

09-10761

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RALPH S. JANVEY,

Plaintiff – Appellant–Cross-Appellee,

v.

JAMES R. ALGUIRE; VICTORIA ANCTIL; SYLVIA AQUINO; JONATHAN BARRACK; NORMAN BLAKE; ET AL; JAY STUART BELL; GREGORY ALAN MADDUX; DAVID JONATHAN DREW; ANDRUW RUDOLF BERNARDO JONES; CARLOS FELIPE PENA; JOHNNY DAVID DAMON; BERNABE WILLIAMS; GAINES D. ADAMS; NEN FAMILY TRUST; JEFF P. PURPERA, JR.; CHERAY ZAUDERER HODGES; LUTHER HARTWELL HODGES; ET AL 1; JOSEPH BECKER; TERRY BEVEN; KENNETH BIRD; JAMES BROWN; MURPHY BUELL; ET AL 2; JAMES RONALD LAWSON; DIVO HADDED MILAN; SINGAPORE PUNTAMITA PTE., LTD.; NUMA L. MARQUETT; GAIL G. MARQUETTE,

Defendants – Appellees-Cross-Appellants

TIFFANY ANGELLE; MARIE BAUTISTA; TERAL BENNETT; SUSANA CISNEROS; RON CLAYTON; ET AL 3; HANK MILLS; ROBERTO ULLOA; CHRISTOPHER ALLRED; PATRICIA A. THOMAS,

Defendants – Appellees

Consolidated with
09-10765

RALPH S. JANVEY, in his Capacity as Court-Appointed Receiver,

Plaintiff – Appellant

v.

JIM LETSOS; FELIPE GONZALEZ; CHARLOTTE HUNTON; RICHARD O HUNTON; CHARLES HUNTON,

Defendants – Appellees

On Appeal from the United States District Court for the Northern District of Texas,
Dallas Division C.A. No. 3:09-CV-0724-N

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral Argument will crystallize the parties' positions and assist this Court in establishing the rule of law that will govern claims in this Circuit for recovery and distribution of money stolen pursuant to a Ponzi scheme. The Receiver contends that all obtainable funds belong to the Receivership Estate for distribution to all fraud victims pro rata. Thus, the Receiver maintains that an investor who cashed out one week before the receivership should recover the same percentage of his investment as an investor who attempted to cash out one week after the receivership. But the Appellees argue that investors who cashed out before the receivership should recover 100% of their investment — even though they were paid with money stolen from other investors — while those who attempted to cash out later should divide the scheme's meager leftovers. Oral argument will assist the Court in determining which of these rules is more consistent with precedent in analogous cases and with equitable principles that govern receiverships such as this.

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STATEMENT OF JURISDICTION

I. Asserted Bases for District Court Subject Matter Jurisdiction

The underlying case is ancillary to a securities fraud case filed by the SEC against numerous Stanford defendants, *SEC v. Stanford Int'l Bank, Ltd.*, No. 3-09-CV-0298-N, in the United States District Court for the Northern District of Texas. Jurisdiction is based on 15 U.S.C., sections 77v(a) and 78aa and also on 28 U.S.C., section 754.

II. Basis for Court of Appeals's Jurisdiction

This is an appeal from the denial in part of a preliminary injunction pursuant to 28 U.S.C., section 1292(a)(1).

III. Filing Dates Establishing Timeliness of Appeal

The district court signed the challenged order on August 4, 2009. R. 477-79. The Receiver filed his notice of appeal on August 6, 2009. R. 480-81.

STATEMENT OF THE ISSUES

1. Does the Receiver for a Ponzi scheme have a viable claim for disgorgement of money paid to some investors before the scheme collapsed when (i) the money purports to be return of the investors' principal, but (ii) the money was, in fact, stolen from other investors?
2. Which of the following rules of distribution will the Court adopt to govern this and future Ponzi-scheme receiverships in this Circuit?

- (A) A pro rata rule, which seeks to return to each investor the same percentage of his or her investment in the Ponzi scheme; or
- (B) A first-come, first-serve rule, which allows investors who cash out shortly before court intervention to recover 100% of their investments while those who attempt to cash out a few days later receive virtually nothing?

STATEMENT OF THE CASE

This case is ancillary to an equity receivership arising out of a multi-billion dollar fraudulent investment scheme. The district court authorized the Receiver to freeze over 30,000 investor accounts while financial professionals determined whether the accounts contain proceeds of the fraudulent activity. Once these reviews were complete, the Receiver named several hundred investors as relief defendants, seeking disgorgement of Ponzi-scheme proceeds that were stolen from thousands of other investors and paid to the relief defendants under the guise of returned principal plus interest.

The Receiver requested a preliminary injunction that would effectively maintain the existing freeze over the relief defendants' Stanford investment accounts until the Receiver's claims for disgorgement are adjudicated. On July 31, 2009, the district court determined that, as a matter of law, the Receiver has no claim against the relief defendants for disgorgement of stolen

money they received as purported return of their invested principal. Based on this determination, the district court denied most of the Receiver's application for a preliminary injunction. In particular, the district court issued an injunction that freezes the relief defendants' accounts only to the extent of purported interest paid to them above the amounts of their principal investments.

The district court stayed the effect of its ruling for ten days to allow the Receiver to request relief from this Court before the relief defendants could disperse the funds in question. On August 9, 2009, this Court granted the Receiver's Motion to Extend Injunction, imposing an account freeze on both principal and interest while it decides this appeal.

STATEMENT OF RELEVANT FACTS

I. The Stanford companies and their too-good-to-be-true CDs

This appeal involves pure questions of law. The following undisputed facts are of record. In addition, most of these facts have been confirmed by Stanford's Chief Financial Officer, James Davis, who has pleaded guilty to his role in running the Stanford Ponzi scheme. A copy of the plea agreement is attached as Appendix B, and the Receiver requests that this Court take judicial notice of the facts recited in it. *See, e.g., Scholes v. Lehman*, 56 F.3d 750, 762 (7th Cir. 1995) (fraudulent conveyance case approving judicial notice of facts in defendant's plea agreement); *In re Fin. Federated Title & Trust, Inc.*, 347 F.3d 880, 883 n.2, 892

(11th Cir. 2003) (affirming equitable lien against property purchased with fraudulently obtained funds and noting that lower court took judicial notice of plea agreement of one of the conspirators).

