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

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

**EXAMINER'S RESPONSE TO RECEIVER'S MOTION TO AMEND FEE STRUCTURE AND HOLDBACK**

John J. Little, the Court-appointed Examiner, respectfully submits this Response to the Receiver's Motion for Approval of Request to Amend Fee Structure and Holdback [Doc. Nos. 1543 and 1544].

**SUMMARY**

The Receiver's Motion accurately sets forth the Examiner's position with respect to the relief requested by the Receiver. The Examiner does not oppose a reduction in the Court-ordered holdback from its current 20% to 10% for work done or on after January 1, 2012. The Examiner also does not oppose the Receiver's request to increase the rates billed by the Receiver and his professionals to current 2012 rates for work done on or after January 1, 2012. The Examiner opposes the Receiver's request to reduce the discount applied to the billing rates of the Receiver and his professionals; the Examiner believes that the Receiver and his professionals should continue to discount their billing rates by the 20% that was agreed upon by the Receiver, his professionals and the SEC.

In this Response, the Examiner addresses three issues in further detail. First, the

Examiner outlines the process through which he arrived at his positions. Second, the Examiner addresses the Receiver's argument that this Court should look to the *Madoff* and *MF Global* matters for guidance as to the Receiver's fees in this case. Finally, the Examiner provides the Court with additional factual information concerning the fees that have been billed and paid to date for the Receiver and his primary professional firms.

## I. THE EXAMINER'S POSITION IS THE RESULT OF EXTENSIVE CONSULTATION WITH THE RECEIVER'S COUNSEL AND THE SEC

Since his appointment by this Court in April 2009, the Examiner[1] has reviewed, consulted with the Receiver and, where appropriate, responded to each of the Receiver's fee applications in this matter. *See* Doc. No. 1149 (Order dated August 10, 2010)(reaffirming the Examiner's responsibility to review and, where appropriate, respond to pending fee applications). Additionally, since late 2009 the Examiner and the SEC have periodically reviewed and consulted with the Receiver and his professionals concerning the Receiver's budgets and cost projects for this Receiver. *See* Transcript of September 10, 2009 Hearing at 41 (directing the Receiver to prepare a budget and to confer with the SEC and the Examiner with respect to that budget).

With respect to the Receiver's motion to alter the existing fee structure, the Examiner began to consult with the Receiver's counsel on February 2, 2012, more than a month before the Receiver filed his motion. Over the course of several meetings and numerous telephone conferences with both the Receiver's counsel and the SEC, the Receiver, the Examiner and the SEC addressed at least four separate topics concerning possible changes to the existing fee

[1] Along with the Court, the Examiner and the SEC have served as the primary reviewers of the Receiver's various fee applications in this matter.

structure, as follows:

1. Release of some of the amounts currently subject to the holdback. The Receiver's Motion accurately recites that some $16 million in fees and expenses is currently subject to the Court's holdback.[2] During the conferences between the Receiver's counsel and the Examiner, the Receiver's counsel inquired concerning the possibility of releasing some portion of the funds subject to the holdback. The Examiner was unwilling to support any release of the funds subject to the holdback; moreover, the Examiner does not believe it appropriate even to consider releasing funds subject to the Court-ordered holdback until such time as (a) some funds have been distributed to Stanford investor-victims, and (b) a significant percentage of the litigation being pursued by the Receiver has been concluded. The Receiver's Motion, as filed, does not seek a distribution of any funds subject to the holdback.

2. Reduction of the holdback percentage. During the initial discussions between the Receiver's counsel, the Examiner and the SEC, the Receiver was interested in whether the holdback could be eliminated. Over the course of a number of conversations, that possibility was rejected and the parties' discussions shifted to whether the holdback percentage might be reduced. Ultimately, the Examiner was willing to support a reduction in the holdback percentage, from 20% to 10%, for two reasons. First, the parties' efforts to review and confer with respect to the Receiver's budgets and cost projections have provided both the SEC and the Examiner with considerably more information concerning the Receiver's activities than they had at the time the holdback was first imposed. Second, the 20% holdback originally imposed by the Court has resulted, to date, in the creation of a "holdback" of approximately $16 million.

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[2] The Examiner calculates that the amount subject to the holdback will be $16.2 million if the Court approves the Receiver's pending 16th Fee Application. Of that amount, $10.2 million is attributable to the period from February 16, 2009 through September 30, 2009.

