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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 3:09-CV-00298-N
	§	
STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
	§	
Defendants.	§	

RECEIVER'S REPLY IN SUPPORT OF MOTION FOR SUPPLEMENTAL AWARD OF PROFESSIONAL FEES AND EXPENSES AND BRIEF IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. Executive Summary

The objections to the Receiver's motion indeed present the Court with a "stark choice." [*See* Examiner's and OSIC's Resp. in Opp'n to the Receiver's Appl. for Suppl. Award of Attorneys' Fees & Expenses ("OSIC Resp."), Doc. 3434 at 8.] The Receiver's motion is based on the applicable law and 15 years of detailed evidence in the record. The objections to the motion are a collection of personal opinions, facile assertions, and inapt comparisons, all of which are untethered from the evidence in the record and the *Johnson* factors.

The SEC, Examiner, and OSIC ("Objectors") do not engage on the case law—the Examiner and OSIC do not even mention *Johnson*. No case is cited that the "results obtained" in this matter are inadequate to justify payment of the holdback. The Objectors simply ignore the case law on the subject of payment for preparing fee applications. And the Objectors fail to distinguish the case law on the subject of compensation for years' delay in payment or cite *any* contrary authority. In fact, the SEC concedes that the proper test for determining a reasonable fee is the lodestar. Yet through his motion, the Receiver is not even seeking the full lodestar amount. Because of the very substantial discounts offered by the professional firms (which discounts total *$39 million*), the Receiver is seeking less than the lodestar and is requesting—to use the words of the Objectors—a "moderate" fee. [*See* OSIC Resp., Doc. 3434 at 7; Pls.' Resp. to Receiver's Mot. for Suppl. Award of Prof'l Fees & Expenses ("SEC Resp."), Doc. 3435 at 9.]

Rather than respond with relevant case law or facts in the record, the clear theme that runs through both objections is that payment of the holdback should be determined based on purely subjective and arbitrary standards. The objections are dismissive of 15 years of work by the Receiver and his professionals and read more like statements suitable for a press release, rather than reasonable legal argument based on case law and the record.

The Objectors' position also rests on the flawed premise that the reasonableness of the hourly rates charged by the Receiver's professionals or the hundreds of thousands of hours of work they performed is subject to any reasonable dispute. That position cannot be reconciled with either the actual evidence in the record or the numerous prior rulings of this Court. All the Receiver's professionals have been discounting their fees by 20%, and more, throughout the life of the Receivership. The invoices presented to the Court have reflected only the work that was reasonable and necessary, and charged at rates that were of significant value to the Receivership. It is no wonder then that the Court has time and time again included the following statement in orders approving the Receiver's fee applications:

> [T]he Court finds the request reasonable under the factors outlined in *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 714, 717–19 (5th Cir. 1974).

[*See, e.g.*, Order Granting 81st Fee Appl., Doc. 3414.]

A third serious flaw in the Objectors' position is the attempt to juxtapose the position of the Receiver's professionals with the plight of the Stanford victims. The Receiver is unreservedly sympathetic to, and absolutely mindful of, the havoc that Stanford's fraud caused in the lives of the Stanford investors. But the present motion, appropriately considered under the applicable legal standards, is not about whether the professional firms are more deserving than the investors. None of the 81 fee applications by the Receiver, the 45 fee applications by the Examiner, or the 13 attorneys' fees motions submitted by OSIC's contingent fee lawyers presented the Court with the false choice of "Do I give this money to the victims or give it to the professionals?" Distributions to investors, on the one hand, and payments to the professionals whose work generated the funds to distribute to investors, on the other hand, are governed by completely different legal standards.

This indeed is the most glaring flaw in the Objectors' position—their view that the Court should ignore the law and the evidence in the record, and instead use a subjective and arbitrary standard that inappropriately pits the Receiver's professionals against the investors. OSIC and the Examiner make their point quite directly: "[T]he Court should favor the investors over the professionals." [OSIC Resp., Doc. 3434 at 8.] An appeal to arbitrarily bestow favor on this party or that one may be appropriate in the court of a monarch, but it has no place in a court of law.

The fourth major flaw in the Objectors' position is the extent to which it leans heavily on a "moving the goal posts" strategy. The SEC and Examiner were champions of the objective "results obtained" *Johnson* standard in arguing against a "premature" release of even a part of the holdback, as the Receiver requested in 2014. [Examiner's Resp. in Opp'n to Receiver's Mot. for Approval to Release Portion of the Holdback, Doc. 2016 at 3; Plaintiff's Resp. to Receiver's Mot. for Approval to Release a Portion of the Holdback, Doc. 2017 at 1.] And as the Court observed in 2014, the purpose of delaying evaluation of the holdback was to allow the Court to "look at the big picture and see how much did the investors get, how much money was spent on friction, operating costs." [Aug. 21, 2014 Hrg. Tr. at 7:8–11.] As noted in the Receiver's motion at page 8, the "big picture" shows a ratio of less than 20% of recoveries were expended on professional fees and expenses. On this indisputable point, the Objectors are notably silent.

Now that the results have been obtained and are far beyond what the Objectors ever imagined was possible, they pivot away from the "results obtained" to a purely subjective and non-legal standard, asking the Court to take a "pragmatic" approach and "favor" the Stanford victims over the professionals. [SEC Resp., Doc. 3435 at 10; OSIC Resp., Doc. 3434 at 8.] And it is no wonder that they do so, because the magnitude of the "results obtained" is irrefutable.