The Stanford companies (“Stanford”) were a sprawling web of more than 130 entities across 14 countries, all controlled by Allen Stanford. R. 298, 302. Although the companies offered a full range of brokerage and investment services, their core objective was to sell certificates of deposit (“CDs”) issued by Stanford International Bank Limited in Antigua (the “Bank”). *Id.* The companies achieved this objective by promising above-market returns on the CDs and falsely assuring investors that the CDs were backed by safe, liquid investments. R. 298, 303; Case no. 3:09-cv-298-N, Doc. 1 at ¶¶ 2, 3, 8.¹

The Bank was nothing like a typical commercial bank. It did not offer checking accounts and did not, in the normal course, make loans. R. 302. It had one principal product line — certificates of deposit — and one principal source of revenue — investor purchases of CDs. R. 298, 302. Substantially all of the funds funneled into each of the Bank’s operating and money-market accounts were proceeds from the sale of Bank CDs. R. 298, 307-08. These same accounts were

¹ This Court granted motions by both the appellant and appellees to supplement the record with documents from related cases pending in the same the district court. However, the supplemental record has not yet been certified. This brief will cite to documents to be included in the supplemental record by their Docket Number in the district court.

then the source of CD proceeds paid out to customers, such as the relief defendants, who redeemed their CDs before court intervention. R. 298, 308.

For almost 15 years, the Bank represented that it consistently earned high returns on its investment of CD purchases, ranging from 12.7% in 2007 to 13.93% in 1994. Case no. 3:09-cv-298-N, Doc. 12-36 at 345; Doc. 13-9, SEC App. 670; Doc. 13-49 at 1030. Since 1994, the Bank claimed that it never failed to hit targeted investment returns in excess of 10%. Case no. 3:09-cv-298-N, Doc. 12-42 at 407. The Bank claimed that its diversified portfolio of investments lost only \$110 million or 1.3% in 2008. Case no. 3:09-cv-298-N, Doc. 12-56 at 540-41. During the same period the S&P 500 lost 39% and the Dow Jones STOXX Europe 500 Fund lost 41%. *Id.*

The Bank offered significantly higher rates on its CDs than conventional banks and disproportionately large commissions to Stanford financial advisors who sold CDs. Case no. 3:09-cv-298-N, Doc. 12-55 at 531, 533; Doc. 13-9 at 669. On November 28, 2008 the Bank quoted a rate of 5.375% on a 3-year flex CD, while comparable U.S. banks' CDs paid under 3.2%. Case no. 3:09-cv-298-N, Doc. 12-56 at 541. The Bank paid a 1% commission to Stanford financial advisors on the sale of each CD. Case no. 3:09-cv-298-N, Doc. 13-9 at 669.

In its 2007 annual report, the Bank represented that its portfolio was allocated in the following manner: 58.6% equity, 18.6% fixed income, 7.2%

precious metals and 15.6% alternative investments. Case no. 3:09-cv-298-N, Doc. 13-32 at 871. In fact, approximately 80% of the Bank's investment portfolio, the so-called Tier III portfolio, was in unknown assets under the apparent control of Allen Stanford and James Davis. Case no. 3:09-cv-298-N, Doc. 12-4 at 31, 586. And purported "earnings" on Bank investments were actually fabricated monthly by Jim Davis and persons working at his direction and under his supervision. App. B at 12-15. The earnings figures were pegged at whatever amount was needed to give the Bank acceptable financial performance and capital ratios for regulatory purposes. App. B at 14-15. In other words, earnings — at least for the last three years and probably longer — were fictitious "plugged" numbers. *Id.*

The forensic analysis of cash flows for 2008 through February 17, 2009 indicates that funds from sales of new Bank CDs were used to make purported interest and redemption payments on pre-existing CDs. R. 298, 303-04, 314-15. The Bank had to use CD sale proceeds for these redemptions because it did not have sufficient assets, reserves and investments to cover the liabilities for redemptions and interest payments. R. 303-04. "Although [the Bank] received some returns on investments, these amounts were miniscule in comparison to the obligations." R. 298, 304. In other words, the Bank operated as a massive Ponzi scheme. *See* BLACK'S LAW DICTIONARY 975 (abridged 8th ed. 2005) (defining a Ponzi scheme as "[a] fraudulent investment scheme in which money contributed by

later investors generates artificially high dividends or returns for the original investors”).

At the inception of the Receivership on February 16, 2009, the total principal amount of outstanding Bank CDs was approximately \$7.2 billion (U.S.), according to Bank records. R. 298, 303. This \$7.2 billion reflects a liability on the books of the Bank, as it is owed to the investors. *Id.* Although the Bank financial statements reflect investments valued at \$8.3 billion (classified as assets) as of December 31, 2008, the combined assets of all Stanford Entities (the Bank included) actually have a total value of less than \$1 billion. *Id.* The Bank is insolvent and apparently has been for a considerable time. *Id.* The billions of dollars bilked from Bank CD investors paid for lavish Stanford offices, an ultra-luxurious lifestyle for Stanford principals and their families, a fleet of aircraft, political contributions, athletic sponsorships, speculative “investments,” and the list goes on.

II. The lawsuit and preliminary orders

The SEC filed suit against Allen Stanford, the Bank, and other Stanford companies on February 16, 2009. Case no. 3:09-cv-298-N, Doc. 1. At the SEC’s request, the district court issued a temporary restraining order. Case no. 3:09-cv-298-N, Doc. 8. Among other things, this order restrained the defendants and anyone in “active concert or participation with them” from “making any

payment or expenditure of funds belonging to or in the possession, custody, or control of Defendants.” *Id.* at ¶ 5. It also restrained all financial institutions from disbursing any funds or securities in regard to any account “in the name, on behalf or for the benefit of Defendants.” *Id.* at ¶ 6.

The district court also signed an order appointing the Receiver, which grants the Receiver broad powers to “[p]erform all acts necessary to conserve, hold, manage, and preserve the value of the Receivership Estate, in order to prevent any irreparable loss, damage, and injury to the Estate.” Case no. 3:09-cv-298-N, Doc. 10 at ¶ 5(g). The order specifically authorizes the Receiver to take possession of all assets “of, or in the possession or under the control of, the Receivership Estate,” and also “all sums of money now or hereafter due or owing to the Receivership Estate.” *Id.* at ¶ 5(b). Anticipating that additional parties could later be joined as “relief defendants,” the district court further ordered all financial institutions to prohibit the withdrawal, transfer or other disposal of any funds “held by or on behalf of any . . . relief defendant in any account maintained in the name of or for the benefit of any . . . relief defendant.” *Id.* at ¶ 12(a). All of these provisions likewise appear in the Amended Receivership Order. Case no. 3:09-cv-298-N, Doc. 157 at ¶¶ 5(b), (g), 15(a).

