No. 19-___

IN THE

Supreme Court of the United States

JOSEPH BECKER, TERENCE BEVEN, WANDA BEVIS, THOMAS EDDIE BOWDEN, TROY L. LILLIE, JR., ET AL.,

Petitioners,

v.

RALPH S. JANVEY, in his Capacity as Court Appointed Receiver for Stanford International Bank Limited, Stanford Group Company, Stanford Capital Management L.L.C., Stanford Financial Group, and Stanford Financial Group Bldg., CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, ARCH SPECIALTY INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, ET. AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An equitable receivership was appointed by the Securities and Exchange Commission to administer the assets of the infamous Ponzi scheme operated by Allen Stanford. The Retirees filed a securities action against the Stanford Brokers and Underwriters in state court. Underwriters agreed to settle with the Receiver conditioned on the court permanently staying the state court securities lawsuits filed against Underwriters by the Retirees. The district court and Fifth Circuit entered the bar orders and approved the settlement. The following questions are presented:

1. Whether the Anti-Injunction Act ("AIA"), 28 U.S.C. §2283, allows for the issuance of bar order by the equitable receiver appointed by the SEC that permanently stays a pending state court securities claim of the Retirees based upon general equitable principles? *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

2. Whether the competing claims of the Receiver and the Retirees to the proceeds of the Underwriters polices are personal claims or *in rem* claims for the purpose of determining whether the "in aid of jurisdiction" exception existed to the AIA when coverage of the Receiver is contested, no hearing has been held to determine the scope of the exclusions applicable to the Receiver's claim, and no cash proceeds of the policy have been actually paid to the Receiver? *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642, 97 S.Ct. 2881, 2893, 53 L.Ed.2d 1009 (1977), and *Kline v. Burke Const. Co.*, 260 U.S. 226, 230; 43 S.Ct. 79, 81; 67 L.Ed. 226 (1922).

LIST OF PARTIES TO THE PROCEEDING

Petitioners, Joseph Becker, Terence Beven, Wanda Bevis, Thomas Eddie Bowden, Linda Boyd, James E. Brown, Sr., Murphy Buell, Jerry Burris, John Buscheme, Virginia Buscheme, Robert L. Bush, Anita Ellen Carter, Ira Gene Causey, Clyde "Jim" Chisholm, Estate of Joseph A. Chustz, Darrell D. Courville, Kevin Courville, Mallory (Paige) Chastant D'Amore, Ralph D'Amore IRA, Ralph D'Amore, William Dawson, Fred Demarest, Cynthia Dore, Kenneth W. Doughtery, Marcel Dumestre, Margaret Dumestre, Gwendolyn E. Fabre, Leah Farr, Richard S. Feucht, Joan A. Feutch, Deborah Forbes, G. Kendall Forbes, Mae Giambrone on behalf of Michael Giambrone, Lynn Gildersleeve Michelli, Lynn Gildersleeve Michelli on behalf of the Estate of Willa Mae Gildersleeve, Robert Gildersleeve, Gordon Gill, Nancy Gill, Jason Graham, Robert Graham, Patrick Haney, Charles Hart, Patsy Hebert, William Bruce Johnson, William Bruce Johnson on behalf of the Aimee Lynn Johnson Trust #1-SAS, William Bruce Johnson on behalf of Benton Bruce Johnson TR II, William Bruce Johnson on behalf of Benton Bruce Johnson Trust #1, William Bruce Johnson on behalf of Mark Calvin Johnson Trust #1, William Bruce Johnson on behalf of Martha JC Johnson Gen Skpg Tr-SAS, Thomas Christian Kiebach as the independent executor of the Succession of Thomas James Kiebach, Dennis L. Kirby, Kerry Kling, Don Landers, Daniel Landry, Merrill Laplante, Laura Jeanette N. Lee, Troy L. Lillie, Jr., Greg Magee, Mamie C. Sanchez as power of attorney for the Estate of Mamie Helen Baumann, Claude Marquette, Ronald Marston, Charles L. Massey, Jean Anne Mayhall (individually and on behalf of Microchip ID Services, Inc. Retirement Plan), Estate of Billie Ruth McMorris, Ronald B. McMorris,

Virginia H. McMorris, Microchip ID Services, Inc. Retirement Plan (Jean Anne Mayhall and John Wade), Kathy Mier, Louis Mier, Jacqueline Millet, Estate of Thomas Moran, Bobby Nix, Margaret Nix, Arthur Ordoyne, Lonnie Ordoyne, Bennie O'Rear, Estate of Claudia O'Rear, Mary Anne Paternostro, Larry W. Perkins, Monty M. Perkins, Lynn Philippe, Joseph Philippe, William Phillips, James Roland, Susan Roland, Jesse Romig, Charles R. Sanchez, Mamie C. Sanchez, Julie Savoy, Robert Schwendimann, Thomas Slaughter, Estate of G. Rogers Smith, Larry N. Smith, Robert Smith, Rodney Starkey, Carol Stegall, James "Harold" Stegall, Walter Bruce Stone, Sharon Witmer, Walter Bruce Stone as independent executor of Succession of Sharon Witmer, Terry Tarver, Terry N. Tullis, Gail Unglesby, Ronald Valentine, Anthony J. Ventrella, John Wade (individually and on behalf of Microchip ID Services Inc. Retirement Plan), Olivia Sue Warnock, Arthur Waxley, Jr., Charles L. White, Estate of Kenneth Wilkewitz, Steven Wilson, and Martha Witmer (collectively the "Retirees"), were objecting parties in the district court and appellants in the court of appeals.

Respondent, Ralph S. Janvey (the "Receiver"), Court Appointed Receiver for the Stanford International Bank, Ltd., In his Capacity as Court Appointed Receiver for Stanford International Bank Limited, Stanford Group Company, Stanford Capital Management L.L.C., Stanford Financial Group, and Stanford Financial Group Bldg., was a movant in the district court action and an appellee in the court of appeals.

Respondents, Certain Underwriters at Lloyd's of London, Arch Specialty Insurance Company, and Lexington Insurance Company (collectively "Under-

writers"), were interested parties in the district court action and appellees in the court of appeals.

Respondents, Eddie Rollins, a former employee of Stanford, and Cordell Haymon, a former Stanford director, were objecting parties in the district court action and appellants in the court of appeals.

