

Case No. 09-10761

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 JAMES BROWN; MURPHY BUELL, ET AL. 2; JAMES RONALD LAWSON; DIVO HADDED MILAN; SINGAPORE PUNTAMITA PTE., LTD., NUMA L. MARQUETTE; GAIL G. MARQUIETTE,

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; RICARDO O. HUNTON, CHARLES HUNTON,

Defendants – Appellees

On Appeal from the United States District Court for the Northern District of Texas,
Dallas Division, Cause No. 3:09-CV-724-N

RESPONSE AND CROSS-APPEAL OF GAINES D. ADAMS, ET AL.

Michael J. Quilling
Texas Bar No. 16432300
Marcie L. Schout
Texas Bar No. 24027960
**QUILLING, SELANDER, CUMMISKEY
& LOWNDS, P.C.**
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
Telephone: (214) 871-2100
Facsimile: (214) 871-2111

**COUNSEL FOR APPELLEES /
CROSS-APPELLANTS**

CERTIFICATE OF INTERESTED PERSONS

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.

A. Appellant And Related Entities

1. Ralph S. Janvey, Receiver
2. Stanford International Bank Ltd.
3. Stanford Group Company
4. Stanford Capital Management, LLC
5. Stanford Financial Group
6. The Stanford Financial Group Bldg Inc.

B. Counsel For Appellant

1. Kevin M. Sadler
Joseph R. Knight
Timothy S. Durst
Susan Dillon Ayers
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard, Suite 1500
Austin, Texas 78701

C. Investors Joining In This Brief As Appellees / Cross-Appellants

1. Gaines D. Adams
2. Nen Family Trust

3. Jeff P. Purpera Jr
4. Cheray Zauderer Hodges
5. Luther Hartwell Hodges
6. Eric Tucker and Jennifer Tucker
7. Robert S. Greer and Alice D. Greer
8. Michael Wheatley and Betty Wheatley
9. Mississippi Polymers, Inc.
10. J. Michael Gaither
11. Geneva Sue Palmer
12. Robert E. Palmer
13. J. Russell Mothershed
14. The Second Amended and Restated Robert A. Houston Revocable Trust and Robert A. Houston
15. Angel Delio Nieuw
16. Angel Delio Nieuw and Maria P.C. Nieuw-Cael
17. Country Hill Investment, N.A.
18. Murfield Investments Inc.
19. Phillip E. Marrett
20. George T. Graves III
21. Thomas H. Turner
22. Daneco B.V.
23. DVX Capital
24. IRM Investments, Inc.

25. Stichting Particulier Fonds El Tributo

D. Counsel For Investors Joining This Brief As Appellees

1. Michael J. Quilling
Brent J. Rodine
Marcie L. Schout
QUILLING, SELANDER, CUMMISKEY & LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201

E. Other Parties To Appellant's Lawsuit Against Investors

See list attached in Appendix at Tab A.

F. Counsel Of Record For Other Parties To Appellant's Lawsuit Against Investors

1. M. David Bryant, Jr.
Mark Joseph Barrera
Deborah Daywood Williamson
COX SMITH MATTHEWS INCORPORATED
120 Elm Street, Suite 3300
Dallas, Texas 75270
2. Gene Besen
SONNENSCHNEIN, NATH & ROSENTHAL, LLP
2000 McKinney Avenue, Suite 1900
Dallas, Texas 75201
3. Bradley W. Foster
Matthew G. Nielsen
ANDREWS & KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201

4. Jeffrey Tew
Andrew B. Thomson
Robin J. Rubens
TEW CARDENAS LLP
Four Seasons Tower 15th Floor
1441 Brickell Avenue
Miami , Florida 33131
5. Ross D. Kennedy
BRACEWELL & GIULIANI LLP
711 Louisiana, Suite 2300
Houston, Texas 77002-2770
6. Bart Wulff
SHACKELFORD MELTON & MCKINLEY
3333 Lee Parkway, Tenth Floor
Dallas, Texas 75219
7. Phillip W. Preis
PREIS GORDON APLC
450 Laurel Street, Suite 2150
Baton Rouge, Louisiana 70821-2786
8. Jeffrey J. Ansley
BRACEWELL & GIULIANI LLP
1445 Ross Avenue, Suite 3800
Dallas, Texas 75202
9. Benjamin Dox Reichard
FISHMAN HAYGOOD PHELPS WALMSLEY WILLIS & SWANSON LLP
201 St. Charles Avenue, 46th Floor
New Orleans, Louisiana 70170-4600
10. Kendall Hayden
COZEN O'CONNOR
2300 Bankone Center
1717 Main Street
Dallas, Texas 75201

G. Parties To The Lawsuit Appointing Appellant

1. U.S. Securities and Exchange Commission
2. John J. Little, Examiner
3. R. Allen Stanford
4. James M. Davis
5. Laura Pendergest-Holt
6. Gilbert Lopez
7. Mark Kurht
8. Leroy King
9. Doug Shaw
10. Miguel Valdez
11. Randi Stanford
12. Rebecca Reeves-Stanford

H. Counsel Of Record For Parties To The Lawsuit Appointing Appellant

1. David B. Reece
D. Thomas Keltner
J. Kevin Edmundson
Michael D. King
Steve J. Korotash
US SECURITIES & EXCHANGE COMMISSION
Burnett Plaza Suite 1900
801 Cherry Street, Unit # 18
Fort Worth, Texas 76102-6882
2. Ruth Brewer Schuster
THE GULF LAW GROUP PLLC
1201 Connecticut Ave NW, Suite 500
Washington, DC 20036

3. Bradley W Hoover
Jacks C Nickens
Paul D Flack
Richard P Keeton
NICKENS KEETON LAWLESS FARRELL & FLACK
600 Travis, Suite 7500
Houston, Texas 77002
4. Shannon W Conway
John W Schryber
PATTON BOGGS
2001 Ross Avenue, Suite 3000
Dallas, Texas 75201
5. Dick DeGuerin
DEGUERIN & DICKSON
1018 Preston, 7th Floor
Houston, Texas 77002
6. Ronald E Cook
COOK & ROACH
1111 Bagby, Suite 2650
Houston, Texas 77002
7. David M Finn
MILNER & FINN
2828 N. Harwood, Suite 1950 LB 9
Dallas, Texas 75201
8. Jeffrey M Tillotson
Chris J Akin
John D Volney
LYNN TILLOTSON PINKER & COX LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
9. Brent R Baker
Erik A Christiansen
PARSONS BEHLE & LATIMER
201 S Main Street, Suite 1800
Salt Lake City, Utah 84111

10. John J Little
LITTLE PEDERSEN FANKHAUSER
901 Main Street, Suite 4110
Dallas, Texas 75202
11. Joe Kendall
KENDALL LAW GROUP, LLP
3232 McKinney Avenue, Suite 700
Dallas, Texas 75204
12. Jeronimo Valdez
VALDEZ WASHINGTON LLP
4514 Cole Avenue, Suite 600
Dallas, Texas 75205
13. Bradford Cohen
COHEN LAW
1132 SE 3rd Avenue
Fort Lauderdale, Florida 33316



Michael J. Quilking
Attorney of Record for
Appellees / Cross-Appellants

STATEMENT REGARDING ORAL ARGUMENT

In his brief, the Appellant asks this Court to redraw boundaries defining the assets a court-appointed receiver can recover from otherwise innocent investors. If this Court agrees, it would radically change the remedies available to court-appointed receivers and the rights protecting investors who are already victims of a fraudulent investment scheme. It would also greatly extend the cases cited by Appellant beyond their original rulings. Appellees – Cross-Appellants believe oral argument would help elucidate the consequences of the Court’s decision.