On March 2, 2009, the district court signed an Agreed Preliminary Injunction against the Stanford defendants. Case no. 3:09-cv-298-N, Doc. 80.

This order extended the TRO's prohibition against any disbursement of funds or securities in regard to any account "in the name, on behalf or for the benefit of the Entity Defendants." *Id.* at 4, ¶ V. The injunction did not modify the Receiver's powers or other restrictions on Stanford accounts set forth in the Receivership Order.

As a result of the Receivership Order and the Agreed Preliminary Injunction, all Stanford investor accounts were frozen at Pershing LLC ("Pershing"), JP Morgan Clearing Corp. ("JP Morgan") and SEI Private Trust Company ("SEI"), each of which contracted with one or more Stanford companies to provide account services for Stanford customers. Case no. 3:09-cv-298-N, Doc. 176-2, at 33-81; Doc. 321 at 2-3. On March 27th, the district court adopted procedures for the Receiver's review of the investor accounts and release of any accounts that did not appear to include proceeds of the fraudulent CDs. Case no. 3:09-cv-298-N, Doc. 239. By late June, more than 97% of investor accounts had been released from the freeze orders. Case no. 3:09-cv-298-N, Doc. 528, 529.

On June 29, the district court ordered the Receiver to complete the account review process within five weeks. Case no. 3:09-cv-298-N, Doc. 533 at 1. The court specified that all remaining account freezes would expire at noon on August 3, unless the Receiver asserted claims against the account owners and obtained injunctive relief in connection with those claims. *Id.* at 2.

III. The claims at issue on appeal

Between June 22 and July 28, 2009, the Receiver filed the claims that led to this appeal. R. 55; 69; 201. The Receiver has named as relief defendants several hundred investors who redeemed their CDs for cash before the Receivership. R. 55; 69; 201. It is beyond dispute that the cash used to make these redemptions was stolen from other Stanford investors. R. 298, 303-04, 307-08, 314-15; *see also* App. B at 14 (describing the Bank as “a massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds”). The Receiver seeks disgorgement of this cash so that the money, along with other assets of the Receivership Estate, can be distributed pro rata to all victims of Stanford’s fraud. To facilitate this equitable claim, the Receiver asked the district court for a temporary injunction that would continue the freeze on relief defendants’ accounts at Pershing, J.P. Morgan and SEI until the claim was finally determined. R. 265.

On July 31, the district court held a hearing on the requested injunction. The court concluded as a matter of law that the Receiver could not prevail on any claim for “return of principal” on the redeemed CDs. R. 477-78; Tr. 47-48. Accordingly, the court froze the relief defendants’ accounts going forward only to the extent of interest payments made to the relief defendants on top of their invested principal. R. 477. But on August 11, this Court extended the account

freeze on both purported principal and interest while the Court considers this appeal.

The freeze that has been in place since the Receivership was instituted has insured that hundreds of millions of stolen investor dollars will actually be available for distribution to Stanford claimants upon final adjudication of the Estate's right to them. The continuation of this freeze is necessary for the same reason. If these funds are released, they will be dispersed worldwide and only recovered, if at all, at great cost – perhaps prohibitive cost – to the Estate.

SUMMARY OF THE ARGUMENT

The claims in this case are based in equity. But there is nothing equitable about a rule that favors a few hundred Ponzi scheme investors who cashed out before court intervention over 20,000 others who did not. The relief defendants may be “innocent” because they did not realize Stanford was a sham; but they are no more innocent than any other investor. The relief defendants may have contractual claims against Stanford for return of the money they paid to purchase CDs; but these claims have no justifiable priority over the identical claims of every other investor. No one – not a relief defendant, not the SEC, and not the Examiner – has come forward with a single case holding that compensation to equally innocent victims with equally valid claims should be based on who was

quick enough, or lucky enough, to receive a pay-off with stolen money before the Ponzi scheme was revealed.

In contrast, the Receiver's claims for disgorgement of stolen money paid to the relief defendants are well-rooted in equitable principles and established case law. For example, even when investor funds can be traced to a particular investor, or were held in a segregated investor account, this Court has held that the broad powers of a district court presiding over an equity receivership allow the court to distribute the funds to all victims pro rata instead of returning them to their original owner. Courts across the country have specifically recognized the district court's power to order relief defendants to disgorge ill-gotten proceeds of an unlawful scheme so they can be shared equally with all victims. The district court erred in concluding that it lacked the power to accomplish this exact same result on the Receiver's claims for disgorgement here.

The propriety of disgorgement flows from the undisputed fact that Stanford was hopelessly insolvent when the relief defendants sought redemption of their CDs. Because Stanford was a Ponzi scheme, it did not hold onto the relief defendants' cash and was able to "return" their CD investments only by looting the more recent purchases of other innocent investors. Equity cannot tolerate this result. Equity demands equal compensation for those from whom the relief defendants' proceeds were stolen. This Court should therefore reverse the district

court's order in part and maintain the existing account freeze until the Estate's claims for the account assets is finally determined.

STANDARD OF REVIEW

The district court's order is subject to *de novo* review because it is based entirely upon a legal conclusion that the Receiver contends is mistaken.

“To obtain a preliminary injunction, a plaintiff must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest.” *Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000) (citing *Sugar Busters L.L.C. v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999)). “Because these four elements constitute mixed questions of fact and law, [this Court] review[s] the district court's factual findings for clear error, but [this Court applies] *de novo* review to its legal conclusions.” *Id.* (citing *Sunbeam Prods., Inc. v. West Bend Co.*, 123 F.3d 246, 250 (5th Cir. 1997)).

The district court's order is based entirely on the first element. The court concluded that the Receiver is unlikely to prevail on his claims solely because the law precludes a receiver from recovering stolen investor money if, prior to the receivership, the Ponzi scheme has already paid the stolen money to

other investors, purportedly in return of their own invested principal. R. 477-78.

In fact, the court strongly suggested that, if the law authorizes such a recovery, then the Receiver would be entitled to a freeze order to ensure that he could recover all of the money to which the Estate was entitled:

I don't think your arguments are stupid and it's a big pot of money and if you're correct about the law, then Mr. Janvey is absolutely righteous in trying to pull money into the Receivership to be passed out. He's doing just exactly what he was appointed to do.

