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

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. STANFORD INTERNATIONAL BANK, LTD., ET AL., Defendants.	§ § § § § § § § §	Case No. 3:09-CV-0298-N

RECEIVER'S REPLY IN SUPPORT OF MOTION
FOR APPROVAL TO RELEASE PORTION OF HOLDBACK

BAKER BOTTS L.L.P.

Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Scott D. Powers
Texas Bar No. 24027746
scott.powers@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
98 San Jacinto Boulevard, Suite 1500
Austin, TX 78701-4039
512.322.2500
512.322.2501 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

The objection of the Examiner and the SEC to release of one-third of the holdback rests on their erroneous understanding of the purpose for the holdback. The holdback was imposed in 2009 out of an expressed concern that there was a risk that the Receivership might literally run out of money. Yet that risk has never materialized. Indeed, if the entirety of the holdback were paid now, the Estate would have more than enough funds to complete the first and second interim distributions, and have substantial funds to continue paying ongoing professional fees and administrative costs of the Estate.

The holdback was not imposed based on any judgment by the Court that 20% of the Receiver's work was unnecessary or that only 80% of the requested fees would be appropriate in the absence of results that would justify an exceptional bonus. The Court also did not order the Receiver to modify his engagement agreements with his professionals to reflect contingency-fee rather than hourly-based compensation. The uncertainty that existed in 2009 no longer exists. To use the Court's metaphor, cited repeatedly by the Examiner, the dust was swirling strongly when the Court imposed the holdback more than 5 years ago, but the dust has now settled to a point that it is reasonable and appropriate to release one-third of the holdback.

The Receiver is not seeking a bonus or a success fee. He instead asks the Court to allow him to pay fees and expenses for work that was necessary, performed reasonably, and for which full payment has been deferred over the last five years. The Receiver respectfully requests that his motion to release one-third of the holdback be granted.

II. DISCUSSION

A. The Receiver's request to release a portion of the cumulative holdback is not premature.

After the Receiver filed his first and second fee applications, the SEC requested the 20% holdback because it contended that the size of the Receivership Estate could not sustain the amount of work that was being required of the Receiver. (*See* Doc. 437 at 8.) The SEC's now-former regional director told this Court that the SEC was concerned that there might literally be nothing left for Stanford's victims after payment of professional fees. (*See* Doc. 1999-1 at 38–39, July 31, 2009 Hrg. Tr. at 38:25–39:3.) The Examiner echoed these concerns. (*See* Doc. 739 at 6 ("At the Receiver's current 'burn rate,' it does not appear that there will be any Estate left for distribution to the creditors and defrauded investors.").) The risk that the Examiner and SEC perceived has never materialized.

During the September 2009 hearing on the Receiver's first and second fee applications, the Court imposed a 20% holdback in light of "the overall size of the Receivership Estate as it now exists." (Doc. 1999-1 at 52, Sept. 10, 2009 Hr'g Tr. at 40:9–12.) In imposing the holdback, the Court stated that the Receiver would be permitted to ask the Court to revisit the holdback "when all the dust settles" and enough time has passed that the results obtained for the Receivership are more certain. (*See* Doc. 1999-1 at 54, Sept. 10, 2009 Hr'g Tr. at 47:16–22.) The Court left the door open for the Receiver to return to the Court at some future date and to request release of a portion of the fees and expenses held back. (*See id.*)

Notwithstanding the Examiner's statements to the contrary, a substantial amount of dust *has* settled. The Receivership is no longer in its early stages, and it has been more than five years since the Receiver and his professionals were required to expend significant resources to carry out the terms of the Receivership Order by quickly securing and preserving the

Receivership Estate for the ultimate benefit of the Stanford investors and creditors. The Receiver has recovered more than sufficient assets to pay for all of the professional services he has obtained as well as to make substantial distributions, which, based on current cash on hand, will likely exceed at least $100 million, with that number likely to more than double based on the expected recovery of Swiss assets alone.

According to their responses, the SEC and the Examiner will oppose the release of any portion of the holdback until the amount distributed to Stanford's investors and creditors "significantly exceeds" the amount paid to the Receiver and his professionals. (*See* Doc. 2016 at 30.) That position, however, is not based on cited law, is arbitrary, and simply moves the goal posts five years into the Receivership. Moreover, the SEC and Examiner's position that the release of *any* portion of the holdback is "premature" ignores undisputed successes such as the Receiver's litigation against the Political Committees and the Receiver's efforts to recover significant Stanford assets located in Canada. (*See* Doc. 1998 at 24–26, 30.)