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Texas purported to have jurisdiction over this case because it is ancillary to the main receivership proceeding initiated by the United States Securities & Exchange Commission under Section 22(a) of the Securities Act (15 U.S.C. § 77aav(a)) and Section 27 of the Exchange Act (15 U.S.C. § 78).

This is an appeal from the District Court's interlocutory order on August 4, 2009, that granted in part and denied in part the Motion for Order Freezing Assets held in the Names of Certain Relief Defendants (Alguire R. 447-79)¹ filed by Appellant Ralph S. Janvey (the "Receiver" or "Appellant"). The Receiver timely filed his Notice of Appeal on August 6, 2009. In this brief, the Appellees – Cross-Appellants ("Investors") argue the Court does not have jurisdiction because, in effect, the underlying order relates to a request for attachment that cannot be appealed under 28 U.S.C. § 1292(a)(1). To the extent the Court does consider an appeal from this order, the Investors respond and cross-appeal on the points presented below.

¹ Throughout this brief, citations to the United States District Clerk's Records are described as follows: (1) the record certified on August 20, 2009, that contains only the hearing transcript dated July 31, 2009, in *Janvey v. Alguire*, Cause No. 3:09-CV-724-N, is "Hr'g Tr."; (2) the record certified on August 20, 2009, that contains pleadings from *Janvey v. Alguire*, Cause No. 3:09-CV-724-N, is "Alguire R."; and (3) the record certified on September 10, 2009, that contains pleadings from *SEC v. Stanford International Bank*, Cause No. 3:09-CV-298-N is "SEC Supp. R."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- Issue 1: Was the District Court correct when it determined the Receiver is not likely to succeed on his claims against principal redeemed by innocent investors?
- Issue 2: Did the District Court err by continuing to freeze interest held by innocent investors who received less than their total principal investment?
- Issue 3: Did the District Court err by continuing the freeze against investors' accounts that are exempt from execution?
- Issue 4: Did the District Court err by continuing to freeze interest held by innocent investors without proper notice or evidentiary support?
- Issue 5: Did the District Court's order essentially deal with a pre-judgment attachment that cannot be appealed under 28 U.S.C. § 1292(a)(1)?

STATEMENT OF THE CASE

Investors do not substantially dispute the Receiver's statement of the case. FED. R. APP. P. 28(b)(3). However, they wish to clarify one point.

It is true that, on July 28, 2009, 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." (Appellant's Br. at 2.) But that is not what the District Court directed him to do. The District Court's order of June 29, 2009, directed him to assert claims against Investors and to seek "prejudgment attachment."

(SEC Supp. R. 2043) The distinction is important because it may impact this Court's jurisdiction to hear the appeal.

STATEMENT OF FACTS RELEVANT TO THE ISSUES

The Securities & Exchange Commission ("SEC") filed an enforcement action alleging that Stanford International Bank, Ltd. ("SIB") operated a Ponzi scheme that marketed and sold certificates of deposit ("CDs") to customers worldwide. SIB was chartered in Antigua and Barbuda and maintained its headquarters there. It boasted over 28,000 customers in at least 113 countries. Roughly three-quarters of those customers are located outside the United States.

The SEC filed its lawsuit in the United States District Court for the Northern District of Texas. The District Court appointed Ralph S. Janvey ("Receiver" or "Appellant") as receiver for SIB and other related entities. Soon afterwards, the High Court of Justice for Antigua appointed Joint Receivers / Liquidators for SIB in an insolvency proceeding there. (SEC Supp. R. 514-16.) The Joint Receivers / Liquidators appeared in the SEC proceeding and have asked the District Court to recognize their standing for SIB and to divest it from the Receiver. (*Id.*) So far there is no ruling on that issue.

The Appellees – Cross-Appellants joining in this brief ("Investors") are investors who purchased CDs from SIB. Virtually all of them are United States citizens who received interest payments from their CDs and/or redeemed some or all

of their principal investment in those CDs. When SIB made those payments, it sent the funds to Investors' accounts at Pershing LLC or JP Morgan. For many Investors, those proceeds are now commingled with other personal assets.

The District Court entered a routine freeze order on February 17, 2009. (SEC Supp. R. 73-82.) Although it did not specifically consider whether to freeze investor accounts, the Receiver interpreted the District Court's order as authority to freeze all investor accounts at Pershing LLC or JP Morgan that were in any way connected to SIB or a United States brokerage company called Stanford Group Company. The District Court converted the freeze to an injunction on March 2, 2009. (SEC Supp. R. 128-33.) The Receiver has maintained the freeze while selectively releasing accounts, including many containing CD proceeds. (SEC Supp. R. 148-58, 193-207, 381-414.) He insists the freeze is necessary to pursue "clawback" claims against otherwise innocent investors who received principal or interest from their CDs. In numerous pleadings, both the SEC and the court-appointed Examiner oppose the clawback claims for legal, equitable, and practical reasons. (SEC Supp. R. 1953-77, 2012-32.)

For months the Receiver froze several hundred investors' accounts without ever filing a cause of action against them. Finally, on June 29, 2009, the District Court entered the following order:

The Court finds that the freeze has lasted long enough to permit the Receiver to assess whether he has viable claims against the various individual investors, and that it is time now for those claims to be asserted and tested.

* * *

The Court finds that five additional weeks should give the Receiver sufficient time to assess whether he wants to assert claims against individual investors and to assert such claims in a proceeding ancillary to the receivership action, together with claims for prejudgment attachment.

(SEC Supp. R. 2042-43.)

He responded by filing an ancillary lawsuit on July 28, 2009, that named roughly 600 innocent investors—including the Investors joining this brief—as “relief defendants.” (Alguire R. 201-49.) His complaint states no causes of action but, instead, recites case law generally supporting the equitable remedy of disgorgement. (Alguire R. 201-20.) Instead of seeking a pre-judgment attachment as directed, he filed a motion asking the District Court to extend the asset freeze as if it were an injunction. (Alguire R. 265-391.) His motion contained none of the elements needed to obtain a pre-judgment attachment under FED. R. CIV. P. 64 and TEX. CIV. PRAC. & REM. Code § 61. (*Id.*)

The District Court conducted a hearing on July 31, 2009. (Hr’g Tr. 25-75.) It did not hear witness testimony or evidence on the likelihood that releasing frozen assets would cause the Receiver irreparable harm. Instead, it only made this finding:

[T]he Court finds as a matter of law that innocent investors in this case who redeemed their investments before the Receivership are not liable for return of principal, and therefore, the Receiver has failed to establish that he is likely to prevail on the merits of his claims with regard to CD principal redemption payments . . .