3. Use of 2012 billing rates. To date, the Receiver and his primary professional firms have billed for their time at the 2009 rates that were in effect when the Receivership began. During the various conversations between and among the Receiver, the SEC and the Examiner, one of the Receiver's key issues was increasing those billing rates to 2012 rates going forward. The Examiner recognizes that the SEC and most (more likely, all) Stanford investors would and do oppose such a rate increase for the Receiver and his professionals. The Examiner is willing to accept this proposed rate increase to 2012 rates for the Receiver and his professional firms for two reasons.

First, it seems to the Examiner unreasonable to hold the Receiver or his professionals to the rates they charged in 2009 for the life of this Receivership. One of the factors that the Court must consider in awarding fees to the Receiver and his professionals is the "customary fee" charged for similar work. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir.1974). It is certainly "customary" for law firms and accounting firms to increase their billing rates from time to time, and it is unusual (at least in the Examiner's experience) for law firms and accounting firms to "freeze" their rate structures for an indefinite period of time. For that reason, the Examiner thinks it is appropriate for the Court to consider permitting the Receiver and his professionals to increase their billing rates to their current, 2012 rates.[3]

Second, it is certainly "customary" for law firms and accounting firms to increase the rates that are charged for younger attorneys and accountants as they become more senior and experienced. In this case, for example, there are a number of young attorneys at Baker Botts who have spent hundreds (if not thousands) of hours working on Stanford-related matters as young and mid-level associates. In doing so, they have accumulated considerable background

[3] The Examiner does not intend to suggest, nor would he support, an annual increase in billing rates by the Receiver and his professionals.

and knowledge concerning Stanford that should inure to the benefit of the Receivership, and ultimately the investors, as they work on additional Stanford-related matters. Permitting Baker Botts to bill for these professionals at rates that are commensurate with their increasing seniority and experience will help insure that they remain available to work on Stanford-related matters in the future and are not reassigned to other, more lucrative matters.

4. Reduction of the discount applied to billing rates.

The Receiver's motion seeks to reduce the discount applied to both his bills and those of his professionals from 20% to 10%. The Receiver acknowledges that the existing 20% discount was requested by the SEC, and agreed upon by the Receiver, during the early days of this Receivership. Motion at 2; *see also* Doc. No. 384 at 1 (Receiver's first fee application). The Receiver now seeks to reduce that percentage over the objection of the SEC (which originally sought and obtained the Receiver's agreement to that discount) and the Examiner.

The Examiner does not think it appropriate to reduce the 20% discount agreed upon by the Receiver and his professionals. The 20% discount was requested and agreed upon "[a]t the request of the SEC, in the public interest, and because the final results to be obtained for investors and other claimants are still unknown." Doc. No. 384 at 1. The considerations that led the SEC to seek, and the Receiver and his professionals to agree upon, a 20% discount still exist today. In particular, "the final results to be obtained for investors and other claimants" still remain very much an unknown in this Receivership. For that reason alone, the Examiner believes that the Receiver and his professionals should continue to live with the 20% discount they agreed upon in the early stages of this Receivership.

The Examiner also believes it is appropriate for the 20% discount to remain in place because it is both customary and common place for law firms and accounting firms to agree to

discount their regular billing rates in exchange for a significant body of continuing work. Assuming that the Court approves the Receiver's pending 16th fee application, the Receiver's primary law firm (Baker Botts) and primary accounting firm (FTI) will each have been paid $19 million for their work in this matter over the past three years. The Examiner believes that most private clients would demand and receive a significant discount in exchange for work of that volume.

## II. THE *MADOFF* AND *MF GLOBAL* CASES PROVIDE LITTLE GUIDANCE

To support the relief he requests, the Receiver directs the Court's attention to the *Madoff* and *MF Global* matters and suggests that the fee arrangements that are in place in those matters support the various changes he seeks in the fee arrangements here. The Examiner respectfully disagrees.

First, at the risk of stating the obvious, there are well-recognized differences between the rates charged by large law firms in New York and the rates charged by large law firms in Dallas, Houston and Austin. Here, the Baker Botts lawyers handling the bulk of the work for the Receiver are resident in that firm's Austin office, where rates are generally lower than those charged in Dallas and Houston (and are certainly lower than those charged in New York).