The fact that I may disagree with you about the law doesn't necessarily mean that I'm right. And if Mr. Janvey and you are correct about the law, then by all means you ought to be glomming onto these assets and sweeping them back into the pot to be distributed to everybody else.

Tr. at 29-30. The district court emphasized that it was not weighing equities or exercising its discretion in any respect other than determining the law:

If I deny injunctive relief because of a mistaken view of the law, [the Fifth Circuit] consider[s] that to be abusing my discretion. It's not an issue of weighing equities, do I just weigh them differently from you. If I'm wrong on the law, I think they view that as sufficient basis for reversing me.

That's their call, of course, and I am not presuming to tell them what to do. But here I think there is a relatively crisp legal question that's presented.

Tr. at 47. Finally, the district court recognized that if the account freeze is lifted, there is great danger that the money will "wander off" where the Receiver cannot recover it. Tr. at 30. All of these comments and paragraph 2 of the written order

(R. 477-78) make clear that the district court denied the Receiver's request for injunctive relief based solely on its legal conclusion that the Receiver cannot recover purported return of principal as a matter of law.

As the district court suggested, "a decision based on erroneous legal principles is subject to *de novo* review." *Enrique Bernat*, 210 F.3d at 442; *see also Martin's Herend Imports, Inc. v. Diamond & Gem Trading*, 195 F.3d 765, 772 (5th Cir. 1999) ("An order granting or denying a preliminary injunction will be reversed only upon a showing that the district court abused its discretion, but legal determinations are subject to plenary review on appeal.") (internal quotations omitted).

Accordingly, if this Court concludes that the Receiver's claim for disgorgement of purported principal is legally viable, the Court should reverse the district court's order in part and issue an injunction continuing the existing freeze over the relief defendants' accounts at Pershing, J.P. Morgan and SEI until the claims are finally adjudicated. Alternatively, at a minimum, this Court should reverse the order in part and remand it for the district court to reconsider the Receiver's motion with instructions that the Receiver has stated a legally viable claim for disgorgement of purported principal that was "returned" only by illegally diverting funds invested by others.

ARGUMENT AND AUTHORITIES

The analysis in this case starts with two undisputed legal principles. First, case law universally supports a pro rata distribution of Estate assets; investor claimants must share equally in Estate assets and losses after a Ponzi scheme collapses. *See e.g., SEC v. Infinity Group Co.*, 226 Fed. Appx. 217, 219 (3d Cir. 2007). As the Supreme Court explained in the original Ponzi scheme case, “equality is equity” among “equally innocent victims.” *Cunningham v. Brown*, 265 U.S. 1, 13 (1924).

Second, relief defendants may be joined in an equitable proceeding to facilitate the recovery of Estate funds. *See SEC v. Colello*, 139 F.3d 674, 676-77 (9th Cir. 1998) (“[A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.”). No wrongdoing by a relief defendant need be alleged. *See Colello*, 139 F.3d at 676; *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191-92 (4th Cir. 2002); *SEC v. Elfindepan*, No. 1:00-CV-00742, 2002 WL 31165146, at *4 (M.D.N.C. Aug. 30, 2002). Courts can order disgorgement or other equitable relief against a relief defendant if “that person: (1) has received ill-gotten funds; and (2) does not have a

legitimate claim to those funds.” *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998); *SEC v. Egan*, 856 F. Supp. 401, 402 (N.D. Ill. 1993).

The question for this Court is how to apply these undisputed principles to the following basic scenario. Suppose two individuals invest \$100,000 each in one-year CDs issued by a Ponzi scheme. The first makes his investment in January 2008, the second in January 2009. When the first CD matures in January 2009, the Ponzi scheme is insolvent. It does not have the first investor’s funds on hand or any of its own assets to redeem the investment. The scheme is able to redeem the first investor’s CD only by diverting the second investor’s money to the first. The scheme collapses in February 2009, leaving behind virtually no money to redeem the second investor’s CD.

The appellees are in the position of the first investor. They see nothing wrong with the first investor retaining the full amount of principal that was “returned” to him by stealing money from the second investor. They advocate a rule of distribution by happenstance – whoever is lucky enough to cash out before the scheme collapses gets to keep the money and whoever is not so lucky gets nothing. The Receiver contends that the first investor has no legitimate claim to money stolen from the second, that equity requires both investors to be treated equally, and that happenstance is an indefensible principle of distribution.

I. The Receiver is likely to prevail on the merits of his claims against the relief defendants for disgorgement of Ponzi scheme proceeds.

The district court's sole basis for finding that the Receiver is unlikely to prevail on the merits is erroneous. The Receiver has stated a legally viable, factually compelling claim against the relief defendants for disgorgement of money that the Bank paid to them in furtherance of a fraudulent scheme.

A. Fifth Circuit precedent supports the Receiver's claims.

This Court has embraced the rule of pro rata distribution in two closely analogous cases. *See United States v. Durham*, 86 F.3d 70 (5th Cir. 1996); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325 (5th Cir. 2001). The rationale for these decisions supports disgorgement claims against investors who cashed out of a Ponzi scheme at the expense of other investors shortly before court intervention.

In *Durham*, this Court approved a pro rata distribution of funds that could be traced to a particular investor. After the FBI seized the assets of a fraudulent scheme, there was approximately \$83,000 available for distribution to defrauded depositors. *Durham*, 86 F.3d at 72. The vast majority of this money came from one depositor, Claremont Properties. *See id.* at 72 n.3 (“An FBI Special Agent traced \$70,000 of Claremont’s payments that were deposited and never withdrawn.”). The government supported Claremont’s claim for return of its own money. *Id.* at 73. But the trial court rejected Claremont’s claim to this \$70,000

and instead distributed only \$16,740.83 to Claremont as its pro rata share of the available receivership assets. *Id.* at 72.

This Court affirmed the pro rata distribution of Claremont's deposit, explaining:

The lower court in this case chose not to impose a constructive trust in Claremont's favor because it seemed inequitable to allow Claremont to benefit merely because the defendants spent the other victims' funds first. Claremont would obtain a preferred claim over funds if the court were to impose the constructive trust. To the district court, all the victims were in equal positions and should be treated as such.