Although the Examiner and OSIC pay lip service to the results obtained issue, their limited arguments on that point are meritless. The 20-20 hindsight "swings and misses" argument mischaracterizes the value of the individual litigation efforts that the Examiner and OSIC select for criticism and also ignores the reality that any significant investment in a 15-year litigation program involving dozens of lawsuits and hundreds of defendants is going to include some individual cases that do not yield direct recoveries. That fact is no sign of any failure to achieve substantial and meaningful results.

As for the argument that OSIC gets "credit" for the most meaningful results in this Receivership, it too is untethered from law and reality. "Credit" is a subjective opinion, not a *Johnson* factor. The evidence in the record shows that tens of thousands of hours of work by the Receiver's professionals was essential to and inextricably intertwined with the litigation pursued by OSIC. The Receiver's lead counsel, for example, was OSIC's lead trial counsel in the bank litigation. To cite another obvious example, Karyl Van Tassel and the firms with which she has been affiliated provided critical testimony in support of every single case pursued by OSIC.

The Objectors simply do not offer any case law or evidence to rebut the Receiver's motion, which *is* based on the evidence and the applicable legal standards. Payment of the fees and expenses held back is justified by the results obtained; a time delay adjustment is clearly warranted under Fifth Circuit precedent; and payment for preparing 81 fee applications is reasonable given the obvious benefit to the Receivership Estate. Finally, no law or logic has been offered to justify continuing the holdback. Whatever purpose it had years ago at a time when substantial recoveries and distributions looked like an impossible goal, today's reality is far different. There is no longer a justifiable role for a holdback in this Receivership.

II. Argument

A. The record establishes conclusively that the rates charged by the Receiver's professionals and the time they billed are reasonable, consistent with the Court's repeated rulings approving the Receiver's fee applications.

The Receiver has submitted 81 fee applications, each of which is accompanied by voluminous invoices describing the work performed by the Receiver's professionals. Those applications are further supplemented by the declaration of Kevin Sadler in support of the Receiver's present motion. The Objectors offer no contrary evidence.[1] They do not offer evidence that the rates were inappropriate or raise any question about whether the work was actually performed. Nor could they. This Court has already ruled that the amounts billed by the Receivership professionals were reasonable and necessary.[2] There is no basis to re-litigate the rates charged or the specific work performed over 15 years by the Receiver and his professionals.

Even if the Court were to throw open the door to debate on this issue after 15 years, the criticisms launched by the Objectors concerning the rates charged by Receivership professionals are not supported by any relevant evidence.[3] In its attempt to relitigate rates already approved, the SEC puts forth the facile assertion, unsupported by competent evidence, that the Receivership professionals' rates exceed the prevailing market rate. [*See* SEC Resp., Doc. 3435 at 4–7.] To support its specious assertion, the SEC offers a list of modest-sized SEC Receivership cases, which

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[1] The SEC's objection as to lack of evidence is not well taken. The declaration supporting the motion, Doc. 3424 at Ex. B, ¶¶4–9 (App. 16–18), contains unrebutted evidence that the rates charged were appropriate and indeed substantially lower than rates charged for similar work in the relevant legal market. This is consistent with the Court's 81 fee application orders that the rates and time were reasonable.

[2] The Receiver's motion also sought payment for the holdback that was applied to out-of-pocket expenses. This Court also previously held those expenses to be reasonable when they were submitted in the fee applications. The Objectors have not offered any evidence or argument justifying the refusal to reimburse the Receiver's professionals for their out-of-pocket expenses incurred for the benefit of the Receivership Estate.

[3] As the Court has observed: "[W]hatever other courts might have to say about the reasonableness of other professional fees in other receivership cases, the Court reiterates, as it implicitly has in almost every fee application order, that the Receiver's professional fees and expenses generally have been spent gainfully and billed reasonably." [Order denying motion to intervene, Doc. 1471 at 4–7 (internal footnote omitted).]

by the SEC's own admission, clearly are not comparable in terms of scope, duration, complexity, or size.[4]

Thus, the cases cited by the SEC demonstrate only that the SEC is not in a position to offer evidence of the reasonable rate for professionals' work involving comparable SEC receiverships, because comparable SEC receiverships simply do not exist. The SEC has no competent evidence and no competent experience to offer the Court on this issue.[5] Indeed, if they did, one would have expected to hear about it in opposition to the Receiver's 81 fee applications.[6]

Although the Objectors may not have experience with insolvency proceedings of the size, scope, duration, and complexity of Stanford, the bankruptcy courts certainly do.[7] These cases

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[4] The assistance of large international firms like Baker Botts and FTI was solicited because of their unique ability to handle the work necessary to handle this extraordinarily complex Receivership. It is disingenuous for the SEC to now compare the rates of regional law firms handling much smaller and less complex receiverships to the rates of a global and internationally recognized law firm like Baker Botts.

[5] In approving Baker Botts's fees in the multi-billion-dollar Asarco bankruptcy, the bankruptcy court noted that when considering hourly rates, it is "more appropriate" to consider "the rates charged by comparably skilled attorneys in other large Chapter 11 cases . . . when determining the prevailing market rate under the lodestar analysis." *In re ASARCO LLC*, No. 05-21207, 2011 WL 2974957, at *17 (Bankr. S.D. Tex. July 20, 2011), *aff'd in part and rev'd in part on other grounds*, 477 B.R. 661 (S.D. Tex. Aug. 8, 2012). Similarly here, it is unreasonable to compare Baker Botts's hourly rates with the rates of firms without the resources, skills, or experience to handle the incredibly complex Stanford Receivership.