RULE 29.6 STATEMENT

Microchip ID Services Inc., whose pension plan purchased a certificate of deposit, does not have a parent corporation and no publically held corporation owns 10% or more of any of its stock.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioners stated that the following proceedings are directly related to the action that is the subject of this Petition as it deals with permanent bar orders issued in connection with settlements by the Stanford Receiver:

> United States Court of Appeals for the Fifth Circuit.
>
> *Antonio Zacarias*, *et al. v. Stanford Int'l Bank, Ltd., et al.*, No. 17-11073 consolidated with 17-11114, 17-11122, 17-11127, 17-11128, 17-11129, issued on July 22, 2019, at 931 F.3d 382 (5th Cir. 2019), withdrawn and superseded on rehearing on December 19, 2019, at 945 F.3d 883 (5th Cir. 2019).

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Joseph Becker, *et al*. ("Retirees"), respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit rendered its opinion on June 17, 2019, reported at 927 F.3d 830, and is reproduced at Pet.App.1a-35a. The Fifth Circuit denied Petitions for Panel Rehearing and Rehearing En Banc on October 23, 2019, and its Order is reproduced at Pet.App. 36a-39a. The Fifth Circuit's mandate was issued on October 31, 2019, and is reproduced at Pet.App.40a-43a. The Final Bar Order granting the Receiver's motion to approve the settlement with Underwriters dated May 16, 2017 is reproduced at Pet.App.44a-57a. The district court's order dated May 16, 2017 denying the Retirees' objections to the Final Bar Order is reproduced at Pet.App.58a-73a. The district court's order dated May 16, 2017 approving the Receiver's attorney's fee request is reproduced at Pet.App.74a-81a. The district court's order dated October 3, 2017 denying a motion for new trial on the granting of the Final Bar Order is reproduced at Pet.App.82a-85a.

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its decision on June 17, 2019, Pet.App.1a-35a, and denied rehearing en banc on October 23, 2019, Pet.App.36a-39a. The mandate was issued on October 31, 2019, Pet.App.40a-43a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 2283 states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

La. R.S. 22:1269 states in pertinent part:

> B. (1) The injured person or his survivors or heirs mentioned in Subsection A of this Section, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Code of Civil Procedure Art. 42 only; however, such action may be brought against the insurer alone only when at least one of the following applies:
>
> (a) The insured has been adjudged bankrupt by a court of competent jurisdiction or when proceedings to adjudge an insured bankrupt have been commenced before a court of competent jurisdiction.
>
> (b) The insured is insolvent.
>
> (c) Service of citation or other process cannot be made on the insured.

(d) When the cause of action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons.

(e) When the insurer is an uninsured motorist carrier.

(f) The insured is deceased.

(2) This right of direct action shall exist whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the state of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if such provisions are not in violation of the laws of this state.

La. R.S. 51:714 (B) states:

B. Every person who directly or indirectly controls a person liable under Subsection A of this Section, every general partner, executive officer, or director of such person liable under Subsection A of this Section, every person occupying a similar status or performing similar functions, and every dealer or salesman who participates in any material way in the sale is liable jointly and severally with and to the same extent as the person liable under Subsection A of this Section unless the person whose liability arises under this Subsection sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known of

> the existence of the facts by reason of which liability is alleged to exist. There is contribution as in the case of contract among several persons so liable.

STATEMENT OF THE CASE

The district court and Fifth Circuit permanently stayed the Retirees' claims against Underwriters even though coverage under the policy was contested based upon the "insured vs. insured" exclusion and the amount of the settlement was substantially less than the policy limits. The Fifth Circuit resorted to equitable considerations to justify the grant of the permanent stay and refused to conduct a hearing on coverage and policy limits.

The permanent stay of the Retirees' state court proceedings based on equitable considerations conflicts with the existing law of this Court. *Atlantic Coast Line R. Co.*, 398 U.S. 281. Based upon an unreported district court decision, the Fifth Circuit designated the Receiver's and Retirees' competing claims for coverage under the Underwriters policy as *in rem* claims against assets of the receivership in order to qualify for the "in aid of jurisdiction" exception to the AIA, 28 U.S.C. §2283. The designation of the competing claims of the Receiver and Retirees for coverage under the Underwriters policy as *in rem* conflicts with the existing precedents of this Court and other circuit courts, which have held that disputed contractual claims are *in personam* and not *in rem* claims and, thus do not fall outside of the prohibitions of the AIA. *Kline*, 260 U.S. 226.

The Securities and Exchange Commission filed a complaint in the Northern District of Texas against Robert Allen Stanford, the Stanford International

Bank, and other Stanford entities, alleging "a massive, ongoing fraud" on February 17, 2009. "The Court appointed Ralph S. Janvey to administer the assets of the infamous Ponzi scheme operated by Allen Stanford on February 17, 2009 and to serve as Receiver of the Receivership Estate and vested him with 'the full power of an equity receiver under common law as well as such powers as are enumerated' in the Receivership Order." *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F.Supp.2d 323, 326 (N.D. Tex. 2011).

The Retirees filed suit against the Stanford Brokers and their insurers, Certain Underwriters at Lloyd's of London, Arch Specialty Insurance Company, and Lexington Insurance Company (collectively "Underwriters"), in Louisiana state court in August of 2009 under the Louisiana Securities Act, La. R.S. 51:701.[1] All of the claims of the Retirees were timely noticed under the terms of the Underwriters policy prior to August 15, 2009 and are direct action claims against

[1] *See* Original Petition in *Joseph Becker, et al. v. Jason Green, et al.*, Docket No. 579503, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana (ROA.68535-68561) with First Amendment (ROA.68563-68567) ("*Becker*"), Original Petition in *Rodney Starkey, et al. v. Jason Green, et al.*, Docket No. 578192, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana (ROA.68569-68596) with First Amendment (ROA.68598-68602) ("*Starkey*"), Original Petition in *James Roland, et al. v. Jason Green, et al.*, Docket No. 581479, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana (ROA.68604-68655) ("*Roland*"), and Original Petition in *Leah Farr et al. v. Jason Green, et al.*, Docket No. 581480, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana (ROA.68657-68714) ("*Farr*").