Id. at 73. *Durham* cannot be distinguished from this case on the mere fact that Claremont's deposit had not yet been returned to it, whereas the relief defendants cashed out shortly before the scheme collapsed. A disproportionate distribution from an insolvent Ponzi scheme is just as inequitable the day before court intervention as the day after.

In fact, Claremont's claim for his \$70,000 was a stronger claim than the relief defendants' claim for CD proceeds here. At least Claremont was seeking return of its own money. When the relief defendants' CDs matured, the Bank no longer held their money. The Bank redeemed the relief defendants' CDs by stealing money from other innocent investors. If equity required Claremont to share its own deposit with all victims of the fraudulent scheme, then equity even more strongly requires the relief defendants to share their purported CD

redemptions with the very investors from whom the cash to pay those redemptions was stolen.

In *Forex*, this Court approved a pro rata distribution of funds that were segregated in a separate account consisting solely of one couple's investment. The receivership estate owed approximately \$2.5 million to Forex investors and lacked sufficient funds to repay them in full. *Forex*, 242 F.3d at 328. Under the district court's pro rata distribution plan, each investor would receive back approximately 33% of his investment. *Id.* But one investor couple, the Whitbecks, objected to this plan on the ground that most of their \$900,000 investment sat in a separate, segregated account that held nothing but the Whitbecks' investment. They argued that they were entitled to return of all money in this account because, after all, it was their money.

But this Court rejected the Whitbecks' arguments and affirmed the district court's pro rata distribution plan. This Court stated that *Durham* could not be distinguished on the basis that the Whitbecks' investment was segregated into its own account rather than comingled with other investors' funds. *Id.* at 331. The dispositive equitable principle remained the same — “the facts did not support a remedy that would elevate the Whitbecks' claim above the other victims.” *Id.*

Forex is analytically indistinguishable from this case. The Receiver is seeking to recover assets held in segregated accounts in the relief defendants'

names but subject to Stanford's control. *See* Case no. 3:09-cv-298-N, Doc. 321 at 2-3 (finding that “[w]ith limited exceptions, Pershing and J.P. Morgan could execute transactions in the accounts only upon Stanford’s instructions, rather than the [investors’] instructions”). The relief defendants are claiming rights to the contents of these segregated accounts, just like the Whitbecks. But the mere fact that the Bank transferred funds to Stanford accounts in the relief defendants’ names “[does] not support a remedy that would elevate the [relief defendants’] claim above the other victims.” *Forex*, 242 F.3d at 331.

Even if the investment accounts at issue here were not subject to Stanford’s exclusive control, the *Forex* rationale cannot tolerate a first-come, first-served rule of distribution. If the Whitbecks were not absolutely entitled to return of “their own money,” which sat in a segregated account and was never comingled with other investors’ money, then the relief defendants cannot be entitled as a matter of law to retain money that was transferred to them only because Stanford stole it from later investors.

Based on these Circuit precedents, this Court should modify the preliminary injunction to freeze the relief defendants’ accounts until the Receiver’s claims are finally adjudicated. Alternatively, this Court should remand the injunction issue to the district court to reconsider its decision with instructions that the relief requested by the Receiver is legally viable.

B. The Receiver’s claim for disgorgement falls well within the district court’s discretion to administer an equity receivership.

The Receiver acknowledges that *Forex* and *Durham* were based, in part, upon deference to the trial court’s discretion. But that does not diminish their significance for this case. In fact, that is the very point of this appeal — the district court erred in failing to recognize that its discretion to fashion an appropriate equitable remedy supports the Receiver’s claim for disgorgement of stolen funds and pro rata distribution of such funds to all Stanford victims. *See, e.g., SEC v. Great White Marine & Recreation, Inc.*, 428 F.3d 553, 556 (5th Cir. 2005) (“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.”) (internal quotations omitted); *SEC v. First Pac. Bancorp.*, 142 F.3d 1186, 1193 (9th Cir. 1998) (district court “has broad equitable powers to fashion appropriate relief for violations of the federal securities laws”) (internal quotations omitted); *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 438 (2d Cir. 1987) (district court may “grant ancillary relief . . . where necessary and proper to effectuate the purposes of” the securities laws).

As a matter of logic and sound policy, the district court erred in concluding that a Ponzi scheme can put stolen money beyond the reach of these broad equitable powers merely by transferring it to a few lucky investors before the scheme collapses. Based upon the rationale of *Forex* and *Durham*, this Court

should hold that the Receiver's claims for disgorgement fall within the district court's discretion to fashion an equitable distribution plan.

C. Cases from other Circuits support the Receiver's claims

Courts in other circuits have recognized that investors in a Ponzi scheme are properly named as relief defendants and are subject to disgorgement if they received proceeds from the scheme. *See, e.g., SEC v. George*, 426 F.3d 786, 798–99 (6th Cir. 2005).² In *George*, the SEC brought an enforcement action

² Case law amply supports the power of a receiver to seek disgorgement of tainted funds from relief defendants who receive proceeds from a Ponzi scheme. *See SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1117 n.15 (9th Cir. 2006) (company that was used as an instrument of a Ponzi scheme ordered to disgorge all proceeds of the scheme); *SEC v. Cross Fin. Servs.*, 908 F. Supp. 718, 730-32 (C.D. Cal. 1995) (relief defendant accused of no wrongdoing ordered to disgorge proceeds of Ponzi scheme received in return for services to defendants); *CFTC v. Bolze*, No. 3:09-CV-88, 2009 WL 1313249, at *2 (E.D. Tenn. Apr. 1, 2009) (relief defendant, a corporation not accused of misconduct, ordered to disgorge funds received from operators of Ponzi scheme); *CFTC v. Foreign Fund*, 549 F. Supp. 2d 1005, 1008 (M.D. Tenn. 2008) (relief defendant ordered to disgorge proceeds from Ponzi scheme); *CFTC v. Foreign Fund*, No. 3:04-0898, 2007 WL 1850007, at *5 (M.D. Tenn. June 25, 2007) (relief defendant, a corporation not accused of misconduct, ordered to disgorge customer funds received from operator of fraudulent scheme; additional relief defendant not accused of misconduct, an employee of fraudulent scheme's operator, ordered to disgorge full amount of customer funds received); *SEC v. Chem. Trust*, No. 00-8015-CIV, 2000 WL 33231600, at *11-12 (S.D. Fla. Dec. 19, 2000) (relief defendant not accused of wrongdoing but ordered to disgorge Ponzi proceeds received from both defendants and relief defendants controlled by defendants); *SEC v. Better Life Club of Am., Inc.*, 995 F. Supp. 167, 184 (D.D.C. 1998) (relief defendants not accused of wrongdoing ordered to disgorge Ponzi proceeds received from defendant as gifts or as part of sham transactions); *SEC v. Infinity Group Co.*, 993 F. Supp. 324, 331-32 (E.D. Pa. 1998) (relief defendants against whom no wrongdoing was alleged, including wife of one defendant and two trusts for which wife was trustee, ordered to disgorge cash and assets that represented ill-gotten gains from Ponzi scheme), *aff'd*, 212 F.3d 180 (3d Cir. 2000). *See also, SEC v. AmeriFirst Funding, Inc.*, Civil Action No. 3:07-cv-1188-D, 2008 WL 1959843, at *5-6 (N.D. Tex. May 5, 2008) (relief defendant not accused of wrongdoing but whose principal was involved in the fraud ordered to disgorge consulting fees paid out of fraudulent proceeds); *SEC v. Dowdell*, No. Civ.A.3:01CV00116, 2002 WL 31357059, at *4-5 (W.D. Va. Oct. 11, 2002) (relief defendants accused of no wrongdoing and who received residential property purchased with Ponzi proceeds enjoined from drawing on lines of credit secured by the property).