[6] Nor would it be reasonable or credible for the SEC to assert that it only raises this issue now because the professionals' rates were just coincidentally 20% too high during the first four years of the Receivership (the first holdback period) and just coincidentally 10% too high during the last ten years of the Receivership (the current holdback period). As demonstrated in the Receiver's motion and as further established herein, the pre-holdback rates charged by the Receiver's professional firms were steeply discounted and modest relative to the expertise the professionals brought to bear in this matter.

[7] As this Court has observed, this particular receivership is essentially equivalent to a Chapter 7 bankruptcy. *See Janvey v. Alguire*, No. 3:09-cv-00724-N-BV, Doc. 1093 at 39–40 ("Ultimately, this particular receivership is the essential equivalent of a Chapter 7 bankruptcy. . . . While a different federal statutory scheme – one that is looser and more flexible than the Bankruptcy Code – is at work, the overall purposes and objectives of the Stanford receivership track the overall purposes and objectives present in the Bankruptcy Code and a Chapter 7 proceeding."). Under 11 U.S.C. § 330(a)(3), in examining a request for fees and expenses to be awarded to an examiner, trustee under chapter 11, or other professional in the context of a bankruptcy, a court considers factors that are essentially the same as those that apply in a receivership. In addition to the amounts involved and results obtained, a bankruptcy court considers

> the nature, the extent, and the value of such services, taking into account all relevant factors, including (A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under [Chapter 11]; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and

demonstrate that the rates charged by the Receiver's professionals were actually substantially *below* the market rate for comparable work handled by comparable firms:[8]

Case	Summary	Hourly Rates	Source
In re Gavilan Res., LLC, No. 20-32656 (S.D. Tex. Bankr. filed May 15, 2020)	Chapter 11 bankruptcy in which total debts were listed at approximately $568.5 million.	*Debtor's Counsel (Vinson & Elkins):* • Partners: $945-$1,470 • Counsel: $895-$1,040 • Associates: $515-$1,015 *Paraprofessionals:* • Paralegals: $345-$430 *Support Staff:* $185-$395	Docs. 142, 392, 505, 521
In re Neiman Marcus Grp., No. 20-32519 (S.D. Tex. Bankr. filed May 7, 2020)	Chapter 11 bankruptcy in which total debts listed at approximately $5.6 billion.	*Debtor's Counsel (Kirkland & Ellis):* • Partners: $1,045-$1,635 • Counsel: $1,190 • Director: $825 • Associates: $610-$1,165 *Paraprofessionals:* • Litigation Support Specialist: $395 • Paralegals: $340-$445 • Junior Paralegals: $275 *Support Staff:* $265-$375	Docs. 1889, 2044, 2146, 3266

> nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under [Chapter 11].

11 U.S.C. § 330(a)(3) (line breaks omitted).

[8] The Fifth Circuit observed in *In re ASARCO LLC* that "Baker Botts's rates were 'below-market'" relative to the "charges by comparable firms when representing parties to Chapter 11 cases pending in Texas." 751 F.3d 291, 297 (5th Cir. 2014), *aff'd sub nom. Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 576 U.S. 121 (2015).

In re Seadrill Ltd., No. 21-30427 (DRJ) (S.D. Tex. Bankr. filed Feb. 10, 2021)	Chapter 11 bankruptcy in which total debts were listed at approximately $7.2 billion.	*Debtor's Counsel (Kirkland & Ellis):* • Partners: $1,080-$1,695 • Counsel: $1,445.00 • Associates: $625-$1,195 *Paraprofessionals:* • Paralegals: $350-$460 • Junior Paralegals: $255-$285 *Support Staff:* $240-$410	Docs. 965, 1253, 1325

The Examiner's and OSIC's criticisms are similarly unfounded. The Examiner and OSIC do not offer admissible evidence that the hours, rates, and fees charged in comparable receiverships or other insolvency proceedings are lower than those in this Receivership. Presumably, if such evidence existed, it would have been amassed over the past 15 years and presented to the Court in opposition to the Receiver's motion (or in opposition to any of the Receiver's 81 fee applications).

The Court should also not give any credit to the Examiner's statement that he has insufficient information to evaluate the reasonableness of the rates and hours underlying the holdback. [*See* OSIC Resp., Doc. 3434 at 11, 15 & n.21.] The Examiner has 15 years of experience reviewing the 81 fee applications in this Receivership, each of which is supported by the invoices of every professional firm working for the Receivership. The Estate has paid the Examiner over $5 million—more than the Receiver has been paid—and $740,000 of that has specifically been for his time spent as "auditor," reviewing and analyzing the fee applications and asking detailed questions about the fees billed by the Receiver's professionals.[9] Baker Botts and other professional firms, for their part, have spent thousands of hours responding to the SEC's and Examiner's questions about the fee applications and work performed, and have done so without

[9] The Examiner has told this Court that he is an "auditor" of the fee application process. [Jan. 16, 2014 Status Conference Tr. at 24:4–5.]

requesting any compensation for that time.[10] Moreover, the invoices documenting all rates, hours, and fees for work performed by the Receiver's professionals, all reside in the record as part of the fee applications and were cited in the Receiver's motion. For these reasons, the Examiner's complaint that he has insufficient information to evaluate the request for release of holdback by the Receiver's professionals is utterly meritless.[11]

B. The Objectors' subjective views about "credit" for the Receivership's $2.6[12] billion in recoveries are irrelevant to the legal standard and at odds with the record.