Underwriters under the Louisiana Direct Action Statute, La. R.S. 22:1269.[2]

The Receiver and Underwriters, who insured the Brokers who defrauded the Retirees, negotiated for complete peace and agreed to settle conditioned on bar orders enjoining further Ponzi-scheme suits filed against them by the Retirees. The district court entered the bar orders, approved the settlements, and specifically entered a permanent stay enjoining the state court claims of the Retirees that had been previously filed against Underwriters and certain Stanford Brokers. The Fifth Circuit granted this bar order in favor of the Receiver even though no determination had been made of the policy limits or that coverage may not exist under the policy for claims of the Receiver because of the "insured vs. insured" exclusion.

This case is the continuation of this Court's previously decided case of *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 134 S.Ct. 1058, 188 L.Ed.2d 88

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[2] *See* La. R.S. 22:1269(B)(2) ("This right of direct action shall exist whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the state of Louisiana…."). Stanford Brokers named defendants are Jason Green, Grady Layfield, Ron Clayton, Michael Word, Jay Comeaux, Hank Mills, Dirk Harris, Timothy Parsons, Charles Jantzi, Tiffany Angelle, James Fontenot, Alvaro Trullenque, John Schwab, Gary Haindel, Thomas Newland, James Comeaux, Zack Parrish, Bernard Young, Lena Stinson, Rhonda Lear, Jack Bruno, J.D. Perry, Joe Klingen, Russ Newton, Danny Bogar, Jim Weller, Timothy E. Parsons, Charles Jantzi, Tiffany Angelle, James Fontenot, Alvaro Trullenque, John Schwab, James Keith Cox, Charles Rawl, Arlen "Tiger" Blackwell (collectively "Brokers").

(2014) ("*Chadbourne*"), where it was held that these same plaintiffs' state court securities law claims were not precluded under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and could be brought under the Louisiana Securities Law, La. R.S. 51:701, *et seq* ("LSA"). The *Chadbourne* decision is now a hollow victory after being informed by the Receiver, the district court, and the Fifth Circuit Court of Appeals, that their securities law claim is permanently stayed. *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 849 (5th Cir. 2019). The Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court, other federal circuits, or at a minimum, decided an important question of federal law that has not been, but should be, settled by this Court. The decision of the Fifth Circuit radically expands the law by allowing an equitable receiver to permanently stay a pending state court action of a third party against a non-debtor broker and their insurer.

The law of this Court is clear on two important points. First, a permanent injunction of a pending state court securities claim in favor of an equitable receiver based upon general equitable principles is not allowed under the AIA. *See Atlantic Coast Line R. Co.*, 398 U.S. at 287. Second, the alleged legal rights of the equitable receiver to proceeds of an insurance policy when the policy proceeds have not been deposited with the receiver is not "*in rem*" property of the estate for purpose of creating an exception to the AIA such that it would allow the lower courts to permanently stay the Retirees' state court claim to the same proceeds. Rather, the two claims of the Receiver and the Retirees are personal claims for the same money from the insurer. As a result, the ruling of the Fifth Circuit

directly conflicts with two prior decisions of this Court. *Vendo Co.*, 433 U.S. at 642; *Kline*, 260 U.S. 226; *see SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Properties, LLC*, 445 F.Supp.2d 356, 361 (S.D.N.Y. 2006). Finally, the decision of the Fifth Circuit conflicts with the Third Circuit decision of *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 232 (3d Cir. 2004), which requires a hearing on the scope of coverage and policy limits before determining whether the federal court may exercise exclusive jurisdiction over the policy and policy proceeds.

The Receiver and Underwriters entered into a settlement, which was approved by the district court. Pet.App.45a. Before Underwriters would make any payment to the Receiver, a final order was required to be issued that permanently enjoined and de facto dismissed the securities law claims of the Retirees against the Brokers and Underwriters. The question of whether an equitable receiver can permanently stay a pending state court securities action of a third party against a non-debtor is an issue that has not been considered by this Court.

At the request of the equitable receivership appointed by the SEC, the district court permanently enjoined and de facto dismissed the Retirees' securities law claims against Brokers, who sold them the worthless Stanford International Bank Certificates of Deposit ("SIB CDs"), and claims against the Brokers' insurer, Underwriters. This case presents two separate issues. First, whether the AIA precludes an equitable receiver from permanently staying a pending state court securities claim against the Brokers and its insurer, Underwriters, based solely upon general equity principles. Second, whether the permanent injunction requested by the Receiver and Underwriters falls

within the "in aid of jurisdiction" exception of the AIA when the contested insurance coverage claims of both the Receiver and Underwriters are "personal claims" based upon *Kline* and not "*in rem*" property of the estate, because the estate is not the holder of actual proceeds of the policy.

The ruling staying the personal action of the Retirees without a hearing to determine whether it is likely the Receiver's claim is covered or excluded under the terms of the Underwriters' policy based upon the "insured vs. insured" exclusion is contrary to the holding of the Third Circuit in *In re Combustion Eng'g, Inc.*, 391 F.3d at 232–33. *See* also *In re Imerys Talc Am., Inc.*, 19-MC-103 (MN), 2019 WL 3253366, at *5 (D. Del. July 19, 2019). If the lower courts had examined this issue, the courts would have had to confront the likely conclusion that the "insured vs. insured" exclusion set forth in Article IV(E) of the Underwriters Policy unambiguously excludes coverage for the claim of the Receiver against Underwriters because the Receiver is only filing claims on behalf of the "Company" and the claim does not fall into the "bankruptcy proceeding" exception to the exclusion.[3]

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[3] The Underwriters' Directors' and Officers' Liability and Company Indemnity Policy provides the following exclusion:

> **ARTICLE IV. EXCLUSIONS**
>
> The Underwriters shall not be liable to make any payment for Loss resulting from any Claim
>
> * * *
>
> E. brought by or at the behest of the Company or by or on behalf of any other Director or Officer except and to the extent that
>
> * * *

In addition, before the court can possibly enjoin the state court action of the Retirees, it must first determine whether the Receiver has any claim to the policy proceeds. The potential abuses of the failure to make this determination of entitlement to policy proceeds are apparent in this situation. Here, the Receiver seeks to settle all claims for significantly less than policy limits in exchange for obtaining a bar order against the Retirees, instead of based on the scope of coverage.