The fees and expenses that have been held back do not represent a bonus or success fee. At the hearing that resulted in the holdback, no party took the position that payment to the Receiver's professionals for ongoing reasonable and necessary work should be withheld until distributions to investors exceed the cost of that work by some unknown benchmark. The Court did not tie release of the holdback, let alone only a portion of the holdback, to some unspecified target ratio of distributions to professional fees and expenses. The amounts held back represent reasonable payment for work that was necessary to lay the foundation for an eventual distribution of funds to the victims of Stanford's fraud.

If the Examiner and SEC were correct that a portion of reasonable fees and expenses must be withheld until distributions have exceeded professional fees, then application

of the holdback from the outset would have been a straightforward, mathematical exercise requiring no reference to or consideration of the overall size of the Receivership Estate. The Examiner and SEC would have simply cited to the authorities establishing the rule they espouse, but of course they did not—because there are no such authorities.

Indeed, the authorities cited by the SEC and Examiner show that there is no such rule. In *SEC v. Byers*, for example, the Court considered payment to three different professional firms. 590 F. Supp. 2d 637 (S.D.N.Y. 2008). Two of the firms were paid in full without holdback. *Id*. at 645, 648. The third firm, Dewey LeBoeuf, was subject to a 20% holdback, but that was driven largely by the fact that the court believed Dewey had billed "excessive" hours and that its rates were "unreasonably high." *Id*. at 646–48; *see also In re Alpha Telecom, Inc.*, No. CV 01-12830PA, 2006 WL 3085616, at *1, *4–5 (D. Or. Oct. 27, 2006) (in denying fee application in part, noting that receiver had hired expensive, out-of-state attorneys instead of cheaper, local attorneys; local counsel's work consisted of administrative and clerical tasks; and receiver and his attorneys had mishandled a major piece of asset-recovery litigation); *Specialty Prods. Co. v. Universal Indus. Corp.*, 21 F. Supp. 92, 94 (M.D. Pa. 1937) (in reducing professional fees, noting inter alia that receivership was only of "average" complexity); *cf. SEC v. W.L. Moody & Co., Bankers (Unincorporated)*, 374 F. Supp. 465, 487 (S.D. Tex. 1974) ("Where, as here, the estate contains sufficient resources to compensate the Receiver and his attorney at commercially acceptable rates for services of considerable benefit to defendant, it would be unreasonable not to do so.").

In contrast, this Court has found that the Receiver's professional fees and expenses "have been spent gainfully and billed reasonably." (Doc. 1471 at 7.) The Court has also recognized the reasonableness of the hourly rates charged by the Receiver's professionals,

both in connection with the Receiver's fee applications and in a fee award where the holdback was not applicable. (*See* Case No. 10-cv-346, Doc. 140 at 5.)

In light of the applicable law and the facts of this case, the Receiver's request to release a portion of the cumulative holdback is not premature.

B. The Court cannot determine whether the Receiver and his professionals have been appropriately compensated simply by looking at the overall amount that has been paid to date.

Both the SEC and the Examiner assert that the release of any portion of the holdback should be denied at this time because the Receiver and his professionals have been "well-compensated." (*See* Doc. 2016 at 14; Doc. 2017 at 1, 4.) What it means to be "well-compensated" in the opinion of the SEC and Examiner, neither of whom are paid after a substantial discount and holdback, is not the legal test. Neither the officials of the Fort Worth Regional Office of the SEC nor the Examiner has any previous experience or expertise in managing such an enormous and complex undertaking as has been required here. The Receiver does not dispute that $64 million paid to professionals is a large figure, but one cannot determine what is reasonable and appropriate compensation simply by reference to a single figure. That sum must be considered in the context of this case. The fees and expenses have been paid to 20 different professional firms for tens of thousands of hours of complex, time-consuming, and challenging work required by a case involving an international Ponzi scheme that operated for two decades and caused more than $5 billion in losses to more than 18,000 victims.

To put the $64 million figure further into context, payment of the entirety of the holdback (rather than the one-third requested) would not put the professional firms in a position where they are paid at a level that is even close to their normal hourly fees. The discounted rates agreed to by the professional firms have resulted in the fees to the Estate being reduced by more than $19 million. Thus, for other work of similar complexity, the amount that would have been

billed is not $64 million but instead exceeds $100 million. In that context, the payment of $5.8 million from the amounts held back does not begin to approach a windfall, as suggested by the Examiner and SEC, but instead is legally justified, reasonable, and appropriate under all of the applicable circumstances.

