

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

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**STANFORD INTERNATIONAL
BANK, LTD., *et al.*,**

Defendants.

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CIVIL ACTION NO. 3-09-CV 0298-N

**BRIEF OF THE EXAMINER REGARDING THE
MOTION TO MODIFY OR VACATE CERTAIN
PORTIONS OF THE COURT’S AMENDED RECEIVERSHIP ORDER**

IN RE:

**STANFORD INTERNATIONAL
BANK, LTD., *et al.*,**

Debtor in a Foreign Proceeding.

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CIVIL ACTION NO. 3:09-CV-0721-N

**BRIEF OF THE EXAMINER REGARDING THE
MOTION TO REFER PETITION FOR RECOGNITION
PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY
CODE AND RELATED PLEADINGS TO THE BANKRUPTCY COURT**

TO THE HONORABLE JUDGE OF SAID COURT:

John J. Little, Examiner, submits his brief regarding Nigel Hamilton-Smith and Peter Wastell’s (collectively, the “Antiguan Liquidators”) Motion to Modify or Vacate

Certain Portions of the Court's Amended Receivership Order (the "Motion to Modify") [Doc. No. 329, Civil Action No. 03-09-CV-0298-L] and their Motion to Refer Petition for Recognition Pursuant to Chapter 15 of the Bankruptcy Code and Related Pleadings to the Bankruptcy Court (the "Motion to Refer") [Doc. No. 1, Civil Action No. 03-09-CV-0721-N]. As directed by the Court in its Order dated April 22, 2009 [Doc. No. 335], this brief does not address the merits of the Antiguan Liquidators' Petition for Recognition Pursuant to Chapter 15 of the Bankruptcy Code.

I. Preliminary Statement

Pursuant to the Court's Order dated April 20, 2009 [Doc. No. 322], the Examiner's task is to convey to the Court such information as he determines may be helpful to the Court in considering the interests of the Investors.¹ With respect to the pending Motions, the interests of the Investors mirror the purpose of the Federal Rules of Civil Procedure. Phrased in terms of Federal Rule 1, the goal is to secure the just, speedy, and inexpensive determination of this matter. Phrased in terms of the Investors, the goal is to maximize the payout to victims (and minimize the extent to which expenses reduce that payout) in the shortest time possible. As it relates to the pending Motions, these goals are best achieved if this Court gives the Antiguan Liquidators leave to file their Chapter 15 Petition and then proceeds to determine the issues raised in that Chapter 15 Petition without first referring that Petition to the Bankruptcy Court.

¹ The "Investors" include any "investors in financial products, accounts, vehicles or ventures sponsored, promoted or sold by any Defendants in this action." Order dated April 20, 2009 at 1.

II. The Motion to Modify

The stated purpose of the Motion to Modify is to strike paragraphs 10(e) and 11 of the Amended Receivership Order [Doc. No. 157] because the Antiguan Liquidators contend that those provisions are “void and unenforceable to the extent they purport to bar Liquidators from invoking [Chapter 15 of the U.S. Bankruptcy Code].” (Motion to Modify, page 2.) No doubt the Receiver, who proposed the language at issue, will disagree with that contention. While the efficacy *vel non* of the questioned provisions presents an interesting question regarding the interplay between receivership and bankruptcy proceedings, the Court need not address the question as presented by the Antiguan Liquidators.

Instead, the Examiner respectfully submits that the Antiguan Liquidators should simply be given leave to do what they have already done – file a petition under Chapter 15 of the Bankruptcy Code.² By permitting the Antiguan Liquidators to file their petition, the Court and the parties can focus on the merits of the issues raised in the Chapter 15 petition.

III. Chapter 15 Issues

With respect to the Motion to Refer, the Examiner notes that the jurisdictional, factual, and public policy issues that arise from the Antiguan Liquidators’ Chapter 15 Petition are similar to issues that have been, are now, and will be before the District Court in these proceedings.

² The Examiner respectfully submits that the Court should otherwise leave the Amended Receivership Order in place.

If the Court permits the Antiguan Liquidators to file their Chapter 15 Petition, the Court next has to address whether Chapter 15 relief is available to Stanford International Bank, Ltd. (“SIB”). Under 11 U.S.C. §§ 1501(c) and 109(b), Chapter 15 relief is not available to a foreign bank that has a branch or agency in the United States.³ The applicable definitions of “branch” and “agency” are stated in the International Banking Act of 1978:

For purposes of this chapter –

(1) “agency” means any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States; . . .