Similar issues have been addressed by the Fifth Circuit in the companion case of *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883 (5th Cir. 2019) ("*Zacarias*").[4] In both this case and *Zacarias*, the Fifth Circuit devotes a considerable amount of time analyzing the equitable reasons to justify its holding based upon the fact that the Retirees should not receive payments in excess of the claimants who did not file an action under the securities law. However, the law is plain that general equitable principles, including the equity powers that can be exercised by SEC receiverships, do not provide an additional exception to the AIA to allow a stay of pending state court claims such as the Retirees' claims against the Brokers and Underwriters. *Atlantic Coast Line R. Co.*, 398 U.S. at 287 ("[A]ny injunction against state court proceedings otherwise proper under *general equitable*

> (iii) such Claim is brought by the examiner, trustee, receiver, liquidator, etc. in a bankruptcy proceeding

See ROA.68726.

[4] The original opinion is cited as *Zacarias v. Stanford Int'l Bank, Ltd.*, 931 F.3d 382 (5th Cir. 2019). This opinion was withdrawn and superseded on rehearing on December 19, 2019 in *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883 (5th Cir. 2019).

principles must be based on one of the specific statutory exceptions to [the Anti-Injunction Act] if it is to be upheld.") (emphasis added).

The Fifth Circuit failed to follow this Court's precedent in *Atlantic Coast Line R. Co.* by relying upon general equitable principles as the basis for the Court's decision in both this case and *Zacarias* for the purpose of staying state court proceedings of the Retirees and the plaintiffs in *Zacarias*. Neither opinion addresses the requirements of *Atlantic Coast Line R. Co.*, 398 U.S. 281.

The lower court mistakenly designates the Receiver's and the Retirees' claim for coverage under the Underwriters policy as an *in rem* claim relying upon the unreported South Carolina case of *SEC v. Parish*, 2010 WL 8347143 (D.S.C. Feb. 10, 2010). Both the Retirees and the Receiver have unliquidated "personal" claims against the insurer for coverage under the policy. Underwriters has made no payments to the Receiver. As stated by this Court in *Vendo Co.*, 433 U.S. at 642, the courts "have never viewed parallel in personam actions as interfering with the jurisdiction of either court." *See also SR Int'l Bus. Ins. Co. Ltd.*, 445 F.Supp.2d at 361.

The ruling of the Fifth Circuit to permanently stay a securities law claim pending in state court against non-debtors by a third party radically expands the powers of an equitable receiver beyond any existing case law. If the district court's bar order against the Retirees is upheld, the rights of an individual investor to pursue securities law claims against the issuer of the securities and its board of directors and executive officers of insolvent companies are severely restricted and limited, and represent a major change in policy. Further, it encourages the Receiver to enter into

discount settlements with insurers in return for global releases, when in fact, no coverage exists under the terms of the insurance policy.

This writ should be granted because the court ignored the Supreme Court's decision of *Atlantic Coast Line R. Co.*, 398 U.S. 281, by primarily basing its decision on general equitable principles to permanently stay the pending state court claims of the Retirees. Equitable considerations are not one of the exceptions to the AIA. Further, the holding in this case by the Fifth Circuit conflicts with this Court's precedent and the law in other circuits which has held that a receiver's claim for insurance coverage and other non-debtor claims for insurance coverage are personal actions and not *in rem* actions and may not be enjoined as an exception to the AIA until the proceeds are actually paid to the Receiver. *Vendo Co.*, 433 U.S. at 642; *Kline*, 260 U.S. 226.

Substantially all of the existing case law decided by the federal courts allowing for bar orders fall into three categories that have no relevance to this case. First, numerous decisions have been rendered where settlement bar orders have been allowed by the courts to bar claims between co-defendants—i.e., to prevent one non-settling co-defendant from seeking contribution against a settling co-defendant. Secondly, numerous decisions have been rendered where settlement bar orders have been allowed by courts to enjoin the filing of future state court claims against settling parties after the date of the bar order. The third category is direct claims by a third party against the Receiver.

No reported case addresses an equitable receivership's right to permanently stay a third party claim that is pending in state court against an insurer for

coverage under an insurance policy where both the Receiver and third party are seeking coverage under the policy. The decision of the Fifth Circuit forges new ground and radically expands the powers of an equitable receiver and bankruptcy receiver beyond the settlement powers conferred under any existing case law. The holding of the Fifth Circuit in this case eviscerates the rights of shareholders to bring securities law claims against fraudulent individual promoters, brokers and their insurers when the original issuer has filed for bankruptcy or where the courts have appointed an equitable receivership for the original issuer by essentially giving the trustee or receiver the right to de facto dismiss any existing securities law claim against the individual brokers and promoters that committed the fraud.

In the case at hand, the Receiver and Underwriters have entered into a settlement agreement notwithstanding the fact that no coverage exists under the policy for less than policy limits in return for the court agreeing that Underwriters will have no further liability. The abuse of this settlement is apparent—the insurer is receiving a release of liability for less than policy limits even though it has no coverage for the Receiver, in return for a complete release of liability from all parties. The insurance coverage in this case turns upon the status of the claimant and not the type of transaction that has resulted in the claim. The coverage of the policy is based upon the status of the plaintiff and not the type of transaction based on a provision in the policy that precludes one insured from suing another insured. This affords the Court the opportunity to fully confront the legal issues relating to the validity of the Retirees' and the Receiver's claim for coverage under the Underwriters policy that provides insurance for the non-debtor

officers and directors. Further, the abuse of not addressing these substantive issues is the type of situation addressed in the *Zacarias* dissent where Judge Willet states, "Federal courts cannot decide a claim's fate outside the 'honest and actual antagonistic assertion of rights.'" *Zacarias*, 945 F.3d at 883, citing *United States v. Johnson*, 319 U.S. 302, 305, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943) (quoting *Chi. & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 36 L.Ed. 176 (1892)). No "honest and actual antagonistic assertion of rights" have occurred between the Receiver and Retirees as to the ownership of the policy proceeds.

Prior to August 15, 2009, the Retirees filed four suits against Underwriters and the officers, directors, and employees of the Stanford Entities, who were insureds under Underwriters' Policies, in connection with the purchases of the SIB CDs.[5] The lawsuits were also filed directly against Underwriters as allowed under the Louisiana Direct Action Statute, La. R.S. 22:1269 (formerly La. R.S. 22:655). The claims against the Brokers were based upon the Louisiana Securities Law, La. R.S. 51:714(B), which allows for liability if the defendants were negligent in omitting certain information in connection with the offering. Under the terms of Underwriters' claims-made policy, any claim had to be noticed prior to August 15, 2009, which was complied with by the Retirees.

On May 16, 2017, the Honorable David Godbey issued a Final Bar Order granting the Receiver's motion to approve the settlement with Underwriters (Pet.App.44a-57a), and issued an Order denying the

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[5] *See* FN 1; The procedural background of case is set forth in detail in *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012).