against the operators of a Ponzi scheme and named several investors as relief defendants. *Id.* at 788. The court-appointed receiver estimated that available funds would allow investors to recover only 42 percent of their original investments. *Id.* at 791. In order “[t]o consolidate the remaining funds,” the district court granted summary judgment to the SEC against the relief-defendant investors and ordered them to disgorge any proceeds they had received from the scheme. *Id.* The court of appeals affirmed, reasoning that because “the SEC showed that the money [the relief defendants] received from the scheme came not from profits on their investments but from the investments of others,” they “received ill-gotten funds and had no legitimate claim to those funds.” *Id.* at 798.

The Sixth Circuit rejected the relief defendants’ argument that they should only be required to disgorge false profits and should be permitted to keep any amount up to the value of their original investment. *Id.* at 799. According to the court, *all proceeds* received by the investors, including the return of their principal investment, were subject to disgorgement:

Hundreds of other investors were victimized by this scheme, yet they will recover only 42 percent of the money they invested, not the 100 percent to which the relief defendants claim to be entitled. . . . [T]he use of a *pro rata* distribution has been deemed especially appropriate for fraud victims of a “Ponzi scheme” As the Supreme Court explained in the litigation that gave the Ponzi scheme its name, “equality is equity” as between “equally innocent victims.” *Cunningham v. Brown*, 265 U.S. 1, 13 (1924). . . . Under these

circumstances, [the relief defendants] may not receive a disproportionate share of the recovered investor funds, only the same pro rata share that other investors may receive.

George, 426 F.3d at 799 (internal quotation and citation omitted).

Another circuit court recently employed a similar analysis in refusing to allow an investor to receive back an investment check that had not yet cleared at the time of the receivership. *See SEC v. Infinity Group Co.*, 226 Fed. Appx. 217 (3d Cir. 2007). The receiver for the Ponzi scheme in *Infinity* recovered sufficient assets to pay back only 55% of each investment in the scheme. 226 Fed. Appx. at 218. But Roberts claimed a right to 100% of his \$30,000 investment. Roberts made this investment just before the SEC initiated the receivership, and Roberts's check was still subject to a three-day bank hold when *Infinity's* accounts were frozen. Accordingly, the Ponzi scheme never gained access to Roberts's money.

But Roberts's arguments failed to persuade the Third Circuit. In particular, the Third Court refused to accept a rule of distribution that was based upon timing and chance rather than equity:

According to Roberts, the bank policy on which he relies wound up depriving [*Infinity*] of access to his funds solely by reason of the date on which [*Infinity*] deposited his check. The mere fact that it did so just two days before its account was frozen does not give Roberts equitable priority over the thousands of other victims of [*Infinity's*] fraud. Accordingly, the District Court determined that there is no equitable basis to distinguish between early investors and those, like Roberts, who

invested shortly before [Infinity's] account was frozen, and that all investors should thus be treated the same.

Id. at 219. As in *Infinity*, the timing of the relief defendants' CD redemptions does not give them equitable priority over thousands of other Stanford victims. There is no equitable basis to distinguish between early investors whose CDs matured just before the receivership and later investments whose CDs matured after the scheme was shut down.

As shown above, the relief defendants in this case all received proceeds from a Ponzi scheme — money paid by other investors to purchase their own fraudulent CDs. The relief defendants here are thus indistinguishable from the relief defendants in *George* and the late investor in *Infinity*. In fact, the argument for equitable relief is even stronger here, because other investors — those not lucky enough to receive proceeds before the Stanford fraud was discovered — will receive a much smaller percentage of their initial investment than the pro rata distributions in *George* and *Infinity*. See R. 299, 303 (“At the inception of the U.S. Receivership on February 16, 2009, the total principal amount of outstanding SIB CDs was approximately \$7.2 billion (U.S.), according to SIB records. ...[B]ased on my analysis to date, the combined assets of all Stanford Entities (SIB included) for which we have financial records have a total value of less than \$1 billion.”). The maxim “equality is equity” applies with even greater urgency in this case.

D. The relief defendants cannot establish a legitimate right to cash that Stanford stole from other investors.

Not only were the relief defendants' CDs redeemed with ill-gotten cash, but the relief defendants have no "legitimate claim" to the funds in question. In practice, once it is proven that distributions were made from Ponzi scheme proceeds, the courts shift the burden to the relief defendant to establish a legitimate right to retain the funds, such as a right to compensation for services that were *not in furtherance of the scheme*:

Alternatively, the Relief Defendants contend that the district court could not proceed against them as nominal defendants because they have asserted an ownership interest in the funds through Samuel Kingsfield's testimony during the preliminary injunction hearing that the funds were received as compensation for his services. We agree that receipt of funds as payment for services rendered to an employer constitutes one type of ownership interest that would preclude proceeding against the holder of the funds as a nominal defendant. However, a claimed ownership interest must not only be recognized in law; it must also be valid in fact. Otherwise, individuals and institutions holding funds on behalf of wrongdoers would be able to avoid disgorgement (and keep the funds for themselves) simply by stating a claim of ownership, however specious.

