IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 3-09-CV -0298-N**
	§	
STANFORD INTERNATIONAL BANK, LTD., et al.,	§	
	§	
Defendants,	§	

EXAMINER'S RESPONSE IN SUPPORT OF
RECEIVER'S MOTION TO ENFORCE RECEIVERSHIP ORDER

John J. Little, the Court-appointed Examiner, respectfully submits this Response in support of the Receiver's Motion to Enforce Receivership Order and, in the alternative, for Protective Order. Doc. No. 1095.

BACKGROUND

Certain Underwriters at Lloyd's of London and Arch Specialty Insurance Company (collectively, "Underwriters") are embroiled in an insurance coverage action with various former Stanford executives, including R. Allen Stanford, Laura Pendergast-Holt, Gilbert Lopez and Mark Kuhrt. That action was filed on November 17, 2009, and is pending before the Hon. Nancy Atlas in the Southern District of Texas as Civil Action No. 4:09-CV-03712 (the "Coverage Action"). As the Examiner understands it, the Coverage Action addresses the various Stanford executives' claim that Underwriters are obliged to pay their defense costs and Underwriters' contention that coverage is excluded pursuant to a "money laundering" exclusion found in the policies at issue. Necessarily, Underwriters' obligation to provide insurance coverage to any or all of the Stanford executives turns upon events that pre-date this Court's

Order appointing the Receiver. As the Examiner understands the arguments being made in the Coverage Action, events occurring after the Receiver's appointment are irrelevant to the issues Judge Atlas will decide.

Underwriters represent in their Response to the Receiver's Motion that Judge Atlas will conduct an evidentiary hearing on this issue commencing on August 27, 2010, and that discovery relating to that hearing must be completed by August 2, 2010. Underwriters seek to take the deposition of Ms. Karyl Van Tassel, one of the senior forensic accountants from FTI Consulting, Inc. ("FTI") that has been working with the Receiver in this matter since his appointment.

Ms. Van Tassel has executed numerous declarations, in this proceeding and many others, in which she sets forth her expert opinions with respect to matters that have been investigated by FTI at the request and direction of the Receiver and his counsel. Underwriters are particularly interested in a declaration executed by Ms. Van Tassel and filed in this Court on July 27, 2009, in Civil Action No. 09-724 as part of Doc. No. 18 (the "July 27 Declaration"). In addition to Ms. Van Tassel's deposition, Underwriters also seek the production of:

> "all materials reviewed by you or for you in connection with" the July 27 Declaration, and
>
> "work papers and notes, including reports, physical models, compilations of data, photographs, graphs, charts and backup data, and other materials prepared by you, or for you," to draft the July 27 Declaration.

The Receiver filed his Motion seeking to block Underwriters' effort to depose Ms. Van Tassel and to obtain the above-described materials. The Examiner supports the Receiver's Motion.

ARGUMENT

A. Ms. Van Tassel is not a Fact Witness

In their response to the Receiver's Motion, Underwriters assert – without analysis – that they are entitled to take Ms. Van Tassel's deposition because she is a "fact witness" with respect

to the matters at issue in the Coverage Action. Doc. No. 1109 at 1, 6. Because Ms. Van Tassel is not a "fact witness" as to any matter at issue in the Coverage Action, the Receiver's Motion should be granted and Underwriters' effort to depose Ms. Van Tassel and to compel her to produce documents should be quashed.

> FED. R. EVID. 602 identifies those who may testify as "fact witnesses:"
>
> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.[1]

Stated differently, a witness cannot offer testimony unless the witness has "personal knowledge" of the matters about which he or she intends to testify. *See, e.g.*, *Williams v. Warren*, 253 F.3d 700, 2001 WL 498501 (5th Cir. 2001)(not selected for publication in Federal Reporter); *Logan v. Pennaco Hosiery*, 140 F.3d 1038, 1998 WL 156350 at *3 (5th Cir. 2001)(not selected for publication in Federal Reporter). Rule 602 similarly prohibits a witness "from testifying to the subject matter of [a] hearsay statement, as he has no personal knowledge of it." *Logan* at *3; *see also Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 280 (5th Cir.1991).

With respect to Ms. Van Tassel, she had no involvement of any sort with the Stanford enterprises prior to the appointment of the Receiver by this Court. Everything she knows about those enterprises has been derived from her firm's investigation of Stanford's records. The July 27 Declaration confirms that all of her knowledge relating to Stanford is second-hand:

> The statements made in this declaration are true and correct based on the knowledge I have gained from the many documents I have reviewed and other work I and my team have performed in the course of FTI's investigation on behalf

[1] Underwriters insist that they do not seek to depose Ms. Van Tassel with respect to the expert opinions she has rendered in this action, in 09-724, and in various other proceedings. Accordingly, the Examiner will not address the extremely limited circumstances under which Underwriters might be entitled to obtain discovery of an expert witness retained by a different party in a different action.

of the Receiver.

July 27 Declaration at 3 of 94. Ms. Van Tassel's July 27 Declaration confirms that she has no "personal knowledge" to offer with respect to any matter at issue in the Coverage Action.