Retirees' objections to the motion to approve the settlement (Pet.App.58a-73a). The Settlement Agreement and proposed Bar Order attempt to permanently enjoin the Retirees' claims that were filed in Louisiana state court prior to August 15, 2009 against Underwriters and each of its insureds, who are brokers and investment advisors. As a condition to the payment of the settlement amount, the district court signed the Bar Order (Pet.App.44a-57a) and issued a written opinion setting forth its basis for the ruling. Pet.App.58a-73a. Paragraphs 11 and 14 of the Judgment and Bar Order permanently enjoin the Stanford Investors from pursuing the Stanford Claims. Pet.App.52a; Pet.App.54a-55a. Paragraph 21 of the Settlement Agreement defines the Stanford Investor Claim to mean "any action, lawsuit or claims brought by any Stanford Investor against Underwriters [or]… Underwriter's Insureds." (ROA.65369-65370). Underwriters' Insureds are defined in Paragraph 25 as "any person that shall be an officer and director of any Stanford Entities… [or] any employee of any Stanford Entities." (ROA.65371).

Based upon this language, the Retirees, including the *Chadbourne* Plaintiffs, all meet the definition of being a Stanford Investor and their timely noticed and filed state court claims are Stanford Investor Claims. Since the Stanford Investor Claims include claims against Underwriters and Underwriters' Insureds (officers, directors, and employees of any Stanford Entities), the permanent injunction would result in a *de facto* final dismissal of all of the Retirees' claims pending in Louisiana state court against the Underwriters and all of its Insureds (brokers, investment advisors, officer, directors, and employees of Stanford Entities) who were named as defendants in the Louisiana state court litigation.

REASONS FOR GRANTING THE PETITION

This holding of the Fifth Circuit in granting a permanent stay against existing state court claims against Underwriters conflicts with this Court's holdings not to interfere in state court proceedings. "The Act broadly commands that those tribunals 'shall remain free from interference by federal courts.'" *Smith v. Bayer Corp.*, 564 U.S. 299, 306-307, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011), citing *Atlantic Coast Line R. Co.*, 398 U.S. *at* 282. Granting this permanent stay based upon general equitable principles impinges on the well-defined boundaries of states' rights that allow personal claims to go forward in separate state court proceedings unless an exception to the AIA exists. It is a novel concept at best that an equitable receiver and third parties cannot pursue the same source of recovery for non-debtors in personal actions—in this case, coverage under the Underwriters policy. It is at this point of the analysis that the powers of the equity receiver clash with the rights of state courts and the historical desires of this Court to prevent federal courts from intervening in the operation of state courts. The writ should be granted to establish the parameters of this relationship.

I. An Order Issued By The Fifth Circuit Allowing An Equitable Receiver To Permanently Stay A Pending State Court Securities Claim Based Upon General Equitable Principles Is Not An Exception To The Anti-Injunction Act.

"[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to [the Anti-Injunction Act] if it is to be

upheld." *Atlantic Coast Line R. Co*., 398 U.S. at 287.[6] Based upon the express holding of *Atlantic Coast Line R. Co.*, general equitable principles cannot be used to create exceptions to the AIA.

The AIA provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. §2283. This Court, in *Smith*, 564 U.S. 299, 306-307, stated the following:

> …[T]he Act's core message is one of respect for state courts. The Act broadly commands that those tribunals "shall remain free from interference by federal courts." *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 282, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). That edict is subject to only "three specifically defined exceptions." *Id*., at 286, 90 S.Ct. 1739. And those exceptions, though designed for important purposes, "are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 486 U.S., at 146, 108 S.Ct. 1684 (quoting *Atlantic Coast Line*, 398 U.S., at 287, 90 S.Ct. 1739; alteration in original). Indeed, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Id*., at 297, 90 S.Ct. 1739.

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[6] *See 202 N. Monroe, LLC v. Sower*, 850 F.3d 265, 271 (6th Cir. 2017); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1100–01 (9th Cir. 2008); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 364 (3d Cir. 2001).

* * *

> …[E]very benefit of the doubt goes toward the state court; …an injunction can issue only if preclusion is clear beyond peradventure."

In reviewing the Fifth Circuit opinion, it is apparent that the Fifth Circuit justified its actions in staying the claims of the Retirees against Underwriters based upon equitable standards specifically not allowed by *Atlantic Coast Line R. Co.* The court explicitly relied upon equitable standards in allowing the bar order, as shown by the following statement:

> ...(E)quity favored avoiding costly litigation and dissipation of receivership assets by allowing the Receiver, a coinsured with equal claim to the policy proceeds, to settle with the Underwriters. Avoiding protracted legal examination of the policy exclusions, which could just as easily bar Retirees and others from the policy proceeds, was precisely the point of the settlement.

Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd., 927 F.3d at 850; Pet.App.34a. Further, the court stated that it reasoned that "on balance the unfairness alleged by the Objectors is either mitigated by other circumstances or simply outweighed by the benefit of the settlement in terms of fairness, equity, reasonableness, and the best interests of the receivership." *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d at 838-39; Pet.App.67a.

No exception is provided for receiverships which would allow the lower court to permanently enjoin and de facto dismiss claims that were filed in state court seven years prior to the proposed settlement based upon general equitable principles. The grant of

the permanent stay, based upon general equitable principles, of a claim by a third party against a non-debtor (the Brokers and their insurer, Underwriters) has no foundation in the law and is contrary to the existing law established by this Court to protect actions in state court.

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R. Co.*, 398 U.S. at 297. These exceptions are each construed narrowly and should not be broadened by "loose statutory construction." *Bayer*, 564 U.S. at 306; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). Thus, the lower court erred by disregarding the precedent of this Court is granting the bar order based on general equitable principles.

II. The Competing Claims Of The Receiver And The Retirees To The Proceeds Of The Underwriters Policies Are Not *In Rem* Claims For The Purpose Of Determining Whether The "In Aid Of Jurisdiction" Exception Existed To The AIA When Coverage Of The Receiver Is Contested And No Cash Proceeds Of The Policy Have Been Actually Paid To The Receiver.

The Anti-Injunction Act, 28 U.S.C. §2283, provides that:

> A court of the United States *may not grant an injunction to stay proceedings in a State court* except as expressly authorized by Act of Congress, or where necessary in aid of its

> jurisdiction, or to protect or effectuate its judgments. (Emphasis added.)

