

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

RALPH S. JANVEY, IN HIS CAPACITY AS §
COURT-APPOINTED RECEIVER FOR THE §
STANFORD INTERNATIONAL BANK, LTD., §
ET AL. §

Plaintiff, §

v. §

JAMES R. ALGUIRE, ET AL. §

Relief Defendants. §

Case No. 03:09-CV-0724-N

**MOTION FOR ORDER ESTABLISHING SUMMARY PROCEEDINGS
AND FOR EXPEDITED CONSIDERATION OF REQUEST FOR CONTINUED
ACCOUNT FREEZE AND BRIEF IN SUPPORT THEREOF**

I. INTRODUCTION

Simultaneous with the filing of this motion, the Receiver is filing (a) an Amended Complaint seeking the recovery of fraudulent CD proceeds from several hundred Relief Defendants, including but not limited to Stanford investors who have accounts frozen by this Court at Pershing, LLP (“Pershing”), JP Morgan Clearing Corp. (“JP Morgan”) and SEI Private Trust Company (“SEI”); and (b) a Motion for Order Freezing and for Disgorgement of Assets Held in the Names of Certain Relief Defendants,¹ which asks the Court to continue the freeze over certain Stanford customer accounts still frozen at Pershing, JP Morgan and SEI beyond August 3, 2009 and until the Court decides the issue of disgorgement. The Receiver seeks

¹ The Motion for Order Freezing and for Disgorgement of Assets Held in the Names of Certain Relief Defendants contains two requests for relief that may be referenced separately herein: (1) a request that the Court continue the freeze over all Stanford customer accounts still frozen at Pershing, JP Morgan and SEI (“Motion for Continued Account Freeze”); and (2) a request for disgorgement of assets contained in the frozen Pershing, JP Morgan and SEI accounts (“Motion for Disgorgement”).

expedited consideration of the request for continued account freeze given that the current freeze as to the named investor Relief Defendants expires at noon on August 3. Further, given the number of interested persons involved and the need to resolve the question of disgorgement on an expedited basis, the Receiver requests that the Court exercise its broad equitable powers available in receivership actions to establish summary proceedings that will allow the Court to fairly and expeditiously resolve the dispositive legal issue that is common to the claims against all Relief Defendants.²

The Receiver therefore requests an order from the Court directing that the procedures and schedule set forth below be adopted to address the Receiver's Motion for Order Freezing and for Disgorgement of Assets Held in the Names of Certain Relief Defendants. Specifically, the Receiver requests the Court to order that:

- (1) For the reasons stated in the Receiver's Motion for Continued Account Freeze, the current freeze over Stanford customer accounts at Pershing, JP Morgan and SEI be extended beyond August 3, 2009 and until further order of this Court addressing the Receiver's request for disgorgement of assets from those accounts;
- (2) By no later than Friday, July 31, 2009, the Receiver shall certify that he has served notice to the Relief Defendants (or their counsel) by delivering to such Relief Defendants — via Federal Express, UPS or Express U.S. Mail as well as email when addresses are available to the Receiver — copies of the Complaint, Motion for Order Freezing and for Disgorgement of Assets Held in the Names of Certain Relief Defendants, this motion, the proposed order granting continued account freeze and proposed order of disgorgement;

² This Motion for Order Establishing Summary Proceedings and the Receiver's Motion for Disgorgement apply to all investor Relief Defendants named in the Amended Complaint who have accounts currently frozen at Pershing, SEI or JP Morgan or who have transferred funds to the Receiver's segregated escrow account pending final adjudication of rights to those funds. The Receiver's Motion for Continued Freeze applies only to the investor Relief Defendants who have accounts currently frozen at Pershing, JP Morgan or SEI, as the freeze on those accounts, per this Court's June 29, 2009 Order in *SEC v. Stanford Int'l Bank, Ltd., et al.*, Civil Action No. 3-09-CV-0298-N, expires at Noon on August 3, 2009. The financial advisor Relief Defendants are not addressed in any of the Receiver's motions being filed on this date, as the freeze on their Pershing, SEI and JP Morgan accounts continues even under the Court's June 29, 2009 Order. Similarly, the Receiver's motions do not apply to the investor Relief Defendants who have no Pershing, SEI or JP Morgan accounts and have not transferred funds to the Receiver's escrow accounts, as those claims do not require the interim relief being requested by the Receiver.