Kimberlynn Creek Ranch, 276 F.3d at 192; *see Cavanagh*, 155 F.3d at 136; *SEC v. Cherif*, 933 F.2d 403, 414 n.11 (7th Cir. 1991); *SEC v. Milan Capital Group, Inc.*, No. 00 CIV 108 DLC, 2000 WL 236374, at *3 (S.D.N.Y. March 1, 2000). None

of the relief defendants rendered any services to Stanford, and none has any legitimate right to the CD proceeds that he or she has received.

The relief defendants' only claim to the funds is based upon their CD contracts with the Bank, which entitle them to return of their purchases, plus interest. But this claim actually cuts the other way because every Stanford investor has the exact same contractual claim, including the investors whose cash was stolen to pay the relief defendants. Because every investor has an equal claim to a portion of the money held in the relief defendants' accounts, this claim supports a pro rata rule of distribution, not a rule of first-come, first-served.

In addition, the relief defendants' contractual claims cannot support the distinction drawn by the district court between principal and interest. If these contractual claims were a legitimate way to distinguish between lucky investors who redeemed their CDs before court intervention and the unfortunate masses who did not, then the relief defendants would also be entitled to keep interest payments that were made to them with stolen money. By maintaining the account freezes to the extent of such interest payments, however, the district court recognized that the Receiver is likely to prevail on his claim for disgorgement of interest payments. Because the relief defendants' claim for such interest payments pursuant to their CD contracts is not "legitimate," their claim for stolen principal is an equally

illegitimate basis for preferring the relief defendants' claims over those of every other investor.

For these reasons the relief defendants are not entitled to retain money that they received from the Stanford defendants, and which was stolen from other investors. The Receiver is entitled to exclusive possession and control of those funds, to be used for the benefit of all Stanford claimants. *George*, 426 F.3d at 798 (investors in Ponzi scheme had no legitimate claim to payments from the scheme); *Kimberlynn Creek Ranch*, 276 F.3d at 190-92 (relief defendant had no legitimate claim to gratuitously transferred proceeds of securities fraud); *Cavanagh*, 155 F.3d at 137 (donee of proceeds from securities fraud had no legitimate claim to the funds); *Colello*, 139 F.3d at 676 (relief defendant who received proceeds of fraud had no legitimate claim to the funds); *SEC v. China Energy Savings Tech., Inc.*, No. 06-cv-6402, 2009 WL 1940794, at *8 (E.D.N.Y. July 6, 2009) (relief defendants had no legitimate claim to proceeds of securities fraud); *SEC v. Byers*, No. 08 Civ. 7104, 2009 WL 33434, at *4 (S.D.N.Y. Jan. 7, 2009) (occupants had no legitimate claim to house whose mortgage was paid with proceeds of securities fraud); *CFTC v. Nations Invs., LLC*, No. 07-61058-CIV, 2008 WL 4376887, at *6 (S.D. Fla. Aug. 25, 2008) (relief defendants had no legitimate claim to proceeds of fraud used to pay off their home equity loans); *SEC v. AmeriFirst Funding, Inc.*, Civil Action No. 3:07-cv-1188-D, 2008 WL 1959843, at *5 (N.D. Tex. May 5,

2008) (relief defendant had no legitimate claim to proceeds of securities fraud despite having provided consulting services to defendant); *FTC v. Holiday Enters, Inc.*, Civil Action No. 1:06-cv-2939-CAP, 2008 WL 953358, at *12 (N.D. Ga. Feb. 5, 2008) (relief defendant had no legitimate claim to properties purchased with proceeds of fraud); *CFTC v. Foreign Fund*, No. 3:04-0898, 2007 WL 1850007, at *5, 7 (M.D. Tenn. June 25, 2007) (relief defendants who did not dispute receipt of proceeds from Ponzi scheme had no legitimate claim to the funds); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1273 (S.D. Fla. 2007) (relief defendant had no legitimate claim to proceeds of fraud); *CFTC v. Schiera*, No. CV05-2660 CAS, 2006 WL 4586786, at *6 (S.D. Cal. Dec. 11, 2006) (same); *CFTC v. Int'l Berkshire Group Holdings, Inc.*, No. 05-61588, 2006 WL 3716390, at *10 (S.D. Fla. Nov. 3, 2006) (same); *CFTC v. Valko*, No. 06-60001, 2006 WL 2582970, at *6 (S.D. Fla. Aug, 16, 2006) (same); *SEC v. Cavanagh*, No. 98-Civ-1818-DLC, 2004 WL 1594818, at *31-32 (S.D.N.Y. July 16, 2004) (same); *SEC v. Renaissance Capital Mgmt., Inc.*, No. 9:00-cv-01848-TCP, 2003 WL 23353464, at *4 (E.D.N.Y. Aug, 25, 2003) (relief defendant did not have legitimate claim to funds obtained from investors by fraud, despite the fact that the transfer of funds constituted repayment of a loan); *Elfindepan*, 2002 WL 31165146, at *6-7 (relief defendants who obtained proceeds of fraud pursuant to a separate fraudulent transaction had no legitimate claim to the funds); *SEC v. Lybrand*, 200 F. Supp. 2d

384, 398 (S.D.N.Y. 2002) (relief defendants who received proceeds of illegal securities sales had no legitimate claim to the funds); *SEC v. Chem. Trust*, No. 00-8015-CIV, 2000 WL 33231600, at *11 (S.D. Fla. Dec. 19, 2000) (relief defendant had no legitimate claim to proceeds of Ponzi scheme); *CFTC v. IBS, Inc.*, 113 F. Supp. 2d 830, 855 (W.D.N.C. 2000) (relief defendants had no legitimate claim to funds obtained from investors by fraud); *Milan Capital Group*, 2000 WL 236374, at *3 (recipient of funds fraudulently obtained from investors had no legitimate claim to the funds); *SEC v. Antar*, 15 F. Supp. 2d 477, 533 (D.N.J. 1998) (relief defendants who received proceeds of fraudulent stock offering did not have legitimate claim and “should not be permitted to retain funds derived from the multifarious frauds” when “their enrichment came at the expense of defrauded investors”); *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 386 (S.D.N.Y. 1998) (relief defendants had no legitimate claim to proceeds of securities fraud); *SEC v. Infinity Group*, 993 F. Supp. 324, 331 (E.D. Pa. 1998) (same); *SEC v. Antar*, 831 F. Supp. 380, 401–02 (D.N.J. 1993) (same).

