

ARGUMENT

A. The Receiver objects to the Examiner's time spent duplicating the arguments and efforts of other parties who were represented by counsel.

In his second fee application, the Examiner seeks \$85,071 for time spent opposing the Receiver's clawback claims against relief-defendant investors. *See* Doc. 849 at 9-10, 11-12. This figure constitutes over 35% of his total fee request.¹ Because such expenditures of time were simply duplicative of the work of other parties, they were neither reasonable nor necessary, and the Receiver objects to the Examiner's recovery of this amount from the Receivership Estate.

The Examiner's work concerning these issues consisted of briefing and asserting the very same arguments already briefed and asserted by several other attorneys with whom he consults regularly. *See* Doc. 849 at 5, 12 (describing the Examiner's contact with approximately one hundred investor attorneys regarding account freezes, clawback claims, and appellate issues).² It is irrelevant that the Fifth Circuit ultimately agreed with the positions asserted by the Examiner; positions which are now being adopted and asserted vigorously by counsel for the financial advisors and other former employees from whom the Receiver seeks to recover proceeds of the Stanford fraud. What is relevant is that the Receivership Estate should not be required to pay the Examiner for his duplication of the arguments of others, including those of investors represented by attorneys.

¹ The Examiner seeks \$239,258.56 in fees and expenses. Doc. 848 at 1. His anti-clawback efforts constitute over 35% of this total: $\$85,071 / \$239,258.56 = 35.6\%$.

² Several of the Examiner's time entries are vague or ambiguous. Because he provides no context for many of his entries, it is difficult for the Receiver to determine whether the work relates to investors, financial advisors, secured creditors, issuers of letters of credit, other former employees, etc. In other cases, the Examiner seeks fees for consulting with unnamed persons (*e.g.*, "Telephone conversation with attorney for investor"; "Email exchange with former Financial Advisor"; "Letter to counsel"). The Receiver, therefore, objects to fees for these activities in their entirety because representing the interests of investors is within the Examiner's mandate, but representing the interests of employees, lenders, and financial advisors is not.

Although instances of duplication are numerous, the following are several examples of the Examiner's duplicative arguments, all of which come from his appellate brief:

First, the Examiner argued that the investors were not proper relief defendants because they had a legitimate interest in the CD proceeds and, therefore, the Court did not have subject matter jurisdiction over the Receiver's relief-defendant claims. *See* Brief of Intervenor John J. Little, Court-Appointed Examiner at 1-2, 15-23 (App. at 16-17, 30-38).³ Multiple other counsel advanced this identical argument in their appellate briefs. *See* Response and Cross-Appeal of Gaines Adams, et al. at 12-14 (App. at 115-17); Brief of Appellee Paula Marlin at 18-21 (App. at 166-69); Brief of Appellee-Cross Appellant James Ronald Lawson at 15-22 (App. at 206-13); Brief of Appellees/Cross-Appellants Divo Milan Haddad and Singapore Puntamita Pte., Ltd. at 1-2, 32-43 (App. at 291-92, 322-33); Brief of Appellee Roland Sam Torn at 7-11 (App. at 360-64); Brief of Appellees Jim Letsos, Felipe Gonzalez, Charlotte Hunton, Richard O. Hunton, Charles Hunton at 1, 14-21 (App. at 380, 393-400); Brief of Defendant-Appellees Jay Stuart Bell, Gregory Alan Maddux, David Jonathan Drew, Andruw Rudolf Bernardo Jones, Johnny David Damon, and Bernabe Williams at 28-38 (App. at 457-67); Joint Appellee Brief for Roberto Ulloa and Hank Mills at 2 (App. at 485).

The Examiner further asserted that, in the alternative, the Receiver's recovery should exclude principal and be limited to net profits. *See* Brief of Intervenor John J. Little, Court-Appointed Examiner at 23-28 (App. at 38-43). Numerous other counsel made this same argument. *See* Brief of Cross-Appellants-Appellees, Joseph Becker et al. at 31-36, 39-42 (App. at 539-44, 547-50); Response and Cross-Appeal of Gaines Adams, et al. at 10-11, 23-24 (App. at

³ Page citations to "App." refer to pages within the Appendix in Support of Receiver's Objections in Response to Examiner's Motion for Approval of Second Interim Application for Payment of Attorney's Fees and Expenses and Brief in Support, which is filed concurrently herewith.