The July 27 Declaration similarly confirms that all (or virtually all) of the knowledge she has obtained derives from hearsay statements – documents and records that she and her team have reviewed, and interviews that she or members of her team have conducted. On this point, the July 27 Declaration cannot be any clearer:

- "we have interviewed numerous present and former Stanford Entity employees. These include, but are not limited to, the persons whose names (as well as employer, title, and supervisor) are listed on KVT-2."[2]
- "we have examined the available accounting and other records relating to the Stanford Entities located in and/or gathered from Houston, Texas; Tupelo, Mississippi; Baldwin, Mississippi; Memphis, Tennessee; Miami, Florida; St. Croix, United States Virgin Islands; Antigua; Barbuda; and other Stanford locations within and outside the U.S."
- "[w]e have also reviewed extensive SIB customer records, including but not limited to paper and electronic records documenting SIB CD purchases, interest payments and redemptions."
- "FTI has also obtained and analyzed paper and electronic files from third-party financial institutions where bank accounts of various Stanford Entities are located. These financial institutions include Toronto Dominion Bank in Canada, Trustmark National Bank and the Bank of Houston. In additional, FTI has gathered and reviewed electronic and other data from Pershing, LLC and JP Morgan Clearing Corp., both of which hold SGC customer accounts, and SEI, which holds STC accounts."

July 27 Declaration at 4-5 of 94.

Underwriters should not be permitted to depose Ms. Van Tassel, nor to compel her to produce the mass of documents that has been requested, because Ms. Van Tassel is not a person

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[2] KVT-2 lists seventeen (17) different individuals as having been interviewed by FTI personnel. Of those seventeen (17) individuals, only two (2) are parties to the Coverage Action – Laura Pendergast-Holt and Gilbert Lopez. July 27 Declaration at 40 of 94.

capable of giving factual testimony pursuant to Rule 602. She has no personal knowledge of any fact that is pertinent to the Coverage Action. Moreover, any testimony she would attempt to give would derive almost exclusively from hearsay materials.

B. The Investors Should Not Pay for Underwriters' Discovery

If this Court concludes that it will permit Underwriters to depose Ms. Van Tassel and/or to compel her to produce the documents and other materials identified in her subpoena, the Examiner respectfully suggests that the Court should require Underwriters to compensate the Receivership Estate for the expenses it has incurred for Ms. Van Tassel and her firm to obtain the knowledge that Underwriters now wish to use to their advantage.

To date, FTI has been the most expensive professional firm engaged by the Receiver. In his various fee applications, the Receiver has sought this Court's approval for $17,261,488 in fees and expenses attributable to FTI (through February 28, 2010), as follows:

Receiver's First Fee Application [Doc. 384 at 32 of 51]	$6,665,265
Receiver's Second Fee Application [Doc. 669 at 29 of 43]	$2,197,868
Receiver's Third Fee Application [Doc. 820 at 29 of 44]	$3,626,892[3]
Receiver's Fourth Fee Application [Doc. 914 at 27 of 42]	$ 834,692
Receiver's Fifth Fee Application [Doc. 1033 at 31 of 48]	$2,329,175
Receiver's Sixth Fee Application [Doc. 1084 at 32 of 45]	$1,607,596

Of the amounts sought by the Receiver for payment of FTI's fees and expenses (through February 28, 2010), the Court has approved and the Receiver has paid in excess of $13,000,000,

[3] The fees and expenses sought by FTI in the Third, Fourth, Fifth and Sixth Fee Applications are expressed prior to the application of the 20% holdback ordered by the Court during the hearing held on September 10, 2009.

with the balance being "held back" for later determination by the Court.[4]

As this Court has recognized, every dollar spent by the Receiver on the work being done by his professionals is a dollar that is not available for distribution to Stanford's creditors, including the Investors victimized by Stanford's scheme. With respect to Ms. Van Tassel, $13,000,000 has already been spent by the Receiver so that she can acquire the knowledge that Underwriters now seek to obtain, via subpoena, and use to their advantage in the Coverage Action. If this Court is inclined to permit Underwriters to proceed with the deposition and document production they seek, the Examiner respectfully requests that Underwriters should bear all or substantially all of the costs that have been incurred to date to educate Ms. Van Tassel as to the matters in which Underwriters are now so keenly interested. If Underwriters are willing to write a check to the Receivership Estate for the $13,000,000 that has been spent educating Ms. Van Tassel, the Examiner will withdraw his objection to the discovery sought.

CONCLUSION

This Court should grant the Receiver's Motion and should enter its Order quashing the subpoena issued by Underwriters seeking the deposition of Karyl Van Tassel and the production of documents in connection with such deposition. Alternatively, if the Court is inclined to permit Underwriters to proceed with the discovery, it should do so only if Underwriters agree to reimburse the Receivership Estate for all, or substantially all, of the money that has been spent by the Receiver on the work of Ms. Van Tassel and her firm, FTI.

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[4] The "hold back" amounts applied to FTI have varied from 20% (for the 1st, 2nd and 6th Fee Applications) to 25% (for the 5th Fee Application) to 35% (for the 3rd and 4th Fee Application).

Respectfully submitted,

/s/ John J. Little
John J. Little
Tex. Bar No. 12424230

LITTLE PEDERSEN FANKHAUSER, LLP
901 Main Street, Suite 4110
Dallas, Texas 75202
(214) 573-2300
(214) 573-2323 [FAX]

Of Counsel:
LITTLE PEDERSEN FANKHAUSER L.L.P.

Stephen G. Gleboff
Tex. Bar No. 08024500
Walter G. Pettey, III
Tex. Bar No. 15858400
Megan K. Dredla
Tex. Bar No. 24050530

901 Main Street, Suite 4110
Dallas, Texas 75202
Telephone: 214.573.2300
Fax: 214.573.2323

CERTIFICATE OF SERVICE

On June 23, 2010, 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 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/ John J. Little