II. The Receiver has established the other elements of his claim for a preliminary injunction.

Although the proceedings below and the district court’s conclusions focused on the issue of likely success on the merits, the evidence strongly supports the other elements of the Receiver’s request for injunctive relief. In fact, the relief defendants’ accounts have been frozen since last February precisely because there

is a substantial threat that the Receivership Estate will suffer irreparable injury absent the freeze, this threatened injury outweighs the harm of maintaining the freeze, and the freeze serves the public interest.

A. There is a substantial threat of irreparable harm to the Receivership Estate absent the account freeze.

The relief defendants' accounts at Pershing, JP Morgan and SEI have been frozen since February for good reason. The Receivership Estate claims ownership of the account assets. But the Estate has precious little resources, and if the relief defendants are permitted to transfer Estate funds out of the accounts, the cost of retrieving them after the Receiver's right to them is finally adjudicated would be substantial, if not prohibitive.

The district court was sensitive to this risk even in the context of the short amount of time it would take to perfect this appeal. *See* Tr. at 30 (offering to extend the account freeze until the Receiver could request temporary relief from this Court and stating "I don't want it to become moot because all of the money has wandered off where you can't get it before you have an opportunity to present that argument").

Other receivership courts frequently impose account freezes in similar circumstances to support the equitable remedy of disgorgement. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005). The purpose of an asset freeze is to preserve the status quo by preventing dissipation and diversion of

assets. *SEC v. Infinity Group Co.*, 212 F.3d 180, 197 (3d Cir. 2000). In this way, the freeze “preserve[s] funds for the equitable remedy of disgorgement.” *ETS Payphones*, 408 F.3d at 734; *see also SEC v. Unifund SAL*, 910 F.2d 1029, 1041 (2d Cir. 1990) (asset freeze designed “to facilitate enforcement of any disgorgement remedy that might be ordered”).

This includes asset freezes against relief defendants. *See Cavanagh*, 155 F.3d at 136; *Cherif*, 933 F.2d at 414; *Byers*, 2009 WL 33434, at *2–3; *CFTC v. Bolze*, No. 3:09-CV-88, 2009 WL 1313249, at *7 (E.D. Tenn. April 1, 2009); *Amerifirst Funding*, 2008 WL 282275, at *1, *vacated in part on other grounds sub nom.*, *Whitcraft v. Brown*, 570 F.3d 268, 270 (5th Cir. 2009); *Elfindepan*, 2002 WL 31165146, at *4–5; *Milan Capital*, 2000 WL 236374, at *1, 3; *IBS*, 113 F. Supp. 2d at 852–53, *aff’d sub nom.*, *Kimberlynn Creek Ranch.*, 276 F.3d at 189; *SEC v. Heden*, 51 F. Supp. 2d 296, 299 (S.D.N.Y. 1999); *SEC v. Pinez*, 989 F. Supp. 325, 345 (D. Mass. 1997); *SEC v. Certain Unknown Purchasers*, No. 81 Civ. 6553, 1983 WL 1343, at *1 (S.D.N.Y. July 25, 1983).

This long and consistent line of cases confirms that an account freeze is warranted under the circumstances of this case. An account freeze properly preserves proceeds of the Ponzi scheme until their ownership can be determined. Issuing such a freeze is a routine exercise of “the court’s broad equitable powers to afford relief to defrauded investors.” *Elfindepan*, 2002 WL 31165146, at *6.

B. The threatened injury outweighs any harm to the relief defendants that may be caused by continuing the account freeze.

By establishing the first element of his claim for an injunction – likelihood of success on the merits – the Receiver has established that the threatened injury to the Estate vastly outweighs any harm to the relief defendants. The harm to the relief defendants is minimal because they have no legitimate claim to the money in the accounts. As the *Elfindepan* court recognized, “[p]arties in possession of such funds who do not have a legitimate ownership interest and who are given notice of the freeze *are not prejudiced by such a freeze* as they are not deprived of their own property.” 2002 WL 31165146, at *6 (emphasis added).

In addition, the account freeze merely preserves the status quo, insuring that the funds will be available to whomever prevails in the competing claims for ownership. See *ETS Payphones*, 408 F.3d at 734; *Infinity Group*, 212 F.3d at 197. But the converse is not true. If the account freeze is not extended, then the relief defendants could ultimately retain the funds even if the Estate prevails on its disgorgement claims, either by moving the funds beyond the Receiver’s reach or by making recovery cost prohibitive. The balance of equities heavily favors maintenance of the status quo.

C. The injunction will serve, not impair, the public interest.

This element is more applicable here than in most cases. The Receiver seeks to recover the funds at issue not for himself, but for the thousands

of Stanford investors who stand to recover but pennies on their lost investment dollars. The public interest is served by the pro rata rule, not by a rule of preference and chance that allows early investors to keep money stolen from later ones.

More than 20,000 investors received little or no proceeds from the fraud and are not named as relief defendants. *See* Case no. 3:09-cv-298-N, Doc. 529 at 1 (stating that 20,416 Stanford CD owners with Pershing accounts had been released from the asset freeze as of June 25, 2009). Their only hope for compensation is a distribution of Receivership assets. If the relief defendants are allowed to keep proceeds from the fraud, despite having no legitimate right to them, then the relief defendants will enjoy unfair preferential treatment at the expense of the thousands of other investors who were not so lucky.

If, instead, the relief defendants are ordered to disgorge the proceeds, all investors — including the relief defendants — will share equally in what remains of the Stanford assets. Far from treating the relief defendants unfairly, the Receiver's plan *avoids* a callous disregard for tens of thousands of other investors. Equity should not shut its eyes to the suffering of thousands in order to preserve the preferential treatment of a few. At a bare minimum, the public interest and the rights of Stanford's 20,000 victims supports a temporary account freeze that will insure meaningful relief for all if the Receiver ultimately prevails on his claims.

CONCLUSION

For all of these reasons, the Receiver prays that this Court reverse the district court's order in part and issue an injunction continuing the existing freeze over the relief defendants' accounts at Pershing, J.P. Morgan and SEI until the Receiver's claims against the relief defendants are finally adjudicated. Alternatively, at a minimum, this Court should reverse the order in part and remand it for the district court to reconsider the Receiver's motion with instructions that the Receiver has stated a legally viable claim for disgorgement of purported principal that was "returned" only by illegally diverting funds invested by others. The Receiver further prays for such additional relief to which he may be entitled.

Respectfully submitted,

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