Second, there are some critical differences between the *Madoff* matter and this case. In *Madoff*, the Security Investors Protection Corporation ("SIPC") is funding the professional fees incurred by the *Madoff* trustee and the firms working for him.[4] Here, the fees of the Receiver and his professionals are being paid by money that would otherwise be available for distribution to Stanford's investor-victims. *See* Transcript of September 10, 2009 Hearing at 40 ("every

[4] The Examiner respectfully requests that the proceedings in the *MF Global* matter, where both a Chapter 11 Trustee and a SIPC Trustee are involved, are not sufficiently developed to permit a meaningful comparison with this case.

dollar that goes to the professionals is not available to ultimately be distributed to investors"). SIPC has refused to provide any coverage to Stanford investors and is currently litigating with the SEC in the District of Columbia over that issue.[5]

Additionally, one of the key *Johnson* factors to be considered by the Court in making a fee award is "the results obtained." *Johnson*, 488 F.2d at 717-19. The trustee in *Madoff* has been successful at recovering a significant fraction of the money lost by *Madoff's* investors. As of February 17, 2012, the SIPC trustee in *Madoff* estimates that he has recovered (or entered agreements to recover) over $9 billion, representing 52% of the money lost by *Madoff* investors who have filed claims. http://www.madoff.com/recoveries-04.html. Here, the Receiver's recoveries have been considerably smaller – at October 31, 2011, the Receiver has reported that the total "cash inflow" to the Receivership was $216.9 million and that he held another $96.6 million in "material assets."[6] Doc. No. 1470 (appendix to Receiver's Third Interim Status Report).

## III. THE RECEIVER AND HIS KEY PROFESSIONALS HAVE BEEN WELL COMPENSATED

The Receiver's Motion identifies for the Court the approximate amounts that have been "held back" from each of the Receiver's professionals in this matter, through September 30, 2011.[7] Doc. No. 1543 at 2 n. 1. It does not identify for the Court the amounts that have been paid to the Receiver's key professional firms for their work on this matter.

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5 *Securities and Exchange Commission v. Security Investors Protection Corporation*, Misc. No. 11-MC-678-RLW in the United States District Court for the District of Columbia.

6 The Examiner does not intend to cast aspersions upon the Receiver's asset recovery efforts to date. Nevertheless, the "results obtained" through those efforts do not support a change in the fee structure.

7 The Receiver's 15th Fee Application (Doc. No. 1480) covered the period from August 1, 2011 through September 30, 2012. The Receiver's pending 16th Fee Application (Doc. No. 1540) covers the period from October 1 through December 31, 2011.

The Examiner has reviewed and analyzed each of the Receiver's sixteen (16) fee applications. Through December 31, 2011 (the ending date of the Receiver's pending 16th fee application), the Receiver's primary professional firms will have been paid as follows:[8]

| | Fees Billed | Expenses | Total Billed | Total Paid | Holdback |
|---|---|---|---|---|---|
| **Baker & Botts** | $24,040,263 | $885,668 | $24,925,380 | **$19,380,777** | $5,544,542 |
| **Thompson & Knight** | $3,956,203 | $170,617 | $4,126,820 | **$3,172,872** | $953,948 |
| **Krage & Janvey** | $1,368,766 | $85,181 | $1,453,947 | **$1,137,167** | $316,776 |
| **FTI** | $22,118,360 | $1,943,684 | $24,805,113 | **$19,146,541** | $5,658,573 |
| **Ernst & Young** | $7,120,255 | $374,058 | $7,493,673 | **$5,832,368** | $1,661,405 |

As set forth above, the Receiver's primary law firm (Baker Botts ) and primary accounting firm (FTI) each will have been paid more than $19 million for their work on this engagement between February 2009 and December 31, 2011. The Receiver's other primary law firm (Thompson Knight) will have been paid $3.17 million for its work over that same period, while the Receiver's other primary accounting firm (Ernst & Young) will have been paid $5.83 million for its work.

## CONCLUSION

As set forth at the outset of this Response, the Examiner does not object to a reduction of the holdback percentage from 20% to 10%, nor does he object to the Receiver and his professionals use of their current 2012 rates for work done in this matter from January 1, 2012

[8] The chart assumes that the Court will approve the Receiver's pending 16th fee application, which will be fully briefed and ripe for decision on or before April 2, 2012.

forward. For the reasons set forth above, the Examiner objects to any other changes in the existing fee structure for the Receiver and his professionals.

Respectfully submitted,

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**COURT-APPOINTED EXAMINER**

**CERTIFICATE OF SERVICE**

On March 30, 2012, 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