The Receiver further asks the Court to consider two other figures when evaluating whether it is appropriate to release a portion of the holdback. The first figure relates to the Madoff bankruptcy estate. Although the Madoff bankruptcy was filed only two months before the Stanford Receivership was instituted, the Madoff bankruptcy estate has incurred general administrative costs and professional fees and expenses totaling approximately $927.8 million as of March 31, 2014.[1] The Stanford Receivership has incurred only a small fraction of the operating costs and professional fees and expenses incurred by the Madoff bankruptcy estate during roughly the same period. Although the losses in the Madoff Ponzi scheme are larger than the Stanford scheme in terms of the total claims against the respective estates ($11.4 billion vs. $5 billion), the Stanford scheme was substantially more complex, involved many, many thousands more victims, and has been far more difficult to unwind. Of course, the Examiner and SEC's expected response to this analogy would be that the Madoff trustee has recovered billions of dollars and paid far more to victims than has the Receiver. But it is a matter of public record that the Madoff trustee's payments to investors and his largest recoveries have come with the substantial and active assistance of SIPC and the U.S. DOJ, and no such assistance has materialized in this case.[2]

---

[1] *See* The Madoff Recovery Initiative, http://www.madofftrustee.com/recovery-chart-fees-34.html (last visited June 23, 2014).

[2] The Madoff trustee has received substantial assistance from DOJ in his recovery efforts, including a settlement with JPMorgan Chase that will result in more than $2 billion being distributed to Madoff's victims, as well as a $7.2 billion settlement with the estate of the largest beneficiary of the Madoff scheme. *See* The Madoff Recovery Initiative, http://www.madofftrustee.com/recovery-chart-34.html (last visited June 23, 2014).

The second figure that the Receiver asks the Court to consider is the $2.5 million in professional fees and expenses that the Receivership has paid to the Examiner's firm for work performed through January 31, 2014. Most of that work was performed by the Examiner himself, at no discount and essentially no holdback,[3] in contrast to the $64.2 million that has been paid, after substantial discount and holdback, to *twenty* different professional firms employing hundreds of people to do the actual work of the Receivership.[4]

C. The Examiner fails to identify any "unresolved" objections that warrant denying the relief requested.

1. The Court resolved the Examiner's and SEC's formal objections to the Receiver's first four fee applications when it ruled on those applications.

The Examiner also argues that the Receiver's motion does not address any of the formal objections that were made by the Examiner and the SEC to the Receiver's first four fee applications. (*See* Doc. 2016 at 17.) But there is no indication anywhere in the record that the Court intended the holdback as a means of deferring the resolution of the SEC's and Examiner's objections to the Receiver's fee applications or the underlying work records.

During the September 2009 hearing, the Court approved the Receiver's first and second fee applications (subject to the 20% holdback), reserving only its ruling with respect to certain fees and expenses incurred by FITS, E&Y, and FTI.[5] (*See* Doc. 1999-1 at 51, Sept. 10, 2009 Hr'g Tr. at 39:8–19 ("With regard to the balance of the fee application, I'm approving

[3] The Examiner's billing rate is $450 per hour. The Receiver's billing rate is $500 per hour, before application of a 20% discount, which reduces his hourly rate to $400. That rate is then reduced to $360 per hour as a result of application of the holdback.

[4] In connection with the Examiner's second interim fee application, the Court imposed a 15% holdback (totaling approximately $36,000) on the fees and expenses charged by the Examiner's firm for work performed from July 1, 2009 to September 30, 2009. (*See* Doc. 994 at 3.) A 2% holdback (totaling approximately $3,500) was applied to the fees requested in the Examiner's third interim fee application (*See* Doc. 1069 at 2.)

[5] The Court reserved its ruling on those fees and expenses to allow the Receiver to provide additional backup support for those amounts. (*See* Doc. 1999-1 at 51, Sept. 10, 2009 Hr'g Tr. at 39:8–15.) The Receiver provided such additional support to the Court, and the Court approved the Receiver's request to pay those amounts to FITS, E&Y, and FTI, subject to the 20% holdback that the Court had imposed during the hearing. (*See* Doc. 994 at 3.)

it.").) The Court also addressed several of the objections that had been raised by the SEC and the Examiner, including objections related to the scope of the Receiver's work, the adequacy of the work records prepared by the Receiver's professional firms, and the fees and expenses requested for the Receiver's communications firm. (*See* Doc. 2016-1 at 11–12, Sept. 10, 2009 Hr'g Tr. at 41:8–42:14.) Ultimately, the Court concluded that "new client matters for the discrete tasks" and "adequate information available to assess the bills," among other things, would be required only on a "going-forward basis." (*See id.* ("I understand that it would be a problem to try and sort through a thousand pages of billings and use different color highlighters and segregate out who did what when and then pay some accountant to add it all up so that you could get a breakout of the legal fees by activities.").) Importantly, in approving the fee applications, the Court did not reserve any ruling on the SEC's and Examiner's objections. (*See* Doc. 2016-1 at 12, Sept. 10, 2009 Hr'g Tr. at 42:11–13 ("I am approving, as I said, the balance of the fee application which includes the PR firm that the Examiner is unhappy about.").)

