bhd. of Teamsters v. Ward*, 501 F.2d 456, 458-59 (4th Cir. 1974). The district court here has actively managed a complex and fast-moving case, and there is nothing to suggest that it will indefinitely refuse to rule on the motions to intervene, many of which are not yet even ripe for determination.

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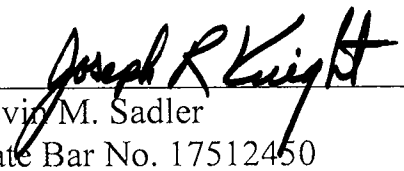
[3] *See In re Lineberger*, 16 Fed. Appx. 115, 115 (4th Cir. 2001) ("[b]ecause the district court has acted within six months of the filing of the petition, we find no unreasonable delay"); *In re Baker*, 256 Fed. Appx. 581, 582 (3d Cir. 2007) ("motions have been pending in the District Court for a mere five months, and we have no reason to doubt that the District Court will timely take action in this case"); *see also In re Dunham*, 160 Fed. Appx. 281, 281 (4th Cir. 2005) (eight-month delay not unreasonable).

PRAYER

For all of these reasons, the Receiver prays that the Court deny the petition for writ of mandamus and award the Receiver such further relief to which he may be entitled.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April 2009, a true and correct copy of the foregoing document was filed with the Clerk of the Court and copies forwarded to all known counsel of record by email or hand-delivery, as well as U.S. mail.

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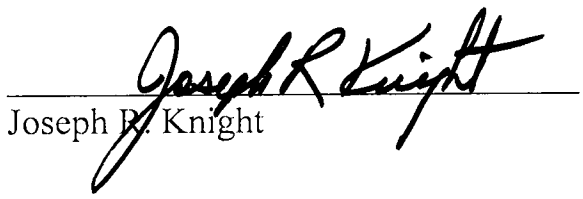

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