113-14, 125-26); Brief of Appellee Paula Marlin at 10-18 (App. at 158-66); Brief of Appellees Patricia A. Thomas and Christopher Allred at 3 (App. at 570); Brief of Appellees Jim Letsos, Felipe Gonzalez, Charlotte Hunton, Richard O. Hunton, Charles Hunton at 21-25 (App. at 400-04); Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of Appellees at 9-19, 22-35 (App. at 612-22, 625-38); Joint Appellee Brief for Roberto Ulloa and Hank Mills at 2-3 (App. at 485-86); Reply of Gaines D. Adams, et al. at 3-4 (App. at 651-52).

Moreover, the Examiner claimed that the Receiver was not entitled to injunctive relief or an asset freeze. *See* Brief of Intervenor John J. Little, Court-Appointed Examiner at 28-35 (App. at 43-50). Once again, this argument was fully briefed by many other parties to the appeal. *See* Response and Cross-Appeal of Gaines Adams, et al. at 17-23 (App. at 120-25); Brief of Appellees/Cross-Appellants Divo Milan Haddad and Singapore Puntamita Pte., Ltd. at 25-29, 43-48 (App. at 315-19, 333-38); Brief of Defendant-Appellees Jay Stuart Bell, Gregory Alan Maddux, David Jonathan Drew, Andruw Rudolf Bernardo Jones, Johnny David Damon, and Bernabe Williams at 14-27 (App. at 443-56); Reply of Gaines D. Adams, et al. at 3-6 (App. at 651-54).

Instead of parroting the arguments of the several other parties to this case, the Examiner could easily have filed a one-page brief that adopted their arguments. This would have saved the Receivership Estate — and, ultimately, the defrauded investors — tens of thousands of dollars. Therefore, the Receiver requests that the Court deny the Examiner any recovery of the associated \$85,071 because such fees were neither reasonable nor necessary.

B. The Examiner had no authority to participate in the Receiver’s appeal to the Fifth Circuit.

Not only was the Examiner’s work duplicative of several other parties’ efforts, but the Court’s order appointing the Examiner (the “Appointment Order”) did not authorize the

Examiner's participation in the Receiver's appeal to the Fifth Circuit. The Examiner requests \$43,660 in payment of fees and expenses just for his involvement with the Fifth Circuit appeal, which represents over 18% of his second fee application.⁴ No provision of the Appointment Order states or implies that the Examiner is allowed to appear before any other court to oppose the actions of the Receiver or of any other party. *See id.* In fact, this Court's Appointment Order states:

The Examiner shall convey to **the Court** such information as the Examiner, in his sole discretion, shall determine would be helpful to **the Court** in considering the interests of the investors in any financial products, accounts, vehicles, or ventures sponsored, promoted or sold by any Defendants **in this action** (the "Investors"). . . . The Court grants the Examiner leave to file a Brief of Examiner in response to any motion filed **in this action**, as he in his sole discretion shall see fit[.]

Id. at 1-2 (emphasis added). The Examiner was, therefore, appointed by **this Court** to provide **this Court** with helpful information and to respond, when necessary, to motions filed **in this action**. It does not, however, allow him to respond or brief the relief-defendant clawback issues in another court, such as the Fifth Circuit Court of Appeals. The Examiner's time spent in the Fifth Circuit echoing the arguments of other attorneys is beyond the scope of this Court's Appointment Order. If the Examiner believed that his participation in the appeal was both reasonable and necessary, he should have sought permission from this Court to participate and should have explained how his participation, advocating duplicative arguments on behalf of a subset of investors, was both reasonable and necessary under the circumstances.

The Receivership Estate should not be required to pay the Examiner for these actions. The Receiver, therefore, objects to the Examiner's unauthorized participation in the

⁴ $\$43,660 / \$239,258.56 = 18.2\%$.

Fifth Circuit appeal and requests that the Court deny the Examiner any recovery of the associated \$43,660.

C. The Examiner has no authority to advocate on behalf of former Stanford financial advisors or other former employees.

As discussed above, the Court's Appointment Order details the Examiner's duties and responsibilities to convey information to this Court concerning the interests of the Stanford investors, rather than only the interests investors who have been named as relief defendants or of investors with frozen accounts. *See* Doc. 322 at 1. To date, the Examiner has, instead, fixated on the investors against whom the Receiver asserted clawback claims. The Receiver has not identified any circumstance in which the Examiner provided this Court with information or advocacy on the part of the tens of thousands of investors who were not lucky enough to receive any money from the Stanford fraud, and certainly his advocacy in the Fifth Circuit did not inure to their benefit.