Similarly, in ruling on the Receiver's third and fourth fee applications, the Court endorsed the reasonableness of the fees and expenses requested in those applications:

> Many of the *Johnson* factors suggest that the Receiver's . . . fees are reasonable. These include the substantial time and labor involved with unraveling such a complex scheme; the novelty and difficulty of many of the legal questions to be addressed; the skill requisite to perform the services in question; and the experience, reputation, and ability of the attorneys and other professionals involved.

(Doc. 994 at 2.)

The Examiner argues that the formal objections made by the Examiner and the SEC to the Receiver's third and fourth fee applications led to an additional 15% holdback being imposed in connection with those fee applications. However, as described in the Court's order on the third and fourth fee applications, the Court concluded that the Receiver's fees and

expenses were reasonable and imposed the additional 15% hold back—which was agreed upon by the Receiver, the Examiner, and the SEC—for the same reasons that the 20% holdback was imposed, namely that there was uncertainty regarding the overall size of the Receivership Estate and the results obtained by the Receiver and his professional firms:

> However, it is increasingly clear that the eventual size of the receivership estate will be smaller than initially hoped or expected. Accordingly, in light of the "amount involved and the results obtained," a fee reduction is appropriate at this time. Thus, the Court will hold back a percentage of the Receiver's . . . fees for the time being.

(Doc. 994 at 2 (footnote omitted).)

Therefore, contrary to the Examiner's argument that the Receiver's motion does not address the Examiner's and the SEC's formal objections to the Receiver's first four fee applications, the record establishes that those objections have been resolved by the Court and that the only relevant issue now is whether the results obtained by the Receiver and his professionals support the release of a portion of the cumulative holdback.

2. The Receiver has carried his burden to show that release of the holdback is appropriate.

The Examiner addresses the Receiver's professional firms, asserting that he has objections to the work each of them performed. But neither the Examiner nor the SEC has offered anything but their ipse dixit that some unidentified tasks have not been performed appropriately. Not only do the Examiner and the SEC fail to identify individual time entries to which they object or the legal basis for their objections, they also fail to identify—even at a very rough level of magnitude—what amount of fees would be affected by their objections.

The Receiver carried his burden to show that he was entitled to full payment each time he filed his fee applications, certifying and explaining the work performed by his professionals and attaching the underlying work records. It is not enough for the Examiner and

SEC to vaguely assert that they have unresolved objections simply because they continued to hold the opinion that some tasks should have been performed in less time or by fewer professionals. This is not the first time that a party has taken the sweeping position, without any supporting basis, that everything the Receiver did he should have done differently, and all in a way that would have been faster, better, and cheaper and produced some miraculously improved results. (*See* Doc. 1999-1 at 13–26.) There is no legal basis for elevating the SEC's or the Examiner's opinions on these issues over the Receiver's judgment. The Receiver has prior experience in this area and has been closely monitoring and directing the actual work performed by his professional firms during the more than five years that this Receivership has been in existence. Neither the SEC nor the Examiner has any specific experience or specialized expertise to offer an informed opinion that any particular task should have been performed differently, in less time, or by fewer professionals. *See* Fed. R. Evid. 702. Even if there were any merit to the SEC's or the Examiner's objections that a particular task could have been performed in less time or by fewer professionals, the 20% discount that has been applied to all professional fees since the beginning of the Receivership would dwarf the amount at issue with respect to any particular task. (*See* Case No. 3:10-cv-00346-N, Doc. 140 at 5 & n.3 (rejecting objections to specific time entries because any improper or unreasonable time entries would be counterbalanced by across-the-board 20% discount applied to rates used to calculate lodestar).)

As to the firm-by-firm criticisms, the Receiver does not intend to respond to each of them because most lack the specificity needed to respond and others, such as those related to Stuart Isaacs and Roberts & Co., have already been addressed in the Receiver's motion. The Receiver will address, however, a few of the issues raised.

Baker Botts

The Examiner criticizes Baker Botts for having conflicts of interest that prevent it from representing the Receiver in every single piece of Receivership litigation. The Examiner's purported concern is that the Receiver might incur more fees in any given litigation by using contingency-fee lawyers than he would have incurred had Baker Botts been retained for that litigation. The Examiner's objection is both unreasonable and internally inconsistent. The SEC recommended that the Receiver retain Baker Botts because of the firm's size, resources, and international reach.[6] It is inevitable that a firm the size and scope of Baker Botts will have conflicts from time to time, particularly given the amount of litigation necessary in this receivership. Baker Botts scrupulously adheres to its ethical obligations related to conflicts and it should not be penalized for doing so.