(Alguire R. 477-79.) Based on that finding, the District Court ordered the release of Investors' principal effective August 13, 2009. Their interest remains frozen, even for Investors who are net losers or have accounts exempt from execution or pre-judgment attachment.

SUMMARY OF THE ARGUMENTS

The Receiver's brief spends a great deal of time discussing whether the District Court should distribute receivership assets on a *pro rata* basis. The District Court has made no ruling on that issue and it is neither ripe nor relevant to this appeal. The fact that this Circuit and others generally favor distributing receivership assets on a *pro rata* basis is beyond serious debate. The Receiver, however, cannot simply cite that policy and bootstrap onto it a remedy (in this case, disgorgement) without stating a recognized cause of action. Before the Investors' assets are subject to *pro rata* distribution, the Receiver must first state a viable cause of action against them, prevail upon it, and then collect their principal and interest into the receivership estate. This case has not progressed that far and the Receiver cannot pretend that Investors' assets are part of the receivership estate when they are not. Therefore, the only true issue raised in the Receiver's appeal is whether the District Court correctly determined that he is not likely to succeed on claims against Investors' principal.

There is no cited case authorizing a court-appointed receiver to clawback all payments made to every investor in a Ponzi scheme. To the contrary, cases directly

on point hold that innocent investors may keep all payments they received—whether characterized as principal or interest—up to the amount of their principal investment. This Court should join that consensus of cases and affirm the District Court’s finding that the Receiver is not likely to succeed on his claims against Investors’ principal.

The Receiver also cannot succeed because his “claims” lack both form and substance. He does not state a single cause of action against the Investors but, instead, merely describes them as “relief defendants.” That is no substitute for stating a viable cause of action, carrying his burden of proof on the elements, and prevailing at trial over Investors’ defenses. The Receiver cannot distort equitable remedies beyond recognition just to cheat Investors out of their day in court.

Furthermore, reciting broad equitable principles like “equality is equity” do not support the result the Receiver seeks in this case. If successful, the Receiver would clawback principal and interest only from the small minority of investors who, by chance, kept their funds in the United States. But he is not able to clawback funds from the vast majority of SIB investors who reside and keep their money abroad. This makes more victims out of United States investors just to generate potentially higher distributions around the world. Creating greater disparity among groups of investors is not equitable. For these reasons and others, the Court should affirm the District Court’s order finding the Receiver is not likely to succeed on his clawback claims against Investors’ principal.

On cross-appeal, the Investors seek a ruling that the Receiver is not likely to succeed on his claims against interest paid to Investors who are “net losers” in the scheme. Since innocent investors may keep all payments they received up to the amount of their principal investment, the Receiver cannot succeed on his claims against Investors who received less than that. There is no reason to continue freezing any funds belonging to those Investors.

On cross-appeal, the Investors also seek a ruling that the Receiver is not likely to succeed on claims to recover interest held in accounts that are exempt from execution. Since the Receiver cannot collect those funds as a matter of law, there is no reason to continue freezing them.

On cross-appeal, the Investors also seek a ruling that the District Court erred by freezing interest they received without proper notice or evidentiary support. As a matter of law, the District Court did not observe procedures necessary to continue the freeze or consider any evidence that could support the Receiver’s claims against interest.

Finally, Investors ask this Court to consider whether it even has jurisdiction to hear this appeal. The District Court’s order essentially dealt with a pre-judgment attachment, which cannot be appealed under 28 U.S.C. § 1292(a)(1). If the Court determines that it does not have jurisdiction, then it need not consider any issues raised in the Receiver’s appeal or in cross-appeals.

ARGUMENT

I. The Receiver Cannot Prevail On Claims Against Principal Redeemed By Investors

Throughout these proceedings, the Investors, the court-appointed Examiner, and the SEC all cited case law supporting their position that the Receiver cannot state claims against investors who redeemed their principal investment. (SEC Supp. R. 374-76, 1963-64, 2073-82.) It is hard to believe the Receiver is truly “likely to succeed on the merits” when he has never addressed or even acknowledged those cases, which ultimately persuaded the District Court. Instead, he chooses to completely ignore them in favor of others that obviously do not apply here.

A. Standard Of Review

The only true issue the Receiver appeals is whether the District Court correctly determined that he cannot succeed on claims against Investors’ principal.² Both the District Court’s order and comments made at the hearing make it clear that it determined, as a matter of law, the Receiver does not have a viable claim against principal redeemed by investors. Since that is a question of law, this Court reviews that issue *de novo*. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

² In his brief, the Receiver also asks this Court to adopt “rules of distribution . . . to govern this and future Ponzi-scheme receiverships in this Circuit.” (Appellant’s Br. at 1.) At this point, however, the Receiver is merely trying to collect assets into the receivership estate. Questions about distributing those assets in the future are both speculative and premature. The order on appeal does not address distribution schemes and the District Court did not discuss it at the hearing on July 31, 2009. It is not an issue on appeal.

B. Cases Dealing With This Specific Issue Support The District Court's Decision

Courts across this nation have uniformly held that receivers and bankruptcy trustees cannot clawback principal that innocent investors redeemed from a fraudulent investment scheme. Such claims are only available against “net proceeds” from the fraud—i.e., the amount investors received less the amount they paid. *See, e.g., Scholes v. Lehmann*, 56 F.3d 750, 757 (7th Cir. 1995) (holding that investor in a Ponzi scheme would only disgorge “the difference between what he put in at the beginning and what he had at the end.”); *In re Indep. Clearing House Co.*, 77 B.R. 843, 857 (D. Utah 1987).

In *Scholes v. Lehmann* the court-appointed receiver for a Ponzi scheme asserted a fraudulent transfer claim against a single investor named Joseph Phillips who received investment returns above his principal investment. 56 F.3d at 753. After the District Court entered judgment against Phillips, he appealed to the Seventh Circuit Court of Appeals arguing that his returns of principal and interest were supported by consideration. *Id.* The Court held that mere consideration was not enough. Phillips could keep funds from the scheme up to the dollar-for-dollar amount the he paid into it. It explained that:

Phillips is entitled to his profit only if the payment of that profit to him, which reduced the net assets of the estate now administered by the receiver, was offset by an equivalent benefit to the estate.

* * *

All he is being asked to do is to return the net profits of his investment—the difference between what he put in at the beginning and what he had at the end.

Id. at 757-58 (citation omitted).

Faced with similar facts, the District Court in *In re Independent Clearing House Company* explained that “to the extent a transfer merely repaid a defendant’s undertaking, the debtor received . . . the exact same value—dollar for dollar.” 77 B.R. at 857. It, therefore, ruled that the trustee for a Ponzi scheme could not recover principal redeemed by innocent investors. *Id.* Other courts considering this precise issue have uniformly adopted the rule and reasoning explained in these cases.³

Without question, the District Court relied on ample law directly on point to support its finding that the Receiver cannot clawback principal redeemed by innocent investors. The Court should join this consensus of cases and affirm the view taken by the District Court, the SEC, and the court-appointed Examiner in this case.