At the July hearing on the Receiver's motion to continue the Court-ordered freeze, the Court asked the Examiner directly how he had reconciled the "conflicting interests" between these "subclasses of potential investors." Transcript of proceedings on 07/31/2009, at 10:24-11:6 (App. at 664). The Examiner acknowledged that he hears from investors who lost everything, do not have frozen accounts, and are not relief defendants "fairly regularly." *Id.* at 11:7-8 (App. at 664). But he then devoted his entire response to advocating on behalf of relief-defendant investors. *Id.* at 11:14-15:5 (App. at 664-65). The Examiner failed to offer any explanation of how he resolved his conflict of interest or to identify any activities he had pursued on behalf of investors who were not relief defendants.

In addition, the Examiner has engaged in advocacy on behalf of former Stanford financial advisors — the very same financial advisors who sold the fraudulent SIBL CDs to the

innocent Stanford investors. *See* Doc. 849 at 5, 9 (describing communications with financial advisors and monitoring of the Receiver's financial-advisor and former-employee claims). For example, in his communications with the Receiver, the Examiner has sought the release of financial advisors' and other former employees' frozen accounts and information regarding the status of those accounts on many occasions. The Receiver has received requests from the Examiner on behalf of financial advisors and former employees Michael Kepesky, John "Whit" Wilks, Scott Chaisson, Richard Gernert, and John Holliday, among others. *See* Appdx. filed in support of Examiner's fee application, Doc. 850-2 at 14, 30-32 (Michael Kepesky); Doc. 850-2 at 12, 15-18, 20, 22 & 27 (John "Whit" Wilks); Doc. 850-2 at 31, 33, 42 & 45 (Scott Chaisson); Doc. 850-2 at 40 & 42 (Richard Gernert); Doc. 850-2 at 41-42 & 44 (John Mark Holliday). The Examiner's advocacy on behalf of the financial advisors and other former employees is not authorized by the Appointment Order. No express or implied provision of the Appointment Order authorizes the Examiner to undertake the representation of the interests of financial advisors or other former employees, all of whom have a direct conflict of interest with both the defrauded investors and the Receivership Estate and most of whom are already represented by counsel.

Moreover, the Receiver has identified other activities of marginal or no benefit to the investors for which the Examiner seeks payment. For example, the Examiner has devoted considerable time to "monitoring" other cases (such as the criminal proceedings in the Southern District of Texas).

The Receivership Estate should not be required to compensate the Examiner for any such activities. Because the Examiner's efforts to help the financial advisors and former employees are beyond the scope of this Court's Appointment Order and present obvious

conflicts of interest with both the Estate and the Stanford victims, the Receiver requests that the Court deny the Examiner any recovery for time and expenses related to such activities.

D. The 20% “holdback” that the Court applied to the Receiver’s fees and expenses should also apply to the Examiner’s fees and expenses.

At the September 10, 2009 fee hearing before this Court, and at the request of the SEC, the Court held that the Receiver should apply a 20% “holdback” on any requested fees and out-of-pocket expenses. There is no basis to impose this condition on one court-appointed office, and not to another. The same rationale proffered in support of the 20% holdback applies with no less force to the Examiner. The Receiver asked the Examiner to submit voluntarily to this condition; however, he has declined to do so. For these reasons, and the reasons articulated at the September 10, 2009 hearing, the Receiver requests that the Court impose a 20% holdback as to the Examiner’s current application for fees and expenses, as well as all of the Examiner’s applications going forward.

CONCLUSION & PRAYER

The Receiver objects to the Examiner’s second interim fee application for the several above-described reasons. The Receiver, therefore, requests that the Court: (a) deny the award of fees and expenses relating to the Examiner’s advocacy on behalf of former Stanford financial advisors and other former employees; (b) deny the award of \$85,071 in fees and expenses from the Examiner’s duplicative opposition to the Receiver’s clawback efforts, including the \$43,660 in fees and expenses from arguing the issue on appeal; (c) apply a uniform 20% holdback to the balance of the award and to all applications for fees and expenses submitted in the future.

Dated: November 16, 2009

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

On November 16, 2009, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served the Court-appointed Examiner, all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler
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