Further, the inability of Baker Botts to handle any particular matter has not forced the Receiver to use alternative counsel charging on a contingency-fee basis. The Receiver's determination as to which counsel to select and what type of fee arrangement is most appropriate on a case-by-case basis. The unavailability of Baker Botts for any particular matter does not force the Receiver to choose contingency-fee lawyers for that matter. Moreover, the Examiner himself has recognized that the use of contingency-fee lawyers can be valuable. Indeed, on the very same page that he criticizes Baker Botts for allegedly forcing the Receiver into the position of having to retain contingency-fee counsel, the Examiner also criticizes the Receiver for retaining Thompson & Knight to handle a fraudulent transfer case on an hourly basis rather than a contingency-fee basis. (Doc. 2016 a 32.)

[6] The Receiver has required the assistance of Baker Botts professionals in fourteen practice areas: litigation, corporate, bankruptcy, employee benefits, environmental, finance, global projects, government relations, income tax, intellectual property, trusts and estates, real estate, state and local tax, and trademarks.

Pierpont

Although the Examiner accurately quotes the Court as stating that the Court would no longer approve the use of a PR firm after September 2009, the Examiner fails to mention that the Court specifically rejected the Examiner's objection to Pierpont's fees up to that point. (*See* Doc. 2016-1 at 12, Sept. 10, 2009 Hr'g Tr. at 42:11–13 ("I am approving, as I said, the balance of the fee application which includes the PR firm that the Examiner is unhappy about.").) As the Receiver explained in his motion, the use of Pierpont in the early days of the Receivership was absolutely essential to manage the firestorm of communications activity that necessarily followed from immediately shutting down a multi-billion dollar international operation, with tens of thousands employees and creditors.

Groner

The Examiner's argument about the Receiver's St. Croix counsel is based on an evident misunderstanding of the facts. Most of the work Mr. Groner performed for the Receiver is already complete and has nothing whatsoever to do with the sale of the Receiver's one remaining property in St. Croix. Further, the conflict identified does not directly relate to the sale of the St. Croix property. It relates only to the negotiation of a potential easement between the Receiver and one neighbor in St. Croix, which is being considered as a possible means of enhancing the marketability of the Receiver's property. The transaction, if it is consummated, is not complicated, and the Receiver already has other counsel familiar with the Receivership who can seamlessly handle the negotiation of the easement. Mr. Groner remains available to assist the Receiver in negotiating and consummating the sale of the Receiver's property in St. Croix.

D. Releasing a portion of the holdback will not impair the fee application approval process; to the contrary, the position of the Examiner and the SEC undermines that process.

As discussed in the Receiver's motion, the Receiver provides the SEC and the Examiner with the Receiver's fee applications, including the underlying work records, in draft form before they are submitted to the Court for approval. The SEC and the Examiner have the opportunity to review the draft fee applications and work records and to raise any questions or concerns. The Receiver then revises or supplements his fee applications and the underlying work records to the extent necessary to address the SEC's and the Examiner's comments and concerns. At times, the Receiver reduces the fees or expenses sought in the interest of compromise so that the Court is not repeatedly burdened with resolving disputed fee applications and so that payment to the Receiver's professionals is not unduly delayed.

The Examiner and the SEC argue that releasing a portion of the holdback will threaten the fee application approval process because the Examiner and the SEC have been relying on the existence of the holdback in not filing formal objections to the Receiver's 5th through 28th fee applications. (*See* Doc. 2016 at 32–33; Doc. 2017 at 5–6.) Both the Examiner and the SEC assert that they have raised unresolved objections to the Receiver's fee applications through the informal review process. According to the Examiner, "those objections have been deferred by the Court, via the holdback mechanism, for resolution at a later date." (*See, e.g.*, Doc. 39 at 35, 38–39.) Although the Examiner correctly notes that the Court's orders approving the Receiver's fee applications have "reserv[ed] any ruling on objections to those [held-back] amounts until a later date," (*see, e.g.*, Doc. 1069 at 2; *see also* Doc. 2016 at 16–17), the holdback was not imposed to defer the resolution of formal objections to the substance of the Receiver's fee applications or the underlying work records until years after those fees and expenses were incurred. As discussed above, the holdback was imposed by the Court due to concerns regarding

the size of the Receivership Estate and uncertainty regarding the results obtained for the Receivership by the Receiver and his professionals.