The Act is "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *MLE Realty Assocs. v. Handler*, 192 F.3d 259, 261 (2d Cir. 1999) (citation omitted). The primary focus of this case is whether the competing claims for the policy proceeds by the Receiver and Retirees are a personal claim or an "*in rem*" claim against the assets of the estate. The *Kline* case establishes two important legal propositions. First, an *in rem* claim against the assets of the estate has been interpreted to allow a court to enjoin a state court lawsuit based upon the in aid of jurisdiction exception. Secondly, "[A] controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending." *Kline*, 260 U.S. at 230.

The legal rights of the equitable receiver under an insurance policy when coverage is contested and the money has not been deposited with the receiver is not *in rem* property of the estate for purposes of creating an exception to the AIA and justification for staying the Retirees' state court claim. Instead, each of the claims by the Receiver and the Retirees are personal claims for the same money from the insurer. The permanent injunction granted the Receiver and Underwriters does not fall within the "in aid of jurisdiction" exception of the AIA because the contested insurance coverage claims of both the Receiver and Underwriters are "personal claims" based upon *Kline*

and not *in rem* property of the estate because the estate is not the holder of actual proceeds.

The Fifth Circuit relied on one unreported case from South Carolina as legal authority for the proposition that the Receiver's claim to the policy proceeds makes it *in rem* property of the estate even though no money has actually been paid. *SEC v. Parish*, 2010 WL 8347143.[7] *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d at 851; Pet.App.35a. Rather than identifying the Receiver's claim as one for coverage under the policy, the lower court erroneously characterized the insurer/Receiver relationship as one in which the Receiver is physically holding the proceeds of the policy as cash in hand. This characterization is not accurate. The only asset held by the Receiver is the claim that it has for coverage under the policy for the negligent conduct of the officers and directors as insureds under the terms of the policy, similar to the

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[7] The unreported case of *SEC v. Parish*, 2010 WL 8347143, is the sole case that the Receiver has provided as authority to support its argument that a claim for coverage under the Underwriters policy is an *in rem* claim and is an exception to the AIA. The Fifth Circuit, with little analysis of who owned the policy proceeds, determined in one paragraph the following:

> "The district court has exclusive *in rem* jurisdiction over the policy proceeds and permanent bar orders have been approved as parts of settlements to secure receivership assets. *See*, *e.g.*, *SEC v. Parish*, No. 2:07-CV-00919-DCN, 2010 WL 8347143 (D.S.C. Feb. 10, 2010) ("[T]he bar order is necessary to preserve and aid this court's jurisdiction over the receivership estate, such that the Anti-Injunction Act would not prohibit the bar order even if there were pending state court actions, which there are not.").

Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd., 927 F.3d at 851; Pet.App.34a-35a.

claim held by the Retirees as a third party beneficiary to the insurance contract. It can convert that "claim" to "cash proceeds" only if it obtains a complete release of rights owned by the Retirees. "We have never viewed parallel in personam actions as interfering with the jurisdiction of either court." *Vendo Co.*, 433 U.S. at 642; *Retirement Systems of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 426 (2d Cir. 2004).

The court in *Kline* held that this exception to the AIA applies *only* where federal and state courts are simultaneously attempting to exercise jurisdiction over *in rem* property of the estate. "(A)n action brought to enforce (a personal liability) does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court." *Id.* at 230; *United States v. Schurkman*, 728 F.3d 129, 136–37 (2d Cir. 2013).

As the *Kline* court explained, the considerations that apply in the context of an *in rem* action do *not* apply to *in personam* actions such as the breach of contract suit that was before it:

> But a *controversy* is not a thing, *and a controversy over a mere question of personal liability* does not involve the possession or control of a thing, and an action brought to enforce such a liability *does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.* Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judg-

> ment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. *The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.*

Id. at 230 (emphasis added). Since *Kline* decided the issue in 1922, "the Supreme Court has never held that a district court may enjoin, as necessary in aid of the district court's jurisdiction, a parallel *in personam* state action." *Retirement Systems of Ala.*, 386 F.3d at 426.

A case very analogous to the facts in this case involving multiple claims in various courts is the case of *SR Int'l Bus. Ins. Co. Ltd.*, 445 F. Supp. 2d 356. This case considers the scope of *Kline* and *Retirement Systems of Ala.* The issue presented in *SR Int'l Bus. Ins. Co. Ltd.* is the same one that is presented in this case—whether claimants for policy proceeds based upon the collapse of the World Trade Center Properties could be litigated in both federal and state court as long as the actual policy proceeds were not paid. The court rejected the arguments of the insurer that insurance proceeds available to the insureds in coverage litigation constituted *in rem* property of the estate over which the federal court had jurisdiction and noted that it only considered insurance proceeds to be "*in rem*" property of the estate when they were deposited with the court; otherwise, suits involving

insurance coverage and insurance proceeds are simply *in personam* actions.[8]

Further, when a payment by the insurer cannot inure to the debtor's pecuniary benefit because of coverage limitations, then that payment should neither enhance nor decrease the bankruptcy estate. *In re 15375 Mem'l Corp.*, 382 B.R. 652, 689 (Bankr. D. Del. 2008) ("Likewise, this Court has repeatedly held that the bankruptcy estate has no protectable property interest in the proceeds of D & O liability insurance when it appeared unlikely that the proceeds of the D & O insurance would be totally exhausted by the non-debtor claims being presented under it or the debtor was not itself subject to claims that were at risk of being left uninsured."). In the case of *In re Cont'l Airlines*, 203 F.3d 203, 217 (3d Cir. 2000), the court goes further holding that "[e]ven assuming that the proceeds are property of the estate, this by itself does not justify a permanent injunction of Plaintiffs' actions against the insured non-debtor D&O defendants as necessary for the reorganization of the Continental Debtors." "There is no dispute that the Securities Litigation, although a complex, multidistrict litigation, is an *in personam* action against defendants." *Retirement Systems of Ala.*, 386 F.3d at 426.