- (3) Within 20 days after the Receiver files a certification that he has served notice, in accordance with the procedures set forth above, to the Relief Defendants, the Examiner shall file a response to the Receiver's Motion for Disgorgement on behalf of all Relief Defendants;
- (4) Within 10 days after the Examiner files his response to the Receiver's Motion for Disgorgement, any Relief Defendant may file a non-redundant further response to the Receiver's motion; and
- (5) Within 20 days after the Examiner files his response to the Receiver's Motion for Disgorgement, the Receiver shall file a reply to the Examiner's response and to all other responses that were timely filed by the Relief Defendants.

This proposed schedule will serve the interests of justice, the affected Relief Defendants as well as the Receivership Estate by allowing briefing on the Receiver's Motion for Disgorgement to be complete in less than six weeks. Both the Receiver and the Examiner, along with a number of the Relief Defendants, have already fully briefed almost all of the legal issues and authorities raised by the Motion for Disgorgement.³ Thus, the expedited schedule proposed herein will not prejudice any party with an interest in the outcome.

II. ARGUMENT & AUTHORITIES

A. **The Court should consider the Receiver's request for continued account freeze on an expedited basis.**

The Receiver asks the Court to consider his request for continued freeze of certain Stanford customer accounts at Pershing, JP Morgan and SEI on an expedited basis. In its June 29, 2009 Order in *SEC v. Stanford Int'l Bank, Ltd., et al.*, Civil Action No. 3-09-CV-0298-N, the Court ruled that "its prior orders freezing the accounts of individual investors are vacated to that extent effective noon, August 3, 2009."

³ See, e.g., the following filings from *SEC v. Stanford Int'l Bank, Ltd., et al.*, Civil Action No. 3-09-CV-0298-N: Examiner's Report and Recommendation No. 1 (Doc. 393), Receiver's Response to Examiner's Report and Recommendation No. 1 (Doc. 441) and Examiner's Reply Brief in Support of His Report and Recommendation No. 1 (Doc. 470).

Simultaneous with this motion, the Receiver is filing an Amended Complaint seeking the recovery of fraudulent CD proceeds from certain Relief Defendants, including over 400 Stanford investors who have accounts frozen at Pershing, JP Morgan and SEI. The Receiver is also requesting an order of disgorgement of the assets in the Pershing, JP Morgan and SEI accounts, which in the aggregate represent approximately \$300 million in recoverable proceeds to the Receivership Estate, and all funds transferred by investor Relief Defendants to the Receiver's escrow account.

While the Court considers the Receiver's request for disgorgement, it is necessary to continue the freeze over the Pershing, JP Morgan and SEI accounts at issue. If the freeze is not extended prior to noon on August 3, the current freeze as to certain investor Relief Defendants will expire and the accounts will be subject to release, making the Receiver's attempts to recover far more difficult, complicated and potentially cost prohibitive.

For these reasons, the Receiver requests expedited consideration of his request for continued account freeze.

B. A receivership court has the power to adjudicate disgorgement claims in a summary proceeding.

“It is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.” *SEC v. Great White Marine & Recreation, Inc.*, 428 F.3d 553, 556 (5th Cir. 2005) (citation omitted). Likewise, “[t]he district court has broad equitable powers to fashion appropriate relief for violations of the federal securities laws.” *SEC v. First Pac. Bancorp.*, 142 F.3d 1186, 1193 (9th Cir. 1998). The Court may “grant ‘ancillary relief . . . where necessary and proper to effectuate the purposes of the securities laws.’” *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 438 (2d Cir. 1987) (citation omitted).