³ See, e.g., *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) (“the general rule is that to the extent innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable”); *In re Slatkin*, 525 F.3d 805, 815 (9th Cir. 2008); *Eby v. Ashley*, 1 F.2d 971, 973 (4th Cir. 1924) *cert. denied* 266 U.S. 631 (1925); *SEC v. AmeriFirst Funding, Inc.*, 2008 WL 919546, *5 (N.D. Tex. Mar. 13, 2008); *Warfield v. Carnie*, 2007 WL 1112591, *12 (N.D. Tex. Apr. 13, 2007) (“investors in illegal Ponzi schemes have . . . provided reasonably equivalent value up to the portion of their actual investment in the scheme”); *Terry v. June*, 432 F. Supp. 2d 635, 643 (W.D. Va. 2006) (“the return of the Defendant’s investment principal was offset by the Defendant’s initial investment”); *In re Lake States Commodities, Inc.*, 253 B.R. 866, 871 (Bankr. N.D. Ill. 2000) (“[t]o determine the amount recoverable from an investor, payments received from the perpetrators of a scheme are ‘netted’ against the amounts invested”); *Mays v. Lombard*, 1998 WL 386159, *3 (N.D. Tex. July 2, 1998); *Miller v. Harding*, 1998 WL 892702, * 7 (D. Mass. Dec. 11 1998); *In re Ramirez Rodriguez*, 209 B.R. 424, 437 (Bankr. S.D. Tex. 1997); *In re M & L Business Mach. Co., Inc.*, 164 B.R. 657, 666-67 (D. Col. 1994).

C. The Receiver Is Not Entitled To Disgorgement Merely By Naming Investors As “Relief Defendants”

Without stating a cause of action against them, the Receiver believes he can seek a disgorgement from Investors by calling them “relief defendants” in the case style. (Appellant’s Br. at 16.) Naming relief defendants is a procedural device available to the SEC in securities enforcement actions. The Receiver cites no cases authorizing a court-appointed receiver to do the same thing.⁴ He also cites no cases where this remedy was used against purely innocent investors or outside the government’s lawsuit alleging regulatory violations.

A relief defendant is a person who “holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute” such as a “trustee, agent, or depository.” *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir.1991). His relation to the suit is merely incidental and “it is of no moment to him whether the one or the other side in the controversy succeeds.” *Id.* This fundamental principle is obvious in every case the Receiver cites.⁵ However, it does not describe the Investors who, as

⁴ It is true that the Order Appointing Receiver anticipated that relief defendants might be named in the main receivership proceeding. (Appellant’s Br. at 8.) That statement, however, only authorized the Receiver to freeze their assets if it occurred. It did not authorize him to name relief defendants himself, either in that proceeding or in an ancillary lawsuit.

⁵ See, e.g., *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1117 (9th cir. 2006) (relief defendant was an entity that collaborated in or had a “close relationship” to the securities violations); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir.1998) (wife named as relief defendant because she possessed proceeds of stock given to her husband for free); *SEC v. Colello*, 139 F.3d 674, 675 (9th Cir. 1998) (relief defendant possessed money earned for facilitating the scheme); *SEC v. Cherif*, 933 F.2d 403, 405 (7th Cir.1991) (cousin named as relief defendant because his account was used to facilitate the scheme and hold proceeds of

explained above, have a legitimate right to keep the principal they redeemed. Naming them as relief defendants is neither authorized nor appropriate and the Receiver cannot do it simply to get the relief he seeks. *See id.* at 414 n. 11 (the “mere assertion of . . . nominal status cannot justify the entry of a freeze order”); *SEC v. Heden*, 51 F. Supp. 2d 296, 299, 302 n.4 (S.D.N.Y. 1999) (claim against relief defendant was limited to “profits” because she still had a “legitimate claim” to the amount of her principal investment).

The primary case cited by the Receiver has no bearing on this case. In *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005) the Court considered the SEC’s ability to

it); *SEC v. Byers*, 2009 WL 33434, *1 (S.D.N.Y. Jan. 7, 2009) (the named and prospective relief defendants were the defendant’s wife, brother, and sister-in-law who received assets without consideration); *CFTC v. Bolze*, 2009 WL 1313249, *4 (E.D. Tenn. Apr. 1, 2009) (relief defendant was the fraudulent commodity pool controlled by defendants); *CFTC v. Foreign Fund*, 549 F. Supp. 2d 1005, 1007 (M.D. Tenn. 2008) (relief defendant was an employee of the scheme who knowingly misappropriated funds to himself); *SEC v. AmeriFirst Funding, Inc.*, 2008 WL 1959843, *5 (N.D. Tex. May 5, 2008) (relief defendant was an entity controlled by defendant that received millions in “consulting fees” and paid the financial scheme’s sales agents); *CFTC v. Foreign Fund*, 2007 WL 1850007, *7 (M.D. Tenn. June 24, 2007) (judgment entered against relief defendants for failing to respond to the motion for summary judgment); *SEC v. Dowdell*, 2002 WL 31357059, * 1 (W.D. Va. Oct. 11, 2002) (relatives named as relief defendants because they received real estate purchased with misappropriated funds); *SEC v. Elfindepan, S.A.*, 2002 WL 31165146 (M.D.N.C. Aug. 30, 2002) (relief defendants were contemnors of court who violated the preliminary injunction); *SEC v. Chem. Trust*, 2000 WL 33231600, *7 (S.D. Fla. Dec. 19, 2000) (relief defendant was an entity that received funds from defendants and did not dispute the SEC’s motion to return them); *SEC v. Better Life Club of Am., Inc.*, 995 F. Supp. 167, 184 (D.D.C. 1998) (relief defendant received gratuitous gifts, unearned fees, or a loan that amounted to a “sham transaction”); *SEC v. Infinity Group Co.*, 993 F. Supp. 324, 326, 331 (E.D. Pa. 1998) (one relief defendant admitted receiving funds without consideration and the other was an entity controlled by a defendant’s wife who facilitated the scheme); *SEC v. Cross Fin. Servs.*, 908 F. Supp. 718, 720, 732 (C.D. Cal. 1995) (relief defendant aided the scheme by selling false letters of credit and provided no testimony that he owned the funds he received); *SEC v.*

name parties closely related to the defendants as “relief defendants” and pursue disgorgement claims against them through summary judgment. 426 F.3d 786, 798 (6th Cir. 2005). It does not authorize court-appointed receivers to do the same thing to purely innocent investors.