Further, the Examiner and SEC's argument is inconsistent with the way the Receiver, the Examiner, and the SEC have approached the fee application process since early 2010 and threatens to impair that process moving forward. The Receiver and his professionals firms devote substantial time (none of which they have thus far charged to the Receivership Estate) to discussing each of the Receiver's fee applications with the Examiner and SEC and reaching agreement that the time spent, services performed, hourly rates charged, and expenses incurred by those firms have been reasonable and necessary for the Receiver to perform his Court-ordered duties. Beginning with the fifth fee application, these discussions have all occurred before the Receiver's fee applications are submitted to the Court. As a direct result of those discussions, the final versions of the fee applications that the Receiver filed with the Court reflected an overall reduction of $313,712.90 in fees and expenses when compared to the draft fee applications that were first submitted to the Examiner and the SEC for review.[7] If the Examiner and SEC were correct about the process, these adjustments would have been unnecessary, as they would have been entirely within the scope of the holdback.

Moreover, the Examiner has charged over $288,000 to the Receivership for reviewing the Receiver's fee applications and discussing them with the Receiver and the SEC. The Receiver strongly objects to allowing the Examiner to charge the Receivership for a second review of the Receiver's fee applications, particularly in light of the fact that the Receiver has already made substantial adjustments to his fee applications prior to their filing. It also makes little practical sense to attempt to resolve objections years after the work has been performed.

[7] This $313,712.90 figure includes the additional $124,222.71 that the Receiver, the Examiner, and the SEC agreed would be held back in connection with the fifth fee application, as well as expenses that were removed from one draft fee application and included in a later fee application filed with the Court.

Such a blanket deferral of the objection process does nothing but increase the costs of resolving the objections and impair the effectiveness of the adjudication of the objections.

E. The results obtained by the Receiver's professionals warrant the release of the holdback at this time.

1. The results achieved by the Receiver cannot be measured purely by the amount that is in the Receiver's accounts.

Contrary to the Examiner's view, it cannot be the case that every accomplishment of the Receiver must be viewed through the lens of whether it resulted in the recovery of specific cash or other assets. *See, e.g., In re Alpha Telecom, Inc.*, 2006 WL 3085616, at *5 ("To be sure, compensation to investors and creditors is not the only criteria by which a receiver's performance must be judged. A receiver is not hired on a strictly contingent basis. He is an officer of the court, charged with performing a range of necessary functions and duties, not all of which duties can or will translate into revenue for the receivership."). Certainly the Examiner's fees could not be justified according to such a narrow standard. The Receiver's Court-ordered duties are not limited to distributing cash to investors, and the results obtained by the Receiver and his professionals cannot be viewed only through the lens of increased cash.

The Receiver's objective is to maximize the amount of assets available for distribution to Stanford's defrauded investors. The goal of maximizing assets necessarily includes tasks aimed at minimizing losses. In order to achieve that objective, the Receiver and his professionals were required to perform substantial work to wind down the affairs of the Stanford entities and to minimize their operating expenses and ongoing liabilities—work that preserved the Receivership Estate for the benefit of the investors and creditors but did not bring additional assets into the Estate. Thus, as the Court has already recognized, the Receiver preserved the value of the Estate when he paid $47.4 million in expenses. (*See* Doc. 1999-1 at

17, Doc. 1471 at 5.) The apparent effect of those payments was to reduce available cash, but the actual effect was to preserve the value of the Estate by avoiding even greater liability.

Additionally, the diligent and effective performance of professional services, even those whose express goal is to obtain a recovery, will not always bear fruit. The SEC argues that the "question is not the quality of the worked performed," because what is at issue is the release of additional fees. (Doc. 2017 at 7.) The Receiver is not, however, requesting a success fee. Every professional firm in this Receivership undertook this engagement billing at a discount of 20% or more. The holdback was then imposed, reducing further the fees that would be recovered in the first instance. Thus, the issue in the present motion is not whether the professional firms will recover the agreed discounted rates charged. Instead, the issue is whether they will recover between 67% and 73% of the amount they would normally charge for a matter of this scope and complexity.[8]

2. The SEC's and Examiner's criticisms of the Receiver's accomplishments are unfounded.

a. The Receiver's negotiation of the Settlement Agreement was an indisputable win for investors.