Based on these powers, a district court can utilize summary procedures that are tailored to the circumstances of the particular case. *See SEC v. Black*, 163 F.3d 188, 198–99 (3rd Cir. 1998); *SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1146–47 (9th Cir. 1996), *abrogated on other grounds by, Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998); *SEC v. Elliott*, 953 F.2d 1560, 1566–67 (11th Cir. 1992); *SEC v. Wencke*, 783 F.2d 829, 836–38 (9th Cir. 1986); *SEC v. Universal Fin.*, 760 F.2d 1034, 1037 (9th Cir. 1985); *United States v. Arizona Fuels, Corp.*, 739 F.2d 455, 458–59 (9th Cir. 1984). “A district judge supervising an equity receivership faces a myriad of complicated problems in dealing with the various parties and issues involved in administering the receivership. Reasonable administrative procedures, crafted to deal with the complex circumstances of each case, will be upheld.” *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). “A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets.” *Elliott*, 953 F.2d at 1566.

Summary proceedings may depart from the Federal Rules of Civil Procedure. *See Elliott*, 953 F.2d at 1566; *Universal Fin.*, 760 F.2d at 1037; *Hardy*, 803 F.2d at 1040 (approving “summary proceedings to determine appropriate relief in equity receiverships, as opposed to plenary proceedings under the Federal Rules”). The choice of procedures is reviewed only for abuse of discretion. *See Elliott*, 953 F.2d at 1567; *Hardy*, 803 F.2d at 1038. Generally speaking, the main differences between a summary proceeding and a plenary suit are:

The former is based upon petition, and proceeds without formal pleadings; the latter proceeds upon formal pleadings. In the former, the necessary parties are cited in by order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual

method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had.

United States v. Fairway Capital Corp., 433 F. Supp. 2d 226, 241 (D.R.I. 2006) (quoting *Central Republic Bank & Trust Co. v. Caldwell*, 58 F.2d 721, 731–32 (8th Cir. 1932)). Summary proceedings satisfy due process so long as there is adequate notice and an opportunity to be heard. *See FTC v. Assail, Inc.*, 410 F.3d 256, 267 (5th Cir. 2005); *Commodities Futures Trading Comm’n v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 2000); *Am. Capital Invs., Inc.*, 98 F.3d at 1146–47; *Wencke*, 783 F.2d at 838; *SEC v. Amerifirst Funding, Inc.*, Civil Action No. 3:07-CV-1188-D, 2008 WL 282275, at *15 (N.D. Tex. Feb. 1, 2008); *SEC v. TLC Invs. & Trade Co.*, 147 F. Supp. 2d 1031, 1034–35 (C.D. Cal. 2001).

Summary proceedings can be used to adjudicate competing claims to property. *See SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 662, 668–69 (6th Cir. 2001) (adjudicating receiver’s and investors’ competing claims to funds in an escrow account); *Elliot*, 953 F.2d at 1566–67, 1570–72 (adjudicating investors’ claims to receivership assets upon final distribution, including determining ownership of securities); *Am. Capital Invs.*, 98 F.3d at 1146–47 (adjudicating receiver’s and investors’ competing claims to real property); *Universal Fin.*, 760 F.2d at 1037 (adjudicating receiver’s and investors’ competing claims to notes and deeds of trust). Most importantly for this motion, summary proceedings have been used to adjudicate a disgorgement claim brought by a receiver against a recipient of fraudulent proceeds. *See Wencke*, 783 F.2d at 836–38 (adjudicating whether non-party received “ill-gotten gains” and hence was subject to disgorgement); *see also SEC v. Ross*, 504 F.3d 1130, 1143–44 (9th Cir. 2007) (citing *Wencke* and approving of summary proceedings against relief defendants for disgorgement).

C. The Court should exercise its equitable power to tailor the summary judgment proceedings in this case.

Based on these broad powers upheld by numerous circuit court decisions, the Receiver asks the Court to utilize the following procedures in connection with the Receiver's summary judgment motion.