(3) “branch” means any office or any place of business of a foreign bank located in any State of the United States at which deposits are received; . . .

12 U.S.C. § 3101(1 and 3). The determination of whether SIB had an agency or branch in the United States will hinge on evidence similar to (i) that presented to the Court in connection with the original receivership and injunction proceedings and (ii) that which is (and will be) before the Court in connection with the Receiver’s pending Motion to Compel against Carlos Loumiet and Hunton & Williams LLP. [Doc. No. 220.]

If the Court decides that Chapter 15 relief is available to the Antiguan Liquidators, it can then consider whether the Antiguan proceeding should be recognized as a foreign

³ 11 U.S.C. § 1501(c): “This chapter does not apply to – (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b).”

11 U.S.C. § 109(b): “A person may be a debtor under chapter 7 of this title only if such person is not – . . . (B), savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, (as defined in section 1(b) of the International Banking Act of 1978[]) in the United States.”).

main proceeding or a foreign non-main proceeding. That determination turns on whether Antigua is the country “where the debtor has the center of its main interests,” *i.e.*, the “COMI” issue, and whether SIB has an “establishment” in Antigua. 11 U.S.C. § 1517(b)(1 and 2).⁴ This operation of Chapter 15 was summarized in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, LTD.*, 389 B.R. 325 (S.D.N.Y. 2008):

Section 1504 provides that a Chapter 15 case ancillary to a foreign proceeding is commenced by filing a petition. Section 1509 permits the foreign representative to file the petition directly with the Bankruptcy Court, without need for preliminary formalities, but conditions any other court access by the foreign representative on recognition. Sections 1504 and 1509 direct the foreign representative to file a petition for recognition of a foreign proceeding pursuant to section 1515. Section 1515 sets forth requirements for documentary or other evidence that demonstrates the existence of the foreign proceeding and the appointment of the foreign representative. Section 1516 permits the bankruptcy court to presume that the materials accompanying the petition demonstrate that the foreign proceeding and the foreign representative meet the basic definitional requirements.

Chapter 15 defines “recognition” as “the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this Chapter.” § 1502(7). “ ‘[F]oreign main proceeding’ means a foreign proceeding pending in the country where the debtor has the center of its main interests.” § 1502(4). “ ‘[F]oreign nonmain proceeding’ means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.” § 1502(5). Pursuant to section 1502(2), an “establishment” is “any place of operations where the debtor carries out a nontransitory economic activity.” . . .

Id. at 331. Once again, the evidence necessary for a determination of Chapter 15’s recognition issue will be evidence with which the Court is already familiar.

⁴ A further question that may merit consideration is raised by Chapter 15’s public policy exception: “Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.” 11 U.S.C. § 1506.

IV. The Motion to Refer

“Because chapter 15 petitions are typically considered in the first instance in bankruptcy courts, [the Antiguan] Liquidators request that the Court refer the Chapter 15 Pleadings to the Bankruptcy Court.” (Motion to Refer, page 2.) In this instance, the Examiner respectfully submits that following the typical path of a Chapter 15 Petition will result in increased expense and delay, and will ultimately diminish the return to the Investors. No matter what decision the Bankruptcy Court makes with respect to the matters raised in the Chapter 15 Petition, an appeal to the District Court is sure to follow.

Adjudicating the issues raised in the Chapter 15 Petition in this Court will result in substantial savings in time, in judicial resources, and in the expenses being incurred by both the Receiver and the Antiguan Liquidators.⁵ This Court’s current familiarity with the case and the issues to be decided reinforces the conclusion that this Court should retain and decide the Chapter 15 Petition without first referring it to the Bankruptcy Court. *See* 28 U.S.C. § 157(d) (“The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding *if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.*”) (emphasis added).

⁵ Adjudicating the issues raised in the Chapter 15 Petition in this Court does not preclude later recourse to the bankruptcy courts should that become appropriate, provided that such recourse is sought in a manner that complies with this Court’s Amended Order Appointing Receiver [Doc. No. 157].

Wherefore, the Examiner respectfully submits that the Court should grant the Antiguan Liquidators leave to file their Chapter 15 Petition and otherwise deny both the Motion to Modify and the Motion to Refer.

Respectfully submitted,

/s/ John J. Little

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CERTIFICATE OF SERVICE

On May 11, 2009 I electronically submitted the foregoing document to 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 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/ John J. Little