What the Receiver refuses to acknowledge about *SEC v. George* is that the SEC stated claims against relief defendants who were less than innocent. Although the Sixth Circuit describes those transfers as “improper,” “ill-gotten,” and “obtained illegally,” it does not go into great detail. *Id.* at 791. One of the relief defendants, Durietha Dzorney, married the principal wrongdoer and accepted a wedding ring, gifts, and a car from him. *Id.* Allen George received more than twice the amount of his investment after the SEC filed its lawsuit plus additional sums after the freeze. (SEC Supp. R. 2077.) Carl Jackson and Frederick Harris “schemed” to obtain a windfall for themselves in spite of the freeze. (*Id.*) The Receiver knows about these extraordinary circumstances in *SEC v. George* but continues to distort its outcome hoping the Court will favor it over cases cited above that are more on point. (*Id.* at 2078 n.9.) To be clear, neither the SEC nor the receiver in that case stated clawback claims against purely innocent investors. This Court should not extend the Sixth Circuit’s ruling beyond its original intent or allow the Receiver to use it in place of recognized causes of action against third parties.

Milan Capital Group, Inc., 2000 WL 236374, *2 (S.D.N.Y. Mar. 1, 2000) (relief defendant

D. Unrelated Equitable Principles Do Not Create A Cause Of Action Where None Exists

The Receiver refers to several equitable principles that have nothing to do with lawsuits against investors. For example, he notes that claimants to the receivership estate will “share equally in Estate assets and losses” on a *pro rata* basis. (Appellant’s Br. at 16.) That principle is not in serious dispute and simply favors distributing receivership assets proportionally rather than tracing claims to particular assets within the receivership estate. *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001); *U.S. v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996); see also *SEC v. Infinity Group Co.*, 226 Fed. Appx. 217, 218-19 (3d Cir. 2007). Like the motto “equality is equity,” it only comes into play when distributing assets out of the receivership estate—not suing third-parties to collect their property into the estate.⁶ The Receiver recites those equitable slogans as if they logically relate to his causes of action against the Investors. They do not.

The Receiver’s own cases illustrate this point. In *Durham*, *Forex*, and *Infinity Group*, the District Court denied investor claims asking it to release receivership assets traced to their original investments. *Durham*, 86 F.3d at 72; *Forex*, 242 F.3d at

was defendant’s wife).

⁶ As used by the Supreme Court in *Cunningham v. Brown*, that phrase refers to the position of creditors who race to recover an “unlawful preference” knowing the entity is insolvent. 265 U.S. 1, 10-11, 13 (1924). Everyone agrees that is not the case here. Here, the Investors are admittedly “‘innocent’ because they did not realize Stanford was a sham.” (Appellant’s Br. at 11.)

327-28; *Infinity Group*, 226 Fed. Appx. at 218. But the situation here is the exact opposite. Here, the Receiver is suing Investors to collect their personal assets that are not in the receivership estate. That is why the District Court ordered him to state “viable” causes of action that can be “asserted and tested.” (SEC Supp. R. 2042-43.) Simply reciting the principles governing estate distributions does neither.

E. Other Factors Support The District Court’s Decision

The record also presents other factors casting doubt on the Receiver’s likelihood for success. For example, it is not certain that he will even have standing to pursue SIB’s clawback claims since the District Court has yet to rule on the Joint Receivers’/Liquidators’ motion to recognize their authority for that entity. (SEC Supp. R. 510-660.)

Furthermore, the Investors have an absolute affirmative defense to the Receiver’s claims. A clawback claim is simply an avoidable fraudulent transfer under the Uniform Fraudulent Transfer Act (“UFTA”). The UFTA includes the following affirmative defense:

A transfer or obligation is not voidable under Section 24.005(a)(1) of this code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

See, e.g., TEX. BUS. & COMM. CODE § 24.009(a). With respect to their principal investment, the Investors can certainly meet both parts of this defense. They obviously redeemed their principal in good faith since the Receiver admits they

engaged in no wrongdoing. (Appellant's Br. at 11.) They also exchanged reasonably equivalent value dollar-for-dollar for their principal investment amount. *See In re Indep. Clearing House Co.*, 77 B.R. at 857. In short, if the Receiver ever did state a proper cause of action against the Investors' principal, he could not possibly prevail.

F. The Receiver Cannot Satisfy Other Elements Needed To Extend The Injunction

1. The Asset Freeze May Be Convenient For The Receiver But It Does Not Prevent Irreparable Harm

There is nothing in the record supporting the Receiver's conclusory statement that releasing Investors' accounts will cause assets to be "dispersed worldwide and only recovered, if at all, at great cost." (Appellant's Br. at 11, 32.) The court did not consider—much less determine—that releasing these particular accounts would somehow make judgment in the Receiver's favor unattainable. The only argument actually presented to the District Court leads to the opposite conclusion:

[T]he people he's going after in the United States are folks like me and you—professionals, prominent business people. There is no evidence that they won't have the ability to write a check when he gets a judgment after due process is given all parties and there's been an intelligent consideration of all the issues.

He will still be able to go after Greg Maddux, I submit. Greg's still a pitcher. Greg's a very wealthy man. Those people will still be available. Certainly my clients are all—you're talking about doctors, lawyers. They'll be there when he comes a knocking.

So release it all and let him do what I've done as a receiver for 25 years: file your lawsuit, prevail on your cause of action, and then go collect. It's all part of the process.

(Hr'g Tr. 67-68.)

The District Court's only statement on this point was a hypothetical question whether it made sense to extend the freeze ten days to facilitate the appeal. It noted that, if it released the funds as scheduled, they may have "wandered" out of the accounts at Pershing LLC and JP Morgan before the Receiver filed his appeal. (Hr'g Tr. 54.) Therefore, the District Court extended the freeze ten days. There was no finding of irreparable harm and the District Court did not decide that funds would "wander" so far that the Receiver could not satisfy a judgment in the future.

Even now, the Receiver only offers a bald conclusion that the cost of retrieving those funds after the release would be "substantial" or possibly "prohibitive." (Appellant's Br. at 32.) That is pure speculation. The Receiver knows with absolute certainty that the Investors currently have funds in their accounts to satisfy all or substantially all of his claims against them. If released, Investors may move those funds into different brokerage accounts but the funds will still exist. He admits Investors are "innocent" and offers no evidence that they would hide those assets or place them beyond his ability to collect. (Appellant's Br. at 11.) Therefore, all the Receiver actually shows is an inconvenience, which does not rise to the level of irreparable harm. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 629 (5th Cir. 1985) ("the hardship and inconvenience attendant on interim loss of

monies which will be paid, with interest, on final judgment does not constitute irreparable harm”).

It is true that a court may order an asset freeze against properly named relief defendants. (Appellant’s Br. at 32-33.) Investors, however, do not fit the description of a relief defendant—either in law or in practice. Cases the Receiver cites should not control because, in every one of those cases, the court froze assets belonging to relief defendants who facilitated, benefited from, or participated in the investment scheme.⁷ That is not the case here and there is no reason to believe Investors would hide assets for themselves or divert them to anyone else.