1. The Examiner should represent the Relief Defendants.

The Examiner should represent the Relief Defendants in the summary proceedings. Although the Examiner presumably represents the interest of all investors, he has already made clear his opposition to the Receiver's claims against the Relief Defendants. There should be no doubt that he speaks for them. Furthermore, the Examiner has stated that he "maintains regular contact, via email, with a group of more than ninety (90) attorneys who represent Investors or groups of Investors." Brief of the Examiner Regarding the Antiguan Liquidators' Petition for Recognition Pursuant to Chapter 15 of the Bankr. Code, 3:09-cv-00721-N, Doc. 37 at 3 n. 4 (N.D. Tex. 2009). Given this close contact, and his stated opposition to claw-back claims, the Examiner is well-positioned to present the Relief Defendants' views and represent their interests.

Receivership courts have employed similar procedures when separate representation is impractical. In *SEC v. Black*, the receiver and SEC moved to modify an initial freeze order. 163 F.3d at 193. Investors were allowed to file written objections prior to a hearing on the motion. *Id.* At the hearing, a representative was designated for each class of investors. *Id.* at 198. Only the representatives were permitted to raise objections, present oral argument, and submit testimony by affidavit or expert report. *Id.* at 198–99. In addition, each representative was allowed to cross-examine two of the government's witnesses. *Id.* On appeal, several investors challenged this scheme of group representation, arguing that they should have

been allowed to introduce evidence on their own behalf at the hearing. *Id.* at 198. But the Third Circuit upheld the procedure, noting that “where there is a receiver with equitable power in a proceeding before it, the District Court has wide discretion as to how to proceed.” *Id.* at 199.

A similar process was used and approved in *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600 (9th Cir. 1978). In that case, several creditors challenged the procedures used by a district court to liquidate companies in receivership. *Id.* at 605. The creditors argued that the district court should have established a creditor’s committee to help carry out the liquidation. *Id.* But the Ninth Circuit found no abuse of discretion, reasoning that the creditors’ interests were adequately protected. *Id.* at 609. Critically, the district court had appointed an *amicus curiae* to represent the creditors in the liquidation proceedings. *Id.*

This mechanism of group representation should only apply to Relief Defendants that are similarly situated to one another. Because the Relief Defendants subject to the Motion for Disgorgement are all investors in SIBL CDs who received interest or redemption proceeds, all such Relief Defendants are similarly situated for purposes of the Receiver’s motion. But out of an abundance of caution and to avoid any potential claim that Relief Defendants did not have an adequate opportunity to be heard, the Court should give the Relief Defendants an opportunity to file separate briefs in response to the Receiver’s Motion for Disgorgement, but limit such briefs to arguments and authorities that are not merely redundant of those presented by the Examiner.

2. The briefing schedule set by the Court’s local rules should be modified.

The Court’s local rules require that a response to a motion be filed within 20 days after the motion is filed, N.D. Tex. R. 7.1(e), and that a reply be filed within 15 days after the response is filed. N.D. Tex. R. 7.1(f). Based on the Court’s broad equitable powers to tailor procedures when administering a receivership, the Receiver requests that:

- (a) The Examiner be given until 20 days after the Receiver files a certification that he has served notice, in accordance with the procedures set forth above, to the Relief Defendants, to file a response to the Receiver's Motion for Disgorgement on behalf of those Relief Defendants;
- (b) Any Relief Defendant be given until 10 days after the Examiner files his response to the Receiver's Motion for Disgorgement to file a non-redundant further response to the Receiver's motion; and
- (c) The Receiver be given until 20 days after the Examiner files his response to the Receiver's Motion for Disgorgement to file a reply to the Examiner's response and to all other responses that were timely filed by the Relief Defendants.

This modified schedule will give the Examiner adequate time to marshal the Relief Defendants' arguments and authorities in opposition to claw-back claims. *Cf. Hardy*, 803 F.2d at 1038–39 (upholding court-ordered deadlines for filing claims to receivership assets where the deadlines were “reasonable in light of the complexity of the receivership and the procedure employed to notify potential claimants”).