In relying on an unreported district court case from South Carolina, the Fifth Circuit essentially expanded the scope of *Kline* to include personal claims where both sides are contesting insurance coverage. The Fifth Circuit held that both the Receiver's claims and the Retirees' claims for coverage were *in rem* property

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[8] *See also Nevada Gen. Ins. Co. v. Provencio*, CIV 15-0165 MCA/KBM, 2016 WL 9488767, at *2 (D.N.M. Dec. 19, 2016); *In re Enivid, Inc.*, 364 B.R. 139 (Bankr. D. Mass. 2007).

claims. It is this issue that is the subject of the writ application to this Court. When the claim of the Receiver is contested because of coverage issues, and no insurance proceeds have been paid to either party, it is a personal claim based upon *Kline* because "the controversy is not a thing". *Kline*, 260 U.S. at 230. Both the state court action and the federal action for insurance coverage involve "*a controversy over a mere question of personal liability*" and "*does not involve the possession or control of a thing*" and, as such, are personal actions. *Id.* (*emphasis added*); *Retirement Systems of Ala*., 386 F.3d at 426. The federal court litigation seeks to compel the insurers to pay monies properly due under the insurance coverage they provided. The current actions filed in state court by the Retirees against the insured Brokers and Underwriters seek a determination that no coverage exists for the Receiver based upon the terms of the policy and a portion of the policy proceeds should be paid to the Retirees. The competing claims for coverage under the policy are personal actions.

The case of *Maryland Casualty Co. v. W.R. Grace & Co*., 726 F. Supp. 62 (S.D.N.Y. 1989), *aff'd*, 889 F.2d 1231 (1989) (per curiam), is another Second Circuit case that is in conflict with the holding of the Fifth Circuit. In *Maryland Casualty*, the district court refused to issue an injunction against parallel state court proceedings and was affirmed by the Second Circuit. At the district court level in *Maryland Casualty*, the court ruled that a federal court overseeing a complex insurance coverage action could *not* issue an injunction preventing the insureds from "litigating against [the insurer] in other [state] forums over... insurance coverage claims placed at issue by the amended complaint and counterclaim in th[e] [federal] lawsuit." 726 F. Supp. at 63.

In *F.D.I.C. v. Geldermann, Inc.*, 975 F.2d 695, 698 (10th Cir. 1992), the court was confronted with this exact same issue and determined that the universal body of law holds that fundamental due process principles prohibit claim extinguishment against anyone not a party to the action. *See also In re GunnAllen Fin., Inc.*, 443 B.R. 908, 916 (Bankr. M.D. Fla. 2011).

The case of *Cobalt Multifamily Inv'rs I, LLC v. Shapiro*, 2013 WL 5418588 (S.D.N.Y. Sept. 27, 2013), is also particularly relevant to the issue at hand. There, the court rejected a proposed bar order that would have "extinguish[ed] potential nonparty claims." In so doing, the *Cobalt* court conducted an extensive analysis, that "principles of due process and fundamental fairness preclude a court from barring claims of *nonparties*." 2013 WL 5418588 at *1-*2 (emphasis added). The same result should be found here. The Bar Order is overbroad to the extent it dismisses the Retirees' claims.

III. The Retirees' Claims Against Underwriters May Not Be Permanently Stayed Without First Conducting A Hearing To Determine Who Has A Legal Right To The Policy Proceeds Under The Terms Of The Policy.

The Fifth Circuit permanently stayed the Retirees' claims against Underwriters without first determining who has a legal right to the policy proceeds based the "insured vs. insured" exclusion in the Underwriters policy or the amount of the policy limits. The law is well established that the court cannot exercise jurisdiction over the policy proceeds without first having a hearing to determine who is entitled to the proceeds of the insurance policy based upon competing personal action claims. "Neither the Bankruptcy

Court nor the District Court made factual findings regarding the terms, scope or coverage of the allegedly shared insurance policies." *In re Combustion Eng'g, Inc.*, 391 F.3d at 232. "It is doubtful whether shared insurance would be sufficient grounds upon which to find related-to jurisdiction." *Id.* The result is the same in a case recently decided by the Delaware district court where it was determined that the person seeking the stay "fails to offer a sufficient record that the terms and operation of the policies establish subject matter jurisdiction." *In re Imerys Talc Am., Inc.*, 2019 WL 3253366 at *5.

The question presented is whether the claim of the Retirees can be permanently enjoined from pursuing a claim for the policy proceeds when no hearing has been had to determine the policy limits or whether the Receiver had coverage under the Underwriters policy. The Fifth Circuit refused to require a hearing on these issues because of the cost of making these determinations would deplete the resources of the receivership. *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d at 850; Pet.App.34a.[9] In other words, the Fifth Circuit skipped a step and determined the proceeds of the policy were owned by the Receiver without this issue ever being briefed or decided based upon general equitable principles not allowed by this Court.

[9] *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d at 850; Pet.App.34a ("...(E)quity favored avoiding costly litigation and dissipation of receivership assets by allowing the Receiver, a coinsured with equal claim to the policy proceeds, to settle with the Underwriters. Avoiding protracted legal examination of the policy exclusions, which could just as easily bar Retirees and others from the policy proceeds, was precisely the point of the settlement.").

Atlantic Coast Line R. Co., 398 U.S. at 287. Further, the abuse of not addressing these substantive issues is the type of situation addressed in the *Zacarias* dissent where Judge Willet states, "Federal courts cannot decide a claim's fate outside the 'honest and actual antagonistic assertion of rights.'" *Zacarias*, 945 F.3d at 883, citing *Chi. & G.T. Ry. Co.*, 143 U.S. at 345. No "honest and actual antagonistic assertion of rights" have occurred between the Receiver and Retirees as to the ownership of the policy proceeds.

Notwithstanding this ruling of the Fifth Circuit granting a permanent stay of the Retirees' claim, there has never been any hearing to determine the policy limits or whether the Receiver was entitled to the proceeds based upon the "insured vs. insured" exclusion. Based upon the previously cited law as to what constitutes a personal action, it is very difficult, if not impossible, for the court to reach the conclusion that *in rem* jurisdiction exists when two personal claims for the policy proceeds exist.

As succintly stated by the Fifth Circuit, Underwriters agreed to pay $65 million into the receivership estate, but the settlement required orders barring all actions against Underwriters relating to the policies. The Fifth Circuit acknowledged the fact that the coverage limits may be as high as $101 million.[10] No

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[10] *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d at 837; Pet.App.6a.

> The maximum amount of remaining coverage is disputed. According to the district court, the Underwriters have paid some $30 million in claims under the policies for insureds' defense costs. Underwriters contend that only $46 million remains available because the losses resulted from a single event—the Ponzi scheme. The Receiver argues that the conduct

authority provided by the Receiver or Underwriters allows the insurer to unilaterally decrease the limits of its policies by the use of a bar order when other parties have an interest in the policy proceeds as a matter of law—in this case direct claims under the Louisiana Direct Action Statute.