2. The Asset Freeze Substantially Harms Investors And Unfairly Punishes Those Located In The United States

The Receiver has already denied Investors access to their funds for months based on claims that are meritless according to the SEC, the Examiner, and now the

⁷ See *Cavanagh*, 155 F.3d at 132, 136 (freezing assets of defendant’s friends, relatives, and associates who admitted receiving stock shares without consideration); *Cherif*, 933 F.2d at 405 (freezing assets of defendant’s cousin whose account was used to facilitate the scheme and hold proceeds of it); *Byers*, 2009 WL 33434 at *1 (freezing assets of defendant’s wife, brother, and sister-in-law who received assets without consideration); *Bolze*, 2009 WL 1313249 at *4 (freezing assets of the fraudulent commodity pool controlled by defendants); *SEC v. Amerifirst Funding, Inc.*, 2008 WL 282275, *1 (N.D. Tex. Feb. 1 2008) (freezing assets of mother, step father, and former attorney who conspired with defendant to hide them); *Elfindapan*, 2002 WL 31165146 (freezing assets of contemnors of court who violated the preliminary injunction); *Milan Capital Group*, 2000 WL 236374 at *2 (freezing assets of defendant’s wife); *CFTC v. IBS, Inc.*, 113 F. Supp. 2d at 830, 853 (W.D.N.C. 2000) (freezing assets of a director of the defendant entity who received unearned pay for unspecified services); *SEC v. Heden*, 51 F. Supp. 2d 296, 299 (S.D.N.Y. 1999) (freezing assets of associate who held account for defendant’s use and benefit); *SEC v. Pinez*, 989 F. Supp. 325 (D. Mass. 1997) (freezing assets of depository institution holding defendant’s

District Court. Since even the Receiver admits they are otherwise “innocent,” the harm in denying Investors their own money is obvious and inherent—especially in times of economic hardship. *See, e.g., Connecticut v. Doebr*, 501 U.S. 1, 17, 111 S. Ct. 2105, 2115 (1991) (taking notice of inherent and severe hardship caused by pre-judgment asset freeze). The Receiver, the Examiner, and the District Court all acknowledge this hardship. (SEC Supp. R. 200, 1965-67, 2023-27, 2042.) Some of the Investors are elderly and rely on these funds for their livelihood. Another is a pension fund that uses its frozen account to make distributions to retirees. Others already suffered tremendous losses from SIB CDs they did not redeem and desperately need access to whatever is left in their brokerage account. Every day the account freeze remains in place it causes real harm to real people. (SEC Supp. R. 1965-67, 2023-27.) The District Court recognized this in its Order dated June 29, 2009, when it said:

The Receiver has estimated that he needs an additional ten weeks to complete his review of accounts. In view of the hardship the freeze is causing the individual investors, the Court cannot leave the freeze in place that long.

(SEC Supp. R. 2042.)

Such hardships are already a matter of record before the District Court. For example, on September 8, 2009, an investor named Robert H. Klug filed a letter with

assets); *SEC v. Certain Unknown Purchasers*, 1983 WL 1343 (S.D.N.Y. Jul. 25, 1983) (freezing assets of brokers or depository institutions holding accounts for wrongdoers).

the court explaining how the account freeze is hurting his family. (App. Tab B.) The Receiver froze money market funds that limit Mr. Klug's ability to care for his grandchildren. One dependant grandchild lives with him and has Cystic Fibrosis, diabetes, and a Factor 5 Leiden disorder. Mr. Klug financially supports another with brain damage, loss of mobility, and mental and behavioral issues. He is not alone and this Court must realize that the account freeze further victimizes those like Mr. Klug who already lost a great deal to the Stanford investment scheme.

Considering all this, it is hard to imagine the Receiver is correct when he says the balance of equities "heavily favors" the freeze. (Appellant's Br. at 34.) To the contrary, the equities do not weigh in the Receiver's favor. The freeze merely helps him pursue claims against a small subset of mostly United States citizens that would only potentially and partially fund a distribution largely benefiting investors located abroad. (Hr'g Tr. 36-8, 68.) Meanwhile, most investors who received principal or interest from their CDs are located outside the United States and, therefore, will not be subject to the same clawback claims. How does that achieve equity? If "equality is equity" then this Court should treat these Investors like all others worldwide who are not subject to an account freeze or clawback claims.

The Receiver also argues the freeze is necessary to preserve the status quo pending a determination of his claim. (Appellant's Br. at 34.) But continuing the freeze actually changes the status quo. As things stand right now, the Investors would

have the right to collect and use the full amount of their principal while their interest remains frozen. (SEC Supp. R. 2042-43, Alguire R. 477-79.) The Receiver, however, asks this Court to revert back to the status he enjoyed before June 29, 2009, when the Investors' principal and interest remained frozen indefinitely.

3. Extending The Asset Freeze Does Not Serve The Public Interest

The Receiver jumps to a conclusion that the public is somehow well-served if the Court takes money from one group of Stanford CD investors and gives it to another group of Stanford CD investors. (Appellant's Br. at 34-35.) A transfer from one discrete group to another, however, only serves the recipients' interests—not the public interests.

The public interest is best served by a proper and reliable application of the law. If this Court permits the Receiver to continue on his course, it would radically change the remedies available to court-appointed receivers and the rights protecting otherwise innocent investors. So far, he has (1) obtained a pre-judgment attachment without following the procedures adopted in FED. R. CIV. P. 64 and without affording investors a notice or hearing,⁸ (2) usurped the SEC's authority to decide which parties shall be "relief defendants" in its own civil enforcement action, and (3) distorted

⁸ Congress has authorized the SEC to obtain pre-judgment asset freezes without conforming to the federal rules and state law. *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990). The Receiver cites no case giving him the same authority. Furthermore, he cannot invoke the SEC's authority because it opposes extending the asset freeze. (SEC Supp. R. 2012-14, 2073-80; Hr'g Tr. 40-1.)

equitable principles beyond recognition so he can recover funds from innocent investors without stating a cause of action against them. This Court should not permit the Receiver to continue cheating rules of procedure or abusing equitable principles. To do otherwise would greatly extend the Receiver's cited cases beyond their actual holdings and radically change the remedies available to court-appointed receivers and the rights protecting victims to a fraudulent investment scheme. The Investors believe public interest is best served by consistent application of the applicable law.

II. The Receiver Cannot Prevail On Claims Against Innocent Investors Who Are Net Losers

On cross-appeal, the Investors assert that the District Court erred by continuing to freeze interest paid to “net losers”—i.e., investors who redeemed less than their total principal investment. The District Court's order presumes the Receiver can successfully clawback interest payments to those investors. As a matter of law, he cannot and the order should be reversed on that point. Injunctions based on erroneous conclusions of law are reviewed *de novo*. *Byrum*, 566 F.3d at 445.