III. PRAYER

For the reasons stated herein, the Receiver requests that this motion be granted and that the Court enter an order granting expedited consideration of the Receiver's request for continued account freeze and an order directing that the following procedures and schedule be followed in addressing the Receiver's Motion for Order Freezing and for Disgorgement of Assets Held in the Names of Certain Relief Defendants. Specifically, the Receiver requests the Court to order that:

- (1) For the reasons stated in the Receiver's Motion for Continued Account Freeze, the current freeze over Stanford customer accounts at Pershing, JP Morgan and SEI be extended beyond August 3, 2009 and until further order of this Court addressing the Receiver's request for disgorgement of assets from those accounts;
- (2) By no later than Friday, July 31, 2009, the Receiver shall certify that he has served notice to the Relief Defendants (or their counsel) by delivering to such Relief Defendants — via Federal Express, UPS or Express U.S. Mail as well as email when addresses are available to the Receiver — copies of the Complaint, Motion for Order Freezing and for Disgorgement of Assets Held in the Names of

Certain Relief Defendants, this motion, the proposed order granting continued account freeze and proposed order of disgorgement;

- (3) Within 20 days after the Receiver files a certification that he has served notice, in accordance with the procedures set forth above, to the Relief Defendants, the Examiner shall file a response to the Receiver's Motion for Disgorgement on behalf of all Relief Defendants;
- (4) Within 10 days after the Examiner files his response to the Receiver's Motion for Disgorgement, any Relief Defendant may file a non-redundant further response to the Receiver's motion; and
- (5) Within 20 days after the Examiner files his response to the Receiver's Motion for Disgorgement, the Receiver shall file a reply to the Examiner's response and to all other responses that were timely filed by the Relief Defendants.

Dated: July 28, 2009

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Robert I. Howell
Texas Bar No. 10107300
robert.howell@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
(512) 322-2500
(512) 322-2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

CERTIFICATE OF CONFERENCE

I hereby certify that on July 27-28, 2009, counsel for the Receiver conferred with (a) counsel for the SEC, Kevin Edmundson; (b) counsel for Divo Milan Haddad and Singapore Puntamita Pte. Ltd., David Bryant; (c) Gene Besen, counsel for Jay Stuart Bell, Gregory Alan Maddux, David Jonathon Drew, Andruw Rudolf Bernardo Jones, Carlos Felipe Pena, Johnny David Damon and Bernabe Williams; and (d) the Examiner, John Little. Each of them indicated they are opposed to the relief sought in this Motion. Counsel for the receiver also attempted to contact Pro Se Relief Defendant, Hank Mills, but has insufficient information to make telephone contact with Mr. Mills. Accordingly, this Motion is opposed.

/s/ Kevin M. Sadler
Kevin Sadler

CERTIFICATE OF SERVICE

On July 28, 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 will serve the Relief Defendants individually or through their counsel of record, electronically, or by other means authorized by the Court or the Federal Rules of Civil Procedure.

/s/ Kevin M. Sadler
Kevin M. Sadler

So ordered and signed, this ____ day of July 2009.

HONORABLE DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

this motion, the proposed order granting continued account freeze and proposed order of disgorgement;

- (2) Within 20 days after the Receiver files a certification that he has served notice, in accordance with the procedures set forth herein, to the Relief Defendants, the Examiner shall file a response to the Receiver's Motion for Disgorgement on behalf of all Relief Defendants;
- (3) Within 10 days after the Examiner files his response to the Receiver's Motion for Disgorgement, any Relief Defendant may file a non-redundant further response to the Receiver's motion; and
- (4) Within 20 days after the Examiner files his response to the Receiver's Motion for Disgorgement, the Receiver shall file a reply to the Examiner's response and to all other responses that were timely filed by the Relief Defendants.

So ordered and signed, this ____ day of July 2009.

HONORABLE DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE