09-10761

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RALPH S. JANVEY,

Plaintiff – Appellant – Cross-Appellee

v.

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

Defendants – Appellees – Cross-Appellants

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

Defendants – Appellees

Consolidated with
09-10765

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

Plaintiff – Appellant

v.

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

Defendants – Appellees

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

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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.

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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Cross-Appellants, Numa L. Marquette and Gail G. Marquette, believe that the adjudication of the issues presented in this appeal would be significantly aided by oral argument. The Receiver has pursued clawback claims and asset freezes against a few hundred investors like the Marquettes, who, due to being on the unlucky side of a couple of arbitrary lines, held brokerage accounts at Stanford with a value in excess of $250,000. The Receiver has contravened his equitable mandate by pursuing claims against such investors. Because the Receiver is taking a highly unorthodox and expansive view of his powers, the Marquettes respectfully submit that oral argument is warranted.

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STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1292(a)(1), this Court has jurisdiction to review the District Court's order because the order includes the partial grant and partial denial of an injunction. The Court's "jurisdiction is not limited to the specific order appealed from," and it "may review all matters which establish the immediate basis for granting injunctive relief." *Magnolia Marine Transp. v. Laplace Towing Corp.* (*In re Magnolia Marine Transp.*), 964 F.2d 1571, 1580 (5th Cir. 1992). "Once an order under § 1292(a)(1) has been deemed appealable, the 'entire order, not merely the propriety of injunctive relief,' comes within [the Court's] scope of review." *Seabulk Offshore, Ltd. v. Honora* (*In re Seabulk Offshore, Ltd.*), 158 F.3d 897, 899 n.2 (5th Cir. 1998) (quoting *Magnolia Marine Transp.*)). The Receiver, Ralph Janvey, appealed the Order of the District Court dated August 4, 2009. (R. 480-481). Cross-Appellants timely filed their Notice of Appeal on September 1, 2009.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

An equitable receivership for a defunct Ponzi scheme is supposed to mitigate the damage to defrauded investors, preserve the estate, and treat all innocent investors equally. The Receiver for the Stanford entities is not accomplishing these goals. Instead, he plans to treat some of the innocent investors much worse than others by: (1) maintaining freezes over the Stanford brokerage accounts of only an unlucky minority of the tens of thousands of innocent Stanford investors; and (2) engaging in extraordinarily expensive litigation that seeks to have that minority disgorge the funds held in their frozen Stanford brokerage accounts. Thus, the issue presented to this Court boils down to whether the Receiver should be permitted, under his equitable powers, to devise a solution that seeks the return of monies from a small minority of investors while allowing many thousands of others to keep the money that they received.

STATEMENT OF THE CASE

This case involves disgorgement claims by the equity receiver for the Stanford estate against less than 2.5 percent of the investors who held Stanford International Bank Certificates of Deposit ("SIB CDs").

The Stanford entities were placed in Receivership on February 16, 2009. (Supp. R. 96-118). At that time, a wholesale account freeze was instituted over all accounts in the name of any of the Stanford entities. *Id.* Less than one month after he had been appointed, the Receiver released many of the frozen accounts, according to his own set of criteria. (Supp. R. 157, 207).

The investors whose accounts remained frozen after the Receiver's initial release continued to seek to have their accounts released, and the district court appointed an Examiner on April 10, 2009 to, at least in part, provide a voice for those investors' concerns. (Supp. R. 1958). On May 21, 2009, the Examiner issued a Report and Recommendation, which suggested that the district court release the frozen brokerage accounts of innocent investors and argued that the Receiver should not be permitted to bring clawback actions against those investors. (Supp. R. 1957). The Securities and Exchange Commission ("SEC"), which had initiated the Receivership, filed a memorandum in support of the Examiner's conclusions. (Supp. R. 2074).

Over the protests of the Examiner and the SEC, the Receiver sought disgorgement of those frozen accounts, through summary proceedings, in a clawback action that he filed on July 28, 2009. (R. 201-249). The SEC sought to have the Receivership Order amended to prevent the Receiver from seeking disgorgement of the frozen brokerage accounts of innocent investors through clawback actions. (Supp. R. 2073). The Examiner filed a memorandum supporting the SEC's efforts. (Supp. R. 2084).

On July 31, 2009, the district court held a hearing, at which it affirmed the Receiver's ability to bring the clawback actions and declined to amend the Receivership order, but limited the Receiver's clawback actions to disgorgement of interest proceeds that innocent investors may have received. (Tr. 1-50; R. 477-479). As a result of the district court's decision, the Receiver is now permitted to maintain the brokerage-account freezes and proceed with costly clawback actions against a tiny subset (less than 2.5%)[1] of innocent SIB CD holders.

STATEMENT OF FACTS[2]

The Receiver has initiated clawback actions against about 650 out of 28,000 SIB CD holders. (R. 233-239). Among these 650 are Numa and Gail Marquette. Mr. Marquette is a retiree who spent most of his adult life working as an engineer for Exxon. When he finally retired in 1999, Mr. Marquette, through thrift and sacrifice, had managed to save what he thought would be enough money to sustain him and his wife in their golden years.

Upon the advice of their Stanford brokers, the Marquettes placed much of their savings in the SIB CDs. In addition to these CDs, the Marquettes also held

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[1] Only about 650 of the 28,000 SIB CD holders (<2.5%) are the subject of the Receiver's actions. (Tr. 11).

[2] Cross-Appellants – Appellees Numa and Gail Marquette ("the Marquettes") adopt a portion of the Appellant – Cross Appellee's ("the Receiver's") "Statement of Relevant Facts." (Appellant's Br. 3-9). The Receiver, however, fails to detail all of the facts that are relevant to this appeal. The Marquettes also wish to adopt the Examiner's Statement of Facts. The Marquettes offer this additional statement of facts relevant to the issue they have presented.

Exxon stock that Mr. Marquette had received during the course of his employment. Over the course of the last several years, the Marquettes have been relying, in large part, on the interest dividends from the SIB CDs to cover their modest daily living expenses. With the collapse of SIB, that source of day-to-day sustenance has disappeared and the nearly $750,000 that they held in SIB CDs has evaporated. The only other significant asset that the Marquettes hold – the Exxon stock – is frozen in an account at Pershing while the Receiver, as with so many other innocent investors, seeks to hit them for another $205,000 above the losses that they have already sustained.

In bringing these actions against investors like the Marquettes, the Receiver has not clearly outlined the criteria that he used in deciding whom to bring actions against, but the following conclusions can be fairly drawn from the record:

1. There were approximately 28,000 SIB CD holders who held approximately $7 billion in certificates of deposit. (R. 271).
2. The CD holdings of citizens of foreign countries represent 80% of the value of the outstanding SIB CDs and clawback actions against many of these investors are impossible or impractical. (Supp. R. 1960).
3. Many of the investors holding SIB CDs also held accounts at a different Stanford entity. These accounts contained non-CD assets in custodial accounts at Pershing, SEI, or JP Morgan. (R. 274).

4. Only about 563 of the investors with non-CD accounts at Stanford entities had assets in these accounts worth $250,000 or more. The Receiver now targets these 563 unlucky investors. (R. 227). The Receiver seeks to claw back all sums, including principal and interest, which were paid to these 563 investors while letting the other 27,000 or so investors off the hook. If the Receiver is successful, he will, at best, receive a $300 million recovery. (R. 203-204, 208).
5. About 12,000 investors with non-CD accounts worth less than $250,000 were released from the account freeze and the Receiver is not currently attempting to claw back assets from them. (Supp. R. 207). This amounts to approximately $500 million in unfrozen non-CD accounts. (Supp. R. 2023).
6. This means that the Receiver is seeking recovery from investors like the Marquettes, who held SIB CDs and also had separate investments in a Stanford Group Company account (here, Exxon stock, a vestige of Mr. Marquette's long career as an engineer at Exxon). Because they had a separate account worth more than $250,000.00, the Marquettes' completely separate long-time investment in Exxon stock is subject to a clawback claim equal to the amount of proceeds that the Marquettes received from their SIB CDs over a period of nearly ten years. This clawback, if successful, would

create an additional loss to them on top of the nearly $750,000 that they lost on their investment in the SIB CDs.

7. In addition to the 563 investors who had non-CD accounts frozen at Pershing, SEI or JP Morgan, the Receiver seeks clawbacks from 49 investors who invested in SIB CDs and who received monies back from Stanford in 2008 and 2009 in amounts greater than $1,857,815. (R. 248-249). These claims are not secured by frozen accounts, and some of these account holders appear to be foreign entities. The sum of these claims approaches $500 million. (R. 249).

8. There are an unknown number of SIB CD holders who received proceeds in 2008 and 2009 totaling less than $1,857,815. These persons are not subject to clawback actions.

9. The total amount of the clawback claims against the individuals who received CD monies in 2008 and 2009, and the innocent investors whose accounts are frozen is about $800 million, which amounts to only about 11% of the total of $7 billion invested in the CDs. (R. 204). With respect to the clawback of unsecured claims over $1,857,815.00, the ones that relate to foreign investors will be difficult or impossible to collect. For example, it is unclear whether the Libyan Foreign Investment Fund will readily return the

$54,830,930 that it received, even if judgment is rendered against it. (R. 248).

Under the Receiver's proposed regime, the following rules seem to apply:

1. If you had a non-CD Stanford account worth $250,000 or greater when the receivership commenced, then your account is frozen and the Receiver is attempting to claw back any monies that you received, whether representing principal or interest or otherwise, and regardless of when it was received. (R. 208).
2. If you had a non-CD Stanford account worth less than $250,000, then your account is not frozen and the Receiver is not currently asserting a clawback claim against you. (R. 157, 207).
3. If you held SIB CDs when the receivership commenced or had such an account at any time in 2008 or 2009, and you received $1,857,815 or more in 2008 or 2009, then the Receiver is asserting a clawback claim against you. It does not matter how much you actually lost in SIB CDs. (R. 209, 248).
4. If you held SIB CDs when the receivership commenced or had such an account at any time in 2008 or 2009, and you received less than $1,857,815 in 2008 and 2009, then the Receiver is not asserting a clawback claim against you (unless you had a non-CD Stanford account). This is true no

matter how much you received prior to 2008, and applies irrespective of whether you are a net winner or net loser. (R. 208- 209, 248).

5. If you held SIB CDs in prior years, no matter how much you received, but you did not receive $1,857,815 or more in 2008 or 2009, then the Receiver is not asserting a clawback claim against you (unless you had a non-CD Stanford account, in which case, he is asserting such a claim, which is the situation with the Marquettes).

SUMMARY OF THE ARGUMENT

This appeal seeks this Court's review of whether the Receiver's costly, litigation-generating course of action against a handful of SIB CD holders is consistent with his duties to the Estate. With outstanding obligations of over $7 billion in SIB CDs and only $1 billion in purported assets (most of which the Receiver will be unable to reach), the amount left to compensate defrauded SIB CD holders is already grossly inadequate. The Receivership Estate is currently estimated to hold only $40-$60 million to cover SIB CD losses. (Tr. 38). But the Receiver, not content with the way that the losses were allocated by circumstances, seeks to accomplish a reallocation that will make many investors, like the Marquettes, even worse off and will not, as a whole, create a less arbitrary result.

The district court was wrong to allow the Receiver to maintain the account freezes and bring his clawback actions. There are two reasons that the Receiver cannot proceed as he desires and remain faithful to his duties to the Estate and the investors. First, the arbitrary selection criteria that the Receiver employed to settle on the tiny subset of investors that he is suing necessarily preclude him from doing equity by treating all innocent investors equally. Second, the Receiver's actions are contrary to his duties because his pursuit of this litigation will substantially deplete the Estate, whereas the SEC has offered to take responsibility for bringing clawback actions at no expense to the Estate.

Section I below explains how the Receiver, claiming that he is spinning straw into gold, instead uses the clawback actions to reach his hand into the Stanford brokerage accounts of an unlucky subset of investors, mostly the ones who meet his arbitrary criteria[3] for continued account freezes. Any money recovered from these arbitrarily chosen investors will then be distributed to other investors who are lucky enough to fall outside the Receiver's poorly cast net. Critically, the Receiver's actions do not target a whole host of others whom he could easily subject to a clawback action, such as: (1) investors who possessed a Stanford brokerage account worth less than $250,000, whose accounts the Receiver released in March; (2) investors who closed their Stanford accounts and moved their money elsewhere sometime between 1990, when the SIB CDs were

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[3] Many of the relief defendants named by the Receiver in his clawback action are innocent investors against whom no wrongdoing has been alleged, but who happened to have Stanford brokerage accounts valued at $250,000 or greater, in which wire transfers occurred sometime in the last three years. (Supp. R. 248, 250).

first sold, and 2008; (3) foreign investors (constituting 80% of the value of SIB CD holdings), who hold their funds in a foreign financial institution; and (4) charities, political campaigns and sporting events that received Stanford donations or sponsorship funds.

To allow the Receiver to proceed in this manner would run contrary to the long-standing proposition that a receiver's principal duty is to ensure that all innocent investors are treated equally.[4] Put simply, there is no way for the Receiver to achieve equity by proceeding in the fashion he contemplates.

Section II below explains how the Receiver's proposed actions would unnecessarily diminish the assets of the Receivership estate that could otherwise be distributed to *all* the investors. Even without the clawback litigation, the assets of the Estate have been quickly dwindling because of the fees that the Receiver, and the professionals that he has hired, have been charging to the Estate (approximately $60 million, thus far).[5]

The Receiver's actions ring an especially discordant tone here because the continued account freeze and clawback actions contradict the express wishes and policies of the SEC, which brought the civil action that created the Receivership in the first place. And, to the extent that any clawback actions are appropriate for the

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[4] *See Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 370 (1908) (holding that receiverships are created towards "the end that the property might be cared for and preserved for *all* who had or might have an interest in the proceeds of its sale") (emphasis supplied).

[5] (Tr. 35).

benefit of the Estate, the SEC has indicated that it would be willing to pursue them. Placing the responsibility with the SEC to pursue clawback actions instead of the Receiver is sensible for two reasons: (1) the SEC, unlike the Receiver, can bring these actions at *no further cost* to the Estate; and (2) the SEC has established policies for how to proceed with clawback actions against innocent investors that would allow the SEC to take sole responsibility for the clawback actions and would ensure the continued uniform application of the SEC's well-defined policies. Thus, the cost to the Estate of clawback litigation and the SEC's willingness to take on such litigation create additional compelling reasons for not permitting the Receiver to proceed with clawback actions against the remaining frozen accounts.

ARGUMENT

I. Standard of Review

The district court's decision to permit the Receiver to pursue clawback actions against innocent investors, such as the Marquettes, is a legal decision subject to *de novo* review. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

The district court's decision to continue the account freeze on the Stanford brokerage accounts, held primarily at Pershing, should be reviewed under the abuse of discretion standard. *Gonzalez v. O Centro Espirita,* 546 U.S. 418, 126

S.Ct. 1211, 1219 (2006) (noting that a decision to grant or deny injunctive relief is reviewed for abuse of discretion).

II. The Receiver is Unable to Treat Innocent Investors in an Equitable Manner by using Account Freezes to Clawback Money for the Estate.

It is a well-established proposition that the Receiver has a duty to preserve the Estate for *all* those to whom the Estate is indebted.[6] But the Receiver here is acting in a way that is generating expensive litigation that is harmful to the innocent investors whose interests he is supposed to protect.[7] "The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, *equitable* distribution of the assets if necessary." *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006) (citing 13 *Moore's Federal Practice* ¶¶ 66.02-.03 (3d ed.1999)) (emphasis supplied). Here, the Receiver's actions conflict with his appointed role.

There are multiple, related reasons here why the Receiver's proposed clawback actions cannot achieve equity among investors. First, he has targeted for

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[6] *See Chapman*, 208 U.S. at 370 (holding that receiverships are created towards "the end that the property might be cared for and preserved for *all* who had or might have an interest in the proceeds of its sale") (emphasis supplied).

[7] *See Esbitt v. Dutch-Amer. Mercantile Corp.,* 335 F.2d 141, 143 (2d Cir. 1964) (concluding that, "in bringing an action for an injunction and the appointment of a receiver, the SEC is [ ] concerned with the protection of those who already have been injured by a violator's actions from further despoliation of their property or rights").

clawbacks only a tiny minority of the many innocent investors, a minority who will suffer disproportionately in comparison to all other investors if his plan is allowed to stand. Second, the manner in which the Receiver chose his targets is arbitrary. And third, in many instances, there are no steps that the Receiver could take to mitigate the inequity his actions would create.

A. The Receiver Targets a Minority of Unlucky, Innocent Investors Who Will Suffer Disproportionately.

Innocent investors, such as the Marquettes, with Stanford brokerage accounts valued at $250,000 or more, are the ones whom the Receiver is most unfairly targeting. Among these investors, there are some who redeemed their SIB CDs, receiving principal and interest. There are others who did not redeem their SIB CDs and have now lost their principal investment, but who, from time to time, received interest payments from their SIB CDs. Critically, this set of innocent investors constitutes less than 2.5% of the total number of investors who held SIB CDs when the Receivership was put into place.[8] This numerical disparity alone is enough to suggest that the Receiver has failed to treat investors equally, and the burden that he seeks to place on this minority reinforces this point.

There are thousands of investors who acted exactly as the Marquettes did, but the Receiver has not pursued them (and in some instances, cannot pursue

[8] Only about 650 of the 28,000 SIB CD holders (<2.5%) are the subject of the Receiver's actions. (Tr. 11).

them). Some of those thousands of investors are overseas, and thus beyond the reach of the Receiver's jurisdiction. Others were lucky enough to have their brokerage accounts placed somewhere else besides Stanford, and thus beyond the reach of the Receiver's account freeze order. Others fortuitously closed their Stanford accounts at some point during the 18 years prior to 2008. Finally, there are the fortunate investors whose brokerage accounts were released over six months ago because they fell below the arbitrary $250,000 threshold that the Receiver set. None of these other, equally innocent investors are in the unfortunate position of having the Receiver target a separate account that contains their money.

A simple example, illustrated in the chart below, demonstrates the inequity of what the Receiver seeks to do here. Assume five investors: A, B, C, D & E. All five held $1 million in SIB CDs. All five received $200,000 in interest proceeds from their SIB CD holdings. A, B, C & D are Americans and E is a foreigner. A had a Stanford brokerage account at Pershing worth $251,000. B had a Stanford brokerage account at Pershing worth $249,000. C had her brokerage account, worth $250,000, at another firm. D cashed out his CD several years ago and left Stanford altogether. Assume that no one else redeemed her CD. Everyone but D has lost almost the entire $1 million in SIB CD value. But only A, by virtue of the Receiver's arbitrary account freeze, is being targeted by the Receiver for disgorgement of $200,000 out of her frozen Stanford brokerage account. The unfairness to those investors similar situated to Investor A is obvious:

Investor	Interest Received	Principal Received	Clawback Amount	Amount in Separate Brokerage Account	Final Accounting
A	$200,000	$0	-$200,000	$251,000 at Stanford	$251,000
B	$200,000	$0	$0	$249,000 at Stanford	$449,000
C	$200,000	$0	$0	$250,000 non-Stanford	$450,000
D	$200,000	$ 1,000,000	$0	$250,000 non-Stanford	$1,450,000
E	$200,000	$0	$0	$250,000 non-Stanford	$450,000

Even if the Receiver were to later file clawback actions under a fraudulent transfer theory against the other investors, there could be no equitable result.[9] As the SEC has noted, "[c]ollection against domestic and international investors who do not currently hold funds at Pershing will be far more difficult and costly than collections of pending claims, and likely unattainable in large part." (Supp. R. 2078). Although the Receiver repeatedly touts the maxim that "equity is equality,"[10] it is clear that there is no such thing as equality of treatment among innocent investors under the Receiver's scheme. Without equality, there can be no

[9] Extensive arguments have been made in the District Court that the proper way for the Receiver to proceed with clawback claims against *any* of the investors is through a fraudulent transfer action. *See*, (Supp. R. 375, 417).

[10] *See Cunningham v. Brown*, 265 U.S. 1, 13 (1924)

equity. The Receiver, therefore, should not be permitted to take actions that do not further his essential purpose.

B. The Receiver Arbitrarily Targeted this Minority of Investors.

That Stanford masked its fraud by also maintaining legitimate brokerage accounts provides the Receiver with a handy source of funds that he can control, but it does not provide any sensible reason for filing clawback claims against one type of victim (those with brokerage accounts of $250,000 or more) and not another (those with accounts less than $250,000). No one contends that those with brokerage accounts that meet the Receiver's criteria are more culpable than those without accounts or those with accounts that do not meet the Receiver's criteria. Nor does the presence of a brokerage account for one innocent investor make that investor more deserving of clawback litigation than an innocent investor without such an account, or indicate that there is anything illegitimate about the brokerage accounts. Instead, the Receiver just draws an arbitrary line because it is easier for him to access the legitimate Stanford brokerage accounts than it is for him to get funds from other investors.

Not content to use only these arbitrary filters to decide whom to sue, the Receiver also decided to sue some innocent investors, but not others, based on the timing of their investment. The Receiver targeted many of the frozen accounts at issue in this appeal by identifying wire transfers between Pershing and the Stanford entities from March of 2006 until the Receiver was appointed. (Supp. R. 248). Thus, the Receiver is targeting accounts in which certain types of activity occurred over the last three years, despite the fact that the purported SIB CD fraud began in 1990 and involved numerous investors who have long since cashed out. (Supp. R. 250). The Receiver fails to explain how targeting the frozen accounts in which transfers occurred during the last three years is any less arbitrary than a shorter or longer period of time, or how it advances the Receiver's purpose of equitable treatment of all innocent investors. The end result is an inequitable distribution of the Estate.

C. There are No Steps the Receiver Can Take to Mitigate the Inequities He is Creating.

As shown above, the Receiver is pursuing just a fraction of the SIB CD investors.[11] Of course, ideally, one would like to collect all of the investors from the very beginning of the fraud, identify all the CD redemptions and interest payments over a period of nearly twenty years, bring claims for every single dollar of proceeds that ever was paid over to an investor, collect it all, and redistribute it on a *pro rata* basis. But that simply is not possible here, and the Receiver

[11] There are over 20,000 foreign investors who are beyond the jurisdiction of United States courts. (Tr. 11). By the Antiguan Liquidator's estimate, U.S. investors represented only 20% of the value of the SIB CDs. (Supp. R. 1960). The Receiver has already released the vast majority of the remaining American investors, whittling it down to 563 investors with frozen accounts worth more than $250,000 and handful of other individuals who received CD proceeds in excess of $1.85 million in 2008 or 2009. (R. 233-249).

recognizes that.[12] Yet instead of fulfilling his "central purpose" of "distributing assets equitably" to *all* investors, the Receiver is simply taking advantage of the fact that some investors held their brokerage accounts at Stanford when the scheme collapsed. *See S.E.C. v. Capital Consultants LLC*, 453 F.3d 1166, 1172 (9th Cir. 2006) ("distributing [the fallen entity's] assets equitably is one of the central purposes of the receivership and, correspondingly, of the SEC's litigation"). This is not equality for the investors; it is just one more arbitrary line-drawing exercise superimposed upon all the others.

In this case, the district court should have used it "discretionary power to deny [certain] equitable remedies as inimical to receivership purposes even though they are or might be warranted under controlling law." *U.S. v. Vanguard Inv. Co., Inc.*, 6 F.3d 222, 226 (4th Cir. 1993). The district court erred in overlooking the dangers to equity that the Receiver's continued account freezes and clawback actions pose. A course of action that further harms fraud victims, as the Receiver has proposed, is certainly "inimical" to the purposes of the Receivership. Thus, the account freeze should have been dissolved and the Receiver should not have been permitted to pursue his proposed clawback actions.

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[12] "Based on the limited investigation to date, the Receiver has identified a number of very large cash withdrawals (totaling over $750 million) from SIBL CD accounts made during the twelve months before the SEC filed this lawsuit that did not go to Pershing accounts. . . . [but the] cost of such investigation [into these withdrawals] is far exceeded by the amount of potential recovery." (Supp. R. 1989).

III. Pursuing this Action is Contrary to the Receiver's Duty to Safeguard the Estate.

With the ultimate goal of producing an equitable return to investors, the Receiver has a coordinate obligation to preserve the value of the Estate. *See*, *Sovereign Bank v. Schwab*, 414 F.3d 450, 454 (3d Cir. 2005) (noting that a receiver has the duty to "protect and preserve, for the persons ultimately entitled to it, an estate over which the court has found it necessary to extend its care") (internal citations omitted); *S.E.C. v. Aquacell Batteries, Inc.*, 2008 WL 276026, at *4 (M.D. Fla. Jan. 31, 2008) ("It is axiomatic that a receiver owes a duty of reasonable care to protect and preserve the assets of the receivership estate."). The fees of the Receiver, and of the lawyers that he has retained, are paid out of the assets of the Stanford Estate. Every dollar that goes to actions undertaken by the Receiver is one fewer dollar available to be distributed to innocent investors. The Receiver's actions here are therefore doubly harmful. He is quickly depleting scarce Estate assets trying to claw back funds that he will be, at least partially, unsuccessful in retrieving, and, in doing so, he is forcing innocent investors to spend what little money they have remaining to defend themselves from his actions. This situation could be avoided entirely if the SEC were left to decide, in its extensive expertise and experience, how best to pursue clawback actions, which it could do at no further cost to the estate.

A. The Receiver's Actions Will Further Diminish the Dwindling Estate.

The Receiver is already depleting the assets of the estate at an alarming rate. To date, the Receiver has submitted claims to the court for fees in excess of $60 million dollars. (Tr. 35). The Receiver is now operating at a clip of approximately $1 million per week in fees. *Id.* All of this money is coming out of the funds that would otherwise be used to pay SIB CD holders. It would not profit the investors to allow the Receiver to continue on his current course if his gains would largely, if not entirely, be offset by his charges to the estate.[13]

If the district court's ruling allowing interest-only clawbacks is upheld, this regime would almost surely be of little net benefit to the Estate. These concerns were pointed out to the district court. As the Examiner noted, an interest-only clawback would result in the estate "losing money in a major way, because there's not that much interest." (Tr. 14). Indeed, even counsel for the Receiver has admitted that "if this is an interest only [action], recapture interest only, I doubt very much it will ultimately be cost effective to pursue or will return very much to anyone." (Tr. 21). For the Receiver to pursue such an action would, in the end

[13] The Receiver himself has acknowledged that his role is to "maximize the pools of assets that will be available for distribution." (R. 271).

analysis, further decrease the value of the estate, which only contains between $40-$60 million right now.[14]

Even if the Receiver could proceed against both principal and interest from these frozen accounts in his clawback action, it is not at all clear how much of a net gain to the Estate such an action would bring. The investors whose accounts are attacked will certainly fight the Receiver tooth and nail on these claims. In some situations, like the Marquettes' predicament, the money in the frozen accounts is literally the only significant asset that the investors still possess.[15] As the SEC observed, "it seems clear that processing claims and defending lawsuits and motions related to the funds held in the Pershing accounts has required, and continues to require, significant expenditure of estate assets. . . . [C]ontinuing an ongoing freeze of those funds prolongs any hardship Stanford's fraud has created for individual investors." (Supp. R. 2074). The SEC has further averred that "the Commission will have to intervene in the clawbacks to [oppose the Receiver's position]." (Supp. R. 2074). Defending its claims against both the SEC and hundreds of investors will require the expenditure of significant Estate resources.

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[14] "[The Receiver is] going to be dwindling that $60 million or so, less than that, probably 40 million that they have. It's just going to be eaten away and there's going to be nothing and then everybody's a net loser and nobody gets any money back . . .." (Tr. 38).