As explained above, a court-appointed receiver will only recover “net profits” paid to investors, meaning the difference between what an investor “put in at the beginning and what he had at the end.” *Scholes*, 56 F.3d at 757-58. The calculation is objective and does not consider how payments were characterized by either side. *In re Indep. Clearing House Co.*, 77 B.R. at 859. Innocent investors, therefore, may salvage their money from a fraudulent investment scheme “dollar for dollar” up to the

value they put in but they cannot make a net profit above that. *Id.* This reasoning is well-established in cases considering clawback claims against investors.⁹

Four of the Investors joining in this Cross-Appeal are net losers.¹⁰ They each paid more into SIB than they ever received back in principal and interest combined. For every dollar they received, those Investors had already provided an “equivalent benefit” to the estate. *Scholes*, 56 F.3d at 757. The estate, therefore, did not suffer a net loss on those transactions for the Receiver to pursue. This Court should reverse the District Court’s order to the extent it continues freezing interest paid to net losers because the Receiver is not likely to prevail on those claims.

III. The Receiver Cannot Prevail On Claims Against Investors’ Accounts That Are Exempt From Execution

On cross-appeal, the Investors assert that the District Court also erred by continuing to freeze interest in accounts exempt from execution. Since the Receiver cannot collect a judgment against those accounts as a matter of law, the order should be reversed on that point. Injunctions based on erroneous conclusions of law are reviewed *de novo*. *Byrum*, 566 F.3d at 445.

⁹ Investors refer the Court to those cases previously cited in Note 3, *supra*.

¹⁰ The following Investors are net losers: (1) J. Russell Mothershed, (2) The Second Amended and Restated Robert A. Houston Revocable Trust and Robert A. Houston; (3) George T. Graves III; and (4) Mississippi Polymers, Inc.

Five Investors have accounts frozen that are exempt from pre-judgment attachment, garnishment, and/or execution under state law.¹¹ They include IRA accounts, SEP accounts, and a pension plan that makes distributions to retirees. The District Court continued to freeze the amount of Investors' interest in those accounts even though the Receiver could not collect a judgment against those accounts if successful. Therefore, there is no legal or practical basis for continuing that freeze. This Court should reverse the District Court's order freezing the interest in those accounts.

IV. The District Court Froze Investors' Interest Without Proper Notice Or Evidentiary Support

On cross-appeal, the Investors assert that the District Court also erred by continuing to freeze interest without proper notice or evidentiary support. The Receiver claims that his freeze against the Investors' accounts is an injunction. Federal Rule of Civil Procedure 65 states that injunctions may not issue without notice to the "adverse party," which includes a "fair opportunity to oppose the application and prepare for such opposition." FED. R. CIV. P. 65(a)(1); *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991). Here, the Investors are the parties adverse to

¹¹ The following Investors have frozen accounts that are exempt under state law: (1) Gaines D. Adams, who has IRA accounts exempt under GA CODE ANN. § 18-4-22; (2) Robert E. Palmer, who has IRA accounts exempt under MISS. CODE ANN. § 85-3-1; (3) Mississippi Polymers Inc., which operates a pension fund for its employees that is exempt under MISS. CODE ANN. § 85-3-1; (4) Michael Wheatley, who has an IRA account exempt under TEX. PROP. CODE § 42.0021; and (5) Eric Tucker, who has a SEP account exempt under TENN. CODE ANN. § 26-2-105.

that freeze even though it was entered without notice or an opportunity to oppose it.¹² Furthermore, the Receiver has not shown that he is likely to prevail on his claims against Investors' interest since he has not yet calculated those amounts or produced them to the Court or to the Investors. Put simply, both the facts and the procedure supporting the freeze against interest were insufficient and the Court should reverse the District Court's order on that point.

V. **The Court Should Consider Whether It Even Has Jurisdiction To Hear This Case Because The District Court's Order Dealt With A Pre-Judgment Attachment**

It is possible that this Court does not even have jurisdiction to consider the Receiver's appeal. Appellate jurisdiction to hear interlocutory orders is generally limited to the following:

[T]he courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . .

28 U.S.C. § 1292(a)(1). Attachment orders—unlike preliminary injunctions—cannot be appealed under 28 U.S.C. § 1291(a)(1). *See, e.g., FDIC v. Elio*, 39 F.3d 1239, 1249 (1st Cir. 1994). Distinctions between the two are well-recognized:

The distinction between attachments and injunctions has been so long recognized that we are convinced that Congress would have provided for

¹² The Investors believe this point is undisputed. Should further support be necessary, they refer to the more detailed explanation of this argument in the Brief of Appellees and Cross-Appellants Divo Haddad Milan and Singapore Puntamita Pte., Ltd.

interlocutory appeals in cases such as this had it deemed such appeals desirable.

Am. Mortg. Corp. v. First Nat. Mortg. Co., 345 F.2d 527, 528 (7th Cir. 1965).

When determining whether an order is an injunction or an attachment, this Court will look beyond the terminology used by the District Court and the parties and, instead, examine the substance of the proceeding below and the order's essential effect and character. *Lucas v. Bolivar County*, 756 F.2d 1230, 1235 (5th Cir. 1985); *H. K. Porter Co., Inc. v. Metro. Dade County*, 650 F.2d 778, 781-82 (5th Cir. 1981). Simply put, the Court of Appeals will "call a duck a duck." *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521 (11th Cir. 1994).

In this case, the essential character of the District Court's order is an attachment. A provisional attachment is a "prejudgment attachment in which the debtor's property is seized so that if the creditor ultimately prevails, the creditor will be assured of recovering on the judgment . . ." BLACK'S LAW DICTIONARY (8th ed.). This is precisely how the Receiver describes his own asset freeze:

The freeze that has been in place since the Receivership was instituted has insured that approximately \$300 million of these funds will be, upon final adjudication of the Estate's right to them, readily available for distribution to Stanford claimants.

* * *

The Receiver first requests an order freezing certain assets currently held at Pershing, JP Morgan and SEI in the names of the Relief Defendants in an amount equal to payments of CD Proceeds received by Relief Defendants from SIB, so that this property of the Estate may be

preserved and protected while the Receiver seeks an order of disgorgement.

(Alguire R. 272, 275) (emphasis added).

On the other hand, the essential character of an injunction requires a party “to do or refrain from doing something that is an integral part of the very matter in litigation, and invokes the normal equitable principles underlying the injunctive process.” *Lucas*, 756 F.2d at 1235. It is possible that the asset freeze was an injunction when the District Court originally issued it. (SEC Supp. R. 73-82, 128-33.)

At that time, the Receiver claimed he needed a freeze for the following reasons:

From the day the Court issued its orders, the Receiver was tasked with running Stanford Group Company and protecting the customers’ assets. It was impossible to accomplish both without freezing all the assets and shutting down operations. Accordingly, the Receiver requested a hold as to all Stanford accounts held in the custody of third parties, including Pershing and J.P. Morgan. Without this hold, brokers and investment managers—the Stanford employees who in many cases had discretionary authority to control customer accounts—could have transferred millions of dollars from customer accounts. The Receiver had to take away this ability immediately to protect the customers from anyone who may be involved in the alleged fraud.

Holding the accounts was also the only way to secure proceeds associated with fraudulent products or activities. At the time, there was no information available to allow the Receiver to readily identify specific accounts associated with fraudulent products or activities.