The Objectors oppose the release of the holdback by arguing that OSIC should get "credit" for many of the Receivership's recoveries. This invitation to argue over who gets "credit" has nothing to do with the *Johnson* factors. Nor is the Examiner's subjective opinion about "credit" competent evidence of anything.

The only appropriate inquiry is whether the "results obtained" from 15 years of the professionals' work support the release of funds that were previously held back from fees and expenses determined by this Court to be both reasonable and necessary. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). And the results obtained are recoveries for investors far beyond what anyone in 2009 anticipated would be possible in this Receivership. [July 31, 2009 Hrg. Tr. at 38:25–39:1, Doc. 664 (the then Regional Director of the SEC's Fort Worth office feared the estate might be "eaten away" so that "nothing" would be left).]

[10] Time spent responding to the Examiner's and SEC's innumerable detailed questions about each fee application (the value of which numbers in the millions of dollars) is not included in the $1.6 million spent preparing the fee applications.

[11] The Objectors' implied request that the Court should leave the holdback in place highlights the arbitrariness of their positions. None of their arguments support continuing the holdback.

[12] The Receiver has recovered $2.6 billion as of the filing of this reply. After receipt of the funds from the SocGen settlement, the total will be more than $2.7 billion.

Moreover, even if the question of who gets "credit" for OSIC's litigation were legally relevant, the Receiver's motion establishes that the work of the Receiver and his professionals was inextricably intertwined with the work of the contingency fee lawyers representing OSIC.[13] The Receiver's 9th through 81st fee applications show that the Receiver and his professionals—in addition to pursuing the Receiver's own litigation and managing all aspects of the Estate—devoted over 50,000 professional hours supporting the work performed by OSIC in pursuing recoveries. Baker Botts's contribution across *all OSIC matters* is over 39,000 hours; FTI's over 14,000 hours. That work has been approved by the Court using the *Johnson* factors as work that was both reasonable and necessary.

In addition, it is a matter of record that Baker Botts stepped in to serve as lead trial counsel for the bank case, served simultaneously as settlement counsel reporting to the Receiver and Examiner, and negotiated the bank case settlements without involvement of OSIC's contingency fee attorneys. Karyl Van Tassel's reports and testimony, all of which received substantial support from FTI, were an integral part of *every single* OSIC case. As the saying goes, "success has many fathers," and the Examiner and the contingency fee lawyers representing OSIC can re-write history to self-proclaim 100% credit for the entire 15-year Receivership if they choose. But such a claim both rings hollow and is irrelevant in the face of the legal standard and the evidence in the record.

As for the SEC's likening the Receiver's request for release of the holdback to a request for a contingent fee without assumption of the risk that OSIC's contingency fee counsel assumed, that argument is completely upside down. The contingency fee professionals were awarded fees that were as much as *five times* the fees that would have otherwise been derived from a lodestar

[13] The Court need not referee an irrelevant debate about "credit" in order to decide the Receiver's motion. For OSIC and the Examiner to suggest, however, that OSIC's litigation efforts—which the Receiver and his team actively supervised and supported for the entire life of this Receivership—were somehow separable from, or only modestly assisted by, the work of the Receiver and his team is to rewrite history and ignore the record.

calculation based on those lawyers' standard rates.[14] The Receiver and his professionals, on the other hand, are simply attempting to go from being paid *far less* than the lodestar to an amount that is *still discounted* from the lodestar amount, as the amount requested by the Receiver is calculated not based on the professionals' standard rates but is instead based on rates discounted by 20%, or in many cases, significantly more.[15] The Receiver's professionals were not promised a percentage of recoveries, nor are they seeking that.

C. The Objectors' appeal to the Court to "favor" the Stanford victims over the Receiver's professionals is contrary to law.

The SEC argues that "[n]ot releasing the held-back fees is a pragmatic means to ensure that the Receivership professionals do not receive a windfall at the investors' expense." [SEC Resp., Doc. 3435 at 10.] And the Examiner and the SEC posit that in deciding what to do with such a miraculous "windfall," the Court should bestow its "favor" on the victims, not the professionals. [OSIC Resp., Doc. 3434 at 8.] But it is hardly a windfall for the Receiver's professionals to receive full payment of their discounted invoices, and the Objectors' assertion to the contrary merely demonstrates that their opposition to the Receiver's motion should not be taken seriously.

Moreover, the funds that would be used to pay the held back fees and expenses are not some accidental "windfall," as if it were money that the Receiver found on the sidewalk or won from a lottery prize. The funds requested—$41 million—are part of the $2.6 billion in hard-fought "results obtained" after 15 years of diligent work. The arguments offered by the Objectors are

[14] OSIC's contingency fee attorneys in the case against Toronto-Dominion, HSBC, and SocGen, for example, were awarded nearly five times what they would have received based on their hours incurred at their standard hourly rates. [*See* Mot. for Approval of HSBC Settlement, Doc. 3243 at 31, 35; Mot. for Approval of SocGen Settlement, Doc. 3228 at 32, 35; Mot. for Approval of TD Settlement, Doc. 3246 at 35, 43.] OSIC's contingency fee attorneys in the Willis matter were awarded nearly four times what they would have received based on their standard hourly rates. [*See* Pls.' Mot. for an Award of Attorneys' Fees & Expenses in Connection with the Settlement with Willis & BMB Defendants ("Motion for Fees in Willis Matter"), Doc. 2398 at 2; App. in Supp. of Mot. for Fees in Willis Matter, Doc. 2399.]