The SEC and Examiner discount the value provided by the international settlement with the Joint Liquidators, arguing that the settlement was only necessary as a result of some failure on the part of the Receiver. Neither the SEC nor the Examiner, however, even attempts to identify any actual deficiency in the services performed by the Receiver or his professionals in the UK or Antigua. Perhaps if the refusal of the courts in the UK or Antigua to

[8] The Receiver's professionals bill no more than 80% of their normal rates. The holdback has generally been set at 20% or 10%, which means that the Receiver's professionals have generally been paid 60% or 70% of their ordinary rates. The Receiver is requesting one-third of the holdback, which would amount to approximately 7% of their normal rates where the holdback was 20% and approximately 3% of their normal rates where the holdback was 10%. Furthermore, paying fees and expenses years after they were incurred is in effect another discount that has benefited the Estate.

recognize the Receiver came as a result of the Receiver's failure to meet a deadline or an inadvertent waiver of a valuable legal argument, the SEC and Examiner would have a point. But nothing of the sort happened. The UK and Antiguan courts determined disputed issues of law based on the merits, not based on any judgment that the Receiver's counsel performed inadequately. And in both cases, the courts of those foreign jurisdictions held to views of the law that are directly at odds with those of this Court. It is difficult to comprehend how that fact is the fault of the Receiver.

Further, it is simply absurd for the Examiner and SEC to blame the Receiver for the fact that the Court's jurisdiction did not ultimately extend to Antigua, the UK, or Switzerland. The Receiver did not place Stanford assets in those jurisdictions. The Receiver did not craft the laws in those jurisdictions. Although by May 2009, the SEC began to express the view that the Receiver should leave recovery of the assets outside the United States to the SEC and the DOJ, the efforts of those agencies were simply not sufficient to ensure the recovery of those assets. In the UK, Canada, and Switzerland, the Stanford assets were subject to multiple and conflicting claims of control, with neither the SEC nor the DOJ in a position to control the outcome. For example, the DOJ's control of assets in the UK was in serious question, first when the Joint Liquidators were given access to $20 million from the UK assets over the DOJ's objection and later when the Joint Liquidators sought to have the UK courts cancel the DOJ's freeze and take complete control of all the UK assets.

The Settlement Agreement was not necessary due to any failure by the Receiver. The Settlement Agreement was necessary because the Joint Liquidators existed, and there was no magic wand that would allow either the Receiver or this Court to wish them away. The Joint Liquidators were pursuing vigorously their litigation agenda in the United States, Canada, the

UK, and Switzerland. Not only was the Settlement Agreement not required by some failure of the Receiver, it was in fact made possible because the Receiver prevailed over the Joint Liquidators in the litigation in Canada and the United States. And when the Settlement Agreement was finally concluded, the Receiver had control of 100% of the U.S. assets; the Receiver and the DOJ had control of 100% of the Canadian assets; and the DOJ had control of the clear majority of assets in the UK and Switzerland.

There was litigation risk to all parties—not because the Receiver failed in any task he was charged with, but because the Joint Liquidators had colorable claims that they would not easily surrender. At the hearing on the motion to approve the Settlement Agreement, the Examiner recognized that the Settlement Agreement would benefit investors because there was a risk that the Joint Liquidators would defeat the DOJ in the UK and would obtain unfettered access to the UK assets:

> One point that I think is lost in a lot of the debate about these dollars is the fact that the Joint Liquidators have other ability to fund their Estate. They could fund their Estate by continuing to fight in the UK where, if they prevail, they'll get $80 million and we'll have no cooperation, we'll have no anything, but they'll have $80 million that they can do with what they please. This agreement makes sure that more than half of that 80 goes out to the investors directly.

(App. at 9, April 11, 2013 Hr'g Tr. at 33:14–22; *see also* Joint Motion of the SEC, Receiver, Examiner, and Official Stanford Investors Committee to Approve Settlement Agreement and Cross-Border Protocol, Doc. 1791 at 4 ("[S]ince 2009 these assets [in the UK, Canada, and Switzerland] have been the subject of costly litigation between the Receiver and the DOJ, on the one hand, and the JLs, on the other. As detailed below, those proceedings are still on-going, and the assets remain under the control of foreign authorities pending resolution of the litigation.").)

There were litigation costs yet to be incurred by all parties. That is why it was so important to finally craft a settlement agreement that would benefit all parties. And it did benefit all parties. It ensured that over 90% of the international Stanford assets would be distributed to victims, which was precisely what the Receiver believed was the most appropriate distribution for those assets. The Receiver obtained control of the manner of distribution of over 90% of these assets, despite the fact that over 50% of the frozen assets were located in a jurisdiction (Switzerland) where the facts and the law did not ultimately support the Receiver's recognition.

The Examiner's argument now is that the funds earmarked in the Settlement Agreement for the Joint Liquidators' operations should be viewed as a cost that should be laid at the feet of the Receiver. In supporting the Settlement Agreement, however, the Examiner recognized the benefit to which the Joint Liquidators would put the funds they would receive:

> This agreement provides a funding mechanism for [the Joint Liquidators'] Estate that also provides great benefit to the investors, provides great benefit to DOJ, provides great benefit to the Receiver, and fosters the cooperation I think this Court has wanted to see happen for at least the last couple of years. The other thing is that the Joint Liquidators, like this Receiver, have work that has to be done, and that work does cost money, including the prosecution of litigation. You know, it's not shocking, I don't think, to discover that there are folks outside of the United States who got net winnings who need to be prosecuted; that there are folks who might have helped Mr. Stanford in other jurisdictions than the United States who might need to be sued. And all of that activity needs to be funded, and it's that sort of funding that -- that these dollars will go to.