(SEC Supp. R. 244.) Since that time, however, the account freeze has ceased being injunctive in nature and turned into an attachment. After gathering information and releasing most accounts, the Receiver now only freezes the actual amount of his claims against investors. He does not allege that the frozen accounts are actually the

accounts where SIB sent payments of principal and interest. Instead, he continues to freeze whatever accounts were necessary to cover the total amount he claims against the Investors. This can only be described as a pre-judgment attachment. Even the District Court observed the evolution from one to the other:

The Court finds that the freeze has lasted long enough to permit the Receiver to assess whether he has viable claims against the various individual investors, and that it is time now for those claims to be asserted and tested.

* * *

The Court finds that five additional weeks should give the Receiver sufficient time to assess whether he wants to assert claims against individual investors and to assert such claims in a proceeding ancillary to the receivership action, together with claims for prejudgment attachment.

(SEC Supp. R. 2042.)

If the freeze is actually a pre-judgment attachment, then the Court need not consider the Receiver's appeal or the cross-appeals and Investors' principal should be released immediately.

CONCLUSION

If this Court determines it has jurisdiction to consider the appeal, it should join the consensus of cases disallowing the Receiver's claims to recover principal that innocent investors redeemed from a fraudulent investment scheme. To do otherwise would allow court-appointed receivers to victimize innocent investors a second time and seize their personal property without even stating a cause of action. Furthermore,

the Court should reverse the District Court's order to the extent it continues to freeze interest paid to net losers or contained in accounts exempt from attachment or execution under state law.

Respectfully submitted,

**QUILLING SELANDER CUMMISKEY
& LOWNDS, P.C.**

2001 Bryan Street, Suite 1800

Dallas, Texas 75201

(214) 871-2100 Telephone

(214) 871-2111 Facsimile

By: _____



Michael J. Quilling

Texas Bar No. 16432300

Marcie L. Schout

Texas Bar No. 24027960

**ATTORNEYS FOR
APPELLEES / CROSS-APPELLANTS**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 29, 2009, a true and correct copy of this brief was served by electronic means and by certified mail, return receipt requested on the following counsel of record:

Kevin M. Sadler
Joseph R. Knight
Timothy S. Durst
Susan Dillon Ayers
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard, Suite 1500
Austin, Texas 78701

David B. Reece
Mike Post
US SECURITIES & EXCHANGE
COMMISSION
100 F Street, NW, Rm 9404
Washington, DC 20549

D. Thomas Keltner
J. Kevin Edmundson
Michael D. King
Steve J. Korotash
US SECURITIES & EXCHANGE COMMISSION
Burnett Plaza Suite 1900
801 Cherry Street, Unit # 18
Fort Worth, Texas 76102-6882

John J. Little
Stephen Granberry Gleboff
LITTLE PENDERSEN FANKHAUSER
901 Main Street, Suite 4100
Dallas, Texas 75202

M. David Bryant, Jr.
COX SMITH MATTHEWS INCORPORATED
120 Elm Street, Suite 3300
Dallas, Texas 75270

Eugene B. Wilshire
Jacalyn D. Scott
WILSHIRE & SCOTT, P.C.
3000 One Houston Center
1221 McKinney Street
Houston, Texas 77010

Mark Joseph Barrera
Deborah Daywood Williamson
COX SMITH MATTHEWS INCORPORATED
112 East Pecan Street, Suite 1800
San Antonio, Texas 78205

Hank Mills
2623 Kleinert Avenue
Baton Rouge, Louisiana 70806

Gene Besen
SONNENSCHNEN, NATH & ROSENTHAL, LLP
2000 McKinney Avenue, Suite 1900
Dallas, Texas 75201

Jeffrey Tew
Andrew B. Thomson
Robin J. Rubens
TEW CARDENAS LLP
Four Seasons Tower 15th Floor
1441 Brickell Avenue
Miami, Florida 33131

Bart Wulff
SHACKELFORD MELTON & MCKINLEY
3333 Lee Parkway, Tenth Floor
Dallas, Texas 75219

Jeffrey J. Ansley
BRACEWELL & GIULIANI LLP
1445 Ross Avenue, Suite 3800
Dallas, Texas 75202

Kendall Hayden
COZEN O'CONNOR
2300 Bankone Center
1717 Main Street
Dallas, Texas 75201

Monica L. Luebker
Parker D. Young
Russell William Hubbard
FIGARI & DAVENPORT
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, Texas 75202-3796

Bradley W. Foster
Matthew G. Nielsen
ANDREWS & KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201

Ross D. Kennedy
BRACEWELL & GIULIANI LLP
711 Louisiana, Suite 2300
Houston, Texas 77002-2770

Phillip W. Preis
PREIS GORDON APLC
450 Laurel Street, Suite 2150
Baton Rouge, Louisiana 70821-2786

Benjamin Dox Reichard
James R. Swanson
Lance C. McCardle
FISHMAN HAYGOOD PHELPS WALMSLEY
WILLIS & SWANSON LLP
201 St. Charles Avenue, 46th Floor
New Orleans, Louisiana 70170-4600

James Scott Annelin
ANNELIN & GASKIN
2170 Buckthorne Place, Suite 220
Woodlands, Texas 77380

Rodney Acker
Barton Wayne Cox
Ellen B. Sessions
FULBRIGHT & JAWORSKI
2200 Road Avenue, Suite 2800
Dallas, Texas 75201

Brett Feinstein
STRATTON & FEINSTEIN PA
407 Lincoln Road, Suite 2A
Miami Beach, Florida 33139

Ruth Brewer Schuster
THE GULF LAW GROUP PLLC
1201 Connecticut Avenue NW
Suite 500
Washington, DC 20036

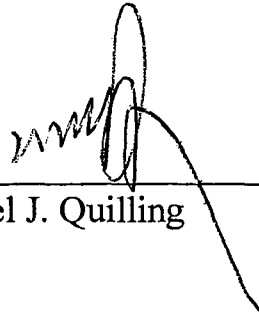
James B. Greer
Joseph A. Hummel
Kenneth C. Johnston
KANE RUSSELL COLEMAN
& LOGAN PC
1601 Elm Street, Suite 3700
Dallas, Texas 75201

David M. Finn
MILNER & FINN
2828 N. Harwood, Suite 1950 LB 9
Dallas, Texas 75201

Kevin M. Lemley
ALLEN LAW FIRM PC
212 Center Street, 9th Floor
Little Rock, Arkansas 72201

Ashlea Brown
NEWLAND & ASSOCIATES PLLC
10 Corporate Hill Drive, Suite 330
Little Rock, Arkansas 72205

Jeffrey M. Tillotson
LYNN TILLOTSON PINKER
& COX LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201

A handwritten signature in black ink, appearing to read "Michael J. Quilling", is written over a horizontal line. The signature is stylized and cursive.

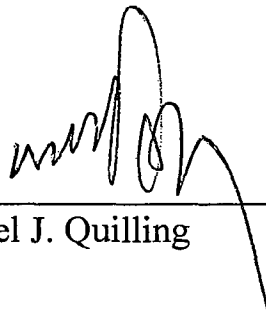
Michael J. Quilling

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains 673 lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.



Michael J. Quilling