[15] Baker Botts is currently charging the Receivership at a 30% discount from its *2021* rates.

more suited to a press release than a court document and are completely detached from both case law and reality.[16]

Perhaps the best demonstration that the Examiner's and OSIC's critiques are not based on the law is the fact that they do not even cite *Johnson* anywhere in their brief. Instead, they cite a single sentence of irrelevant dicta from *SEC v. Harris*, No. 3:09-cv-01809-B, Doc. 315 (N.D. Tex., April 18, 2016), for the proposition that the Receiver's professionals are not entitled to "complete compensation" because the investors have not received complete compensation. [*See* OSIC Resp., Doc. 3434 at 7, 9.] But there is no disputing that the standard is "reasonable compensation," and nothing in the Objectors' responses meaningfully rebuts the argument that what the Receiver seeks is reasonable compensation.[17] Moreover, even a cursory examination of the facts of *Harris* reveals that it is not remotely analogous to this Receivership. The size of the receivership in *Harris* was a tiny fraction of the size of the Stanford Receivership; the ratio of fees to recoveries was nearly 50%; the fees requested would have consumed 98% of the assets available for distribution; and the recoveries were insufficient to pay the professionals in full, regardless of their rates. *Harris*, No. 3:09-cv-1809-B, Doc. 315 at 25 n.17, 31, 34.

The SEC's equity argument is similarly misplaced. The SEC cites *SEC v. Byers*, 590 F. Supp. 2d 637, 645 (S.D.N.Y. 2008), for the proposition that receivers and their attorneys should

[16] The Examiner's and OSIC's citation to the annual revenues of some of the Receiver's professional firms further demonstrates the chasm between the appropriate legal standard and the Objectors' argument that the Court should take a Robinhood-style approach to ruling on this motion. No case law suggests that this is an appropriate consideration.

[17] It is not clear from context how, if at all, the *Harris* court's dicta contrasting "complete" compensation and "moderate" compensation, *see Harris*, No. 3:09-cv-01809-B, Doc. 315 at 18, is intended to differ from the way the *Byers* court contrasted "extravagant" compensation and "moderate" compensation, *see SEC v. Byers*, 590 F. Supp. 2d 637, 645 (S.D.N.Y. 2008). The *Harris* court cites *Byers*, so perhaps "complete" was intended to express the concept of extravagance. But in any event, what the Receiver seeks here—payment for 15 years of work at deep discounts totaling more than $39 million—cannot reasonably be characterized as either "complete" or "extravagant" compensation.

be awarded only "moderate compensation." [SEC Resp., Doc. 3435 at 9.] But as the quote from *Byers* makes clear, the distinction the court was making there was between "extravagant" compensation and "moderate" compensation, and the court in that case concluded that the fees requested were too high, both because the hours billed and the rates were excessive. *Id*. at 645–48. There is no evidence—or even suggestion in the record—that either concern applies here. To the contrary, unlike in *Byers*, all professionals have discounted their rates, and the hours billed have been reasonable.[18] Thus, awarding the Receiver and his professionals full payment of their substantially discounted fees can hardly be characterized as extravagant under the circumstances of this Receivership.

D. The Examiner's and OSIC's "swings and misses" approach is contrary to the applicable legal standard and inconsistent with the record.

The Examiner's and OSIC's "swings and misses" list is yet another purely subjective approach to the holdback analysis. The *Johnson* factor the Court needs to evaluate is the "results obtained." And "results obtained" means the results for the Receivership as a whole, not on a selective case-by-case, or task-by-task basis, especially given the Court's rulings on the Receiver's 81 fee applications. If after 15 years, the payment of the holdback was meant to be subjected to this kind of cherry-picking, there was no hint of that in the Court's statements about the reasons for the holdback in the first place. "Again, just to be clear, I'm not rejecting that 20 percent. I am just hanging on to it until we see how everything works out." [Sept. 10, 2009 Hrg. Tr. at 39:20–22, Doc. 777.] How everything has worked out is $2.6 billion in recoveries, with $2.1 billion to

[18] Nor does the SEC's citation to *SEC v. Lauer*, No. 03-80612-CIV-MARRA/HOPKINS, 2016 WL 3225216 (S.D. Fla. Mar. 31, 2016), support its position that payment of the holdback should be refused. [*See* SEC Resp., Doc. 3435 at 9–10.] In *Lauer*, the receiver's distributions to investors were approximately $68 million as against claims of approximately $747 million. [*See* No. 03-80612-CIV-MARRA/HOPKINS, Doc. 2970 at 12–13.] Thus, distributions were less than 10% of the claimed amounts—substantially less than the distributions in this Receivership—which places in appropriate context the "small fraction" comment made by the court in *Lauer*.

be distributed to victims—a result that far surpasses what was forecast in 2009. [*See* Receiver's Mot. for Suppl. Fees, Doc. 3423 at 5.]