(App. at 10, April 11, 2013 Hr'g Tr. at 34:4–19.)

Nothing has changed since the Examiner uttered these words in Court. Neither the SEC nor the Examiner ever offered a magical legal solution to solve the problems brought about by the disputes with the Joint Liquidators, and not once did either express the view that the Receiver should simply abandon his efforts to secure the assets in dispute. Consistent with what

the Examiner told this Court, the Settlement Agreement has provided and will continue to provide great benefit to the investors, and the substantial fees and expenses incurred in litigating and ultimately resolving that once intractable dispute were absolutely reasonable and necessary.

b. The Receiver is distributing assets as quickly as possible.

The Examiner complains that it has taken too long for the Receiver to complete the Receiver's first interim distribution. As the Examiner well knows, however, the Receiver cannot distribute funds to an investor until the investor completes a certification form—which is required by this Court's order—disclosing whether the investor has obtained a collateral source recovery. The simple reality is that many investors have failed to complete their certification forms on a timely basis, despite repeated reminders from the Receiver. The Receiver would be happy to distribute the remaining funds more quickly, but until investors comply with the Court's order, that simply cannot happen. And the fact that it has not yet happened is no fault of the Receiver's.

c. The Receiver's litigation against brokers and net winners.

The Receiver has recovered nearly $20 million from former employees and net winner investors. He may recover more depending on the outcome of future litigation. With respect to the broker case, the Fifth Circuit has reversed this Court's ruling on arbitration once, not twice. And that reversal came as the result of the highly unusual circumstance in which a different Fifth Circuit panel reversed itself sua sponte on the standing issue. As to the net winner appeal, the Receiver's efforts against the net winner defendants have already borne substantial fruit. In any event, the Examiner lodges no complaint about the quality of the work performed by the Receiver's professionals, nor does he suggest that it was inappropriate for the Receiver to pursue such litigation.

F. Trustmark's objection should be overruled.

Trustmark's objection to the Receiver's motion is no different from any of the objections that it has filed to the Receiver's nineteenth through twenty-eighth fee applications. (*See* Docs. 1705, 1739, 1750, 1794, 1867, 1892, 1913, 1936, 1950, 1986.) The Court rejected each of those objections by signing orders approving the Receiver's fee applications, (*see* Docs. 1734, 1749, 1763, 1824, 1885, 1899, 1927, 1939, 1963, 1996), and it should similarly overrule Trustmark's objection to the Receiver's motion to release holdback.

Trustmark's objection is nothing more than an attempt to re-litigate issues that Trustmark has lost multiple times—in this Court and the Fifth Circuit. (*See, e.g.*, Doc. 1310 at 9 (holding that assets "likely [do] belong to the Receivership Estate"); Doc. 1655 at 2, 4 ("Thus, in the Trustmark Order [(Doc. 1310)], the Court recognized – and the Fifth Circuit affirmed – that the funds in the Account belong to the Receivership. . . . Trustmark has failed to provide a single example of a relevant disputed fact issue that the Court has not previously resolved."); Doc. 1672 at 1 ("Because Trustmark is seeking to relitigate issues that the Court has already decided, the Court denies Trustmark's motion.")); *SEC v. Stanford Int'l Bank Ltd.*, No. 11–10355, 2012 WL 745099, at *4 (5th Cir. Mar. 8, 2012) (recognizing that assets on deposit with Trustmark are part of the Estate); *SEC v. Stanford Int'l Bank Ltd.*, No. 12–10822, 2014 WL 60143, at *5 (5th Cir. Jan. 8, 2014) ("This court has already affirmed that the funds Trustmark turned over to the Receiver were Stanford property and thus properly part of the receivership estate.").

III. Conclusion

For the foregoing reasons, the Receiver respectfully requests that the Court grant his Motion for Approval to Release Portion of Holdback and enter an order approving the Receiver's request to release one-third of the fees held back by the Court for the period from February 17, 2009 to October 31, 2013.

Dated: June 23, 2014

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Scott D. Powers
Texas Bar No. 24027746
scott.powers@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
98 San Jacinto Boulevard, Suite 1500
Austin, TX 78701-4039
512.322.2500
512.322.2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
214.953.6500
214.953.6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

CERTIFICATE OF SERVICE

On June 23, 2014, 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
Kevin M. Sadler