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February 20, 2009

Allen Stanford's Former Attorneys Effected a Noisy Withdrawal

Posted by Christine Hurt

Rarely does the mainstream media talk about Rule 205.3 of the Securities Exchange Act, found at 17 C.F.R. 205.3, so the event requires at least some blogging. According to reports in the WSJ, Law Blog and elsewhere, Stanford's attorney, Thomas Sjoblom of Proskauer Rose, alerted the SEC on February 14 via a "note" that **"I disaffirm all prior oral and written representations made by me and my associates to the SEC staff regarding Stanford Financial Group and its affiliates."**

What does this mean? When did Proskauer Rose make oral or written representations to the SEC? I assume that Stanford is not a reporting company from the SEC's Memorandum of Law, which has some very interesting legal positions, by the way. So Sjoblom is not talking about ordinary affirmations or opinions that an attorney would proffer in the context of periodic filings. However, the SEC had begun an investigation into Stanford International Bank and the other Stanford companies, so it may be that Sjoblom's initial answers to questions are not complete or accurate in retrospect after further investigation.

So, why is this interesting from a corporate law standpoint? Because the reason that Sjoblom can do this is in the relatively new Rule 205.3, which was promulgated pursuant to Section 307 of the Sarbanes-Oxley Act of 2002.

Section 307 required the SEC to promulgate rules "requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company" and then, if no satisfactory response, "requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors."

As those who followed the melee that followed, the SEC proposed rules that required this "up the ladder" reporting and then also a "noisy withdrawal" from the representation and filing with the SEC if no satisfactory response. I won't retrace the debate, but the final rules are found at 17 C.F.R. 205.1 et seq.

Rule 205.3 does outline an up-the-ladder procedure for an attorney who "becomes aware of evidence of a material violation." And, more importantly for Mr. Sjoblom, allows an attorney, without the issuer's consent, to reveal to the SEC "confidential information related to the representation to the extent the attorney reasonably believes necessary (i)[t]o **prevent** the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors. .

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.or (iii)[t]o **rectify** the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used." So, it sounds like Sjostrom may be telling the SEC more than this single line from the "note" implies.

In this article for American Lawyer, Zach Lowe, opines that "the federal Sarbanes-Oxley Act likely made his decision much easier than it otherwise might have been." Law Blog then takes that a little step further by stating "Lowe reports that SOX actually makes life easier for lawyers in such predicaments, because it explicitly allows them to reveal confidential client information to investigators if that attorney believes that doing so will prevent a violation of the law or help rectify losses investors have already suffered." I think most securities lawyers confronted with these choices would disagree about whether Rule 205.3 makes their life easier. Hard and fast rules make people's lives easier, although their may be some unsatisfying consequences -- criminal defense attorneys that cannot reveal to families where their loved ones' bodies are buried, and other Law & Order-type scenarios. Rules that allow revelations in scenarios marked with terms like "material," "substantial," "may" and "likely" usually make most circumstances a little tougher.

We will stay tuned to see how this unfolds as more facts are known.

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Comments (6)

1. Posted by Mike Guttentag on February 21, 2009 @ 19:18 | Permalink

> A typo in the second to last paragraph suggests our colleague at Northern Kentucky and soon Arizona may be involved as well.

2. Posted by Christine on February 21, 2009 @ 20:17 | Permalink

> Oops! I guess I'm not familiar with that many "Sjo" surnames. No bad intent there! Sorry, Bill.

3. Posted by annon. on February 23, 2009 @ 15:57 | Permalink

> May be worth contacting Houston attorney George M. Fleming for the rest of the story.

4. Posted by Candace on February 24, 2009 @ 8:29 | Permalink

are we really to believe that the proskauer attorneys had no knowledge of the fraud until just now? weren't they documenting all the deals, all the fund formations, all the off-shore stuff?

this seams like a last minute case of CYA more so than following the law.

5. Posted by rk on February 24, 2009 @ 10:49 | Permalink

Isn't Mr. Fleming the attorney who sued Proskauer for issuing a bad tax opinion (Pelican Trading), and also is suing Stanford?

6. Posted by Charles H. Green on February 28, 2009 @ 20:45 | Permalink

Candace's question is a good one, it seems to me.

And if Sarbanes has actually made it easier to rat out multi-billion dollar fraud, then good heavens how awful was it before?

Alternatively, it seems to me that a "disaffirmation" coming after a great deal of time and discussion has passed, and only after an apparently disastrous deposition forced the issue--if it is truly Sarbanes-driven--represents very bad public policy. If Proskauer had knowledge, and if it couldn't "ethically" or legally resign until this point in time, despite an apparent multi-billion dollar ripoff, then Sarbanes must have not gone far enough.

Or, is Candace right and this is as simple as CYA?

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Sjoblom should be arrested with the rest of them. He did not do anything that Sarbanes required, he in fact led the poor 24 yr Holt to think he was representing her and then pulled the plug only after the SEC later asked him to be clear on who he represented. This guy was with the SEC for 20 years and he did not know it was a scam or perhaps thats how the scam was effectuated and covered up.
He did nothing about reporting up the ladder, etc. he did not whistleblow, when the SEC started asking questions, he ran, disaffirming his and Proskauer Rose's statements for years, as soon as he knew they were busted. In fact, in a meeting with employees and others he claimed that they should all pray and that "THE PARTY IS OVER" according to news reports and SEC documents.
Please, send him and all the Proskauer crowd to join Bernie and be taken as wives in the fed pen. What assets do Proskauer attorneys have is what Stanford victims should ask and then file suits against them for every last dime from them.

That is but for the fact that I am waiting to collect on Proskauer as I am in a ONE TRILLION suit with them in federal court and tied to a WHISTLEBLOWER Case. According to judge Shira Scheindlin the case is one of MURDER and CAR BOMBING. For the real jiggy on Proskauer and graphics of the car bombing visit www.iviewit.tv

The Court Cases as follows:
United States Court of Appeals for the Second Circuit Docket 08-4873-cv - Bernstein, et al. v Appellate Division First Department Disciplinary Committee, et al. - TRILLION DOLLAR LAWSUIT
Cases @ US District Court - Southern District NY
(07cv09599) Anderson v The State of New York, et al. - WHISTLEBLOWER LAWSUIT
(07cv11196) Bernstein, et al. v Appellate Division First Department Disciplinary Committee, et al.
(07cv11612) Esposito v The State of New York, et al.,
(08cv00526) Capogrosso v New York State Commission on Judicial Conduct, et al.,
(08cv02391) McKeown v The State of New York, et al.,
(08cv02852) Galison v The State of New York, et al.,
(08cv03305) Carvel v The State of New York, et al., and,
(08cv4053) Gizella Weisshaus v The State of New York, et al.
(08cv4438) Suzanne McCormick v The State of New York, et al.

Posted by: Eliot Bernstein | March 12, 2009 at 05:35 PM

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