Moreover, the "swings and misses" approach is inconsistent with reality. It is impossible to predict with certainty how any particular piece of litigation will ultimately work out. That a handful of cases over 15 years did not work out perfectly should be surprising to exactly nobody (with any experience in the legal profession) and is not evidence of any deficiency in the work of the professionals who handled those cases. What is certain, however, is that had the Receiver not made a significant investment in litigation, this Receivership would not have been nearly as successful, and there would have been little money available for investors.

That the "swings and misses" approach is also completely arbitrary is easily illustrated by specific matters the Examiner and OSIC *do not* cite. The Receiver's litigation against the Magness Parties is but one example. The Receivership has recovered over $143 million from the Magness Parties, including full compensation to the estate for its attorneys' fees and expenses—without any deduction for the fees held back. [Receiver's Mot. for Suppl. Fees, Doc. 3423 at 16.] In the view of the Objectors, then, the Estate should receive payment for attorneys' fees the Estate incurred, but the Estate should be barred from paying the professionals for those same fees. No legal justification is offered for this inequitable result, further highlighting the arbitrary nature of the Objectors' position.

The characterization of the cases the Examiner and OSIC cite as "misses" is also dubious. With respect to the Nanes matters, the Examiner and OSIC claim that the Receiver has not recovered a single dollar. In fact, the Receiver recovered more than $710,000 from frozen accounts—accounts that would have been released to Nanes if the Receiver had not fought (over

the objection of the SEC) to preserve the injunction that applied at the beginning of this Receivership.

The Examiner and OSIC leave out important facts about the *Romero* case, to cite another example. That case started out as an OSIC case, as the Examiner and OSIC acknowledge. However, because it was the first fraudulent transfer case to proceed to trial, the Receiver, Examiner, and OSIC all agreed that due to the precedent-setting nature of the trial, Baker Botts should be responsible for handling it. The Receiver prevailed at trial, paving the way for tens of millions of dollars in fraudulent transfer settlements in other cases. The fact that Romero declared bankruptcy, and therefore that the judgment against him yielded a modest recovery,[19] is only a small part of an overall story of success that is thanks in very substantial part to the diligent efforts of the Receiver's counsel.

To take another example, the Examiner and OSIC subjectively deem the Receiver to have "missed" in his litigation against the Stanford investors as relief defendants. [*See* OSIC Resp., Doc. 3434 at 17.] But how are those activities, the work for which has already been found to be reasonable and necessary, a "miss" by any *objective* legal standard? Just as they did with the brokers who sold the fraudulent CDs—also sued originally as relief defendants—the Receiver's professionals stepped in where the SEC would not. After years of litigation and multiple appeals, the Receiver ultimately recovered tens of millions in bonuses and commissions from Stanford brokers and more than one hundred million from net winners.[20] The Examiner's and OSIC's

[19] The Examiner erroneously asserts that the Receiver recovered nothing from Romero. The Receiver in fact received a distribution from Romero's bankruptcy estate of approximately $57,000.

[20] The Receiver obtained $177.6 million from net winners (including the Magness Parties) and $74.2 million from Stanford financial advisors and insiders. [*See* Receiver's Mot. for Suppl. Fees, Doc. 3423 at 16 & n.10.]

"swing and miss" argument is itself a swing and a miss.[21] It is not tied to either the law or the facts in the record.[22]

The Examiner and OSIC also direct their selective ire at a number of the Receiver's professionals specifically: Pierpont Communications, Inc.; Gilardi n/k/a Verita; Stuart Isaacs; and Felicity Toube. [*See* OSIC Resp., Doc. 3434 at 21–22.] The work of those firms, however, was reasonable and necessary, and the Examiner and OSIC do not offer any evidence to the contrary.

As to Stuart Isaacs and Felicity Toube, the Receiver could not have simply declined this Court's directive to safeguard Receivership assets and abandoned any effort to recover the Stanford assets in the United Kingdom. Perhaps if the Receiver had a crystal ball and could have foreseen with certainty that his efforts in the United Kingdom would not succeed, he would have made that choice, but this Receivership takes place in the real world, where crystal balls are not part of a receiver's toolkit. Stuart Isaacs and Felicity Toube are competent, diligent professionals who were asked to do a job and did it well. They are entitled to reasonable compensation.[23]

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[21] The "swing and miss" argument also relies on a hindsight evaluation approach, which is inconsistent with the way bankruptcy courts evaluate the reasonableness of litigation work. *See In re Woerner*, 783 F.3d 266, 274 (5th Cir. 2015) ("Section 330, then, explicitly contemplates compensation for attorneys whose services were reasonable when rendered but which ultimately may fail to produce an actual, material benefit."); *see, e.g.*, *In re Cmty. Home Fin. Servs., Inc.*, 990 F.3d 422, 428 (5th Cir. 2021) (reversing the district court's vacating of fees awarded by the bankruptcy court to debtor's counsel on the basis that the district court improperly assessed the benefit of counsel's services to the estate from hindsight, rather than assessing the reasonableness and likely benefit from the time the services were rendered).

[22] Presumably under the Examiner's and OSIC's standard, the Receiver's loss at trial on the original futility question in the Magness matter would be considered a "miss," notwithstanding the ultimate "results obtained" of over $143 million in recoveries. [Receiver's Mot. for Suppl. Fees, Doc. 3423 at 16.]

[23] The criticism of Isaacs and Toube further highlights the heads-I-win-tails-you-lose quality of the Examiner's and OSIC's opposition. The Examiner and OSIC fail to mention Osler, which represented the Receiver in Canada. Osler contributed substantially (along with Baker Botts and FTI) to the Receiver's success in extracting more than $24 million from Canada for distribution to investors. Notwithstanding this successful result, Osler too apparently is unfit to receive full payment of its discounted fees.