[15] Recently, the Receiver has released some of the funds that were frozen in the Marquettes' account; however, about $205,000 are still frozen according to the Receiver's assessment of interest proceeds they received on their SIB CDs. The remaining frozen funds represent a very significant amount of money to the Marquettes, who have already lost about $750,000.

"A primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986) (citing *S.E.C. v. Wencke*, 783 F.2d 829, 837 n.9 (9th Cir. 1986); *First Empire Bank-New York v. FDIC,* 572 F.2d 1361, 1368 (9th Cir. 1978)). The helter-skelter onslaught of litigation that the Receiver's plan contemplates would frustrate the "orderly and efficient" administration of the Estate. This is all to the ultimate detriment of investors.[16]

In sum, no one wins if the Receiver is allowed to proceed against the frozen accounts, with the exception, perhaps, of those who are working for the Receiver. The investors lose because the estate is depleted by expenses that may not be offset by significant recoveries. The unlucky investors whose accounts the Receiver is attacking lose even more by having to defend themselves against the Receiver's claims, after having lost from the fraud in the first place.[17] The Courts lose by having to expend judicial resources on the hundreds, or potentially thousands, of motions to dismiss, motions for summary judgment, counterclaims and other

[16] Amazingly, the Receiver has not pursued disgorgement from other beneficiaries of the Stanford fraud who did not put anything into it. The Stanford Companies, according to the Examiner, "sponsored sporting events, athletes, gave to charities." (Tr. 13). But the Receiver has instead settled on going for the most controversial claims.

[17] The Receiver is committing himself to "what will likely be an extraordinarily expensive course of litigation with the very people the Receiver is supposed to be hiring." (Supp. R. 2084).

related motions that the Receiver's proposed actions will generate. And the SEC loses by having its policies undermined by the Receiver that it sought to have appointed to further those policies.

B. The SEC is the Proper Party to Bring any Clawback Actions.

The SEC can and should handle any actions against investors for the benefit of the estate that it deems to be appropriate in this instance. The SEC has emphasized that "with respect to the remaining claims that might be brought in the future against investors, the Commission believes that we are in a position to pursue those claims as plaintiff in this case, it would provide a cost savings to the Receivership, and we believe it's appropriate to do so." (Tr. 4). Besides providing a cost savings to the Estate,[18] having the SEC retain responsibility for pursuing claims against investors ensures uniformity of results in this type of case. The Receiver has previously recognized that it is the SEC that "is statutorily commissioned to represent the interests of individual investors and the public at large." (Supp. R. 256) (citing *S.E.C. v. Qualified Pensions, Inc.*, 1998 WL 29496, at *4 (D.D.C. Jan. 16, 1998)). The Receiver, in proceeding in a manner that runs contrary to SEC policy, seems to have forgotten this principle.

Permitting the Receiver to proceed as it wishes would alter the ability of "the Commission, as plaintiff . . . to shape its case and determine the type and scope of

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[18] "What we [the SEC] want to do is file the clawbacks where they're appropriate without any cost, any more cost, any additional cost to these investors." (Tr. 36).

relief sought." (Supp. R. 2075). The SEC "does not make a practice" of suing innocent investors for return of principal, and exercises "a great deal of discretion and consideration" before asserting claims against victims for the return of interest payments received by them. *Id.* Here, as the SEC has stated, there are "no compelling reasons" to pursue innocent victims. (Supp. R. 2076). Thus, the Receiver should not be permitted to proceed with his clawback action against those victims' frozen accounts.

CONCLUSION

The Receiver, in advancing his scheme, flies the flag of equity high and proud, but there should be no sense of pride in taking actions that will perpetuate the hardships that the Stanford fraud has created for innocent investors, like the Marquettes, who are net losers from the Stanford fraud.

The ruling that the Court should adopt in this case is that the Receiver should not be able to maintain account freezes and bring clawback actions against innocent investors, for either principal or interest, because there is no way for him to bring such actions without harming SIB CD holders and the Stanford estate, both of which he is duty-bound to protect.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,369 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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