Two important issues are involved in the question of the payment of the insurance proceeds by Underwriters. First, what are the maximum policy limits that should be paid by Underwriters under the terms of the policy. Second, and most importantly, who is entitled to the proceeds based upon the terms and exclusions under the policy—the Retirees or the Receiver. To state it bluntly, the Receiver is receiving the cash payment in consideration for implementing the global settlement bar and not as compensation for the coverage that exists under the Underwriters policy. Given the coverage issues that exist on the "insured vs. insured" exclusion, it is apparent Underwriters is using the equitable receivership as a vehicle to reduce its policy limits, and attempting to eliminate other meritorious claims through the Bar Order and equitable powers of the receivership.

The abuse of approving this type of procedure without a hearing to really determine who owns the policy proceeds is unprecedented. The question that should be focused on is what protection exists to prevent the Receiver from receiving the cash payment in consideration for implementing the global settlement bar and not as compensation for the coverage that exists under the Underwriters policy.

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implicates the aggregate loss limits up to $101 million of remaining coverage.

Because of the legal standing afforded the Retirees based upon the third party beneficiary status under the Louisiana Direct Action Statute, the Retirees and the Receiver all have similar types of claims and standing for coverage under the policy. The district court erred by permanently staying the claim of the Retirees without making a determination of whether the Retirees or the Receiver has a legal right to the policy proceeds under the terms of the Underwriters policy based upon the "insured vs. insured" exclusion or the amount of the policy limits. Underwriters is attempting to use the receivership law to achieve a full and complete release of liability for less than policy limits by paying the settlement to the Receiver with no regard as to the literal language of the policy and its exclusions.

As stated by the Fifth Circuit in *In re Equinox Oil Co., Inc.*, 300 F.3d 614, 618–19 (5th Cir. 2002), interpreting the earlier decision of *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993), "[t]he overriding question when determining whether proceeds are property of the estate is *whether the debtor would have a right to receive* and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate." (Emphasis added). In the case of *In re Cont'l Airlines*, 203 F.3d 203, 217 (3d Cir. 2000), the court goes further holding that "[e]ven assuming that the proceeds are property of the estate, this by itself does not justify a permanent injunction of Plaintiffs' actions against the insured non-debtor D&O defendants as necessary for the reorganization of the Continental Debtors." *In re 15375 Mem'l Corp.*, 382 B.R. at 689 ("Likewise, this Court has repeatedly held that the bankruptcy estate has no protectable property

interest in the proceeds of D & O liability insurance when it appeared unlikely that the proceeds of the D & O insurance would be totally exhausted by the non-debtor claims being presented under it or the debtor was not itself subject to claims that were at risk of being left uninsured.").[11]

The law conclusively provides that the "insured vs. insured" exclusion set forth in Article IV(E) of the Underwriters Policy unambiguously excludes coverage for the claim of the Receiver against Underwriters because the Receiver is only filing claims on behalf of the "Company" and the claim does not fall into the "bankruptcy proceeding" exception to the exclusion.[12] *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Resolution Trust Corp.*, 1992 WL 611463, at *3 (S.D. Tex. Aug. 12, 1992). Thus, the terms of the Policy unambiguously exclude any claim brought by the "Company" from coverage unless "such claim is brought by the examiner, trustee, receiver, liquidator, etc. in a bankruptcy proceeding." Therefore, the first question is whether the receiver is bringing the claim "at the behest of the Company." The second question is whether the claim is being brought in a "bankruptcy proceeding," which is the exception to the exclusion.

The exception to the exclusion allows a claim that "is brought by the examiner, trustee, receiver, liquidator, etc. in a bankruptcy proceeding." The exception for receivers in a bankruptcy proceeding does not

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[11] *In re 15375 Mem'l Corp.*, 382 B.R. at 689 ("In such situations, this Court has recognized that "the proceeds of the Debtor's insurance policy are not property of the estate" because the estate's interest in the proceeds is defined by the terms of the policies and in no way superior to the interest of other, non-debtor parties intended to be benefited by the policies.").

[12] *See* FN 3 for full text of the exclusion.

apply here because the Stanford Receivership is not a "bankruptcy proceeding." The pleadings of the SEC, the Receiver's facts and prior Orders of the Fifth Circuit are very specific that this is not a "bankruptcy proceeding."

The "insured vs. insured" exclusion similar to the exclusion in the Underwriters Policy has been the subject of multiple lawsuits arising initially from the S&L crisis of the 1980s and 90s wherein the FDIC as receiver attempted to strike down this straightforward exclusion based upon the argument that the Receiver does not represent the company in pursuing the claims against the insurer. With few exceptions, the courts have rejected this argument and ruled that a receiver does not have coverage under the terms of the policy for claims by a company against its employees, officers or directors. In *Nat'l Union*, the court stated:

> In *Gary v. American Casualty Company of Reading, PA*., 753 F.Supp. 1547 (W.D. Okla. 1990) the Court found the Insured v. Insured Exclusion barred coverage because the FDIC was standing in the shoes of the bank who was prosecuting the claims. *Id.* at 1554… Based upon the reasoning of *Gary*, this Court finds that the claims asserted by the RTC in this action are barred by the Insured v. Insured Exclusion in addition to the Regulatory Exclusion.

Nat'l Union, 1992 WL 611463 at *3. The "insured vs. insured" exclusion bars any claims brought by any receiver". *Hawker v. Doak*, 685 Fed.App'x. 565, 567 (9th Cir. 2017); *BancInsure, Inc. v. FDIC*, 796 F.3d

1226, 1234–39 (10th Cir. 2015).[13] This position has been adopted by the Underwriters in multiple briefs filed in this proceeding.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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[13] *Redmond v. ACE Am. Ins. Co.*, 614 Fed. App'x 77, 80 (3d Cir. 2015); *Indian Harbor Ins. v. Zucker*, 2016 WL 1253040 (W.D. Mich. Mar. 31, 2016); *BancInsure, Inc. v. F.D.I.C.*, 796 F.3d 1226, 1234 (10th Cir. 2015); *Oliver v. Indian Harbor Ins. Co.*, 2008 WL 565514, at *3 (N.D. Ill. Feb. 27, 2008).