As to Pierpont, the Examiner already lost this fight. He asked the Court to refuse compensation to Pierpont, and the Court declined to accede to that request. [Sept. 10, 2009 Hrg. Tr. at 42:11–22, Doc. 777.] There is no reason to refuse payment of the Pierpont fees held back.

Finally, as to Verita, the Objectors' position is not well taken. Verita has processed more than 18,000 claims; has by this point distributed more than a billion dollars; and continues to interact daily with the claimant population. Verita is the face of the Receivership to most of the claimants. The Receiver recognizes that there will be some claimants who are unhappy with decisions made with respect to their claims, and Verita often bears the brunt of that unhappiness. The Examiner and OSIC have offered no evidence, however, to support their criticisms of Verita's work, on which the Receiver expects to continue to rely for years to come in distributing hundreds of millions more dollars to claimants. To arbitrarily cut Verita's fees based on vague, unsubstantiated criticism would be inappropriate and would work to the detriment of the overall and continuing Receivership effort.

E. The Objectors do not offer any legal support for their opposition to the Receiver's request for the application of a delay in payment adjustment to the holdback.

The Objectors claim that the Receiver's professionals are not entitled to a delay in payment adjustment because the investors are not receiving such an adjustment. [*See* OSIC Resp., Doc. 3434 at 18 (the Examiner and OSIC gratuitously call the request "offensive"); SEC Resp., Doc. 3435 at 11.] This argument is yet another false comparison that ignores the applicable legal standard.

The legal standards for investment loss payments to victims of a Ponzi scheme are fundamentally different, and arise from different bodies of case law, from the standards for payments to professionals who produce the recoveries to make payments to the victims of a Ponzi scheme. The victims of Ponzi schemes can recover only their net principal investment loss. *Janvey*

v. Brown, 767 F.3d 430, 443 n.76 (5th Cir. 2014) ("Ponzi scheme victims have claims for damages in the amount of their original investment." (citation omitted)). There is no legal basis to award interest or any other time delay component to investor victims. As for the Receiver's professionals, an adjustment for delay in payment is an appropriate part of a "reasonable fee" where the law establishes a basis to recover a "reasonable fee." *See In re Lawler*, 807 F.2d 1207, 1212 (5th Cir. 1987). The two standards having nothing to do with one another.

None of the Objectors offer any case law to support the argument that professionals' reasonable fees are not entitled to an adjustment when there has been a significant delay in payment. The most the Examiner and OSIC do is offer the conclusory argument that the Receiver's authorities are all fee-shifting cases. [*See* OSIC Resp., Doc. 3434 at 18–19.] This is both irrelevant and inaccurate. The Examiner's and OSIC's facile dismissal of the fee-shifting cases misses the point entirely: Where the law allows recovery by an attorney of a reasonable fee, adjustment for significant delay in payment is a proper component of that reasonable fee.

And the Receiver's authority is not limited to fee-shifting cases. *See In re Lawler*, 807 F.2d at 1212. The Fifth Circuit held in *Lawler* that upward adjustments in fee awards are appropriate where there was a delay in the payment of fees *in the context of a long-running receivership. Id.* at 1209, 1212. The Examiner and OSIC fail to make any logical argument to distinguish *Lawler*'s holding. Instead, they claim that the Receiver's professionals should not get an upward adjustment because the professionals have already been paid 80 to 90% of their fees. [*See* OSIC Resp., Doc. 3434 at 19.] But the Receiver is not asking for an adjustment on the fees and expenses that have already been paid. The adjustment is only being requested for the amounts

held back, which have been unpaid for as many as 15 years. This is directly analogous to *Lawler* and the Objectors offer no law to the contrary.[24]

F. The Objectors' arguments for denying the Receiver's request that Baker Botts be paid for its work preparing fee applications ignore the law and the facts of this Receivership.

This issue is governed by *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 132 (2015). No Objector even mentions the case, which clearly holds that "professional's preparation of a fee application is best understood as a 'servic[e] rendered' to the estate." *Id.* (alteration in original) (citing 11 U.S.C. § 330(a)(1)). As such, the time spent preparing fee applications is no different from the other reasonable and necessary services the Receiver's professionals perform. *See Soler v. G & U, Inc.*, 801 F. Supp. 1056, 1064 (S.D.N.Y. 1992) ("[I]t is well settled law that the time spent on an attorney's fee application is compensable." (citing *Gagne v. Maher*, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980))). The Receivership has paid the Examiner over $740,000 to review and critique the Receiver's fee applications over the past 15 years, and it would be illogical and inequitable to hold that no compensation is to be paid for preparation of those fee applications in the first place.

Rather than center their oppositions on any case law, the Objectors focus on a supposed policy that the SEC has against paying a Receiver the fees for preparing fee applications. [*See* OSIC Resp., Doc. 3434 at 20; SEC Resp., Doc. 3435 at 11.][25] This so-called "policy" is a legal

[24] The Receiver's request for the application of CPI results in a smaller adjustment than if the Receiver were to ask for the held back amount to be paid according to the present rates billed to the Receivership. [*See* Receiver's Mot. for Increased Hourly Rates, Doc. 3088 at 2 (observing that billing rates increased between five and seven percent each year).] Inflation concerns further demonstrate the reasonableness of this request. *See Copeland v. Marshall*, 641 F.2d 880 (D.D.C. 1980), ("[P]ayment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage adjustment to reflect the delay in receipt of payment therefore may be appropriate." (citing *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976))).

[25] Neither the SEC nor the Examiner ever mentioned these billing policies in their oppositions to the Receiver's fee applications. [*See* Docs. 437, 452, 738, 739, 853, 860, 940, 941, 946.]

nothing. It is not law; it is not a regulation published in the Code of Federal Regulations. It is in fact a single sentence in an unsigned form agreement found on the SEC's website. [*See* OSIC Resp., Doc. 3434 at Ex. A-1.] It is obvious that neither the Receiver nor Baker Botts is an employee or third-party vendor to the SEC, and neither was ever presented with or signed any version of the form agreement. Furthermore, one would be hard pressed to conclude that this single statement in the never-proposed form agreement contemplated the particular situation here—a 15-year engagement in a multi-billion-dollar matter, involving over 40 professional firms performing hundreds of thousands of hours of work.

It is also notable that the form agreement in question was created by the SEC as early as 2008, strongly implying that someone at the SEC made the conscious decision not to present it to the Receiver in 2009. And why would SEC have made that decision? Because the SEC surely recognized that this was not going to be one of their run-of-the-mill receiverships. That is why the SEC insisted on not one but two leading international firms—Baker Botts and Thompson Knight—to represent the Receiver from the beginning. Having now gotten the benefit of the work, expertise, and resources the Receiver and his team of highly qualified professionals brought to this matter, the SEC wants to retroactively change the rules and ask the Court to withhold payment of a reasonable fee. The SEC's position is arbitrary and capricious, and not based on the proper legal standard or the record in this matter.

Moreover, as the Receiver pointed out in his motion, had the fee application services not been performed by Baker Botts, the Court would have been inundated with *hundreds* of individual fee applications. This would have been incredibly chaotic and inefficient, would have discouraged professionals from working for the Receiver, and would have ultimately resulted in the

accumulation of more billing from the Examiner for his time reviewing those hundreds of fee applications. To these points, the Objectors respond with absolute silence.[26]

The Objectors' reliance on the SEC's form agreement illustrates the emptiness of the argument that the SEC's objection to the Receiver's motion should be given "great weight." [*See* OSIC Resp., Doc. 3434 at 20 (citation omitted).] The subjective and arbitrary views of the SEC cannot be elevated above the case law and evidence that supports the Receiver's motion. The SEC shares responsibility with Allen Stanford for the size, and duration of his fraud scheme, due to SEC's documented failures to step in and take action against Allen Stanford well prior to February 2009. [*See* SEC Office of the Inspector General, Report of Investigation, Case No. OIG-526 (Mar. 31, 2010), Doc. 1514-1 at 000556] That fact should be given "great weight" when considering the SEC's position on the Receiver's motion.

G. The Objectors do not articulate any reason for applying the holdback to future fee applications.

Finally, the Objectors suggest that the Court continue the hold back but offer no rationale for doing so. The Objectors do not argue—much less offer evidence—that the Court has insufficient information to determine the "results obtained" at this point. Furthermore, the dire financial circumstances that may have justified the hold back in 2009 do not exist and have not existed for some time. The Receiver currently has over $169 million in cash that is not already designated for distribution. There is substantial cash available to meet the Receivership's commitments to fund (1) necessary operations through the conclusion of the Receiver's work,

[26] The SEC also complains that this request should have been made earlier in the Receivership, but the logic of this point is missing. The SEC presumably would have just as vigorously opposed this request in 2009 or any later point in time prior to today. Moreover, the Receivership has not been disadvantaged in any way by Baker Botts's patience in waiting to submit a request for these fees until now. As to the SEC's assertion that fee application work was billed at "above-market" rates, it is not based on an analysis of the rates actually charged. A simple calculation of the fees and hours laid out in the Receiver's Exhibit B2 reveals that the average hourly rate for fee application work is less than $291. [*See* App. in Supp. of Receiver's Mot. for Suppl. Fees, Doc. 3424 at 372.]

including the work associated with the distribution of funds under both approved and future plans; (2) payment of all of the amounts requested in the Receiver's motion; and (3) additional distributions beyond the 11 currently authorized, including another distribution of at least $100 million from residual funds, as well as one or more additional distributions from funds that ultimately go unclaimed by investors with approved CD claims. And in addition to the distributions from funds currently on hand, the Receiver will also be distributing approximately $117 million from the SocGen settlement, after the appeal of that settlement is concluded. [*See* Mot. for Approval of SocGen Settlement, Doc. 3228 at 32.] In light of these circumstances, application of a holdback to the Receiver's work going forward is not justified by the law or the facts.

III. Conclusion and Relief Requested

The "results obtained" by the Receiver's professionals in this Receivership are remarkable given all the daunting challenges facing the Receivership in 2009. The Receiver's motion is well-supported by relevant case law and a voluminous evidentiary record. The SEC's, Examiner's, and OSIC's objections are not and should be overruled. The Receiver requests that the Court grant the motion and all the relief requested.

Dated: November 22, 2024

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

On November 22, 2024, 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 will serve 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).

On November 22, 2024, I served a true and correct copy of the foregoing document and the notice of electronic filing by United States Postal Certified Mail, Return Receipt required to the persons noticed below who are non-CM/ECF participants:

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